

The Ecclesiastical Tribunal in Marriage Cases

James E. Harpster

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

James E. Harpster, *The Ecclesiastical Tribunal in Marriage Cases*, 35 Marq. L. Rev. 237 (1952).

Available at: <http://scholarship.law.marquette.edu/mulr/vol35/iss3/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

THE ECCLESIASTICAL TRIBUNAL IN MARRIAGE CASES

JAMES E. HARPSTER*

It is sometimes said by our separated brethren that, while the Catholic Church pretends opposition to divorce, those who have enough money can get a divorce from the Church through the ecclesiastical annulment process. A statement so absurd exhibits a complete lack of understanding of the difference between a divorce and an annulment and of the process involved in the annulment suit. The position of Holy Mother Church is, of course, that any marriage validly entered into is indissoluble, while any marriage which is not validly contracted is no marriage at all. In controverted cases it is the duty of the Church to determine the truth, and to pronounce sentence accordingly, viz., that the marriage is a valid one and cannot be dissolved by any save God, or, the marriage was invalid when contracted. The ecclesiastical tribunal which pronounces such sentences, like any tribunal, must have a law to administer and rules of procedure to guide it. These are supplied by the Code of Canon Law.

The present Code which governs the universal Church is a recent work, having been officially promulgated on the twenty-seventh of May, 1917, and made binding on the nineteenth of May, 1918. Prior to the adoption of the Code, Church law was a vast, complicated, and confused mass of legislation which was of little help to the average diocesan priests who had to apply much of it. There was no arrangement to this legislation, and, indeed, much of it was not legislation at all. Also many laws had been abrogated, many were mutually contradictory, and many referred only to particular cases. These reasons,¹ plus the fact that the form of most of the laws was obsolete and difficult to follow, determined Blessed Pius X, then Supreme Pontiff, to decree a codification of all Church law. He therefore issued a *Motu-proprio*² in which he decreed that "the laws of the universal Church be brought together and arranged in a lucid order."³ The work was also to incorporate all new legislation and all modifications of existing legislation which the times made necessary or desirable.⁴ Accordingly, His Holiness appointed a Pontifical

* Ph.B., Marquette University; Third Year Law Student, Marquette University Law School, Member of the Board, MARQUETTE LAW REVIEW.

¹ The reasons here given are taken from Peter Cardinal Gasparri, *Praefatio ad Codicem* (Preface to the Code).

² A *Motu-proprio* is an authoritative order or decree of the Pope, drawn up and issued on his own initiative, without the advice of others, and personally signed by him.

³ Pope Pius X, *Arduum sane munus*, March 19, 1904.

⁴ It might be well to point out here that the Code of Canon Law does not for the most part embrace a restatement of Sacred Scripture or of Moral or Dogmatic Theology, which the Church is not free to change, but contains

Commission consisting of Cardinal Codifiers, and to them he added a group of skilled canonists as consultants. To the Metropolitans of the whole world went a letter requesting, within four months time, suggestions as to new laws and modifications of existing legislation. These suggestions were to be made only after a consultation by the Archbishops with their suffragans.⁵ The Holy Father named Peter Gasparri as Secretary of the Commission. On Cardinal Gasparri's shoulders fell the heaviest responsibility for the work.

It was the lot of Benedict XV to promulgate the Code, Pius X having died during the thirteen years of its preparation. This he did in his Constitution, *Providentissima*, of May 27, 1917. After briefly reviewing the history of the Code, His Holiness then stated:

"Therefore, having sought the aid of Divine Grace, trusting in the authority of the Blessed Apostles Peter and Paul, *Motu proprio*, of our certain knowledge and in the fulness of the Apostolic power with which we are invested, by this our constitution, which we wish to be binding for all time, we promulgate, and we decree and order that the present Code, just as it is drawn up, have in future the force of law for the universal Church, and we entrust it for safekeeping to your custody and vigilance.

"That all concerned, however, may have full knowledge of the prescripts of this Code before they become effective, we decree and ordain that they shall not have the force of law until Pentecost of next year, that is, on the nineteenth day of May, 1918.

"All enactments, constitutions and privileges whatsoever, even those worthy of special mention, and customs, even immemorial, and all other things whatsoever to the contrary notwithstanding."⁶

The Code is divided and subdivided, in a logical connection of the several matters covered, into books, parts, sections, titles, chapters, and articles. The ultimate subdivisions are the canons. Of these canons there are 2414.

mainly disciplinary and directive legislation as to the conduct of the affairs of the Church in its rites, dispensations, penalties, etc. Having made these laws in the first place, the Church is free to change them as changes in the conditions of society and the exigencies of the times dictate. However, morality is not a mutable thing. All expressions of the Natural Law or of Divine Positive Law are not within the legislative ken of the Church. That is to say, she cannot abrogate, modify, or dispense their operation. Thus, where God has made the marriage bond indissoluble, the Church cannot make it dissoluble. The final form of the Code, while changing and adapting much, added no actual new legislation.

⁵ A suffragan bishop is a diocesan bishop who is subject to an archbishop as Metropolitan. For example, the Most Reverend Moses E. Kiley, Archbishop of Milwaukee, is Metropolitan of the Province of Milwaukee. The bishops of Green Bay, La Crosse, Madison, and Superior are suffragan bishops within his province.

⁶ Pope Benedict XV, *Providentissima*, May 27, 1917. This translation is taken from *The Ecclesiastical Review*, as quoted by the Most Reverend Amleto Giovanni Cicognani, *Canon Law* (Westminster, Maryland, The Newman Press, 1934), p. 443.

Book I, *Normae generales*, is a book of general rules. Comprising the first 86 canons, it explains the nature of the Code and the extent of its application. These introductory regulations affect the entire Code. Book II, *De Personis*, deals with the laws concerning persons. It takes up, in three parts, the clergy, religious communities and their members, and the laity. Book III, *De Rebus*, concerns the regulation of the things of the Church. It is in six parts, and deals with the Sacraments, Sacred Places and Times, Divine Worship, the Teaching Authority of the Church, Benefices, and the Temporal Goods of the Church. The fourth book, *De Processibus*, concerns the processes of trials and judgments, of canonization and beatification, and the application of penal sanctions. The final book, *De Delictis et Poenis*, concerns offenses and penalties. There are also certain documents before and after the canons which are a part of the Code, but which were not drafted in the form of canons.⁷

This, then, is the Pian-Benedictine Code. It is drafted in Latin, since thereby the Code says precisely the same thing to all peoples. A translation is essentially and necessarily an interpretation, and, for this reason, the Code may not be translated into the vernacular without the approbation of the Holy See. In the subsequent discussion, therefore, we will not attempt to render into English any of the canons discussed. Rather, we will rest on the explanations given in the *Instruction* issued on August 15, 1936, by the Sacred Congregation for the Discipline of the Sacraments, and on the authority of the works of the Most Reverend Archbishop Amleto Giovanni Cicognani,⁸ of the Reverend Stanislaus Woywod, O.F.M.,⁹ of the Reverend William J. Doheny, C.S.C.,¹⁰ and of the Reverend T. Lincoln Bouscaren, S.J.¹¹

In the few years of the existence of the Code much has been written concerning it. Indeed, only a few specialized students could hope to

⁷ The documents inserted before the canons are: 1. *Praefatio ad Codicem* by Cardinal Gasparri; 2. the Constitution, *Providentissima* (*supra*, note 6); 3. the *Motu proprio Cum iuris canonici*, of September 15, 1917, by which Pope Benedict XV established a Pontifical Commission for the official interpretation of the Code. Following the canons are nine documents. The first three of these, together with the last one, concern the vacancy of the Apostolic See and the procedure during the election of a new pope. The fourth document has to do with the appointment of priests to vacant parishes, while the fifth deals with the Sacrament of Penance. The following three documents are all concerned with marriages contracted in infidelity in the West Indies by converts who had been polygamists. According to Cicognani, *op. cit.*, p. 425, by virtue of Canon 1125, these last three mentioned documents apply with equal force to all places where similar conditions obtain.

⁸ Cicognani, *op. cit.*, *supra*, note 6.

⁹ Stanislaus Woywod, O.F.M., *A Practical Commentary on the Code of Canon Law*, revised by Callistus Smith, O.F.M. (New York, Joseph F. Wagner, Inc., 1948), 2 volumes.

¹⁰ William J. Doheny, C.S.C., *Canonical Procedure in Matrimonial Cases* (Milwaukee, Bruce Publishing Company, 1948), 2 volumes.

¹¹ T. Lincoln Bouscaren, S.J., *The Canon Law Digest* (Milwaukee, Bruce Publishing Company, 1934, '43, '49), 2 volumes and Supplement.

read and grasp all of this mass of material. It is with humility, then, that we write this article. For in these few pages we cannot hope to do justice to the subject of which we treat. Yet, aside from the interest of the lawyer in the form and application of laws, there is some need of making our civil attorneys conversant with the general and basic procedural rules of Canon Law. Often attorneys are faced with a divorce petition where one or both of the parties are Catholic. Conscientious lawyers, aware of their civil duty to affect a reconciliation, if possible,¹² and concerned about the consciences of their clients, will advise such Catholics that divorce, per se, is morally impossible for them. Should their clients persist in their intentions, these attorneys will attempt to place their cause before an ecclesiastical court for its decision before proceeding with the civil action. To do this, however, the attorney must possess a certain modicum of knowledge which most do not possess. We will attempt, in this article, to briefly outline the adjective or procedural law with which the Church tribunals are concerned in matrimonial cases. Substantive law will not be dealt with. The attorney is advised to consult competent ecclesiastical authority for the valid causes for annulment in individual cases.

I. THE COURTS

The Pope, as successor to the primacy of St. Peter, holds the supreme administrative, legislative, and judicial authority of the Church. Immediately inferior to the Pope are the various Sacred Congregations, Tribunals, and Offices of the Roman Curia. These departments are, in effect, assistants to the Supreme Pontiff in much the same way as Cabinet officers are assistants to the President. Thus, while there are cases involving certain people which only the Roman Pontiff may judge (*causae majores*), he ordinarily delegates this authority to one of the various departments of the Curia. When so delegated, the designated Congregation or Tribunal has exclusive authority.¹³ Cases, including marriage cases, which the Pope has the exclusive right to judge are those involving heads of states, their sons and daughters, and persons who have the immediate right of succession as heads of state, e.g., heirs to a throne, presidents-elect, and governors-elect.¹⁴

Marriage cases for all others are handled in the following manner. The Sacred Congregation of the Holy Office has exclusive jurisdiction

¹² *Szymanski v. Szymanski*, 151 Wis. 145, 138 N.W. 53 (1912). The court said, at page 147, "The policy of the law favors the reconciliation of the contending spouses . . . the resumption and continuance of the marriage relation, the solidarity of the family, and the end of litigation, especially divorce litigation. . . . Such counsel should promote settlement and reconciliation of parties wherever possible, even at the sacrifice of his fees when necessary."

¹³ Can. 1962; *Instruction* of the Sacred Congregation of the Sacraments, August 15, 1936 (hereinafter referred to as simply the *Instruction*), Art. 2 §2.

¹⁴ Can. 1557 §1.

in marriage cases involving a non-Catholic. It may adjudge the case itself, or may refer it to the Tribunal of the Sacred Roman Rota, as it deems fitting.¹⁵ The Sacred Congregation for the Discipline of the Sacraments decides all other cases concerning the validity of marriage, except those requiring further discussion or investigation. In the latter instance, it must refer the cases to the Sacred Roman Rota.¹⁶ The Roman Rota is an ordinary collegiate tribunal consisting of a certain number of judges who try cases in rotation, three judges constituting one tribunal. At its head is a Dean, who is the first among equals. In some cases the entire body of judges sits as a single court. The Sacred Rota tries appeals of marriage cases which have been brought to the Holy See from the courts of any diocese.¹⁷ Practically all cases within the jurisdiction of the Congregation of the Sacraments go directly to the Rota.¹⁸

Often spoken of as the supreme court of the Church is the Supreme Tribunal of the *Signatura Apostolica*. This court tries cases which concern:

1. The violation of secrecy by a judge of the Roman Rota, and the damages due a party because of the invalid or unjust acts of a judge of the Rota;
2. A plea of suspicion against any of the judges of the Rota
3. A plea of nullity against a sentence handed down by the Rota;
4. A petition for the *restitutio in integrum* against a sentence of the Sacred Rota which has become *res judicata*;
5. Recourses against sentences of the Rota in matrimonial cases which that court refused to admit to a new trial;
6. Disputes over competency which arise between inferior tribunals; and
7. Petitions offered to the Holy Father to obtain the commitment of a case to the Sacred Roman Rota.¹⁹

The *Signatura Apostolica* has no other appellate jurisdiction than that herein listed. It is not, therefore, a regular court of appeal.

The Code of Canon Law is not officially interpreted by any of these Congregations or Tribunals. Canon 17 states that an interpretation of the law given in the sentence or judgment of a court has no force of law, and binds only those persons to whom it is given. The exclusive right to interpret the Code was given to a Pontifical Commission by

¹⁵ Can. 247; 249 §3.

¹⁶ Can. 249 §3; *Instruction*, Art. 2 §4.

¹⁷ Can. 1599; *Instruction*, Art. 216 §1. By virtue of Canon 1600, the *causae majores* are absolutely excluded from the jurisdiction of the Rota.

¹⁸ For a discussion of the *Studium* conducted by the Rota to train advocates, cf. *infra*, page 255.

¹⁹ Can. 1603.

Pope Benedict XV.²⁰ This Commission for the Authentic Interpretation of the Code has absolute authority in this regard. It therefore possesses ordinary legislative authority. In matters of great importance the Commission must consult that Sacred Congregation within whose province the matter ordinarily lies before handing down its decision.²¹

It is, of course, necessary that the Code be sometimes interpreted by the courts in order to arrive at a judgment. In the absence of an express explanation of a canon by the Pontifical Commission, the Code is often interpreted in the light of the law existing prior to its adoption. For, in many instances, Canon Law is merely a reiteration of previous ecclesiastical law. Earlier interpretations are, therefore, applicable to the new Code.

Marriage cases are brought in the first instance in the proper diocesan marriage court.²² In every diocese such a court has been established by the Bishop for the exclusive purpose of handling matrimonial cases. These are collegiate tribunals, that is, courts consisting of at least three judges. The court is presided over by the *Officialis* of the diocese, or by one of his assistants, *Vice-Officiales*.²³ The *Officialis* is appointed by the Bishop and constitutes one tribunal with him. An appeal cannot, therefore, be taken to the Bishop from his diocesan court. Rather, the appeal goes to the archdiocesan court in which province the court of the first instance sits. In the case where the archdiocesan court is the court of the first instance,²⁴ the appeal is taken to another archdiocesan court, which the Archbishop, with the concurrence of the Holy See, has appointed to be, for all time, the proper court of appeal from his own court. A suffragan Bishop's court may be designated instead of the court of another province for such appeals. The Sacred Roman Rota has concurrent appellate jurisdiction with these inferior tribunals, and

²⁰ Motu-proprio of Benedict XV, September 15, 1917, *Acta Apostolicae Sedis*, IX, 483.

²¹ *Ibid.* In the same instrument His Holiness laid down the manner in which the Code may be amended. The Sacred Roman Congregations were forbidden thereafter to issue any new General Decrees unless some grave necessity required it. In the future the Sacred Congregations, if they felt there was a need for a new decree which conflicted with the present Code, were to present it to the Supreme Pontiff for approval. After approval it was to be submitted to the Code Commission, who would draft it into the form of canons. It was to be the function of the Commission to determine at what place the new canons were to be inserted, and which old canons were to be withdrawn from the Code. Canons not affected by the changes were not to be renumbered, however, in order to make room for the new ones. This is the present manner of amendment.

²² See Section IV, JURISDICTION, *infra*, p. 259, for an explanation of how to determine which court has competency in individual cases.

²³ In the Archdiocese of Milwaukee the *Officialis* is the Very Reverend John A. Wiczorek, 2000 W. Wisconsin Avenue, Milwaukee.

²⁴ This situation arises when anyone living under the jurisdiction of the Archbishop, but not under a suffragan, brings an action. Such is the case when a resident of Milwaukee sues for a declaration of nullity.

the latter may, therefore, be skipped entirely by appealing to the Holy See, as we shall point out in the following section.

II. APPEALS

Redress against the sentence of the court of the first instance, or that of the second or third instance, may be had by two methods: by the complaint of nullity and by the appeal. The complaint of nullity is an allegation that there was some extrinsic defect in the sentence issued, e.g., the incompetency of the court for lack of jurisdiction. It is addressed to the court that issued the sentence. An appeal, on the other hand, is addressed to a higher tribunal, and alleges the injustice of the sentence.

As to the first redress: the nullity of a sentence may be either curable or incurable, sanable or insanable, remedial or irremedial. A sentence is invalid by reason of irremedial nullity when issued by an absolutely incompetent judge or by an insufficient number of judges as prescribed in Canon 1576; when one of the parties to the action has not the legal standing to bring suit; or when someone has prosecuted a suit in the name of another without a legitimate mandate to do so.²⁵ A sentence is invalid by reason of remedial nullity in cases where there was no legal summons, or where the sentence was issued without the court's reason for its decision, or where the signatures demanded by Canon 1874 are missing from the sentence, or where the date of the sentence or its place of issuance is omitted.²⁶

Although the term "irremedial nullity" is used in respect to certain cases, this does not mean that absolutely nothing can be done to validate them. As we have said, a complaint of nullity is presented to the court issuing the sentence. But, in cases of irremedial nullity, that court is without authority to correct its own mistake in hearing the case, since it was without authority to try the case in the first place. Therefore, the complaint accomplishes nothing. However, by virtue of Canon 1603, the *Signatura Apostolica* has the authority to remedy or sanate the sentence, and the proper recourse is a request for sanation addressed to this tribunal. If sanation is not desired, but merely a declaration of the nullity of the sentence, such nullity may be proposed by way of an exception, which is of its nature perpetual,²⁷ before any competent court, or by way of an action brought within thirty years of the publication of the sentence before the tribunal which issued the sentence.²⁸

In the cases of remedial nullity, the complaint may be introduced by the parties, by the *Defensor Vinculi*, and by the *Promotor Justitiae*.

²⁵ Can. 1892; *Instruction*, Art. 207.

²⁶ Can. 1894; *Instruction*, Art. 209.

²⁷ Can. 1667.

²⁸ Can. 1893; *Instruction*, Art. 208.

The judge, acting *ex officio*, may within three months time, retract, amend, or otherwise correct the sentence.²⁹ There are two ways of introducing a complaint of nullity open to the party or official desiring such declaration. The complaint may be attached to an appeal and presented within ten days, equitable time, to the higher court. Or the complaint may be introduced separately before the court rendering the sentence, provided that it is presented within three months of the publication of the sentence. If neither of these methods is adopted by an authorized person, the remedial nullity is considered automatically sanated at the expiration of three months from the publication of the sentence.³⁰

An appeal differs from the complaint of nullity in its object, in the time element involved, and in the court to which it is addressed. An appeal maybe prosecuted by either of the parties or by the *Promotor Justitiae*. If the sentence is in favor of the petition, i.e., if it declares the marriage null and void, the *Defensor Vinculi* is obliged to file an appeal, even when a similar appeal is filed by the party upholding the marriage's validity. Should the *Defensor Vinculi* fail to appeal, he may be forced to do so by the presiding judge,³¹ and should his failure be culpable, he may be punished and removed from office.³² If the court of second instance decides in favor of nullity, the *Defensor Vinculi* of that court is free to appeal or to accept the sentence as in conscience he deems best. This freedom is also allowed the *Defensor Vinculi* of the court of third and succeeding instances. The *Defensor Vinculi* of the third instance need not prosecute an appeal made by the *Defensor Vinculi* of the second instance, and the court must acquiesce in its abandonment.³³

An appeal must be filed, under ordinary rules, within ten days of the publication of the sentence,³⁴ and prosecuted within one month. The time prescribed by the canon is equitable time, i.e., the ten days does not begin to run until the party knows of his right to appeal or is enabled to do so. ³⁵Under the precepts of Canon 1902, if the appeal is not so filed or prosecuted, the case becomes *res judicata*. This canon also states that a case is irrevocably judged when two concordant sentences have been issued, when an appeal has been made but not further prosecuted within the prescribed time, and when the sentence issued was definitive accord-

²⁹ Can. 1897; *Instruction*, Art. 211 §§1, 2.

³⁰ *Instruction*, Art. 211 §3.

³¹ Can. 1986; *Instruction*, Art. 212 §2.

³² Can. 1625 §3.

³³ Pont. Comm., May 29, 1947, *Acta Ap. Sedis* XXXIX, 373-374.

³⁴ Can. 1881; *Instruction*, Art. 215 §1.

³⁵ Time is computed so as to exclude the day of the publication of the sentence. The ten days expire at the tenth day. Judicial holidays (all Sundays, holydays of obligation, Holy Thursday, Good Friday, and Holy Saturday) are counted, except when the tenth day is a judicial holiday. Where this situation arises, the time expires at the end of the day following the judicial holiday or holidays.

ing to the rulings of Canon 1880.³⁶ However, under the law contained in Canon 1903, cases concerning the status of persons are never irrevocably adjudged. While the Code does not define what is meant by the status of a person, marriage is obviously one such status, and it is accepted and acted upon as such.³⁷ But if two concordant decisions have been issued, the case may be appealed only upon the presentation of new and weighty evidence. Doheny³⁸ explains that this new evidence need not be such as to necessitate a peremptory reversal of the two previous decisions, but only of such cogency as to give evidence of solid probability.³⁹ The value of this new evidence is appraised by the court of the third instance, i.e., the Sacred Roman Rota or the tribunal of the Holy Office.⁴⁰

An appeal from the diocesan tribunal is prosecuted before the Archbishop's court. However, at the discretion of the appellant, this court may be passed over completely, the appeal being made directly to the Sacred Roman Rota or the tribunal of the Supreme Sacred Congregation of the Holy Office. Even though the appellant has filed with the diocesan appellate court, he may still file an appeal with the proper court

³⁶ Canon 1880 states that there is no appeal:

1. From the sentence of the Supreme Pontiff or the *Signatura Apostolica*;
2. From the sentence of a judge who has been delegated by the Holy See to judge a case, where the instrument of delegation contains a clause barring an appeal;
3. From a sentence vitiated by an invalidating defect;
4. From a sentence which has become *res judicata*;
5. From a final sentence which is based on an oath taken to end litigation in a case;
6. From an interlocutory sentence or decree, unless it has the force of a final sentence (cf. note 217, *infra*);
7. From a sentence in a case in which the law demands that the matter be most speedily settled;
8. From a sentence of contempt of court, where satisfaction has not been made; and
9. From a sentence against a person who has, in writing, waived his right to appeal.

³⁷ A sentence in a marriage case does become *res judicata*, however, when the bond of marriage has been severed by the death of one of the parties. Decision, Sacred Roman Rota, June 20, 1922, *Acta Ap. Sedis*, XIV, 600. Woywod, *op. cit.*, II, p. 384, states that the reason for this is that Canon 1903 merely restates the law in effect before the Code, and that the former law was uniformly so interpreted.

³⁸ *Op. cit.*, I, p. 533.

³⁹ *Instruction*, Art. 217 §3.

⁴⁰ Doheny, *op. cit.*, I, p. 534, note, gives an example of a matrimonial case which was appealed four times after two concordant decisions:

- "1. Decision of Diocesan Tribunal, Non constat de nullitate [i.e., the marriage is valid].
2. Decision of the Sacred Congregation of the Council, Non constat de nullitate.
3. *S. R. Rotae Dec.*, I (1909), 155, Seven Judges, Non constat de nullitate.
4. *S. R. Rotae Dec.*, IV (1912), 33, Ten Judges, Non constat de nullitate.
5. *S. R. Rotae Dec.*, XV (1923), 274, Ten Judges, Constat de nullitate [i.e., the marriage was void].
6. *Signatura Apostolica*, July 30, 1924, Constat de nullitate. Decision reported in *S. R. Rotae Dec.*, XV (1923), 292."

of the Apostolic See, unless the Archbishop's court has already issued the legal citations. In the latter case, the appellant must await the trial and decision of this court before appealing to Rome.⁴¹

In Canon Law a court of appeal does not approve or disapprove the findings of law and fact of the lower court, nor its decision, except indirectly. The function of the court of appeal is to retry the case. It, too, is a collegiate tribunal, having similar rules of procedure to those of the court of the first instance.⁴² The rules given in the following sections apply equally to trials in the court of first instance.

When an appeal is made, copies of the acts recorded in the case must be bound, indexed and forwarded to the appeal court, with an affidavit of the actuary or the chancellor testifying that the copies are correct. If the vernacular language of the appeal court differs from that of the previous court, the acts must be translated into Latin. If the copies of the acts can be made only with grave inconvenience, then the originals may be forwarded, proper precautions being taken for their safety.⁴³

III. THE OFFICERS OF THE COURT

Those persons necessary to the conduct of a case in which the validity of a marriage is questioned are the judges, including the presiding judge (*Officialis*), the auditor, and the *Ponens*, the *Defensor Vinculi*, the *Promotor Justitiae*, the court messengers and apparitors, the notary, the attorneys, and the advocates.

By virtue of Canon 1576, every case involving the validity of the matrimonial bond must be tried by a collegiate tribunal of three judges. So strict is this injunction that any definitive sentence given contrary to it is vitiated by irremedial nullity.⁴⁴ At the head of this tribunal is the presiding judge. The presiding judge is always the *Officialis* of the diocese or one of the *Vice-Officiales*.⁴⁵ Canon 1573 makes it mandatory for every Bishop to appoint an *Officialis* who shall be possessed of the ordinary power to judge in all ecclesiastical cases, excepting only those which the Bishop has reserved to himself. Such reservations by the Bishops are generally limited, and, when made, are strictly interpreted, since they constitute restrictions on the power given in law to the *Offi-*

⁴¹ *Instruction*, Art. 216 §3.

⁴² Can. 1595; *Instruction*, Art. 213.

⁴³ Can. 1644; *Instruction*, Art. 105 §2.

⁴⁴ However, it seems proper for the Bishop to appoint two additional judges to help decide a specific case where the present judges continue in a deadlock or absolute confusion.

⁴⁵ Can. 1577; *Instruction*, Art. 14 §2. It is the opinion of Doheny, based on the language employed in Canons 1576 and 1892, that a decision rendered by a collegiate tribunal in which an ordinary judge acted as the presiding judge would be a valid sentence, even though the action of the presiding judge in assuming the office would be unlawful.

cialis. Only one *Officialis* may be appointed in each diocese, and, upon appointment, he becomes and constitutes one tribunal with the Bishop. However, the Code does not limit the number of *Vice-Officiales* whom the Bishop may name. This is left to his discretion, and depends upon the number of cases tried annually by the ecclesiastical courts in his diocese. The *Vice-Officialis* also enjoys ordinary jurisdiction with the *Officialis*.

The term of office of the *Officialis*⁴⁶ is indeterminate, depending upon the will of the Bishop. When the Bishop dies, the *Officialis* retains his office during the vacancy of the bishopric, but the new Bishop must confirm his appointment when he assumes office.

Canon 1573 lays down four qualifications necessary before a man may fill the office of *Officialis*: (1) he must be a priest;⁴⁷ (2) he must have an irreproachable reputation; (3) he must be at least thirty years of age; and (4) he must possess the degree of Doctor of Canon Law, or, at least, have a thorough knowledge of it.

The *Officialis* has a triple responsibility. He acts as a single judge in those cases requiring only one judge; he acts as the moderator of the collegiate tribunal; and he acts as the presiding judge of that court. The *Instruction*, in Article 68, sets forth the rights and duties of the presiding judge. He has the right to perform the following acts:

1. He directs the trial and determines what is necessary for the administration of justice.⁴⁸
2. He appoints the *Ponens* or acts himself in this office.⁴⁹
3. He decides any exception of suspicion that is made against the *Defensor Vinculi*, the *Promotor Justitiae*, and the other judges (together with the remaining judge who is not suspect).⁵⁰
4. He may order that the briefs and documents be printed as, in his discretion, he deems best.⁵¹
5. He may limit the length of briefs, unless this is regulated by special rules of the tribunal.⁵²
6. He determines when the judges are to meet for deliberation,⁵³ and directs the discussion at this meeting.⁵⁴

⁴⁶ Hereinafter where we use the term *Officialis*, unless expressly excepted, we are referring also to the *Vice-Officiales*.

⁴⁷ Prior to the Code it was the custom in certain dioceses for lay canonists to act as judges in matrimonial cases. The Sacred Congregation of the Council was asked whether the custom of 170 years standing was of such force as to permit a continued toleration of it. The Sacred Congregation replied: In the negative. Therefore, not only the *Officialis*, but all judges must be priests. This is the manifest requirement of Canons 1573 and 1574. *Resolution*, Sacred Congregation of the Council, December 14, 1918, *Acta Ap. Sedis*, XI, 128.

⁴⁸ Can. 1573; 1577 §2; *Instruction*, Art. 14 §2.

⁴⁹ Can. 1584; *Instruction*, Art. 22.

⁵⁰ Can. 1614 §3; *Instruction*, Art. 31 §3.

⁵¹ Can. 1863 §3; *Instruction*, Art. 179 §§3, 4.

⁵² Can. 1864; *Instruction*, Art. 182.

⁵³ Can. 1871; *Instruction*, Art. 185.

⁵⁴ Can. 1871 §3; *Instruction*, Art. 198 §3.

7. He may permit oral discussion of the case by the parties.⁵⁵
8. He disciplines those who fail in the respect and obedience which should be shown the court.⁵⁶
9. He ascertains the identity of the plaintiff and other parties to prevent a fraudulent substitution of persons.⁵⁷
10. He attempts the reconciliation of the parties, or urges the celebration of a valid marriage if the first was invalid.⁵⁸

In addition the presiding judge may also perform the following duties, unless the tribunal has expressly reserved these, or any of them, to itself :

1. He may act as the *Ponens*.⁵⁹
2. He may determine the joining of issues in pleading.⁶⁰
3. He may determine the time limits to be allowed for the furnishing of proofs and for presenting the defense.⁶¹
4. He may force disobedient witnesses to testify, even to the extent of imposing fines if that is necessary.⁶²
5. He may approve the taking of depositions before the *litis contestatio* where that is necessary because of the impending death or removal to a distant place of witnesses.⁶³
6. He may indemnify the witnesses and levy fees.⁶⁴
7. He appoints experts after a consultation with the *Defensor Vinculi*, and may determine their fees.⁶⁵
8. He appoints advocates *ex officio*.⁶⁶
9. He rules on the inspection of documents.⁶⁷
10. He declares the *litis contestatio*.⁶⁸
11. He declares the conclusion of the case.⁶⁹
12. He announces the abatement of proceedings.⁷⁰
13. He admits the renunciation of the instance.⁷¹

Also the presiding judge may undertake the duties of the auditor, unless one already has been appointed.

⁵⁵ Can. 1866; *Instruction*, Art. 186 §1.

⁵⁶ Can. 1640 §2.

⁵⁷ *Instruction*, Art. 58; *Instruction* of the Sacred Congregation of the Sacraments, March 27, 1929, *Acta Ap. Sedis*, XXI, 490.

⁵⁸ Can. 1965.

⁵⁹ *Instruction*, Art. 22 §2.

⁶⁰ Can. 1726; *Instruction*, Art. 87, 88.

⁶¹ Can. 1862; *Instruction*, Art. 179 §1.

⁶² Can. 1766 §2; *Instruction*, Art. 127 §2.

⁶³ Can. 1730.

⁶⁴ Can. 1787; 1909 §2; *Instruction*, Art. 235 §1.

⁶⁵ Can. 1787 §2; 1793 §1; 1805; 1913 §1; *Instruction*, Art. 141; 150; 235 §1.

⁶⁶ Can. 1655 §2; 1916; *Instruction*, Art. 43 §2; 237.

⁶⁷ *Instruction*, Art. 163-167.

⁶⁸ Can. 1726-1731; *Instruction*, Art. 85-88.

⁶⁹ Can. 1860 §3; *Instruction*, Art. 177.

⁷⁰ Can. 1736-1739; 1850 §1.

⁷¹ Can. 1740; 1741.

The remaining two judges of the collegiate tribunal are chosen by the Bishop or by the *Officialis* from the synodal or prosynodal judges. These judges, of whom there must be not less than four nor more than twelve,⁷² are appointed by the Bishop with the consent of the diocesan synod, hence the name synodal. Since a synod meets only once each decade, and vacancies may occur in the interim, the Bishop is empowered, under the provisions of Canon 386, to appoint judges outside of the synod upon the advice of the Cathedral Chapter, or, in some circumstances, of the board of Diocesan Consultors. These latter judges are known as prosynodal judges, and they enjoy the same privileges and have the same duties as the synodal judges. The term of office of all judges (other than the *Officialis*) expires at the end of ten years, or earlier, if a new synod is held earlier. They may finish any case upon which they are working at the time the synod is convened, however. These judges cannot be removed from office without grave reason, and then only upon the advice of the Cathedral Chapter or the board of Diocesan Consultors. Nor do they need the confirmation of a new Bishop to continue in office. As a general rule the judges are chosen by rotation to act in cases, although this rule may be deviated from where one or more specialized talents of a certain judge are desired for a specific case.

From the synodal or prosynodal judges, the Bishop appoints one or more auditors. It is the duty of these judges to cite⁷³ and examine⁷⁴ witnesses, and to draw up such other judicial acts as are provided for according to the tenor of their appointment.⁷⁵ Further, they may make judicial inspections,⁷⁶ examine and compare documents,⁷⁷ receive the written report of the court messenger concerning the service of summons,⁷⁸ and administer oaths to witnesses.⁷⁹ However, an auditor may never pronounce a definitive sentence.⁸⁰ If the auditor cannot be appointed from among the synodal or prosynodal judges, he may be any priest of learning and good judgment in the diocese. In this eventuality, however, he may not exercise any of the rights reserved to judges.

In the civil courts of this country having more than one judge, the chief justice always designates one justice to write the majority opinion. So also is the practice in the ecclesiastical collegiate tribunals. This officer is known as the *Ponens* or *Relator*. He is appointed by the presiding judge, and may be removed by him for a just cause.⁸¹ It is his duty

⁷² Can. 385.

⁷³ Can. 1715 §2.

⁷⁴ Can. 1773.

⁷⁵ Can. 1582; *Instruction*, Art. 24.

⁷⁶ Can. 1807.

⁷⁷ Can. 1821 §2.

⁷⁸ Can. 1722 §1.

⁷⁹ Can. 1767 §1, 1797 §1.

⁸⁰ Can. 1582; *Instruction*, Art. 24.

⁸¹ Can. 1584; *Instruction*, Art. 22 §1.

to report on the case at the meeting of judges, and, when the decision of the court has been reached, to draw up the sentence and reduce it to writing. While the Code says nothing further on the opinion, the *Instruction* adds the requirement that the opinion be in Latin.⁸² It is the duty of the *Ponens* to embody in the opinion the motives which prompted the sentence. Thus, ordinarily, he may select the most cogent and dismiss the others. However, should the court so determine, the *Ponens* is relieved of this right, and those motives indicated by the vote of the court are to be embodied in the opinion without any exercise of discretion on the part of the *Ponens*.

Canon 1584 says nothing of the eligibility of the presiding judge to act as *Ponens*, stating merely that he should appoint one of his associate judges to this office, and this was formerly a much controverted point. The *Instruction* has now cleared this point by providing that he may fill this office if the rest of the court assents.⁸³ The acts of the case should clearly indicate that this assent was given.

In any case concerning the marriage bond, an officer whose presence is absolutely necessary to the validity of the proceedings is the *Defensor Vinculi*, the Defender of the Bond.

Since marriage is a Sacrament, and may not lightly be annulled, the position of the *Defensor Vinculi* is a most important one, difficult and demanding. For it is the duty of this officer to do all that is necessary and possible to uphold the validity of any marriage whose annulment is sought. It follows that the priest who fills this office must be a man of tried judgment and of irreproachable reputation. He must have extensive experience in tribunal work, and be far above the average in his knowledge of theology and Canon Law.

Usually the *Defensor Vinculi* is permanently appointed by the Bishop, but in small dioceses it is sometimes found more feasible to appoint one as cases arise.⁸⁴ Once appointed, the *Defensor Vinculi* can be removed only for just cause. However, if he is removed for less cause, the removal is valid although unlawful. Upon the death of the Bishop he continues in office until the new Bishop officially notifies him of his status. It is within the province of a newly appointed Bishop to re-appoint him or to appoint another in his place. But until notification, the *Defensor Vinculi* retains his office.

Under the prescriptions of Canon 1968, the *Defensor Vinculi* has these duties:

1. To be present at the examination of the parties, the witnesses, and the experts.

⁸² *Instruction*, Art. 22 §1.

⁸³ *Instruction*, Art. 22 §2.

⁸⁴ *Instruction*, Art. 15 §1.

2. To present to the judge a sealed and signed interrogatory for the examination of the parties and witnesses.
3. To suggest new questions arising during the course of the examination.
4. To consider the points proposed by the parties and to contradict them where that is necessary.
5. To examine the documents presented by the parties.
6. To write animadversions against the nullity of the marriage and to state the proofs for the validity of the marriage.
7. To do everything necessary to uphold the marriage bond.⁸⁵

While it is the right and duty of the judge to question witnesses on his own motion, he must first examine them according to the interrogatory submitted to him by the *Defensor Vinculi*. The rights enjoyed by the Defender of the Bond in regard to the questioning of witnesses is extensive. His interrogatory precedes all others; he may recast the questions proposed by the parties, which must be submitted to him before the examination, particularly if he deems them leading or suggestive; he may examine the interrogatory of the *Promotor Justitiae*, but he may not change or recast them; and finally, he may propose questions during the actual examination. In this latter case, however, he gives his questions, either orally or in writing to the judge, who in turn proposes them to the witness. The *Defensor Vinculi* never has the right to question witnesses directly.

Canon 1969 lays down the following additional rights of the *Defensor Vinculi*:

1. To inspect the acts of the case at any stage of the trial, even though they have not as yet been published; to ask for more time to complete his written defense, which time is to be granted to him in the prudent discretion of the judge.
2. To be informed of all the proofs and allegations in such a manner that he has an opportunity to prepare objections.
3. To request that additional witnesses be summoned to testify, even though the taking of evidence has been completed and published; and to submit new evidence and objections.
4. To demand that other acts be drafted, unless the tribunal by unanimous vote decides against him.⁸⁶ However, unless the vote of the court is unanimous in declining to draft additional documents, the will of the *Defensor Vinculi* prevails.

In a letter dated January 5, 1937, addressed to the Archbishops, Bishops, and Ordinaries of the world, the Sacred Congregation of the Sacraments denounced the practice of Defenders of the Bond express-

⁸⁵ Can. 1968; *Instruction*, Art. 70.

⁸⁶ Can. 1969; *Instruction*, Art. 71.

ing themselves as to the truth of the cases in which they are acting. This, declared the Sacred Congregation, is "an attitude so far removed from the provisions of the law that there is no room for dispute about it (cf. Canon 1968, 3°, and the Rules of this Sacred Congregation of 7 May, 1923, n. 28)." This office was reserved to the courts and to the Bishops. Therefore the Reverend Prelates were instructed to communicate to the Defenders of the Bond in their dioceses "that it is their right and duty to bring up in trial all that they deem necessary or useful in defense of the marriage, and, at the close of the trial, to draw up carefully observations in favor of the consummation of the marriage, drawn from the record, either as regards matters of procedure or of substantive law, without giving their opinion on the merits of the case."

However, on October 2, 1944, in an Allocution delivered to the Prelate Auditors and other officials of the Sacred Roman Rota, His Holiness, Pope Pius XII, substantially modified the rule enunciated by the Congregation of the Sacraments. The Supreme Pontiff declared:

"On the other hand, it cannot be demanded of the Defender of the Bond that he draw up a defense at any cost; an artificial defense without care as to whether or not his statements have a solid foundation. Such a demand would be contrary to right reason. It would burden the Defender of the Bond with a useless, worthless task. It would contribute no clarification, but rather a confusion of the question. It would harmfully prolong the process. In the very interest of truth and by the dignity of his office the Defender of the Bond must, therefore, be accorded the right to declare, whenever the case requires, that after a diligent, accurate and conscientious examination of the acts he has discovered no reasonable objection to be made against the petition of the plaintiff or the petitioner. * * *

"Nor should it be objected that the Defender of the Bond must write his animadversions not '*pro rei veritate*' but '*pro validitate matrimonii*.' If by this is meant that the Defender of the Bond must emphasize all that favors or all that is not opposed to the existence or the continuance of the bond, the observation is indeed accurate. But if, instead, is intended the affirmation that the activity of the Defender of the Bond is not likewise bound to serve the ultimate purpose, namely, the ascertainment of the objective truth, but that he must unconditionally and independently of the proofs and results of the process sustain the imposed thesis of the existence or necessary continuance of the bond, this assertion must be adjudged as false. Thus all those who participate in the process must without exception direct their efforts toward the sole end: '*pro rei veritate!*'"⁸⁷

Of equal importance to a trial involving the bond of marriage is the *Promotor Justitiae*, the Promoter of Justice. This court officer is ap-

⁸⁷ Pope Pius XII, Allocution to the Sacred Roman Rota, October 2, 1944, *Acta Ap. Sedis*, XXXVI, 281-290. (This translation is taken from Doheny, *op. cit.*, I, pp. 1100-1101).

pointed in the same manner as the *Defensor Vinculi*,⁸⁸ and should have the same requisites as the latter. It is the duty of the *Promotor Justitiae* to safeguard the public good. Specifically he has the right and duty to impugn any marriage which he believes to be invalid by reason of an impediment which is of its nature public.⁸⁹ His is also the duty of enforcing strict adherence to procedural law. He may do this by calling the court's attention to violations of this law, and, if necessary, the attention of the Bishop. It follows that he be not only exceptionally well versed in Canon Law, but, *a fortiori*, an expert on procedure.

The *Instruction* has ruled that three conditions must exist before the *Promotor Justitiae* may attack the validity of a marriage on his own motion:

1. There is a question of an impediment which has become public and which is based on argument so certain and valid either in fact or in law, that there can be no serious doubt as to the existence of the impediment.

2. The public good, namely, the removal of scandal, really demands this, in the judgment of the Ordinary.

3. That even upon the cessation of the impediment it is impossible that the marriage be duly contracted.⁹⁰

Notice that while the *Promotor Justitiae* acts in his own right in instituting the action, he must await the judgment of the Ordinary as to whether the public good demands the suit.

However, if someone, not allowed in law to attack the marriage,⁹¹ denounces the marriage to him, or if such person denounces the marriage to the Bishop (who must refer the matter to him⁹²), it is the duty of the Promoter of Justice to investigate the facts. If he is of the opinion that the denunciation is just, he must attempt to get the marriage validated. If the parties refuse to cooperate in such validation, he has no recourse but to institute an action to have the marriage annulled.

Although they take no part in the trial proceedings, court messengers or couriers are necessary to the proper functioning of the tribunal. They are appointed by the Bishop, and can be removed only by him.⁹³ Court messengers may be appointed for all trials in general or for a designated case. It is their duty to carry notices of judicial acts, summons, and the like, at the behest of the court. Apparitors (constables) are appointed in like manner as messengers and for like terms in the discretion of the Bishop.⁹⁴ It is their duty to execute the sentences and decrees of the

⁸⁸ Can. 1587; *Instruction*, Art. 16 §2.

⁸⁹ Can. 1971; *Instruction*, Art. 35 §1, 2^o.

⁹⁰ *Instruction*, Art. 39.

⁹¹ For a discussion of those persons only who are permitted to impugn a marriage, cf. page 264.

⁹² *Instruction*, Art. 40.

⁹³ Can. 373; 1591; 1592; *Instruction*, Art. 18 §§1, 2.

⁹⁴ *Ibid.*

court. Both messengers and apparitors should be laymen, unless prudence indicates the appointment of a priest. The same person may occupy both positions.

Some courts in the United States have dispensed with these officials, substituting the use of registered mail. In extraordinary cases, temporary officers are appointed.

Canon 1585 provides that there must be present at every trial a notary who acts as the clerk of the court. Any trial held without his presence is invalid, with only one exception not having to do with matrimonial trials. One or more notaries are appointed by the Bishop for his diocese, and a clerk is selected for each trial by the presiding judge, unless the Bishop appoints one for a specified trial himself. Notaries may be laymen or clerics, except the Chancellor of the diocese, who is, by virtue of his office, a notary. Canon 372 provides that the Chancellor must be a priest. The notary has the duty to write all of the acts and proceedings of the trial in his own handwriting, and to show the acts and documents on file to those who have the right to see them.⁹⁵ In addition, Article 73 of the *Instruction* lays down the following duties as belonging to the notary: (1) to transcribe everything diligently and carefully; (2) to gather and preserve all the acts properly and conscientiously; (3) to preserve the secrecy of the acts;⁹⁶ (4) to attest all documents;⁹⁷ (5) to sign all documents together with the presiding judge;⁹⁸ (6) to arrange properly the protocol or the register of cases; (7) to make copies of the interrogatory;⁹⁹ (8) to be present whenever an oath is legally administered;¹⁰⁰ (9) to sign the citations and to record the receipt thereof;¹⁰¹ (10) to be present at the drafting of the process and at all oral discussions;¹⁰² (11) to certify the authenticity of copies;¹⁰³ (12) to take care that rescripts, decrees, and decisions are delivered for execution;¹⁰⁴ (13) to inform the parties of the sentence; and (14) to sign the original copies of the sentence and to certify copies of them.¹⁰⁵

Important to any party in an action is his lawyer. Canon Law has provided for every party, not only his lawyer, but also a proxy. These two offices will be considered together, inasmuch as they are so handled by the Code and by the *Instruction*. What we know in

⁹⁵ Can. 374.

⁹⁶ Can. 1645 §3.

⁹⁷ Can. 1585 §1; 1813 §1, 2°.

⁹⁸ Can. 1585 §1.

⁹⁹ Can. 1745.

¹⁰⁰ Can. 1621; 1622; 1623.

¹⁰¹ Can. 1715 §2; 1722.

¹⁰² Can. 1706-1710; 1773 §1; 1778; 1866.

¹⁰³ Can. 374 §1, 3°.

¹⁰⁴ Can. 1813 §1, 2°.

¹⁰⁵ Can. 374 §1, 3°; 1874 §5; 1894 3°.

civil law as the attorney or lawyer is known in Canon Law as the advocate, while the person we would designate as a proxy is known in the Code as the attorney. The office of an attorney¹⁰⁶ is to act as a proxy for the party appointing him. He holds that party's power of attorney and represents him in every way throughout the trial, acting as a juridical person. His duties include presenting the bill of complaint and instituting the appeal.¹⁰⁷ Obviously, however, the attorney cannot testify in the place of the parties. Therefore, the presence of the proxy does not relieve the party of appearing in court in all cases, but he need only appear on those occasions when the law or an order of the judge requires this of him.¹⁰⁸ All legal aspects of the case are reserved exclusively to the care of the advocate. In matrimonial cases both positions are usually filled by the same person.

While it is the right of any party to be represented by an advocate, often there is no necessity for this. If both spouses insist on the nullity of the marriage, or if both oppose such declaration, one advocate may act for both. And where one party attacks the validity of his or her marriage, and his or her consort supports it, the latter's position is amply safeguarded by the action of the *Defensor Vinculi*.

The Code requires that both advocates and attorneys must be Catholics, over twenty-one years of age, and of good reputation.¹⁰⁹ A non-Catholic may be admitted to act in these offices, but only by way of necessity. Prudence might occasionally dictate that a person, not a Catholic, representing a party in a civil court, perform the same office in the ecclesiastical court. Under the prescriptions of the Code, the advocate must be a Doctor of Canon Law, or be at least expert in it.¹¹⁰ The *Instruction*, however, has raised these requirements. It insists that the advocate have his doctorate, and, moreover, have completed at least three years of forensic apprenticeship "in a praiseworthy manner."¹¹¹ In reference to attorneys the *Instruction* states that they "should" (as distinguished from the word "must" as used in reference to advocates) have at least a licentiate in Canon Law, and have at least one year of forensic apprenticeship.¹¹² The Sacred Congregation is most solicitous that this apprenticeship be passed at the *Studium* of the Sacred Roman Rota.

The *Studium* of this tribunal presents a course of studies and work that would be overwhelming to the average American law student. Ordinarily an applicant is not admitted to the course unless he has previously obtained the degrees of Doctor of Canon Law and

¹⁰⁶ Our designation throughout this discussion will be that of the Code.

¹⁰⁷ *Instruction*, Art. 44 §2.

¹⁰⁸ Can. 1647; *Instruction*, Art. 45.

¹⁰⁹ Can. 1657 §1; *Instruction*, Art. 48 §1.

¹¹⁰ Can. 1657.

¹¹¹ *Instruction*, Art. 48 §2.

¹¹² *Instruction*, Art. 48 §3.

Doctor of Roman Law. Upon occasion, however, licentiates have been allowed to attend the classes while studying for their degrees. Each year there are about one hundred candidates taking the course. The entire course takes three years to complete, and during this time regular class sessions are held. In addition each student is required to draw up a complete case in Latin each month. Father Doheny says of the course,

"The complete course comprises three years of study and practice. Records are kept of all the cases submitted by the candidates as well as their interest in the work. After the completion of three years' work the candidates are eligible for the final examination. The written examination is a most formidable one and generally lasts eight or ten hours without any intermissions. The fact that only two or three candidates qualify each year as advocates and attorneys is ample proof that the course is not an easy one."¹¹³

¹¹³ Doheny, *op. cit.*, I, p. 169. On June 8, 1945, the Sacred Roman Rota issued a decree on the organization of studies in the Rota. This decree provided the following rules:

I. The Sacred Roman Rota conducts a Course of Studies, which must be attended for three years by all who aspire to the title of Procurator and Advocate of the Rota.

II. The School is under the authority and supervision of the Dean of the Sacred Roman Rota.

III. Upon presentation by the Dean, the College of Auditors elects the Director of the School from among the Auditors, and it may elect also an Assistant Director from among the Officials of the Sacred Tribunal.

IV. The instructors in the School shall be Auditors or Officials of the Rota, or other persons selected each year by the Dean after consulting the Director.

V. The following courses are given in the School:

1. Judicial Deontology, that is, moral theology applied to the work of the tribunal;
2. Jurisprudence of various departments of canon law, especially the law of marriage, the penal law, and the law of procedure;
3. Practice in the offices of the tribunal.

The method in use in the School consists chiefly of exercises and discussions. VI. It is the duty of the Director to organize and arrange the prescribed courses, to make provisions for the proper conduct of the School, to report to the Dean on the condition of the School, and to make suggestions for its improvement.

VII. The Assistant Director shall assist the Director in conducting the School, keep the documents which pertain to it, and in general see that the orders of the Director are perfectly carried out.

VIII. Those who may be enrolled in the School are clerics, secular or religious, and laymen, who have at least the licentiate in canon law and are properly recommended by their Ordinary; clerics must moreover present a '*nihil obstat*' from the Vicariate of Rome. But no one shall be admitted to the examination for Procurator or Advocate, unless he has acquired at least the doctorate in canon law in a University or Faculty recognized by the Holy See.

One who has received the baccalaureate in canon law, and who wishes to attend the School, without aspiring to the title of Procurator or Advocate of the Rota, may apply to the Dean to be admitted as a special student.

IX. Enrollment in the School is reserved to the decision of the Dean.

Enrolled students are bound to take an oath each year according to the usual formula; and the fact that it has been taken by each one shall be inscribed by a notary in the records.

X. The students must be present at the exercises, and must study the cases assigned to them, give their decisions upon them, explain the questions sub-

In addition to these requirements, both attorneys and advocates need the approval of the Ordinary of the diocese before they may practice in the courts of that diocese. Here again the *Instruction* has made more exacting the law of the Code. Canon 1658 specifically states that, while advocates must have the approval of the Ordinary, attorneys may be appointed by a party without any such approval. Article 48 §4 of the *Instruction* makes no such distinction. A ruling to the same effect as the *Instruction* was earlier handed down by the *Signatura Apostolica*.¹¹⁴

Before an attorney may be admitted to plead, he must deposit with the court a written mandate from the party appointing him. This mandate is usually attached to the bill of complaint. The mandate must be signed by the mandator, attested by his pastor or by a notary of the Curia (diocesan), and must bear the place and date on which it was executed.¹¹⁵ All mandates are subjected to the most searching scrutiny by the courts. Should even the slightest irregularity appear, the court will refuse to proceed further until it has been satisfied as to the validity of the mandate.

The advocate is required to have a commission similar to the mandate of the attorney. This commission is issued either by the party whom the advocate will represent or by the judge.¹¹⁶ Both the

mitted to them, make the assigned researches in the library, and perform other tasks of the same sort; they may also assist at oral discussions unless the Dean or the *Ponens* forbids it.

XI. The students may, in accordance with the rules of the tribunal, look over the statement of cases which are assigned to them, and also, on designated days and hours, frequent the library of the tribunal; but they may not take away with them either the statements of cases or books from the library. On the completion of each task, they must return to the tribunal the summaries and whatever records they may have.

XII. The Instructors are to pass judgment on the trials of the students and enter them in the record; and these written judgments together with the grade attained in the examinations are to be preserved in the archives of the School.

XIII. At the completion of each year, after a special examination, the Instructors shall give their judgment in writing on the diligence, industry, work and merit of each student, and declare whether they deem them worthy of being advanced to the next year; this advancement is decided by the Dean. XIV. Upon the completion of the three years' course, if he has passed all the annual examinations, the candidate may apply to the Dean to take the written examination before the College of the Rota, to receive the title of Advocate of the Rota.

If he passes this examination successfully, the candidate, upon taking the oath before the College of the Rota, is admitted to practice as a Procurator and Advocate and receives a diploma as Advocate of the Rota." Decree of the Sacred Roman Rota, June 8, 1945, *Acta Ap. Sedis*, XXXVII, 193; quoted from Bouscaren, *Canon Law Digest* (Milwaukee, Bruce Publishing Company, 1949), Supplement, pp. 220-222.

¹¹⁴ *In Causa Romana*, June 23, 1923, *Acta Ap. Sedis*, XVI, 105.

¹¹⁵ Can. 1659; *Instruction*, Art. 49 §1. The Canon does not make necessary the attestation of the pastor except in the case of parties who are unable to read or write. The *Instruction* extends this provision to every mandate.

¹¹⁶ Can. 1661; *Instruction*, Art. 49 §4.

mandate¹¹⁷ and the commission¹¹⁸ must be embodied in the acts of the case. So important is the mandate that Canon 1892 provides that a sentence is vitiated by irremedial nullity if it is not valid, or if one was never issued to the attorney who acted in the case.

There are three methods by which an attorney or an advocate may cease to act in a case. First, by the handing down by the court of a definitive sentence. Unless the right has been explicitly reserved in the mandate, however, the attorney and the advocate have the right and duty to act for the party in filing an appeal.¹¹⁹ Since this must be done within ten days of the publication of the judgment, their offices expire at the end of this ten day period. Often the mandate authorizes the attorney or advocate to act in both trials of the case (since every matrimonial trial must be tried in two courts), but this authorization must be clear and unmistakable for it to be effective.

Secondly, the attorney and the advocate may cease to act by their removal by the party who appointed them. The removal is effective upon the date that the officer becomes apprised of his removal. If the issues have already been joined, the judge and the opposing party must also be notified of the removal before it can be effective.¹²⁰

Thirdly, the attorney and the advocate can be rejected by a decree of the court. This may be done *ex officio* or on the petition of the party. However, no such decree may be made unless there exists both a just and grave reason for it. Such reason would be the excommunication of the attorney or advocate, or his failing in his duty to his client through culpable negligence or through a betrayal of trust. These latter reasons never react to the prejudice of the client in an ecclesiastical court, however, as they may and sometimes do in our civil courts. For Canon 1619 provides that, in all cases affecting either the common good or the salvation of souls, the judge must step in and supply all of the proofs and exceptions which the advocate should supply were he acting in the best interests of his client. In cases where an advocate has been appointed by the court to furnish legal aid without charge to a destitute party, dereliction of duty is most severely punished, even to the extent of barring him from further practice in the ecclesiastical courts.

His Holiness, Pope Pius XII, in his Allocution of October 2, 1944, to the Sacred Roman Rota, said of the duties of advocates:

¹¹⁷ Can. 1660; *Instruction*, Art. 49 §3.

¹¹⁸ Can. 1661; *Instruction*, Art. 49 §4.

¹¹⁹ Can. 1664 §2 is the authorization for the attorney to continue his functions long enough to file the appeal, while the authorization for the advocate is contained in Art. 52 §2 of the *Instruction*. When either the attorney or the advocate files an appeal, it becomes unnecessary for the other to do so. Therefore, the authority of both ceases with the first appeal filed.

¹²⁰ Can. 1664; *Instruction*, Art. 52 §2.

"The Advocate assists his client in drafting the preliminary 'libellus' of the case, in determining rightly the object and the basis of the controversy, in expounding the salient points of the matter to be adjudicated. The Advocate points out to his client the proofs to be adduced and the documents to be produced. He suggests to his client the witnesses to be called in the case and the peremptory points to be emphasized in the deposition of the witnesses. During the trial, the Advocate assists his client justly to evaluate and to refute the exceptions and the opposing arguments. In a word, the Advocate marshals and emphasizes everything that can be alleged in favor of the petition of his client.

"In this manifold activity the Advocate may well exert every effort to win the case of his client. However, in all his activity, he must not withdraw himself from the sole and common final purpose: the discovery, the ascertainment, the legal affirmation of the truth of the objective fact. You eminent jurists and most upright Defenders of the Ecclesiastical Tribunals assembled here today, well know how the knowledge of that subordination must guide the Advocate in his reflections, in his counsels, in his arguments and in his proofs.

"You also know how this knowledge not only protects him from elaborating factitious suppositions and from accepting cases lacking in every serious basis, from employing fraud and dishonesty, from inducing the parties and the witnesses to testify falsely, from resorting to any other dishonest subterfuge, but also induces him positively to act in the whole series of acts of the process, according to the dictates of conscience. It is necessary that the work of the Advocate as well as that of the Defender of the Bond tend to the supreme triumph of truth in all its radiant splendor. For both of them, even though proceeding from opposite directions because of the different proximate ends, must of necessity tend toward the same final purpose."¹²¹

IV. JURISDICTION

Necessary to any system of courts are those rules governing the competency of any given court within that system to hear and determine causes. Just as jurisdiction is determined in the civil courts of this country by territorial limits (i.e., state boundaries), so is it determined in the ecclesiastical court system, the jurisdictional entity being either a diocese, a prefecture apostolic, or a vicariate apostolic. In general the following rules control competency:

1. When both consorts are Catholic, the competent tribunal is that of the district in which the marriage took place, or in which the defendant maintains a domicile or quasi-domicile;

2. When one of the parties is not a Catholic, however, the proper court is that of the place where the marriage was contracted, or in

¹²¹ *Supra*, note 87. (Translation from Doheny, *op. cit.*, I, pp. 1102-1103).

which the Catholic party maintains a domicile or quasi-domicile.¹²²

Diocesan domicile¹²³ is acquired in either one of two ways: first, by residence in a diocese combined with the intention to stay there permanently; or second, by actual residence in one diocese for ten years or more.¹²⁴ If one moves into a new diocese with the intention of permanently staying there, he acquires a domicile therein upon his first day of residence. And this is totally unaffected by the fact that he subsequently moves, even if he remains in residence only for one week. It is his intention that is the determining factor. Upon his removal, if his intention is to stay permanently in his new diocese, or if he actually does stay therein for ten years or more, he loses his domicile in the first diocese. In the second manner of acquiring domicile, intention is of no importance whatsoever. Actual residence for ten years or more operates automatically to confer canonical domicile irrespective of intent or wish.

In order to establish a domicile, residence must be continuous. This does not, however, prohibit absences, even prolonged absences. For example, a student may be absent from his home for four years or more, and still retain his domicile in the diocese in which his home is located.

Quasi-domicile may also be acquired in two ways: first, by residence in a diocese combined with the intention to stay therein for the greater part of a year unless one is called elsewhere; or secondly, by actual residence in a place the greater part of a year no matter what the intention.¹²⁵

There is a class of persons, called *vagi*,¹²⁶ who have neither domicile nor quasi-domicile. From the wording of Canon 1964 it would seem that such persons can be cited only in the diocese where the marriage took place. However, Canon 1563 rules that a *vagus* has his proper forum in the place where he is actually staying. Doheny¹²⁷ believes that this is authorization to cite a *vagus* before the tribunal of the place where he is staying, particularly in those instances where it is impossible to cite him in the diocese in which the marriage was performed.

The Code also provides for certain necessary domiciles. A wife shares the domicile of her husband, unless she is legitimately

¹²² Can. 1964; *Instruction*, Art. 3 §1.

¹²³ Diocesan domicile is to be distinguished from parochial domicile. While they are acquired in precisely the same way, they differ in the importance they have in various Church functions. For the celebration of marriage, for example, parochial domicile is of prime importance, whereas in determining jurisdiction in an annulment suit, diocesan domicile is the only consideration.

¹²⁴ Can. 92.

¹²⁵ *Ibid.*

¹²⁶ Can. 91.

¹²⁷ *Op. cit.*, I, p. 23.

separated from him; an insane person shares the domicile of his guardian; a minor shares that of his parent or guardian.¹²⁸ The same canon also rules that a minor may acquire his own distinct quasi-domicile after his years of infancy; that a wife not legitimately separated from her husband may likewise acquire a quasi-domicile; and that, if she is legitimately separated, a wife may also acquire her own domicile. As can be seen from this, the wife of an insane husband, from whom she is not separated, shares the domicile of her husband's guardian. The guardian referred to in the Code is that guardian appointed by the Ordinary of the diocese, and not to one appointed by civil law (though they will generally be the same, in the absence of some cause dictating a different procedure), or to the parents of a minor incompetent.

From the foregoing discussion it may be observed that a case properly may be tried in three, or even more, jurisdictions. This leniency has been the occasion of grave abuse in the past, parties establishing quasi-domiciles in distant dioceses where they are unknown and where evidence of the truth of their assertions is difficult to obtain. In order to correct these abuses, the Sacred Congregation of the Sacraments issued an *Instruction* on the 23rd of December, 1929, which set forth certain rules regulating those marriage cases tried in a quasi-domicile.¹²⁹ By virtue of this *Instruction*, the *Officialis* of the tribunal of the quasi-domicile is obliged to make a thorough study of the case before he may accept it. He must determine the validity of the quasi-domicile established by the plaintiff, the reason why the parties are bringing the action outside of the diocesan domicile, and what proofs and documents are more easily to be secured in the quasi-domicile than in the place of domicile. He must further notify the Ordinary of the place of domicile of the proceedings, as well as the Ordinary of the diocese in which the marriage was contracted if that be different, asking for a verification of all proofs, statements and documents. He is forbidden to proceed with the cause until he has received these. If he is notified by any Ordinary that the parties are bringing the action before his court for a fraudulent purpose, he must decide, by a decree or interlocutory sentence, the advisability of remanding the case to the tribunal of that Ordinary.

Not only the *Officialis*, but the *Defensor Vinculi* as well must study these aspects of the case. If it is his opinion that the case is being improperly tried in his diocese, that is, the diocese of the

¹²⁸ Can. 93.

¹²⁹ *Instruction*, Sacred Congregation of the Sacraments, December 23, 1929, *Acta Ap. Sedis*, XXII, 168. This is not to be confused with the 1936 *Instruction* to which we have frequently referred in this article.

quasi-domicile, he must lodge an appeal with the Sacred Congregation of the Sacraments. The *Defensor Vinculi* of the court of second, third, or succeeding instance may likewise refer the matter to the Sacred Congregation for determination. If the *Officialis* of the court of quasi-domicile decides that his court is competent, and the *Defensor Vinculi* concurs, the protesting party, if there be one, has no recourse himself to the Sacred Congregation, but he may, upon appeal to the court of second instance, urge his views on the new *Defensor Vinculi*, who may lodge an appeal if he deems the reason just.

When two or more courts are equally competent, that court which first legitimately summoned the defendant to appear before it is the proper and only court for trial.¹³⁰ Jurisdiction, once obtained by the citation of the defendant, is not lost, irrespective of a change of domicile by one or both of the parties.¹³¹

Where one party challenges the competency of a tribunal, this question is decided by the tribunal itself.¹³² If the court decides in favor of its own competency, where the question is of relative incompetency, there is no appeal from this decision. If the court adjudges itself incompetent, the aggrieved party may appeal within ten days.¹³³ Where the question concerns the absolute incompetency of a court, a decision either for or against its own competency may be appealed within a like period.¹³⁴

V. THE ORDER OF THE CALENDAR

The Code's provision as to the court calendar is very simple. All cases are to be tried in the order in which they come before the court. If some case is presented that requires an immediate decision, then the court may move this case ahead of others, but a special decree must be issued by the judge or the court stating the preference.¹³⁵

VI. THE COMMENCEMENT OF AN ACTION

Action is instituted through the following steps. First, the bill of complaint is presented to the court. Second, the court must pass on its own competency and the right of the plaintiff to bring the action. If the court's decision is favorable on both counts, the summons of the parties is issued. Finally there is the joinder of issues, called the *litis contestatio*, and the concordance of doubt, called the *concordatio dubii*. Counterclaims that are to be made must be filed immediately

¹³⁰ Can. 1568; *Instruction*, Art. 11.

¹³¹ Can. 1725, 1^o, 2^o, 5^o; *Instruction*, Art. 85.

¹³² Can. 1610 §1; *Instruction*, Art. 9.

¹³³ Can. 1610 §§2, 3; *Instruction*, Art. 28.

¹³⁴ *Instruction*, Art. 29.

¹³⁵ Can. 1627.

after the *litis contestatio*. We shall consider each of these steps in order.

The suit is opened by the plaintiff when he presents the bill of complaint (*libellus*) to the court.¹³⁶ If the plaintiff is unable to write, he is allowed to make an oral petition to the court. In the latter case, the notary must reduce the complaint to writing, and this is to be read to the plaintiff and approved by him.¹³⁷ The complaint must contain the name of the judge before whom the case is brought, the object of the action, the name of the defendant, a statement of the facts, the arguments on which the plaintiff relies, and a petition that the court aid him. Further, it must be subscribed by the plaintiff or his proxy, must give the date of the complaint, and must show the plaintiff's place of residence. All details relating to the domicile or quasi-domicile of the parties should be stated, so that the court may determine its competency.

Two things should be noted concerning the *libellus*. First, the statement of facts should be short and succinct. Elaborations of difficulties encountered in the marriage may be stated later if they are pertinent to the issues. Secondly, all documents presented to sustain the plaintiff's allegations must be attached to the complaint, and, if proof is to be made through the use of witnesses, their names and full addresses must accompany the bill.¹³⁸

As soon as possible after the complaint is presented to the court, the judge must accept or reject it, giving reasons in the case of rejection. If the complaint is rejected because of faults which can be remedied by amendment, the plaintiff may submit an amended bill. An appeal from the decree rejecting a bill of complaint may be lodged with the next higher court within ten days of the decree. If the appeal is prevented by impossibility or the ignorance of the plaintiff of his rights to this recourse, the ten days does not begin to run until the impediment is removed. If the court refuses to hand down its decree of acceptance or rejection within thirty days of the filing of the complaint, the plaintiff may, by petition, insist on the court performing its duty. If the decree is not forthcoming in the next five days thereafter, recourse may be had to the Bishop who is obliged to force the judge to make the decree, or, in the alternative, to substitute another judge.¹³⁹

Two reasons which might move the judge to reject the bill are its own incompetency or the inability of the plaintiff to act in the ecclesiastical courts. We have already discussed competency in other sections of this article. As to the second reason, not every person

¹³⁶ Can. 1706; *Instruction*, Art. 55 §2.

¹³⁷ Can. 1707 §§1, 3; *Instruction*, Art. 56.

¹³⁸ Can. 1761 §1; *Instruction*, Art. 59.

¹³⁹ Can. 1710; *Instruction*, Art. 67.

may act as a plaintiff in Church tribunals. Canon 1971 provides that the following persons are capable of attacking the validity of a marriage: (1) the married parties in all cases of separation or of nullity, unless they were themselves the culpable cause of the impediment; and (2) the *Promoter Justitiae* in impediments public of their nature. All other persons, even blood relations, are incapable of attacking a marriage.¹⁴⁰

There are, therefore, only three parties who may act as a plaintiff in a suit of annulment—the husband, the wife, and the *Promoter Justitiae*. As we have seen earlier, the *Promoter Justitiae* may only attack the marriage if three conditions are verified.¹⁴¹ In the absence of these conditions only the consorts may question its validity. But this is not to say that they may always do so. Canon 1971 specifically forbids that party who was the culpable cause of the impediment which invalidates the marriage to act as plaintiff. In case both parties contributed to placing the impediment, then neither can ask for an annulment. Their only recourse in such a situation is to denounce the marriage to the Bishop or to the *Promoter Justitiae*.¹⁴² If the latter is legally prohibited from attacking the marriage, then there is no recourse. For, as in equity, the party must come into court with clean hands. The Code Commission has declared, however, that where a party has placed an innocent and licit cause of an impediment, he is not estopped by virtue of Canon 1971 from impugning the marital bond.¹⁴³

But even though a party be not estopped by virtue of Canon 1971 from attacking a marriage, he may be so estopped by other provisions of the law. Excommunicated persons,¹⁴⁴ non-Catholics,¹⁴⁵ and apostates¹⁴⁶ are all held to be incapable of acting as plaintiffs. These persons may apply to the Holy Office which may admit them if there is a special reason present. In these cases the *Promoter Justitiae* is also prohibited from bringing suit without prior permission of the Holy Office, unless the public good, in the judgment of the Ordinary, demands it.¹⁴⁷

¹⁴⁰ Before the enactment of the Code strangers to the marriage could attack it on certain grounds. In 1916, the Rota declared a marriage void, at the instance of a third party, on the grounds that the wife did not have sufficient mental capacity to give consent.

¹⁴¹ *Supra*, page 253.

¹⁴² Decision, Sacred Roman Rota, August 11, 1928, R.D. XX, 402.

¹⁴³ Pont. Comm., July 17, 1933, *Acta Ap. Sedis*, XXV, 345.

¹⁴⁴ Can. 1654; 2263. In greatly restricted circumstances excommunicates may sometimes act through an attorney.

¹⁴⁵ Can. 87; Reply, Supreme Sacred Congregation of the Holy Office, January 27, 1928, *Acta Ap. Sedis*, XX, 75.

¹⁴⁶ Reply, Supreme Sacred Congregation of the Holy Office, January 15, 1940, *Acta Ap. Sedis*, XXXII, 52.

¹⁴⁷ Reply, Supreme Sacred Congregation of the Holy Office, March 22, 1939, *Acta Ap. Sedis*, XXXI, 131.

Once the competency of the court and the right of the plaintiff to sue is established, the summons is issued. As is done under Federal procedure, the summons is drawn and issued by the court. It is either written on the *libellus* or is appended to it.¹⁴⁸ The summons must contain the following essential items:

1. The injunction of the judge to the defendant to appear in court;
2. The name of the judge before whom the defendant is to appear;
3. The nature of the case;
4. The name and surname of the person summoned;
5. The place where the defendant is to appear;
6. The date and hour of appearance;
7. The seal of the court;
8. The signature of the presiding judge (or his auditor); and
9. The signature of the notary.¹⁴⁹

If any of these items are omitted, the summons, the trial, and the resulting sentence are entirely void by virtue of remedial nullity.¹⁵⁰

The summons is sent to the defendant, except where he is mentally incompetent, in which eventuality it is sent to his guardian, and to the *Defensor Vinculi*.¹⁵¹ Notice of the time designated in the summons must also be sent to the plaintiff, to the end that he may appear.¹⁵² Where the action is instituted by the *Promotor Justitiae* a copy of the summons must be directed to both parties. If the parties voluntarily appear, no summons need issue, but the notary must indicate in the record that such was the case. For without this the court of appeal has no assurance that an otherwise necessary summons was issued. Without a voluntary appearance, the summons must be served or the whole proceedings are void in virtue of remedial nullity. Canon 1714 rules that every summons is peremptory and need not be repeated. There is one exception to this: if the judge wishes to punish a party for contempt of court by reason of non-appearance, he may not do so until the party has rejected or ignored a second summons.¹⁵³

There are several methods of serving the summons. The preferred method, and the one to be used unless impossible, is personal

¹⁴⁸ Can. 1712.

¹⁴⁹ Can. 1715; *Instruction*, Art. 76.

¹⁵⁰ Can. 1723; *Instruction*, Art. 84.

¹⁵¹ The summons of the *Defensor Vinculi* (and the *Promotor Justitiae*, where his presence is necessary) does not require the formalities of a summons of the parties, and may be by any means of communication, including the telephone.

¹⁵² Can. 1712 §3; *Instruction*, Art. 74 §3.

¹⁵³ Can. 1845 §2.

service by a court messenger.¹⁵⁴ If the defendant is not found within the diocese in which the case is to be tried, the court messenger may enter any diocese in the world to accomplish service.¹⁵⁵ The summons is to be handed to the defendant personally, but if he is not at the location indicated substituted service may be made on a member of his family or household, or on his servant, providing that person promises to deliver the summons to the summoned person as soon as possible.¹⁵⁶ The court messenger must sign the receipt of summons and indicate thereon the day and hour of delivery, and he must submit a written report to the court. The receipt must also be signed by the summoned party or by the person who received the summons for him.¹⁵⁷

There may be a valid service also by registered mail if a return receipt is demanded.¹⁵⁸ Occasionally there are obstacles present which make personal delivery impossible, or at least difficult. It is to surmount these obstacles that this provision was put in. It provides a safe method to put the summons in the hands of the defendant, and the purpose of the summons is thereby effectuated. This manner of service may be used only upon order of the presiding judge.

Service may also be made by publication where, after diligent inquiry, the whereabouts of the defendant cannot be ascertained.¹⁵⁹ Publication is accomplished by tacking the summons to the door of the diocesan Curia and by inserting a notice in some suitable public newspaper. If both of these cannot be done, then either method standing alone suffices. The procedure used in service by publication is within the discretion of the presiding judge. Considering the rather limited audience that a notice on the door of the Curia would have, the judge is almost impelled to use the newspapers. But even this is not always possible. Father Doheny¹⁶⁰ cautions that in some states this would make the ecclesiastical court subject to arrest.¹⁶¹

The Code allows service by publication only where careful investigation has failed to uncover the defendant's whereabouts. This injunction is repeated in the *Instruction* of the Sacred Congregation of the Sacraments. Canon 1894 states that a sentence is vitiated by remedial nullity where there was no legal summons. Apparently this

¹⁵⁴ Can. 1717; *Instruction*, Art. 79 §1.

¹⁵⁵ Can. 1717; *Instruction*, Art. 79 §2.

¹⁵⁶ Can. 1717; *Instruction*, Art. 79 §3.

¹⁵⁷ Can. 1721 §§1, 2; *Instruction*, Art. 81 §1.

¹⁵⁸ Can. 1719; *Instruction*, Art. 80.

¹⁵⁹ Can. 1720; *Instruction*, Art. 83.

¹⁶⁰ *Op. cit.*, I, p. 257.

¹⁶¹ In Wisconsin this difficulty does not arise. WIS. STAT. (1949) 187.12 provides that "Such corporation [the Roman Catholic Church] * * * may * * * do all things necessary for the proper transaction of its business and duties and all things needful in the management of the temporal affairs of the Roman Catholic Church * * *."

canon would vitiate any sentence rendered by a court that was negligent in its investigation, inasmuch as service by publication can be made only when personal or substituted service is impossible.

It sometimes happens that the one summoned refuses to accept the citation, or that he does not hear of the summons where it was not personally handed to him. Canon 1718 states that he is legitimately summoned who refuses to accept the summons. Because of the sanctity of marriage and the indissolubility of its bond, it would seem on first glance to be presumptuous of the court to proceed to trial without all of the parties before it. But it must be remembered that in all marriage cases the Defender of the Bond is present to uphold the validity of the union. In this way the marriage is defended as well as it would be with the party present. So too, the rights of an absent party who would wish the annulment granted are protected. For such a person is missing only in those cases where the Promoter of Justice has instituted the action, and that person has not received the summons. The *Promotor Justitiae* is, of course, attacking the marriage to the best of his ability in these instances, and is, therefore, protecting the would-be plaintiff's rights.

The legitimate service of summons has these results: the case is before the court, and is no longer a private affair, but a public one; the court issuing the summons becomes the only competent court to try the case to the exclusion of other heretofore equally competent courts; the jurisdiction of the judge is rendered firm so that the death of the Bishop or the convening of a synod does not operate to remove him from the case; and the case begins to pend. Once this has happened nothing may be changed that would change the nature of the case.¹⁶²

The joinder of issues, the *litis contestatio*, takes place when the defendant appears in court on the day and at the time summoned to deny the allegations of the complaint. The process of this meeting is simple; the parties appear in court and the complaint of the plaintiff and the denial of the defendant are determined. The court seeks to ascertain only whether a good cause of action has been presented, and what points are disputed.

Canon 1630 states that counter-claims should be pressed immediately after the *litis contestatio*, but they are allowed at any time before the final sentence. There are rarely counter-claims in an annulment suit (although there may be in the incidental issues of property settlement), since they would be merely additional grounds for annulment, and would thereby constitute the defendant a party-plaintiff with his spouse. In those cases where both parties appear

¹⁶² Can. 1725; *Instruction*, Art. 85.

before the court asking for the declaration of nullity, either on similar or different grounds, the *Defensor Vinculi* defends the sanctity of the bond alone. His presence at the *litis contestatio* is not required, however.

VII. THE TRIAL

With the completion of the *litis contestatio* the trial proper gets under way, either in a separate and later court appearance of the parties or immediately afterwards at the same appearance. The procedure followed in the trial is quite different from the civil trials with which we are familiar. The first step in the trial is the questioning of witnesses. As has been intimated previously, only the auditor or the presiding judge may examine the witnesses. It is absolutely forbidden for any other person to put a question to any witness.¹⁶³ The auditor questions the witnesses according to the interrogatory presented to him by the *Defensor Vinculi*, and, when necessity requires it for ascertaining the truth or elucidating an obscure point, *ex officio*. The parties may also submit questions to be asked the witnesses, but this must be done through the *Defensor Vinculi* who has the right to recast any of them.¹⁶⁴ The *Promotor Justitiae* also has the right to submit questions. The examination is conducted in absolute secrecy, the only parties normally present besides the witness being the auditor, the *Defensor Vinculi*, and the *Promotor Justitiae*. Neither the parties nor their attorneys or advocates are ordinarily admitted, unless by way of exception, permission of the auditor being necessary.¹⁶⁵ However, each party, and, inferentially, his attorney and advocate, may be present at the examination of his spouse. Upon rare occasion the auditor may decide, after consultation with the *Defensor Vinculi*, to confront one witness with another or with one or both parties. Three conditions must be concurrently present before this is allowed: (1) the witnesses must disagree among themselves or with one or both of the parties on some issue going to the essence of the case; (2) there is no easier way open to the auditor to discover the truth of the controverted matter; and (3) there is no danger of scandal resulting from the confrontation.¹⁶⁶

Witnesses must always give their answers orally, and they may never recite from written memoranda.¹⁶⁷ The answers must be recorded verbatim by the notary, unless determined otherwise by the auditor, in which case the substance of the answer must be given in

¹⁶³ Can. 1742; *Instruction*, Art. 101.

¹⁶⁴ *Instruction*, Art. 70 §2.

¹⁶⁵ Can. 1771; *Instruction*, Art. 128.

¹⁶⁶ Can. 1772 §§2, 3; *Instruction*, Art. 133.

¹⁶⁷ Can. 1777; *Instruction*, Art. 103 §1 (b).

full.¹⁶⁸ After the completion of the examination, the answers of the witness must be read back to him by the notary. He then has the right to add, suppress, correct, or change them in any manner which he deems proper to the integrity of his testimony. A dual oath is thereafter taken by the witness, first, as to the truth of his assertions, and second, to keep his testimony secret until the publication of the process, or even perpetually if the judge deems this necessary for the avoidance of scandal or the protection of others.¹⁶⁹ He then signs the deposition, as does the *Defensor Vinculi*, the *Promotor Justitiae*, the auditor, and the notary.

Witnesses may be proposed by the parties, by the *Defensor Vinculi*, by the *Promotor Justitiae*, and even by the judge *ex officio*.¹⁷⁰ Occasionally witnesses may voluntarily appear and request to testify. These may be accepted or rejected according to the best judgment of the auditor. In order to expedite the trial, the judge has, under the rulings of Canon 1762, the authority to limit the number of witnesses. This is done most particularly when the introduction of numerous witnesses seems to be only for the purpose of harming the other party or of delaying the trial. Canon 1620 states that a trial of the first instance may not be protracted over a period of two years, nor over one year in a court of second instance.¹⁷¹ Thus, it is the duty of the court at all times to forbid any practice that tends merely to prolong the trial.

The names of all witnesses must be made known to the parties before the examination, or, if this is impossible or very difficult, at least before the publication of the process.¹⁷²

All persons may be witnesses unless they are excluded by law as unfit, suspect, or incapable. Persons who are excluded as unfit are those who have not attained the age of puberty and those who are mentally deficient.¹⁷³ Persons who are excluded as suspect are: excommunicates,¹⁷⁴ perjurers,¹⁷⁵ infamous persons,¹⁷⁶ where any of

¹⁶⁸ Can. 1778; *Instruction*, Art. 103 §2.

¹⁶⁹ Can. 1623 §3; *Instruction*, Art. 104 §1.

¹⁷⁰ Can. 1759 §§1, 2; 1619 §2; *Instruction*, Art. 123 §1.

¹⁷¹ The length of the trial is computed from the date of the *litis contestatio*.

¹⁷² Can. 1763; *Instruction*, Art. 126.

¹⁷³ Can. 1757 §1; *Instruction*, Art. 119 §1.

¹⁷⁴ Can. 1757 §2, 1°; 2263; *Instruction*, Art. 119 §2, 1°.

¹⁷⁵ Can. 1757 §2, 1°; *Instruction*, Art. 119 §2, 1°.

¹⁷⁶ *Ibid.* Infamy is divided into infamy of law and infamy of fact. It is in either case that total loss of good reputation that results from some serious delinquency. Canon 2293 declares that infamy of fact is contracted when one has lost good repute among righteous and serious Catholics by virtue of his bad conduct. Whether or not a person has contracted infamy of fact is determined by the local Ordinary. Infamy of law is contracted by all persons who (1) are apostates, heretics, or schismatics (Can. 2314); (2) desecrate the Sacred Host (Can. 2320); (3) desecrate the graves of the dead (Can. 2328); (4) have been condemned by law for offenses against the sixth commandment (Can. 2357); (5) are principals or seconds in a duel (Can.

these three types have been branded as such by a declaratory or condemnatory sentence; persons of such a debased moral character as to be unworthy of belief;¹⁷⁷ and public and implacable enemies of the parties against whom they intend to testify.¹⁷⁸ Persons who are excluded as incapable are: parties or those who take their place, viz., attorneys and guardians;¹⁷⁹ judges or advocates who have assisted in any way in the case;¹⁸⁰ priests with regard to any knowledge they have obtained in the confessional, even if the party has released them from the obligation of the seal;¹⁸¹ one consort in the case of another consort;¹⁸² and blood relatives or relatives by affinity, in any degree of the direct line and in the first degree of the collateral line, unless there be a question in the case which concerns the civil or religious status of a person, knowledge of which cannot be secured from any other source, and where the public welfare demands that the truth be ascertained.¹⁸³ Even these persons, except those denominated as incapable, may be heard in court where good reason indicates this procedure, but they are generally not put under oath and their testimony is only an indication of proof.¹⁸⁴

All witnesses are obliged to answer truthfully every question put to them by the judge.¹⁸⁵ There are two exceptions to this. The first exception refers to privileged communications. Priests, civil magistrates, doctors, advocates, and notaries are not obliged to answer questions which would violate their oath of official secrecy. They may answer, however, if two conditions are met: (1) they must be released from the bond of secrecy by the interested person (except a priest in regard to secrets learned in the confessional, since these can never be revealed); and (2) they prudently feel that they can testify.¹⁸⁶ The second exception refers to persons who fear that infamy, dangerous vexations, or serious harm may accrue to them or their relations by consanguinity or affinity.¹⁸⁷

The testimony of expert witnesses is held necessary in all cases of impotency¹⁸⁸ and lack of consent due to insanity.¹⁸⁹ In all other cases

2351); (6) are bigamists (Can. 2357); or (7) do violence to the person of the Pope, Cardinals, or Papal Legates (Can. 2343).

¹⁷⁷ Can. 1757 §2, 2°; *Instruction*, Art. 119 §2, 2°.

¹⁷⁸ Can. 1757 §2, 3°; *Instruction*, Art. 119 §2, 3°.

¹⁷⁹ Can. 1757 §3, 1°; *Instruction*, Art. 119 §3, 1°.

¹⁸⁰ *Ibid.*

¹⁸¹ Can. 1757 §3, 2°; *Instruction*, Art. 119 §3, 2°; Decision, Sacred Roman Rota, August 11, 1927, R.D. XIX, 428.

¹⁸² Can. 1757 §3, 3°; *Instruction*, Art. 119 §3, 3°.

¹⁸³ *Ibid.*

¹⁸⁴ Can. 1758; *Instruction*, Art. 120.

¹⁸⁵ Can. 1755 §1; *Instruction*, Art. 121 §1.

¹⁸⁶ Can. 1755 §2, 1°; *Instruction*, Art. 121 §2, 1°.

¹⁸⁷ Can. 1755 §2, 2°; *Instruction*, Art. 121 §2, 2°.

¹⁸⁸ Can. 1976; *Instruction*, Art. 139.

¹⁸⁹ Can. 1982; *Instruction*, Art. 139.

expert testimony is required where the case requires it, as, for example, where the authenticity of handwriting must be determined.¹⁹⁰ Experts are appointed by the presiding judge after consultation with the *Defensor Vinculi*. He also determines the necessity for them, and the number to be allowed. However, in cases of impotency two physicians must be appointed,¹⁹¹ the presiding judge having no discretion in the matter. Persons who are unfit, suspect, or incapable of being witnesses are, of course, barred from acting as and testifying as experts. In addition, physicians who have examined the parties prior to the trial are not admitted as experts.¹⁹² But they may and should be called as ordinary witnesses.¹⁹³ The parties may challenge any expert appointed if they suspect him of any bias in the case. His competency is then ruled on by the presiding judge, who, by decree, rejects or admits the challenge.¹⁹⁴

Normally it is required that each expert make his examination separately from the other experts, not allowing the others to know his opinion or findings.¹⁹⁵ However, if it is the opinion of the presiding judge that there is good reason for allowing all experts to examine the party at one and the same time, then he may by decree allow this.¹⁹⁶ The opinions of the group should be presented to the court in one report in these instances, such report indicating any difference of opinion which the experts have. Where the experts disagree, the court must appoint another expert. In no case is the court bound by the opinions of the experts, even when they are unanimous in their conclusions.¹⁹⁷

Before examining the next stage of the trial after the conclusion of the examination of witnesses, we should like to insert at this point a brief review of the rules governing presumptions and proofs by documents.

In Canon Law presumptions are divided into presumptions of law and presumptions *ab homine* (i.e., presumptions which the judge forms for himself). Presumptions of law are either simple or absolute (i.e., those which do not admit of proof to contradict them).¹⁹⁸ Judges are enjoined from formulating presumptions that are not determined by law, unless they arise from certain and specific facts which are connected directly with the controverted fact.¹⁹⁹ By virtue

¹⁹⁰ Can. 1792; *Instruction*, Art. 140.

¹⁹¹ Can. 1979; *Instruction*, Art. 150.

¹⁹² Can. 1978; *Instruction*, Art. 143.

¹⁹³ Can. 1978; 1982; *Instruction*, Art. 143.

¹⁹⁴ Can. 1796 §§1, 2; *Instruction*, Art. 145.

¹⁹⁵ Can. 1802; *Instruction*, Art. 148 §1.

¹⁹⁶ Can. 1802; *Instruction*, Art. 148 §2.

¹⁹⁷ Can. 1804 §1; *Instruction*, Art. 154 §1.

¹⁹⁸ Can. 1825; *Instruction*, Art. 170.

¹⁹⁹ Can. 1828; *Instruction*, Art. 173.

of Canon 1014 the validity of a marriage is deemed to be a simple presumption of law. Therefore, it is always upon the party attacking a marriage to prove its invalidity. Should he fail in this, the law assumes that the marriage is good.

Canon 1812 states that proof by documents, both public and private, is admitted in every trial. Public ecclesiastical documents are defined as: (1) Acts of the Supreme Pontiff, the Roman Curia, and of Ordinaries, in the exercise of their office, drawn up in authentic form, and also authentic attestations of these acts made by the original persons making them or by their notaries; (2) instruments made by ecclesiastical notaries; (3) judicial ecclesiastical records; and (4) records of baptism, confirmation, ordination, religious profession, marriage, and death, which are in the registers of the curia or parish or religious institute; also written attestations certified from the same registers made by pastors, or Ordinaries, or ecclesiastical notaries, and authentic copies of them.²⁰⁰ Public civil documents are those which are recognized by law as such in each country or state.²⁰¹ Letters, wills, contracts, and the like, written by private persons, are private documents.²⁰² No document has the force of proof in court unless it is either the original or an authentic copy. Copies of ecclesiastical documents must be written by hand, signed by the official in charge of the archives where the original is kept, and they must bear a seal. Copies of civil documents are admitted as authentic if they conform to the civil law requirements for copies in the particular locality where they are kept.²⁰³ Excerpts of documents may be admitted, but the other party, the *Defensor Vinculi*, or the auditor may demand that the original or an authentic copy of the entire document be produced.²⁰⁴

The following rules govern the probative value of documents. Anonymous letters and documents of any kind are proof of nothing, and may not be taken even as an indication of truth.²⁰⁵ Public ecclesiastical and civil documents are presumed genuine until the contrary is established, and they prove those facts which are directly and principally stated therein.²⁰⁶ Private documents whose authenticity has been admitted by the person alleged to have executed them, or whose authenticity has been recognized by the judge, prove those things stated therein.²⁰⁷ Where any document shows alterations, interpolations, or erasures, it is left to the discretion of the judge as to

²⁰⁰ Can. 1813 §1; *Instruction*, Art. 156 §1.

²⁰¹ Can. 1813 §2; *Instruction*, Art. 156 §2.

²⁰² Can. 1813 §3; *Instruction*, Art. 156 §3.

²⁰³ Can. 1819; *Instruction*, Art. 159.

²⁰⁴ *Instruction*, Art. 166.

²⁰⁵ *Instruction*, Art. 165.

²⁰⁶ Can. 1814; 1816.

²⁰⁷ Can. 1817.

what they prove and to what extent.²⁰⁸ Where a party refuses to produce any document upon order of the auditor, the collegiate tribunal decides what significance is to be attached to this refusal.²⁰⁹

After the examination of all witnesses is completed, the publication of the process takes place.²¹⁰ Included in the process is the testimony of all witnesses and all documentary proof which has been adduced. Occasionally the advocates have been granted permission, prior to publication, to examine the documents which have been given into court. Where this has happened, only the testimony need be published.²¹¹ After examining all of the proofs of the case, the advocates may produce additional proofs together with corroboration and explanation of proofs already presented. The judge by decree fixes the period of time in which this may be done. At the expiration of this time, the judge, by decree, concludes the case. This is not to say that the court immediately enters upon deliberation. It only means that normally no new proofs may be admitted. However, for marriage cases, since they never become *res judicata*, an exception is made as to them. If important documents or witnesses come to light after the conclusion of the case, they may be admitted by decree of the presiding judge. If he rejects them, recourse may be had to the collegiate tribunal.

Upon conclusion of the case, the parties, and the *Promotor Justitiae* if he has impugned the marriage, present their arguments and defense.²¹² The *Defensor Vinculi* thereafter must present his animadversions. The parties and the *Promotor Justitiae* may reply to the arguments of the *Defensor Vinculi* within a period of ten days. Ordinarily the parties have the right to only one rejoinder, but, for grave reason, the presiding judge may permit a second.²¹³ The *Defensor Vinculi* always has the right to be heard last, but, if he does not submit his answer to the parties' rejoinder within ten days, he is presumed to have nothing more to say, and the case proceeds.²¹⁴ Oral argument is permitted, but is restricted to a moderate discussion aimed at clearing up obscure points. At no time may an advocate presume to instruct the court as to the law applicable to the facts of the case. Oral discussion is not a matter of right, but is granted within the sound discretion of the presiding judge.²¹⁵

²⁰⁸ Can. 1818.

²⁰⁹ *Instruction*, Art. 167 §2.

²¹⁰ Can. 1858; *Instruction*, Art. 134; 175 §§1, 2.

²¹¹ Can. 1859.

²¹² Can. 1862 §1; *Instruction*, Art. 179 §1.

²¹³ *Instruction*, Art. 180.

²¹⁴ Can. 1984; *Instruction*, Art. 180 §3; 183.

²¹⁵ Can. 1866; *Instruction*, Art. 186.

VIII. INCIDENTAL QUESTIONS

During the course of a trial matters may arise which require immediate settlement before the case proceeds. Among others these matters may be a contempt of court, the request of a third party to be allowed to intervene in the case, a question as to the competency of the judge or of the court, the adjustment of fees and expenses, and the like. These bear directly upon the case at hand and must be decided in order that the principal case may be decided. Accordingly, if such question is proposed by either party, the *Defensor Vinculi*, or the *Promotor Justitiae*, the collegiate tribunal decides whether to admit it or to reject it. In order for such a question to be admitted, two conditions must be concomitantly fulfilled: first, it must have a connection with the principal case; and second, it must be founded on a probable basis.²¹⁶ The court then decides whether the question is to be decided by decree or by an interlocutory sentence, and whether it is to be decided immediately or upon the date when the definitive sentence is handed down.²¹⁷ If the question is to be decided by an interlocutory sentence, all of the formalities observed in the presentation of the principal case must be observed, viz., the issuance of the formal summons, the *litis contestatio*, the concordance of the doubt, the conclusion, and the pleading.²¹⁸ All such steps should be as brief as possible to the end that the trial be not unduly delayed. If, however, the point may be settled by decree, these formalities may be dispensed with. This is the preferred method, since the court may, after the first briefs have been presented, conduct the entire proceedings by oral discussion. The question is thus settled with dispatch.²¹⁹ There is no appeal from a decree or interlocutory sentence, unless it is coupled with an appeal from the sentence of the principal case,²²⁰ but the court may, for good and just reason, reverse or correct its decree or sentence at any time before the definitive sentence in the principal case has been handed down.²²¹

²¹⁶ Can. 1839; *Instruction*, Art. 189 §1.

²¹⁷ Can. 1839; 1840 §1; *Instruction*, Art. 189 §2; 190 §1. A definitive sentence is one which decides the principal case; an interlocutory sentence decides an incidental case, given with the formalities of legal procedure; a decree also decides an incidental case, but is exercised without the strict formalities of a judgment (Can. 1868; *Instruction*, Art. 196).

²¹⁸ Can. 1840 §2; *Instruction*, Art. 191.

²¹⁹ *Instruction*, Art. 192.

²²⁰ Can. 1880, 6^o; *Instruction*, Art. 214 §1. However, §2 of this Article provides that a sentence or decree is considered to have the force of a definitive sentence when it imposes a burden which cannot be remedied by a definitive sentence. As an example, the *Instruction* cites the case where a sentence or decree refuses to admit proofs in the case which could have a real influence on the outcome of the case. Where this happens, an appeal may be filed from a decree or an interlocutory sentence.

²²¹ Can. 1841; *Instruction*, Art. 195.

IX. THE TERMINATION OF THE ACTION

The action may be ended in any one of three ways—by abatement, by renunciation, and by the handing down of the definitive sentence.²²² An action abates when no procedural act has been done for two years in the court of first instance, or for one year in the court of second instance, unless some legitimate impediment has prevented the prosecution of the suit.²²³ After the expiration of the requisite time the presiding judge announces the abatement of the proceedings, unless the collegiate tribunal has reserved this power to itself. In cases not involving the salvation of souls, the abatement of the action in the court of appeal makes the case *res judicata*. Inasmuch as a matrimonial case can never become finally adjudged, an abatement has no effect if the plaintiff wishes to commence the action anew at a later period. The court would probably take previous abatements into consideration when assessing costs, however, since the defendant is to be protected from harassment by the expense of annoyance suits.

The action may also terminate by renunciation. The plaintiff may renounce his action at any stage of the trial, but only in the following manner and only upon the following conditions: the renunciation must be made in writing and signed by the party or his proxy;²²⁴ the renunciation must be communicated to the defendant and accepted by him, or, at least, not opposed by him; and it must be admitted by the presiding judge.²²⁵ The costs of the action must be borne by the plaintiff when he renounces it.

Lastly, the case is ended by the definitive sentence of the court. In order to pronounce sentence the judge must have a moral certainty that he is correct.²²⁶ This certainty he is to obtain from the

²²² Can. 1732.

²²³ Can. 1736.

²²⁴ The mandate of the proxy must specifically authorize him to renounce the action. This power is not inferred from the general powers of a mandate. An attempted renunciation by the proxy without this specific authority is of no effect.

²²⁵ Can. 1740.

²²⁶ Can. 1869 §1; *Instruction*, Art. 197 §1. In defining of what this moral certainty must consist, the Holy Father has said, "Between the two extremes of absolute certainty and quasi-certainty or probability, is that *moral certainty* which is usually involved in the cases submitted to your court, and of which We principally wish to speak. It is characterized on the positive side by the exclusion of ill-founded or reasonable doubt, and in this respect it is essentially distinguished from the quasi-certainty which has been mentioned; on the negative side, it does admit the absolute possibility of the contrary, and in this it differs from absolute certainty. The certainty of which We are now speaking is necessary and sufficient for the rendering of a judgment, even though in the particular case it would be possible either directly or indirectly to reach absolute certainty. Only thus is it possible to have a regular and orderly administration of justice, going forward without useless delays and without laying excessive burdens on the tribunal as well as on the parties.

"Sometimes moral certainty is derived only from an aggregate of indications and proofs which, taken singly, do not provide the foundation for true

acts and proofs in the action, evaluating them according to the good dictates of his own conscience. In some cases the law itself determines the efficacy of certain proofs. Where this is true, the judge is relieved of the burden of deciding whether the nullity of the marriage has been truly established.²²⁷ The law has placed upon the judge a heavy responsibility, for marriage cases involve the salvation of souls. It is an oddity within certain individuals that they believe that, if they have fooled the Church acting through its tribunals, they have fooled God. To them the declaration of nullity is a green light from God to contract another marriage. Yet, if through deceit, they have fraudulently obtained the declaration, they are still married to their first spouse. Any second marriage is invalid and immoral. It is the office of the Church to prevent her children from offending God where she can. In trials seeking a declaration of the nullity of a marriage, Holy Mother Church acts through her judges. And upon him rests the total responsibility. He may not shift it to another, and no other may assume it. This is why the judge is not bound by the opinions of experts, even when unanimous, and this is why the advocate may present his case in its most favorable light, so long as he does not distort facts nor conceal truth. If the judge cannot arrive at this moral certitude of the nullity of the marriage, then his sentence must be *non constare de matrimonii nullitate in casu*, that is, the nullity of the marriage in the case is not established.²²⁸ Undoubtedly this may work an injustice in a few cases. But the provisions of the law are designed for the common good, and it is far better that a minority be denied a right to remarry when in fact they have this right than to allow others to remarry when they do not have this right. If there is a possibility of error, the error must be on the side of the good. If the plaintiff has honestly presented his case, and the court also believes that grounds for annulment are present and so awards it, that marriage is still valid in the sight of God if the grounds were in fact not there. Yet there is no sin attached to a remarriage in this

certitude, but which, when taken together, no longer leave room for any reasonable doubt on the part of a man of sound judgment. * * *

"In any event, this certainty is understood to be objective, that is, based on objective motives; it is not a purely subjective certitude, founded on sentiment or on this or that merely subjective opinion, perhaps even on personal credulity, lack of consideration, or inexperience. This moral certainty with an objective foundation does not exist if there are on the other side, that is, in favor of the reality of the contrary, motives which a sound, serious, and competent judgment pronounces to be at least in some way worthy of attention, and which consequently make it necessary to admit the contrary as not only absolutely possible but also in a certain sense probable." Pope Pius XII, *Allocation to the Sacred Roman Rota*, October 1, 1942, *Acta Ap. Sedis*, XXXIV, 338. (This translation is taken from Bouscaren, *op. cit.*, Supplement, pp. 226-227).

²²⁷ Can. 1869 §§2, 3; *Instruction*, Art. 197 §§2, 3.

²²⁸ Can. 1869 §4; *Instruction*, Art. 197 §4.

case, since the party has the right to rely on the judgment of the ecclesiastical courts.

The sentence of the collegiate tribunal is determined and formed in the following manner. After the arguments are all in the judges of the tribunal meet to discuss the case.²²⁹ Each judge brings to that meeting his written conclusions on the merits of the case. If he wishes he may change his original conclusion, but this must be indicated in the opinion. The final decision is arrived at by majority vote. The *Ponens* then draws up the sentence of the court.

The sentence always begins with the invocation of the Divine Name. After this are stated the names of the judges, the parties, their advocates and attorneys, the *Defensor Vinculi*, the *Promotor Justitiae*, the facts of the case, the conclusions of the parties, and the reasons which prompted the court to hand down the sentence. The dispositive part of the sentence follows this, and the costs of the action are determined and assessed. All of the judges must sign the sentence,²³⁰ as must the notary, and the date must be entered upon it.²³¹

Publication of the sentence should be made without delay. This may be accomplished in any of three ways. The parties may be summoned to hear the reading of the sentence. Or they may be notified that the sentence is available at the Chancery office for their inspection. Or finally, a copy may be sent to them by registered mail.²³² If either party has a proxy, the sentence may be sent to him,²³³ and where a party has a guardian because of minority or mental deficiency, the sentence must be sent to the guardian.²³⁴

Once a definitive sentence has become valid, it cannot be retracted, even by unanimous agreement of the judges, except where there is a material error in transcription.²³⁵ Recourse is by appeal. The time for appeal begins to run from the day of the notice of the publication of the sentence.²³⁶

X. JUDICIAL EXPENSES

Canon 1908 provides that the parties may be forced to pay the judicial expenses of the trial unless they are exempted by the grant of gratuitous legal assistance. The fees to be charged for each

²²⁹ Can. 1870; 1871 §1; *Instruction*, Art. 198 §1.

²³⁰ The Code Commission has declared that any judgment rendered by a collegiate tribunal is null and void when signed only by the presiding judge. Pont. Comm., July 14, 1922, *Acta Ap. Sedis*, XIV, 529.

²³¹ Can. 1874; *Instruction*, Art. 202.

²³² Can. 1877; 1719; *Instruction*, Art. 204 §1.

²³³ *Instruction*, Art. 204 §3.

²³⁴ Pont. Comm., January 25, 1943, *Acta Ap. Sedis*, XXXV, 58.

²³⁵ Can. 1878; *Instruction*, Art. 205.

²³⁶ Can. 1881; *Instruction*, Art. 204 §4.

judicial act as well as the fees of attorneys and advocates are to be determined according to a list formulated by the Council of Bishops in each province.²³⁷ The *Instruction* cautions tribunals to take care that the parties are not unduly burdened by unnecessary acts or with the fees of unnecessary experts. The court is also charged with the duty to see that attorneys and advocates confine their fees to the legally prescribed list of rates.²³⁸ In its final sentence the court must determine the costs and how they are to be apportioned between the parties.²³⁹ There is no appeal from the determination of costs, but an appeal from the sentence of the principal case automatically carries with it an appeal concerning these costs.²⁴⁰ An objection to the assessment of expenses may be filed before the court assessing them within ten days of the notice of the publication of the sentence, and the court may reconsider and reduce them if it feels it was in error in the first assessment.²⁴¹

To the end that the impoverished be not denied legal assistance by reason of their poverty, Canon 1914 provides that the poor who are not able to make any payment at all towards the expenses of a trial have a right to free legal service, and, if they can pay only a portion of these expenses, they are entitled to a reduction. Moreover, the court must appoint for them attorneys and advocates who are obliged to serve without compensation.²⁴² It does not lie within the discretion of the judge to refuse this relief when legitimately petitioned for. But it does rest upon him to determine whether an applicant is entitled to an exception or a reduction. Any petitioner asking for relief must present to the presiding judge documents proving his financial status.²⁴³ Such documents must be endorsed by trustworthy persons cognizant of the facts. If it becomes apparent during the course of the trial that relief has been erroneously given because of the absence of poverty or need, the court may revoke the exemption or reduction.²⁴⁴

A witness has the right to demand compensation for the expenses he has incurred in traveling and staying at the place of trial.²⁴⁵ The judge has the privilege of ordering either or both of the parties to pay into court a deposit to cover the expenses of witnesses. In addition the plaintiff must guarantee to reimburse the court for the expenses it incurs in the performance of its duties, and the court may

²³⁷ Can. 1909 §1; *Instruction*, Art. 233.

²³⁸ *Instruction*, Art. 234.

²³⁹ Can. 1873; *Instruction*, Art. 236 §1.

²⁴⁰ Can. 1913 §2; *Instruction*, Art. 236 §4.

²⁴¹ Can. 1913 §1; *Instruction*, Art. 236 §3.

²⁴² Can. 1914; 1916; *Instruction*, Art. 237.

²⁴³ Can. 1915; *Instruction*, Art. 238 §1.

²⁴⁴ Can. 1915; *Instruction*, Art. 239.

²⁴⁵ Can. 1787; *Instruction*, Art. 127 §3.

enforce this by requiring a prior deposit.²⁴⁶ If a party refuses to make this deposit, the court may consider that he has waived his right to have his witnesses heard.²⁴⁷

XI. CONCLUSION

We have attempted in this article to give a résumé of the procedural law of matrimonial trials. Necessarily we have not exhausted the subject. There are special regulations relating to specified types of trials, as, for example, those involving impotency. Nor have we even covered all aspects of the normal trial. What we have tried to do was to condense in a short space some indication of the make-up of the ecclesiastical courts and their *modus operandi*.

Behind every trial hovers the spirit of the law applied by the court before whom the case is tried. And this is beyond all doubt the most important single element in the trial. For it is the philosophy of the society which determines its law. Where the society is atheistic, it is useless to expect the law to subserve the ends of justice; where the society is indifferent, justice comes indifferently; but where the society is ever mindful of the natural law and the divine positive law, then justice becomes an absolute necessity which must be meted out in accord with the dictates of conscience and moral principles. It is in this latter category that the Church is most pre-eminently represented. Her law reflects her philosophy and her reason for existence. Divinely founded, she has in her care the spiritual welfare of all mankind. We can do no better than to conclude with the words of the Holy Father pointing out how this primary concern of the Church must ultimately affect its judicial process. In the Allocution to which we have hereinbefore referred the Supreme Pontiff said:

“In the Ecclesiastical Forum the matrimonial process is a function of the juridical life of the Church. In Our Encyclical on the Mystical Body of Christ, we set forth how the so-called ‘Juridical Church’ is truly of Divine origin, but it is not the whole Church, for it represents in some way only the body which must be vivified by the spirit, that is, by the Holy Ghost and His grace. * * *

“This indicates the superior unity and the higher purpose to which are destined and converge the juridical life of the Church. It indicates also that the mind, the will, and personal activity must, in this type of work, aim toward the Church’s end: the salvation of souls. In other words, the supreme end, the supreme beginning, the supreme unity means only ‘the care of souls’ just as all the work of Christ on earth was the

²⁴⁶ Can. 1909; *Instruction*, Art. 235 §§1, 2.

²⁴⁷ Can. 1788.

care of souls, and just as the care of souls was and is the entire work of the Church. * * *

"The salvation of souls has for its guide an absolutely secure supreme norm: the law and the will of God. This same law and will of God will guide the settlement of the cases submitted to the juridical activity which recognizes and has full realization of having no other purpose than that of the Church. Thus will this juridical activity see confirmed in a superior order what was already its fundamental principle: namely, the service and affirmation of the truth in the ascertainment of the true fact and in the application to that fact of the law and the will of God."²⁴⁸

²⁴⁸ *Supra*, note 87. (Translation from Doheny, *op. cit.*, I, pp. 1105-1107).

MARQUETTE LAW REVIEW



Vol. 35

WINTER, 1951-52

No. 3

EDITORS

Editor-in-Chief

ROBERT F. BODEN

Associate Editors

PAUL BINZAK

JOHN A. FORMELLA

IRVING W. ZIRBEL

LAW REVIEW BOARD

RICHARD P. BUELLESBACH

JAMES E. HARPSTER

HUGH R. O'CONNELL

STAFF

WILLIAM H. BEZOLD
LAWRENCE J. BINDER
EDWARD A. DUDEK
CLINTON J. FINNEGAN
FINTAN M. FLANAGAN
LOUIS R. GILBERT
JOHN M. GROGAN

GAYLORD HENRY
LAWRENCE V. KAMINSKI
JAMES J. KOENEN
GEORGE G. LORINCZI
LEO M. McDONNELL
ARTHUR J. SCHMID, JR.
JOHN J. WITTAK

Advertising and Circulation Manager

THOMAS J. LOSE

Faculty Adviser

LEO W. LEARY

"MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS"