Error as to the Quality of the Person in Canon Law

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When one tries to study, even in a perfunctory manner, the history of the canonical concept of error and its relationship to marriage, one is surprised that so few matrimonial actions have come before our courts alleging error as a basis of nullity. In his Decretum which was written between 1139 and 1159, Gratian explains that consent is the perceiving by two or more persons of the same thing. He who errs, according to Gratian, does not perceive. Consequently he does not consent, i.e., he does not perceive the same thing as the other or others. There is no meeting of the minds. He who has made an error does not consent. In the Glossa Ordinaria of the Decretum, it is stated categorically that there is nothing as contrary to consent as error. I do not know whether this must be attributed to Joannis Teutonicus who wrote the original Glossa or the Bartholomew of Brescia who revised it about the year 1245. However, I am inclined to believe that the one who inserted it in the Glossa Ordinaria probably borrowed it from the Digest of Justinian where we find, “What is so contrary to consent as error.” The Digest ascribes this statement to Ulpian. Thomas Aquinas states that to the extent that it impedes consent which is the cause of marriage, error impedes marriage by the law of nature. Writing in our own century, Gasparri states that anyone who makes a mistake does not give consent. Gasparri, making this statement, acknowledges that he has taken it from the Digest of Justinian which in turn ascribes this statement to Pomponius, a Roman lawyer who lived in the time of the Emperor Hadrian.

While Gratian is very clear in insisting on the legal consequences of error, he is quick to limit the invalidating effect to an error as to person

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1 C. XXXIX, Q.1.

2 S.v. consensit.

3 L.Si per errorem, ff. De Jurisdict. omn. judic.

4 A Roman lawyer who died in 228 A.D.


6 L. 20, De aqua et aquae plubiae arcendae, XXXIX, 3.
and to error as to a condition of slavery. He specifically states that an error as to fortune and an error as to quality do not exclude matrimonial consent. In regard to an error of quality, Gratian states that a man who marries a prostitute or one who has been corrupted, thinking that he is marrying a chaste woman or a virgin, is not able to send her away and to marry again.7

Gratian acknowledges that an error as to a condition of slavery does cause a marriage to be null and void. He explains that this law came from Synod of Verberie, a local synod held in France at which Pepin is supposed to have been present. This Synod of Verberie supposedly was held in the year 753. Any doubt that there might have been concerning the universal application of law concerning an error about a condition of slavery was removed by a decretal of Innocent III8 who approved the action of a soldier who left his wife upon learning after the marriage that she was a slave and that he had not consented either by word or fact to the marriage after his learning of her condition of slavery. It is interesting to note that Thomas Aquinas9 agrees that an error concerning a condition of slavery invalidates a marriage, but he argues not from the positive legislation of the Synod of Verberie nor from the Decretal of Innocent III, but he states that in this case the error concerns the essence of marriage inasmuch as a slave is not able freely to grant a power over his body to another without the consent of the master.10

The teaching of Gratian is that error as to person and error as to a condition result in invalidity. According to Gratian, error as to condition is exclusively error as to a condition of slavery in a strict sense. Likewise, according to Gratian, error as to a quality or error as to fortune do not cause invalidity. His arguments for these conclusions are based on analogy with other contracts. My personal opinion is that Gratian was much affected by the then prevailing definition of a person. He who wanted to marry a particular person was especially interested in the person. Qualities were only accidentals. It was the person who was important. My reason for believing this is found in the definition of a person as given in the Glossa Ordinaria by Bartholomew of Brescia who states that a person, according to Boethius, a Roman philosopher who died about 525, is a rational creature, an individual essence.11 It appears that the distinction between substance and accidents had a great effect during the following centuries on the teaching of the legal consequences of error in regard to the validity of marriage.

Thomas Aquinas does not go into an explanation in depth about the

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7 C. XXXIX, q.1.
8 d. 1216.
9 d. 1274.
11 C. XXXIX, Q.1., s.v. persona.
reason why error as to quality does not cause invalidity, but he does say that an error which causes invalidity must be about the essence of marriage. He explains that marriage consists of two things: the two persons who are joined together and the mutual power which they exchange with each other. An error as to fortune or an error as to quality do not cause invalidity because fortune and quality do not belong to the essence of marriage.\textsuperscript{12}

Authors following Thomas continue to speak of the essence of the contract but they add the distinction between substance and accidents. Sanchez\textsuperscript{13} speaks of the essentials of the matrimonial contract, but makes a further distinction between substance and accidents. An error as to a person is an error about substance.\textsuperscript{14} An error as to a quality is an error about an accidental aspect and therefore does not affect the matrimonial consent. Alphonsus of Liguori\textsuperscript{15} teaches that errors about a quality of a person, even though they give rise to the contract of marriage, do not invalidate marriage because they are errors only about accidentals.\textsuperscript{16} Subsequent authors, such as Reiffenstuel,\textsuperscript{17} Schmalzgrueber,\textsuperscript{18} Wernz-Vidal, and Gasparri,\textsuperscript{19} continue to make this distinction between substance and accidents. If an error is about a person, the marriage is invalid. If an error is about an accident or an accidental quality, it does not invalidate. This distinction between substance and accidents as being applied to a distinction between the person and any qualities that that person might have, was brought down to our own day. An error as to the substance, e.g., the person, would invalidate the marriage. An error as to an accidental quality, e.g., wealth, social status, mental acuity, physical appearance, special aptitudes, would not cause a marriage to be invalid. These were all considered to be accidental qualities. As accidents in a philosophical sense they inhered in a substance. A person was considered to be making a judgment about entering marriage with a certain substance, a person, and as long as there was no error as to the substance, the person, the validity of the marriage was not affected. To cause invalidity, error had to be about the essentials of the marriage contract. The two persons entering marriage were considered to be essential to the marriage contract. The accidental qualities of the two persons were not considered to be of the essence of the

\textsuperscript{12} Loc. cit.
\textsuperscript{13} d. 1610.
\textsuperscript{14} De Sancto Matrimonii Sacramento Disputationes (3 vols. Nurnberg: 1706), Liber VII, Disp. XVIII, n. 25.
\textsuperscript{15} d. 1787.
\textsuperscript{16} Theologia Moralis, lib. 6, tract. 6 (De Matrimonio), cap. 3, dub. 2, n. 1012 (4 Vols., Vatican Press, 1905-1912) Vol. IV, pp. 178-179.
\textsuperscript{17} d. 1703. Cf. Ius Canonicum Universum, Lib. IR, tit. I (De Sponsalibus et matrimonio), § IX, nn. 343-344.
\textsuperscript{19} Wernz, Vidal and Gasparri are twentieth century canonists.
marriage. A few canonists before Alphonsus and Sanchez did hold that error about a simple quality would invalidate in the case where it was caused by fraud which was so great that it took away consent. This opinion was subsequently universally rejected on the grounds that any error of this type would be concerned about a quality which was only an accidental quality and therefore could not affect the essence of the contract.

It is interesting to consider the reasoning shared by canonists down through the centuries as to why an error about a quality did not make a marriage null and void. Those who treated the subject were convinced that the Church could cause a marriage to be null and void because of an error about a simple quality. However, they considered this very inexpedient for two reasons. First, it would cause many marriages to be of doubtful validity and open the way to frequent litigation about the validity of the marriage. Secondly, an increase in the number of invalid marriages would cause great harm to one of the spouses, to the children from the marriage, and to the good and welfare of the country.

Strangely enough, the only development that the concept of error had after Gratian came not from canonists but from theologians and especially from Thomas Aquinas and from Alphonsus Liguori. Canonists even down to our own century continued to make the distinction between person and quality, stating that this was equal to the distinction between substance and accidents. Only an error as to the substance, i.e., the person, would cause invalidity. Any error as to a quality in and of itself would not cause invalidity. After repeating the traditional doctrine that error about nobility, wealth, and other things of this type, including error about a quality, did not cause a marriage to be invalid, Thomas Aquinas added that if the error of nobility or dignity amounted to an error as to person (reundat in errorem personae), then the error did cause invalidity. Thomas gave an example: if the consent of the woman is directly concerned with the person (feratur in istam personam), the error about nobility does not invalidate; if, on the other hand, the woman directly intends to consent to marry the son of a king, whoever he might be, and someone other than the son of a king is presented to her, there is error as to a person and the marriage is invalid.21

Pio Fidele states that we are indebted to Thomas for this phrase “error redundans in errorem personae.” The following appears to be certain. This phrase does not appear in the Corpus Iuris Canonici. Thomas does use this expression. The concept seems to be universally accepted by all

20 Cf. Alphonsus, loc. cit.
21 Loc. cit.
subsequent writers. It is today found in the Code of Canon Law.

It is clear from Thomas' own wording that the quality about which error exists and which redounds into an error of the person need not be possessed by one single person. I repeat, Thomas states that if a woman directly intends to consent to marry the son of a king, \textit{whoever he might be}, and someone other than the son of a king is presented to her, there is an error as to a person and the marriage is invalid. That particular quality of being "the son of a king" could have been predicated of a number of persons in Thomas' time. However, if the person marrying directly intended that the other person possess the particular quality of being the son of a king, and if the other person did not possess that quality, the marriage was invalid. This is definitely the teaching of Thomas. In this instance, according to Thomas, the invalidity resulted from an error as to a quality which redounded into an error as to a person.

As stated above, the phrase \textit{"error redundans in errorem personae"} was accepted universally by subsequent theologians and canonists and eventually found its way into the present Code of Canon Law. However, it has not always been understood in the same manner.

Sanchez admits that an understanding of an error of quality which redounds into an error of the person is very difficult but he says it is of the greatest importance. He states that in accordance with Boethius, a person must be understood as an individual substance of an intellectual nature. Consequently, if an error of a quality is to amount to an error of a person, the error of the quality must be about some one individual. He concludes that as often as a quality in which there is error does not determine one individual person, it is not error of a person but simply an error of quality. For an error of a quality to redound into an error as to a person, the quality intended by the spouse must specify a certain individual, \textit{e.g.}, the firstborn son of the King of Spain. This opinion of Sanchez, that to redound into an error of person a quality had to specify some single person, was repeated almost universally by canonists down to our own time. We need only to look at the textbooks familiar to us, of Cappello, of Wernz-Vidal, of Regattillo, of Coronata, etc. There is one notable exception—Albert Blat who wrote in the early 20's. Being a Dominican, fortunately he was more acquainted with the teaching of Thomas. Some authors saw no real distinction between an error about a person and an error which redounded into an error about a person. They concluded that it was redundant in the Code of Canon Law to speak of an error which redounded into an error of a person. A few canonists said that an error of a quality redounded into an error of the person when a marriage with a person having that particular quality was seen by the other contractant as a sole means of obtaining an

\footnote{Loc. cit.}
\footnote{Commentarium Textus Codicis Iuris Canonici, Liber III: De Rebus, Pars I: De Sacramentis (Rome: 1924), pp. 604-605, n. 482.}
end that he had in mind. This opinion, however, was by far exceptional.

The great Gasparri, also stated that the question as to when an error of a quality redounded into an error of a person was of the greatest importance but exceedingly difficult. He added that the more canonists tried to solve the difficulty the more complicated it became. He gave his own opinion that an error of a quality which amounted to an error of the person was verified when someone wished to contract marriage with a person who was certain and determined by that quality, e.g., with the firstborn child of Maevius. Gasparri quoted the rule of Thomas, including the phrase, "if she directly intends to marry a son of a king, whoever he might be", but he gave no explanation of the fact that this rule did not demand that the person be certain and determined by the quality. He did add that some authors add other things but he concluded that if one wanted to avoid error, he should hold fast and solve cases according to the rule of Thomas. This, of course, was not very clear. His own opinion required that the quality make very clear whom the person would be.

I have stated that Thomas, the supposed author of the phrase, "error of a quality which redounds into error of a person" did not require that the quality specifically denote a definite person. He gave the example that if a girl directly intends to consent to marry a son of a king, whoever he might be, and is more concerned about his being a son of a king than she is about his person, there is error as to person and the marriage is invalid if someone other than the son of a king is presented to her. Following especially Sanchez, canonists in the centuries to follow either misunderstood the opinion of Thomas or determined to ignore it. Alphonsus Liguori, another theologian, took great pains to explain in detail Thomas' notion of when error redounds into an error of the person. Alphonsus was very definite in stating that an error about a simple quality, even though it gave rise to the contract, would not cause a marriage to be invalid even if the marriage would not have taken place had the error been known. On the other hand, Alphonsus holds that error does invalidate if it concerns a quality which redounds into an error of the person. Alphonsus explained that an error of a quality redounded into an error of the person in three cases:

1) When someone actually intends to contract marriage with the quality as a condition sine qua non;

2) When the quality is not common to others but is proper to an individual or some determined person, e.g., to contract marriage with the firstborn daughter of the King of Spain;

3) When the consent is referred directly and principally to a quality and less principally to the person, then error in quality redounds into substance.

Alphonsus gave an example of his third rule. Error would redound into

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the substance when a man states, "I wish to marry a noble girl whom I think is Titia." Alphonsus stated that the error would not redound into the person in the case that the person wished to marry Titia whom he thought was a noble person.\(^\text{2}\)

From the third rule of Alphonsus, it is clear that the quality about which there is error does not have to specify a certain definite individual in order for it to be considered as redounding into error of the person. The consent must be considered as being directly and principally concerned with the quality rather than with the individual. In this case the quality is more important than the person. In this case error as to the quality is considered to redound into error as to the person. This is definitely the teaching of Alphonsus. In spite of the impressive weight of authority found both in Thomas and in Alphonsus, canonists continued to insist that the quality about which there was error had to designate a certain definite individual before it could be considered as redounding into error as to the person.

In the last few years, a new interest has been created in this lack of consent because of error. This new interest arose especially after two canonical decisions of nullity, one of the appellate court of Sens, dated April 22, 1968, and the other of the Sacred Roman Rota, coram Canals, dated April 21, 1970.

In the Sens case, Edward, a Catholic, aged 35, entered a civil marriage from which two children were born. Ten years later he abandoned his children and his civil consort. After the Second World War he was found guilty of crimes and sentenced, among other things, to twenty years of forced labor, to national disgrace for collaboration with the enemy, and to confiscation of his goods. At the age of 58, under an assumed name, and posing as a single person, a nephew of a high governmental official, a doctor of medicine, and a member of the faculty of Louvain, he married Colette in a canonically valid ceremony. The marriage was a failure and Colette obtained a civil annulment in France on the grounds that she had been completely deceived about Edward's identity and that she would never have married him if she had known the truth. She then took her case to the Tribunal of Moulin on the same grounds—error as to the person. Moulin gave an affirmative decision, arguing according to the principles of St. Alphonsus that the marriage was null because of error inasmuch as the consent of the plaintiff had been directly and principally about a person who was single, a doctor of medicine, of good repute, etc. The appellate court of Sens, after having stated that it was necessary to reframe our concept of person by taking into account the findings of anthropology and psychology as to what is the meaning of a marriageable person, also found for nullity on the grounds of error.\(^\text{28}\)

It is reported that this decision of Sens of April 22, 1968 was appealed


\(^{28}\) Cf. Il Diritto Ecclesiastico, Ann. LXXXI (1970) Fasc. II, pp. 31-55. This contains a lengthy commentary by Prof. Paolo Moneta of the University of Pisa.
by the Defender of the Bond pro sua conscientia to the Sacred Roman Rota, but the Defender of the Bond of the Rota refused to pursue the appeal in which case the plaintiff was free to remarry. If this is true, it would not necessarily mean that the Defender of the Bond approved of all of the reasoning of the prior two cases. It could be that he merely thought that the appeal would be futile inasmuch as in his estimation the marriage was null and void for some other canonical reason, e.g., error as to qualities which amounted to implicit conditions.

The second case which recently provoked thought about the concept of the error of the person originated in Niteroi, Brazil. The plaintiff requested a declaration of nullity of her marriage on the grounds of error as to person. Two months after her canonical marriage, her husband was taken into custody and charged with bigamy. He had previously entered into a canonically invalid civil marriage. Three children had been born of this prior marriage. He had fraudulently concealed knowledge of his prior civil marriage from the plaintiff. In Brazil, divorce even of a civil marriage is not available. The trial court found for nullity on the grounds of error of a quality which redounded into error of a person. The appellate court reversed as far as the original grounds of error were concerned, but found for nullity because of an incapacity on the part of the defendant to oblige himself to the essential property of fidelity in marriage. The case then found its way to the Sacred Roman Rota. The Rota found for nullity on the same grounds as the trial court, i.e., error of the person. It reasoned that a moral, social, or a juridical quality which is so intimately connected with the physical person that the person would be altogether different if that quality did not exist, can be the grounds of nullity because of error. Canals, writing the opinion of the court, after citing the traditional strict opinion that a quality which amounts to a quality about the person must be the only possible means of establishing the identity of an otherwise unknown person, and after recognizing the opinion of Thomas and Alphon-sus that an error as to a quality which was directly and principally inten-ded causes nullity, cites a third opinion:

The third interpretation considers the case of a moral, social, or juridical quality which is so intimately connected with the physical person, that the person would be altogether different if that quality did not exist. Thus, if someone enters marriage with a person whom he believes to be free from all ties, but who is already civilly married, the contract would be invalid according to this third interpretation. The reason for this invalidity would not arise from any implicit condition, but rather be due to an error of quality amounting to an error concerning the person understood in a more complete and

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integral way. Civil marriage cannot be considered in the same way as concubinage. The former is recognized by the Church as valid for non-Christians and for baptized non-Catholics. Because of the lack of canonical form, a merely civil marriage does not share this recognition when entered into by Catholics, nor in the union of a Catholic and non-Catholic. Nevertheless, even in these cases, Canon Law accepts the fact that a civil union produces certain canonical effects, as for example, establishing the basis for a sanation, or for the impediments of public honesty and crime, or resulting in a possible excommunication. Moreover, in those places where a complete separation exists between the civil and religious marriage, the Church usually encourages and indeed instructs the faithful to contract the civil marriage first, thereby indirectly protecting the religious marriage with civil laws of indissolubility, legitimacy of children, and protection of property. Therefore, we must admit that although civil marriage is rejected in principle, it does establish a status of the person and consequently an error about such a status amounts to an error of the person.

Perhaps we should note in passing, that the Church's opposition to civil marriage does not weaken the argument because the Church is also opposed to slavery and yet Canon 1083 #2, explicitly declares null a marriage contracted in error regarding that matter.

Canals gives credit for his reasoning to Jemolo from whom he quotes:

The formula, drawn up with the canonical tradition in mind, does not correspond to real life. The tradition itself is a relic from the past, as a glance at ecclesiastical jurisprudence will reveal. It refers to the pre-Tridentine era when there were merely civil acts, when marriages were imposed by parents with hardly any period of engagement or mutual acquaintance of the intended partners and at a time when proxy marriages were not uncommon in the upper classes. Under such conditions, it may have been possible to have the situation where one who was to marry Bertha intended to marry her as the King's daughter, identifying her solely as the daughter of the King of Cyprus, without caring whether she was beautiful or deformed, educated or illiterate, talented or otherwise.

But all this is far removed from our situation today. Rather, we should ask ourselves what are those qualities which are generally considered as constituting the identity of a person, without its being even necessary (providing the ignorance or error is established) to investigate further into the reaction of the person as the discovery of his mistake. If we pursue this approach, it is almost impossible to deny the importance of error... even in the case where, for example, a woman marries a man thinking he is honest when actually he has a long criminal record or where a man marries a woman thinking she is a virgin when in fact she is a prostitute.

The most noteworthy point about this decision of Canals is that it does not require for a finding of nullity that error is concerned about such a quality which would be the only possible means of establishing the identity of an otherwise unknown person. Eliminated is the rigid distinction between person or substance on one hand and accidents on the other with the result that any error about an accidental quality would not pertain to the person or to the substance. The value of the decision of Canals is that
it recognizes that there are such qualities in persons which, although they
are accidental, are so important as to be means of identifying the person,
even though there might be other persons having the same qualities. A
particular quality or a combination of particular qualities identifies the
person in the particular case. This is most natural. If we maintain the
hylomorphic theory of substance and accidents on which the traditional
exclusion of all qualities as basis for nullity is founded, we must admit that
the only way that we have of knowing a person is through the qualities, or
accidentals, of that person. By reason of substance, all persons are alike.
They differ exclusively by accidentals. It is through the qualities or acci-
dentals that we must identify persons. There is a basis for this in the
teaching of Thomas who said that the meaning of this word, person, is not
essence or nature but personality. Thomas also affirmed that the person
in whatsoever nature means that which is distinct just as in human nature
it means this flesh and these bones and this soul which are the things which
distinguish one person from another.30

Another noteworthy point about the Niteroi decision is that for nullity
because of error it does not require the substitution of one physical person
for another physical person. This was the understanding of error, generally
speaking, in Gratian, in decretal law, and in the commentators following
the Code. It was for this reason that it was said that it was very difficult
for error to be realized unless the marriage was contracted by proxy. The
proper person would be readily recognized. The Niteroi decision puts the
emphasis on the subjective intention. The question is whether the qualities
which were principally intended are actually in existence in the other
person at the time of marriage.

Is this case of Niteroi, decided by Canals, the only case where the Rota
has found for nullity because of an error of a quality which did not specify
a definite individual? There are a number of cases where the Rota came
to the conclusion that although an expressed condition had not been made
by the plaintiff, impliedly a condition actually existed about a quality,
causing nullity. However, there is one case which makes special reference
to the third rule of St. Alphonsus concerning error which redounds into the
person. This was decided on June 21, 1941.31 The decision was written by
Heard. It concerned a marriage which took place in present day Pakistan
where, according to the local custom, women are divided for the purposes
of marriage, into virgins and non-virgins. A higher price was demanded for
virgins than for non-virgins. The plaintiff in the case paid the higher price
to have a virgin as his wife, but later found out to his dismay that she was
not a virgin. The court recognized the marriage as null because of error in
a quality which was directly and principally intended. In a few other cases,

30 Summa Theologica, Pars I, Q. XXXIX, Art. III, ad. 4; also Pars I, Q. XXIX, art. IV.
31 S.R. Rotae Decisiones, Vol. XXXIII (1941) pp. 528-533. This case is popularly known as
the “De Dinajpur” decision.
the rule of Alphonsus of a quality being principally and directly intended was quoted to find for validity inasmuch as the quality had not been directly and principally intended. In a few cases, the rule of Thomas and Alphonsus was rejected not because it was erroneous but because it was not pacifica. I presume this means there was some doubt about it.

Is this decision of Canals in the Niteroi case well received? In an article in the recent three volume work, Miscellanea in honorem Raymundi Bidagor, Pio Fedele is quite critical of the Canals decision. He is of the opinion that the reasoning should be on the grounds of an implied condition rather than error. This criticism of Pio Fedele is not found in the particular facts of this individual case, but in Pio Fedele's own concept of error. Pio Fedele, a professor of the University of Perugia and the editor of Ephemerides Iuris Canonici, has been carrying on for many years a friendly disagreement with Orio Giocchi, a professor at the Catholic University of the Sacred Heart of Milan, about the nature of the error of a quality which redounds into an error of the person. Giocchi, following Thomas and Alphonsus, has been saying that as long as the intention is turned directly and principally toward a quality which might be individual or common, then error as to that quality could cause nullity. Pio Fedele has been insisting that the error of the quality must be equal to the lack of a condition even though the condition might not be explicit but only implied. This appears a battle of words. Pio Fedele says that a condition de praesenti relative to a quality, makes that quality a constitutive part of the consent. At the same time, he admits that the intention directly and principally into the quality makes the quality a constitutive part of the consent. Consequently, there would be no difference inasmuch as both make the quality an essential element of the consent. There is some basis for the thought of Pio Fedele. Cappello in the last edition of his work was of the opinion that when a marriage is null because of an error about quality, it is really because of a condition . . . at least implicit.

A continuing major distinction in this area is between qualities which only are motives of consent and qualities which identify the person. This is a question of fact and is most important in determining validity or nullity. Frequently, the qualities which caused one to be interested in the other party will also be the qualities by which one identifies the other at the time of marriage. If so, no problem. But it can happen that the qualities which originally caused one to be interested in the other person are no longer important at the time of the marriage. The intention "principal and direct" might have gone to other qualities. If so, the original qualities would have no legal significance. They merely gave rise to the contract. It is a question as to whether the qualities which are directly and principally intended at the time of the marriage and which identify the person are verified.

Ius Populi Dei, Vol. III, pp. 560-570.
Pio Fedele has another criticism of Canals' Niteroi decision. In determining error, he says we should not have recourse to customs of a certain place or to the common considerations of people as to what constitutes a marriageable person. He says that the error or condition must be proved in the individual cases from the actual intention of the contractant — what that person directly and principally intended in the person of the other. At least in the decision of the Niteroi case, no evidence or proof is mentioned about the specific intentions of the plaintiff. There is no doubt that under certain conditions, judges can take "judicial notice." Notoria non indigent probatione (Canon 1747, 1°). But this is something which must be used with great care. Individuals marry and individual marriages are declared valid or null. It is difficult to understand how a court in Rome could take judicial notice of the fact of the mentality of the people of Niteroi about a prior canonically invalid civil marriage. Perhaps it was the complexus of qualities in the Niteroi case which the Court in Rome thought no woman anywhere on the earth should be deceived about. It is my personal opinion that the mere fact of a prior civil marriage alone, without other complications, would not be so repulsive to all our people in the United States so that we could find for nullity because of error without proof of the specific intentions of the individual concerned. In our mixed, changing society, I agree with Pio Fedele that at least in our areas for the most part we must look for the error in the individual case.

Pio Fedele does not agree with the finding of nullity in the Niteroi case. The final judgment of the case states that "to enter the marriage the defendant simulated his free state, and using a false name obtained a document of free state." The plaintiff had testified that if she had known that the defendant had been married, she would never have become engaged to him and in no manner would she have consented to the marriage. To Pio Fedele this indicates an error about a quality which merely gave rise to the contract or, at the most, an interpretive intention both of which have no legal effect in regard to nullity. Pio Fedele also criticizes the Sens decision. The plaintiff had testified that it was beyond all question and there was no doubt that she would never have consented to have anything to do with that odious character if she had been able to know his past. To Fedele, then, the words of the plaintiff in these cases indicate an interpretive consent and therefore are not invalidating.

Against Fedele, I would say that we must not be too literal in interpreting testimony. If we look merely to the spoken words of the two plaintiffs, they do appear to indicate an interpretive intention. But we must remember that the exact words of parties and witnesses often depend on the way the questions are proposed to them. Also, the recording of the answer is not always complete and accurate. In many Canon Law Courts the judge summarizes the testimony and sometimes omits phrases which an appellate court might find important. Lastly, and most important, we must give more attention to what the people are telling us than to the specific wording they are using. Reading what we have of the Niteroi and
Sens cases, we must conclude that what the plaintiffs are saying is that the other was an entirely different person from the one they thought they were marrying. Each envisioned a person, free to marry, free of other major responsibilities, capable of taking on new responsibilities in marriage and what they discovered shortly afterwards was entirely different. Pio Fedele generally is a plaintiff's attorney but in his criticism of Niteroi and Sens he sounds more like a Defender of the Bond. These words "I would not have married him if" do indicate an interpretive intention, but they can mean much more depending on how articulate the witness is, how he is interrogated, and how well the answers are recorded.

In short, Fedele's criticism of Canals' Niteroi decision is that the facts of the case, as recorded, were not sufficient for the finding of nullity, and that he would have preferred that the court speak in terms of implied condition rather than in terms of error.

Not all of the criticism of Niteroi has been negative. Orlando DiJorio, an archivist of the Rota, writing an extensive commentary on the case in *Il Diritto Ecclesiastico* concludes that no serious difficulty can be found with the new thinking found in the Canals decision. He is of the opinion that jurisprudence about error as to quality did not develop because of the tendency of courts to fall back into a discussion of implicit condition just as courts shied away from impotence and solved cases by "non-consummation."

Orlando DiJorio is of the opinion that it is not necessary to prove error in circumstances as found in the Niteroi case but ignorance alone is sufficient. Canals' norm, according to Orlando DiJorio, does not demand an intention directly and principally centered on a special quality. He says we must not demand an intention directly and principally centered on a special quality because either it becomes a motivating cause of the marriage which, according to Canon 1083, does not result in nullity, or the quality is considered as a condition. In the case where the quality is considered a condition, he says that one always ends in some doubt as to whether a true condition actually existed.

It is difficult to agree with Orlando DiJorio's view that a direct and principal intention toward a certain quality is not required for nullity on grounds of error. He argues from an equivalence of error and ignorance. This is true of the *ius conjugale* and its essential properties, but is it true as to a quality of a person? A direct and principal intention toward a certain quality need not be proved in every case because of the certitude the courts have that that quality is intended in every case. Some things are overwhelmingly evident without proof. On the other hand, if that particular quality is not intended in some way, expressly or impliedly, and if it is not an important aspect of his picture of the other party, how can a contractant claim that he was substantially in error? In some manner, the

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quality which redounds in the error of the person must be directly and principally intended. Orlando DiJorio's concern that the quality becomes a motive (*causam dans*) is overemphasized. A motivating cause can easily become an integral and principal part of the picture of the other party. The fact that a particular quality is a motivating cause of the consent does not preclude its being a necessary term of the consent which is exchanged.

I sincerely do not want to appear to differ greatly with DiJorio's making ignorance and error equivalent. Certainly if there is true ignorance it must be just as destructive of consent as error. It is my personal belief that what sometimes appears to be ignorance is in fact error. Before a person even makes the acquaintance of the one he wishes to marry, he already has formed a general picture containing all the qualities he would demand in a possible spouse. A statement after marriage that he did not know she had epilepsy and he would not have married her if he had known it, sounds like ignorance but it is actually error. He wanted a person with reasonably good health and was convinced he was marrying such a person, but he was deceived: he was in error... not mere ignorance.

One objection that can be made against the Niteroi decision is that it could cause the validity of a marriage to depend on a quality which is not closely associated with the essence of marriage. This must be admitted, but do we not have the impediment of concealed slavery for many centuries? It must be conceded that slavery is also a quality. Rather than a singular case, slavery must be considered an example of those things which are so important that an error could cause a person to be substantially different from the one intended.

Another objection to the Niteroi decision is that it opens the door to many and varied grounds of nullity. This is true, but is it not also true in the case of a condition? According to Canon 1092, 4º, any condition about a past fact or a present fact will render the marriage valid or invalid inasmuch as the fact on which the marriage is conditioned is present or absent. Error would go no further than condition.

What are we to conclude from the Niteroi and Sens cases? As John Heywood stated, "One swallow maketh not summer." We do not have in Canon Law the doctrine of stare decisis. As Cyril Murtagh pointed out so forcefully, the jurisprudence of the Rota is not binding on all diocesan courts. Nor does Niteroi describe the style and practice of the Roman Curia or the common and constant opinion of learned men. Niteroi does, however, show that this area of error is open to a development of jurisprudence because the law on error is not definitely settled once and for all either from the style and practice of the Roman Curia or from the common and constant practice of learned men.

Both Niteroi and Sens were concerned with facts which the courts considered notorious, as needing no proof because of their universal application. The court could take judicial notice. If a Tribunal can find error which redounds into the person in the case of a prior civil marriage, there is no reason why it cannot find invalidating error in the case where any
particular quality is directly and principally intended. Orlando DiJorio foresees the extension of the norm of the Niteroi case to cases involving pathological states, perversions, and degrading habits. This would be especially true where the one supposedly in error is prevented from observing the objective qualities of the other by the pathological condition of "denial."

Some practical problems remain in regard to cases of error. First, does the plaintiff have to prove that the error was caused by fraud? The answer to this must be in the negative. The error itself causes the invalidity because the consent is lacking. However, proof of fraud helps to establish the proof of the error. If it is established that the one party deliberately tried to lead the other into error, a court can more easily find that the other party was in error.

Secondly, in a case of error, must it be proved that the one in error would not have entered the marriage had the truth been known? Certainly, if the one in error would have married in any event if all the truth were known, the marriage would be valid because the error would not be about the essentials of the personality but merely about accidentals. In the Niteroi and Sens cases it was shown that the plaintiffs would not have entered the marriage, if all the facts were known. This proof was not essential in these cases because the courts took judicial notice that the respective defendants were persons altogether different from the persons with whom the plaintiffs would have considered marriage. Proof that the marriage would not have taken place if the truth about the particular quality had been known is not an absolute necessity but it does help to establish that the quality in question had been directly and principally intended.

A third question arises whether the quality involved in the error must be one which is recognized by society at large as making the person in question different from an ordinary person acceptable in that society as a spouse. Certainly the Sens case used anthropological and psychological findings to determine what a society considers a marriageable person. Canals in Niteroi does not directly require the opinion of society at large but Jemolo, quoted by Canals, speaks of the qualities which in the common consideration makes up the picture of a person. It appears that these cases do not make the common estimation of the community a necessary condition. If Canals feels justified in using an opinion which he considers less strict, I do not see why we cannot use an opinion which is more strict, e.g., that of Thomas and Alphonsus. Of course the proof will be more difficult because the facts of the individual case must be proved and special care must be taken to distinguish between the motivating cause (causam dans) and the qualities which actually identify the particular person.

In a recent address to the Judges of the Sacred Roman Rota, Pope Paul called for the application of the rules of equity in the adjudication of cases. The Sens and Niteroi cases provide such an opportunity. Our jurisprudence can be developed in the area of error provided, according to my
opinion, it follows the teaching of Thomas that the error is about a quality that is directly and principally intended. Fact patterns behind such cliches as “Love is blind” and “I thought I could change him” could be quite revealing.