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ANNULMENT IN CHURCH¹ AND STATE²

ALBERT A. VAIL

AS A RESULT of the position which a lawyer occupies in his community and of the very nature of the practice of law, nearly every legal practitioner from time to time is consulted about marriage problems. Perhaps in no other type of problem, upon which we attorneys are consulted, do we have such a good opportunity to act as social physicians as in the case of marital problems which are presented to us. Many of the persons who present their marriage difficulties to the lawyer are Catholics. Regardless of the religious tenets of the attorney, he will recognize the fact that his Catholic client is bound by two systems of law, the civil and the ecclesiastical. Knowing this he will be conscious of the fact that if he is to reach a solution to the problem, a solution which will be truly beneficial to his client, it must needs be a solution which is in conformity with both systems of law to which his client is subject. While the marriage laws of the Church do not have legal effect in the civil forum in the United States, still they are binding in conscience upon the Catholic client and therefore must be considered and followed if the proper answer to his problem is to be achieved for him.

Besides his duty to protect the moral as well as the legal welfare of the Catholic client, the attorney has also a moral obligation of his own in dealing with the marital difficulties of his client. In the Canons of Professional Ethics of the American Bar Association, Canon 31 reads in part as follows:

. . . The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instruction.

It has been aptly said: "In the matter of divorce and separation, the Church's norm of moral conduct is the same. Since the lawyer repre-

¹ When the word "Church" occurs, reference is made to the Roman Catholic Church.

² By the word "State" there is intended the civil government as separate and distinct from ecclesiastical government.

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sents and speaks for his client, he may licitly do what his client may licitly do in regard to divorce and separation suits."³

In order that the best interests of a Catholic client may be served and the attorney develop a right conscience in dealing with the client's problem, at least a general knowledge of the teachings of the Church in regard to divorce and separation is essential. While it is not the intent of the writer to attempt an exhaustive discussion or authoritative commentary on Canon Law, still it is hoped that a relatively simple statement of the basic doctrines of the Church in regard to marriage may be of some assistance to law students and to a number of practicing attorneys who desire at least a practical and workable understanding of the moral obligations of their Catholic clients.

Since all who have studied in law school the subject of Persons and Domestic Relations have a knowledge of the general principles⁴ of annulment of marriage and the grounds therefor, it is believed that a discussion of Canon Law in terms of its similarity or dissimilarity to those general principles of civil law may contribute to a better understanding of the former.

The laws of the Church regarding marriage are to be found in the Code of Canon Law, promulgated in 1917 by Pope Benedict XV. Title VII of the Code deals with marriage and is comprised of Canons 1012 to 1143, inclusive.⁵

DIVORCE AND SEPARATION

Before entering upon a discussion and comparison of the various factors which prevent a marriage from being a valid one under civil and canon law, it might be well to mention in passing the fundamental difference which exists in the civil and canon law as to the question of the dissolution of a valid marriage. The law of the Church in this matter is pointedly stated in Canon 1118: "A valid consummated⁶ mar-

³ Canon Law on Civil Actions in Marriage Problems, p. 73, The Catholic Lawyers Guild of Chicago—which see for a thorough discussion of the moral obligations of a judge or attorney who cooperates in the procurement of a civil divorce or separation.

⁴ It is the intent of the author to discuss in a general way the common bases for the procurement of civil annulment and not to indicate the specific law of any one state on the matter.

⁵ "The Code of Canon Law is, for the most part, a codification of already existing law found in many different sources, including Decrees, Decretals, Councils, decisions of the Rota, and Papal Constitutions and Bulls." John G. Gest, *Nullity of Marriage in Ecclesiastical Courts*, The Catholic Lawyer, Vol. 1, No. 4, Oct., 1955.

⁶ A marriage in both civil and canon law is consummated by natural intercourse. In canon law there are two situations in which a valid but unconsummated marriage

riage between two baptized persons⁷ can be dissolved by no human power and for no cause whatsoever except death." Such a marriage creates a bond which is absolutely indissoluble by the parties, the Church, the State, or any other human agency whatsoever. Only death of one of the parties can terminate that bond, once it is created.

For many centuries this same concept of the absolute indissolubility of marriage was held to be the civil law of all Christian countries and became a part of the Anglo-American common law. The modern concept of civil divorce with the destruction of the marriage bond or status and with the right to remarry finds its origin about the middle of the Sixteenth Century. In the early days of its existence absolute divorce was granted infrequently, and then only for adultery clearly proven. Since that time the concept of absolute divorce (*divortium a vinculo*) has spread and has been liberalized until it has become a part of the statutory law of most of the Western nations. At the present time the practically unlimited liberalization of divorce statutes in many of the States and the almost innumerable divorce decrees with the personal, social, and economic evils flowing therefrom have become matters of the greatest concern to thoughtful minds in every

may be dissolved: (a) where one of the parties is admitted by Apostolic indult to solemn religious profession, and (b) by Apostolic dispensation granted for just cause at the request of both parties or of only one party (Canon 1119).

⁷ A Christian marriage (one between two baptized persons) is a sacrament (C. 1012) and is subject not only to divine law but also to canon law (C. 1016). Canon 1118 uses the Latin word "Ratum" which is interpreted in C. 1015 as the "valid marriage of two baptized persons"—it is frequently rendered in English by "sacramental marriage" or "Christian marriage."

A non-sacramental marriage is one between two persons, one or both of whom are not baptized. If neither of the parties to the marriage has been baptized, the marriage, even if it has been consummated, may be dissolved by the Pauline Privilege, sometimes referred to as the Privilege of the Faith (C. 1120). The application of the Pauline Privilege is restricted to the situation where the first marriage, the one to be dissolved, was entered into by two persons neither of whom was then baptized, one of them, since the marriage, has been admitted to the Church by baptism, the other remains unbaptized, and the unbaptized party either abandons the baptized spouse or, remaining, renders the practice of the new faith difficult by refusing to be baptized or to live peacefully with the converted party. The "Privilege" is used in the foregoing circumstances only when the converted party wishes to enter into a new marriage. The dissolution of the prior marriage occurs at the moment of the second marriage (C. 1126).

As appears from the foregoing, the Pauline Privilege can never be applied where one of the parties to the prior marriage was baptized. In a situation where an unbaptized person intermarries with a baptized non-Catholic, and later either party joins the Catholic Church, if for valid reason shown the prior marriage would render the practice of the faith difficult for the converted party, the prior marriage can be dissolved by the Pope.

walk of life. This concern is amply evidenced by the almost limitless number of treatises, articles and comments on the subject which have been published during the last few years.

The Church holds that the granting by the State of a divorce *a vinculo* is an usurpation by the civil government of divine authority. Herein lies the basis for the great conflict between Church and State in the matter of absolute divorce.

The Church not only holds that the marriage bond is indissoluble but also requires that married couples must live and cohabit together unless excused by a just cause (C. 1128). There are two instances where a separation (*divortium a mensa et thoro*) will be granted under canon law permitting the spouses, while still remaining man and wife, to live separate and apart. (1) Adultery of the other spouse which is uncondoned, which was not consented to, or connived at by the offended party is cause for obtaining a permanent separation decree by a spouse who has not himself (herself) been guilty of adultery (C. 1129). (2) If one of the spouses joins a non-Catholic sect, gives the children a non-Catholic education, leads a criminal and disgraceful life, is a grave danger to the other's soul or body, by cruelty renders common life too hard, or gives other similar cause, the other spouse may apply to the Bishop for permission to separate or may do so on his own authority if the cause is certain and there would be danger in delay (C. 1131).

Since the Church requires married couples to cohabit, it also forbids any married Catholic from applying to the civil courts for separate maintenance (separation from bed and board) without first consulting ecclesiastical authority.⁸ The Church likewise forbids any Catholic to seek from a civil court a decree of divorce from the marriage bond. Should a Catholic violate this prohibition and attempt another marriage, he incurs automatic excommunication.⁹ However, in two instances permission is given to apply for a civil divorce: first, where the Church has already declared the marriage null and void or dissolved it (see note 7), and second, where the Church for sufficient cause has granted a separation from bed and board and a decree of the civil court is necessary in order to protect the civil rights of the party, such as property rights. In this case, however, the divorced party is

⁸ Third Council of Baltimore, 1884, Decree 126.

⁹ Third Council of Baltimore, 1884, Decree 124.

not permitted to remarry, since this effect of the civil decree is not recognized.

ANNULMENT

While the concepts of Church and State are at complete divergence in matters relative to the dissolution or destruction of the marriage bond by civil authority, as has been seen, one frequently finds striking similarity of civil and ecclesiastical law in matters of annulment of marriage. This is not a matter of surprise when one recalls that in early English law all questions of the validity or invalidity of marriage were directly subject to the jurisdiction of the ecclesiastical courts. When other courts succeeded to the jurisdiction of the ecclesiastical courts over marriage matters, it was quite to be expected that their rules and holdings would be greatly influenced by ecclesiastical precedent. This same influence was later to be found in the decisions of the equity courts of America which exercised jurisdiction in annulment proceedings.

One of the great differences, however, between the civil and canon law is as to the nature and effect of a marriage in which there is found in either party a deficiency of capacity or consent. At its inception a marriage, at civil law, may be *valid*, *voidable*, or absolutely *void*. As between the various States the same deficiency may have a different effect upon the marriage; as, for example, insanity may render a marriage void in one state but only voidable in another. The two chief characteristics of a voidable marriage are that it is a marriage until it is annulled, upon which event it is commonly said to be rendered void *ab initio*, and that under proper circumstances it may be ratified by continued cohabitation of the parties, in which event it may be said to ripen into a valid marriage. However, cohabitation under coercion will not ratify a voidable marriage.¹⁰ A third characteristic is that a voidable marriage can be avoided only during the lives of the parties in an action by one against the other for the purpose of getting an annulment. This is known as a "direct" attack.

In canon law there is no such thing as a *voidable* marriage. Every marriage is either valid or void at its inception. If, at the time of the marriage ceremony, there existed an invalidating impediment, the marriage is void *ab initio*; otherwise it is valid. It follows that strictly speaking it is not proper to refer to annulment in canon law. To annul connotes the avoiding or nullifying of something which has

¹⁰ Fowler v. Fowler, 131 La. 1088 (1913).

existed. A more proper term would be a decree of nullity, because when the issue of the validity of a marriage is before the Ecclesiastical Court, the decree or decision is that nullity has or has not been proven. At canon law, as in civil law, there is a presumption of the validity of a marriage which it is the duty of the one who asserts invalidity to rebut.

GROUND¹¹ FOR ANNULMENT

As in civil law there are certain factors which render a marriage void, as insanity in many states, and others which result in the marriage being voidable only, so also in canon law there are two classes of impediments: (1) impedient impediments which make marriage illicit (sinful) but do not affect validity, (we are not here concerned with this class of impediment, an example of which would be a simple vow of virginity by a lay person) (C.1036-1 and C.1058-1); (2) diriment (invalidating) impediments which render the attempted marriage void (C.1036-2 and CC.1067 to 1080, inclusive). There are thirteen (13) such impediments, each of which will be hereafter considered. Some of the diriment impediments exist purely by virtue of ecclesiastical legislation (canon law) while others find their origin in the Divine Law. From impediments which are founded solely on ecclesiastical law the Church may grant a dispensation for a sufficiently grave cause; however, for no reason may a dispensation be granted from impediments based upon the Divine Law. An example of an impediment by ecclesiastical law would be that of affinity, while the bond of prior existing marriage would be illustrative of impediments by Divine Law. A dispensation granted by proper ecclesiastical authority removes the impedient effect of the impediment which canon law has established and the marriage then would be absolutely licit.

In the following discussion of the various impedient impediments no distinction will be made as to whether the specific impediment is based in ecclesiastical or Divine Law and the impediment will be considered in its effect where no dispensation has been procured.

In both civil and canon law, for a valid marriage there are needed competent parties who are physically, mentally, and legally capable of entering the marriage relationship, an agreement or mutual consent to enter into the marriage relation, and satisfaction of any mandatory requirement as to the form in which the mutual agreement is ex-

¹¹ The common term used in civil law has been adopted for the sake of convenience of expression.

pressed. Accordingly, for convenience of our discussion the reasons or grounds upon which the nullity of a marriage may be established have been divided into three groups, those dealing with (1) Competent Parties, (2) Defect of Consent, and (3) Mandatory Form.

I. COMPETENT PARTIES

A. IN BOTH CHURCH AND STATE

The following five grounds or impediments are recognized both in civil as well as canon law as preventing a valid marriage:

1. *Prior Marriage*

Since both at civil law and canon law it is impossible for one to have more than one wife or husband at the same time, it necessarily follows that a valid and subsisting prior marriage by either or both of the parties prevents the entrance into a second valid marriage.

In church.—Ordinarily, the impediment of a prior existing marriage is referred to as the impediment of the bond. This impediment follows naturally and necessarily from the Catholic doctrine of the absolute indissolubility of marriage and is based in natural law. It is therefore held to be binding not only upon the baptized but also upon the unbaptized. Canon 1069, paragraph 1, provides that a marriage attempted by one who is already held to the bond of an existing marriage is invalid even though the prior marriage was not consummated. The canon expressly excepts the cases referred to in footnotes 6 and 7, *supra*.

If the prior marriage was void *ab initio*, it does not constitute an impediment to the second marriage. However, the canon does require that the invalidity of the prior marriage be satisfactorily demonstrated. Accordingly a priest will not assist at a second marriage until the case has been referred to proper authority for decision.

In state.—The general rule in the United States is to the effect that any attempted second marriage while a valid prior marriage is undissolved is absolutely void *ab initio*. Some states have held that the one who knowingly marries a person who is already married may not himself be heard to attack the validity of that marriage, although this rule does not represent the weight of authority. Some states, however, provide by statute that if the second marriage is entered in good faith and on a reasonable belief that the former spouse is dead, the marriage

is voidable only and continues to exist until its nullity is declared by a court of competent jurisdiction.

2. *Impotence*

In church.—The matter of impotency as an impediment to a valid marriage is dealt with in Canon 1068 which provides that antecedent and perpetual impotency on the part of either the man or the woman, whether or not known to the other party, whether absolute or relative, invalidates marriage by the law of nature. If there is doubt whether impotency is present, the marriage should not be forbidden. The canon further provides that sterility does not invalidate marriage.

It follows from the canon that perpetual inability present at the time of the marriage to have natural sexual intercourse would render the marriage void. If there is a question as to whether or not impotence existed where there was a capacity for sexual intercourse, the canon specifically provides that in case of doubt the marriage is not to be prevented. Impotency which has its beginning after the marriage cannot invalidate the marriage, nor does a prior impotency that can be remedied. The relative impotence referred to in the canon deals with the situation where the spouse is incapable of sexual intercourse with the married partner although that would not necessarily be the case with someone else. This situation would arise mainly in case of psychological factors which prevent natural intercourse.

In state.—At civil law impotence is one of the so-called canonical disabilities which has been adopted by most states from the ecclesiastical law. It is believed that no state in the United States will annul a marriage on the grounds of impotence unless provision for such has been made by statute, which has been done in many of the states. Being a canonical disability it renders a marriage voidable only and never void. To qualify under this civil impediment, the impotence must consist of an inability of the man or the woman to copulate, which inability may be the result of malformation, frigidity, disease, or psychological factors. As in canon law, so also in civil law, sterility, the incapacity for procreation of children, is not a ground for the annulment of a marriage. However, fraudulent representation as to one's incapacity to procreate might very well be held by some states as sufficient fraud to invalidate the marriage. To render marriage voidable, the impotence or incapacity must exist at the time of the marriage and most states hold that it must be incurable. It has been

held that where the impotence results from psychological factors, it is considered incurable if the afflicted person refuses to take psychiatric treatment. At civil law no one is permitted to set up his own impotence as a ground for avoiding his marriage. Contrary to the provisions of canon law, under the civil law the impotence of one party, if known, may be waived by the other before the marriage, in which case the marriage would be completely valid, or it may be waived after the marriage by long and continued cohabitation and acquiescence therein, in which event the marriage becomes valid upon the impediment being waived. Some states follow the rule of triennial cohabitation which is to the effect that if the parties cohabit for three years after the marriage and the wife still remains a virgin, there is a conclusive presumption that the husband is impotent. However, in most of the states the existence of impotence is a matter to be demonstrated by evidence.

3. *Consanguinity—Blood Relationship*

In church.—The law of the Church relative to consanguinity is established in canon 1076 where it is provided that marriage is void between all ascendants and descendants in the direct line as well as within the first three degrees of relationship in the collateral line.

In state.—In civil law consanguinity is the second so-called canonical disability which has been adopted by the civil government from the ecclesiastical law. In early England the rules of ecclesiastical law in relation to consanguinity were followed. However, by the Statute of 32 Hen. VIII, C.38, the ecclesiastical courts were forbidden to impeach any marriage which was not within the Levitical degrees¹² of relationship. Since in the United States we have in civil law no counterpart of the ecclesiastical courts of England, it has been said that the impediment of consanguinity would not be a basis for annulment unless it were made such by express statute, and since it is a canonical disability that it would render a marriage voidable only and not void unless the relationship was so close as to "shock the conscience of all civilized persons." However, the matter has been covered by statute in all of the states and many of the statutes expressly provide that marriages which are in violation of the statutory provisions are absolutely null and void. Some of the statutes prohibit marriage within what amounts to the Levitical degrees of kinship, some extend it to

¹² The Levitical degrees of relationship are set out in the Book of Leviticus, c. 18, verses 6 to 18, and c. 20, and comprise all blood relatives nearer than first cousins.

include first cousins, while one state extends the prohibition to include second cousins.

4. *Affinity*

In church—Canon 1077 provides that affinity of any degree within the direct line and to the second degree in the collateral line renders marriage void. Affinity may be described as “in-law” relationship. A married person, in other words, is related to in the same degree by affinity all the blood relatives of one’s spouse. Thus a married man is related by affinity in the first degree to the blood sister of his wife. It has been said that affinity does not beget affinity; that is, there is no objection to two brothers marrying two sisters, because the affinitive relatives of the wife are not related to the affinitive relatives of the husband.

In state.—In England the same impediment to marriage existed in the case of affinity as in the case of consanguinity. However, in the United States the impediment of affinity has been abrogated in many of the states by statute. Generally, in those states that do follow the impediment of affinity, the affinitive relationship which a married person has with the relatives of the spouse ceases upon the death of the spouse unless descendants of the marriage which created the affinity survive the decedent and thus carry on the relationship. In other words, when the spouse and all descendants of the marriage die, the relationship by affinity ceases and is no longer an impediment to marriage. Affinity in civil law is the third so-called canonical disability.

5. *Nonage*

In church.—Canon 1067 provides that marriage cannot be validly contracted by a girl before her fourteenth completed year of age (14th birthday) nor by a boy before his sixteenth completed year of age (16th birthday).

The period of one’s life from the moment of birth until reaching the stipulated age is referred to as nonage, which is an impediment to a valid marriage by virtue of ecclesiastical law and therefore is not binding upon unbaptized persons. Before the effective date of the Code, May 19, 1918, the age for valid marriage coincided with the normal age of puberty; that is, at the age 12 for a girl and 14 for a boy. Under the old rule, if it could be demonstrated that a child had reached the age of puberty before the age of 12 (or 14), a dispensation would be granted from the impediment. However, the present

Code establishes the definite ages of 14 and 16 and all marriages prior to those respective ages are void. The same Canon (1067) instructs pastors to discourage young people from marriage until they have reached the customary age in their community even though the Canon provides that marriages after 14 and 16 are valid.

In state.—At common law the age of valid marital consent, as in canon law, was held to be the age of 12 for the girl and 14 for the boy. At the present time, each state by statute has raised the age of consent somewhat above the age at common law, although there is considerable difference as between the various states regarding the age of valid marital consent.

At common law and also today the marriage of a child under the age of seven is considered absolutely void, since under that age the child has not reached the use of reason and is incapable of giving consent. Strictly speaking, at civil law the period of nonage extends from the age of seven to the minimum age established by statute for the entrance into a lawful marriage. Although many of the statutes read in terms of lawful marriage at the minimum age, still nonage is universally held to render the marriage voidable only and not void. A nonage marriage may be avoided at the complaint of either the infant or the other party to the marriage even though of legal age. A nonage marriage may be avoided either before or immediately after reaching the age of legal consent, but in no event may it be ratified prior to reaching the legal age. Continued cohabitation of the parties as man and wife after the nonage individual has reached the legal age—minimum is sufficient affirmation to render the marriage thereafter absolutely valid by virtue of ratification.

Since nonage renders a marriage voidable only, it is commonly held that no third party can avoid the nonage marriage, but in a few states by statute provision has been made for the bringing of an action for annulment of the marriage by the parents of the nonage individual.

B. IN STATE ONLY

Miscegenation

At common law and in England there is no impediment to marriage because of race, creed, or color. In the United States today there are thirty states which have statutes forbidding miscegenetic or interracial marriage. The intent and effect of the statutes is to ban marriage between a white person and members of the Negro, Indian, or Orien-

tal races. Some of the statutes ban marriage with members of only one race while others include two and even all three. In twenty-four of the thirty states having such statutes the marriage is rendered absolutely void *ab initio*. Some states have likewise made provisions in their State constitutions against certain interracial marriages.

There is no distinction whatsoever made in canon law between races since, being Catholic, the Church is open to all races and nationalities, all members of which are considered equal before God and in the Church.

C. IN CHURCH ONLY

The following eight diriment impediments in canon law have no counterpart in the civil law:

1. *Disparity of Cult*

Canon 1070-1 provides that marriage between a baptized person and an unbaptized person is absolutely void.

To obtain an annulment on the basis of the impediment of disparity of cult it is necessary to prove with certainty that one of the parties is baptized while the other is not. In case of doubt the marriage would be presumed valid.

2. *Major Orders*

Major Orders in the Catholic Church are considered the Sub-deaconite, Deaconite, and Priesthood. Canon 1072 provides that an attempted marriage by any man in Major Orders is a nullity.

Since this impediment is one of ecclesiastical law only, it can, under certain circumstances, be dispensed, but the dispensation is rarely granted.

3. *Solemn Vow of Chastity*

Canon 1073 is to the effect that persons who have taken solemn vows in a religious order or who have taken only simple vows, to which the Holy See has attached the force of invalidating marriage, cannot contract a valid marriage.

This also is an impediment by operation of ecclesiastical law and for very grave reasons can be dispensed.

4. *Abduction*

If a man abducts a woman for the purpose of marriage or retains her against her will in a place to which she has gone freely, so long as

she remains under his control there can be no valid marriage contracted between them (C. 1074).

This impediment refers to abduction in the strict sense, or kidnapping, and is not intended to cover the matter of elopement which does not affect the validity of a marriage.

5. *Crime*

Two persons cannot validly enter marriage (a) if, during the legitimate prior marriage of either or both, they committed adultery under a promise of subsequent marriage or if they attempt a marriage even by civil ceremony; (b) if, during the subsisting marriage of either or both, they commit adultery and one of them murders his own spouse or the spouse of the other party; and (c) if, even without adultery, they cooperate in procuring the death of the former spouse of one of them (C. 1075).

This impediment of crime is based upon ecclesiastical law only and therefore is subject, under proper circumstances, to dispensation.

6. *Public Honesty*

The impediment of Public Honesty arises from an invalid marriage or from public and notorious concubinage, and renders invalid an attempted marriage between the man and the blood relatives in the direct line in the first two degrees of the woman, and vice versa (C. 1078).

This is another impediment which is based upon ecclesiastical law and is open to dispensation.

7. *Spiritual Relationship*

Canon 1079 provides that there can be no valid marriage between a baptized person and the one who administers the baptism, if it was administered by a lay person, or between the baptized person and the godparent or sponsor.

This impediment is subject to dispensation.

8. *Legal Adoption*

Canon 1080 provides that the validity of the marriage between an adopting parent and the adopted child is the same in the Church as it is in the civil law of the land. Since adoption does not render marriages void between adopting parent and adopted child in the civil law

of the States, it does not have that effect in canon law in the United States.

II. DEFECT OF CONSENT

A. IN CHURCH

The essential nature of matrimonial consent necessary for a valid marriage is established by Canon 1081. Section 1 of the Canon provides that marriage is effected by the consent of the parties lawfully manifested between persons who are competent according to the law and that this consent can be supplied by no human power. Section 2 of the Canon defines matrimonial consent as an act of the will by which each party gives and accepts a perpetual exclusive right over the body for acts which are of themselves suitable for the generation of children.

The canons which follow thereafter establish the various factors which will destroy or prevent the giving of the necessary consent as established in Canon 1081. For simplicity of discussion those factors may be divided into those which result in defective knowledge, defective intention, and defective freedom.

1. *Defective Knowledge*

Defective knowledge may be the result of no knowledge or mistaken or erroneous knowledge.

Canon 1082 provides that in order that matrimonial consent may be possible, it is necessary that the contracting parties at least know that marriage is a permanent union between man and woman for the procreation of children. It further provides that ignorance of this fact is not presumed after puberty.

Since marriage is by its very nature a permanent union of man and wife for the begetting of children, no person can enter marriage without knowing that much about it. To have sufficient knowledge it is not required that the parties have specific understanding of the physiological facts connected with the procreation of children. It suffices if they know that marriage is for the purpose of procreation.

Error which will invalidate a marriage is established in Canon 1083 which provides that error regarding the person makes a marriage void. This refers only to the case of mistake of identity of the person, or simply mistaken identity.

Paragraph 2 of the Canon provides that error regarding a quality of

the person, even though it is the cause of the marriage, invalidates only if it amounts to an error of identity of the person or if a free person contracts marriage with a person whom he believes to be free but who in fact is in a condition of slavery in the true sense.

It would be extremely difficult to prove that an error of personal quality amounted to an error of the identity of the other person, especially today where great precaution is taken by pastors in examining the parties before marriage in order to assure the validity of the marriage which follows. However, where the existence or nonexistence of the quality is made an absolute condition to entrance into the marriage, the failure of the condition to occur or be verified would amount to a mistake in the true identity of the person. Such a condition is known as a condition *sine qua non*. An example of such a condition of quality would be one where a man would make the virginity of his prospective spouse a condition *sine qua non* to his consent to marry her. He could do this by saying: "I will not marry you unless you are a virgin." In order to prove the existence of such a condition, it would be necessary that the condition had been reduced to writing or that it had been made before witnesses.

Since there is no slavery in the true sense in the United States today, the provision of the law relative thereto is of slight interest.

Canon 1084 provides that simple error regarding the unity, indissolubility, or sacramental nature of marriage, even though it is the cause of the contract, does not vitiate matrimonial consent. For example, if one erroneously believes that divorce and remarriage are possible after marriage, his error does not vitiate his consent and his marriage would be valid.

Canon 1085 provides that the knowledge or belief that the marriage is null does not necessarily exclude matrimonial consent.

2. *Defective Intention*

Since, as we have seen, Canon 1081 provides that matrimonial consent is an act of will, it naturally follows that if, because of insanity or other defect of intelligence, extreme fright, intoxication, drugs, or other cause, one is deprived entirely of the use of reason, it would be impossible in such case to give matrimonial consent because of lack of sufficient intention to be married. But there are also other deficiencies of intention which will render a marriage void.

While Canon 1086-1 provides that it is presumed that the internal

assent of the mind is in conformity with the words and signs used in the marriage ceremony, still Section 2 of that Canon provides that the marriage will be void if both or either of the parties by a positive act of the will excludes marriage itself, or all right to the conjugal act, or any essential quality or property of the marriage.

Exclusion of marriage itself would happen where a marriage takes place in jest. In such a situation there would be no real consent given by either party.

Since the primary end of marriage is the procreation and education of children, as is provided in Canon 1013, it follows that if one or both of the parties deliberately and positively excludes all possibility of the procreation of children by a complete exclusion of the conjugal act, there is no intention to enter into the marriage relationship. It is impossible to intend marriage and at the same time exclude any possibility of the primary purpose thereof.

The essential property of marriage which is generally the one which is excluded is the property of indissolubility. As we have seen, an error or mistaken idea of the indissolubility of marriage does not render the marriage void, but if the parties before marriage enter into an agreement or understanding that either of them may resort to divorce in the event that the marriage proves unsuccessful, they have excluded an essential property of marriage, namely, indissolubility, and their attempted marriage would be void. It is not necessary that the two parties agree to a future divorce, but it is sufficient if one of the parties has the definite intention to get a divorce in case the marriage does not work. The difficulty in obtaining an annulment of a marriage on this basis consists in the difficulty in proving the existence of such an agreement or resolution unless it has been reduced to writing or has been clearly expressed before witnesses.

3. *Defective Freedom*

The Code provides in Canon 1087 that a marriage is null when it has been entered into because of force or grave fear caused unjustly by an external agent.

The Canon provides that in order to render the marriage null the fear must be grave, which means that it must be sufficient to overcome the mind and the will of the individual. This type of fear might, for example, be fear of offending one's parents where the parents have been severe in their demands and the child is of a sensitive and obedient disposition.

The Canon also provides that the fear must be unjustly inflicted. This means that the person who causes the fear must be violating justice when he demands the marriage. Such fear is often the result of a threat of death or bodily harm as a result of which, and to free himself from which, the individual enters into the marriage. In such case the marriage would be invalid.

In order that the fear, although grave and unjust, have the effect of invalidating the marriage, it is necessary also that the marriage shall have been entered into in order to free one's self from the cause of that fear.

It might be well to call to the attention of lawyers and law students, who are well acquainted with fraud as a ground for annulment of a marriage in civil law, to the fact that nowhere in canon law is fraud, in and of itself, found to be the basis upon which the nullity of the marriage can be predicated. While it may very well be true that some fraudulent representation by the other party may have been connected with, or even been the cause of, some form of invalidating error in the mind of the party whose consent was defective, nevertheless it is true that in canon law fraud as such is nowhere established as a cause for invalidation of a marriage. However, it might well be possible that the same marriage would be annulled by a civil court on the basis of fraud perpetrated by the defendant and its nullity declared by an ecclesiastical court on the basis of defective consent due to the error which existed in the mind of the complaining party.

B. IN STATE

While it is true that one finds considerable difference, at least in certain areas, in the theoretical approach to questions of defective marital consent as between State and Church, still careful analysis of decisions under civil and ecclesiastical law seems to indicate that there is not too great practical difference in the type and degree of consent necessary for entrance into a valid marriage.

One finds innumerable and varied statements by various judges and authors as to the essential elements in valid marital consent. It can be fairly stated in simple language that mutual marital consent is present and sufficient if the two parties know, at least in a general way, what marriage is, if, when they express their mutual agreement, they know what they are doing, and if they intend to do what they do. This has been stated by Mr. Bishop in his work on "Marriage, Divorce and Separation," as follows:

If the agreement between the parties is to dwell together substantially in the law's relation of husband and wife, they will be adjudged such, and any collateral stipulation contrary to law will be held null.¹³

Although little difference exists as to the nature of the consent required, still one finds very great difference between civil and ecclesiastical law in the effect resulting from defective consent. As we have seen, defective consent from whatever cause renders the marriage absolutely void according to canon law. In civil law, however, except in a number of states which hold that insanity of one of the parties renders the marriage void, a defect of marital consent from whatsoever cause is practically universally held to render the marriage voidable only and, therefore, capable of being ratified by the continued cohabitation of the parties after the defective consent has been removed.

Since the only consent necessary for a valid marriage is that the two parties agree to be man and wife, it follows that the effects of the giving of that mutual consent are established by law and does not depend upon the intent of the parties. Therefore, if capable parties legally agreed and consented to be man and wife with the mutual understanding that the wife was to support the husband during a certain stipulated time, this collateral agreement would be void since the law establishes, as a result of the marriage which the parties entered, that the husband must furnish the wife with support.

1. *Defective Knowledge*

In order for a person to enter a valid civil marriage it is necessary, at the time when his consent is given, that he know at least in a general way what marriage is and what its effects are. While there is some variance in the statements of courts and authors as to the essential mental capacity necessary for the entrance into marriage, the above seems to be the general intent of the authorities.

It follows that one source of defective knowledge would be the mental incapacity of one or both of the parties. This incapacity might be the result of insanity, idiocy, lunacy, or any other defect or disease of the mind. It might likewise result from a mistake in the identity of the party to whom one expresses his consent. If a man went through a marriage ceremony with Anna, thinking that she was Mary, his lack of knowledge of the identity of his proposed spouse would result in

¹³ Bishop, *New Commentaries on Marriage, Divorce and Separation*, Vol. I, p. 125, § 301, 1891.

his marriage to Anna being held voidable. Invalidating defective knowledge might also be the result of mental incapacity caused by alcohol or drugs which had temporarily removed mental capacity.

Mistake as to the health, wealth, education, character, virtue, rank or social standing does not affect the validity of a marriage.

2. *Defective Intention*

It is evident, from the very nature of things, that any of the causes of defective knowledge would also result in a defect or lack of intention whether it be from a permanent or temporary mental incapacity from whatsoever cause.

All of the courts and authors are in agreement that an exchange of marital consent, which was given in true jest, would render the marriage at least voidable. However, there is considerable disagreement amongst the authorities as to just exactly what does and what does not amount to jest. Certainly, everyone would agree that a marriage ceremony which occurred during the presentation of a drama could not possibly result in a valid marriage. But when facts become more difficult and complicated, one does not find complete agreement. This lack of agreement may be illustrated by *Crouch v. Wartenberg*, 86 W.Va. 664 (1920), and *DeVries v. DeVries*, 195 Ill. App. 4 (1915). In the *Crouch* case the two parties had been engaged and an elaborate press story had reported that the young lady had refused, at the last moment, to marry the young man. Due to the particular circumstances of the parties the gentleman would have been seriously injured in his business affairs by the loss of friends and patrons if the reported story were permitted to stand as true. In order to avoid this result he induced the young lady to go through a marriage ceremony with him, with the definite understanding that neither of the parties would intend to enter into a matrimonial contract and that they did not intend or contemplate consummation of the marriage or assumption of any of the duties resulting therefrom. The ceremony was performed. Thereafter, Miss Crouch brought a bill for annulment. The Court of Appeals held that the marriage had been entered into in jest, and granted an annulment.

In the *DeVries* case from Illinois we find a very similar set of facts. The young lady was under contract with a theatrical company and wished to be freed from her contract obligations. The contract provided that her marriage during the term of the contract would result

in its rescission. Accordingly, and to work this result, she prevailed upon a man from Chicago to go through a marriage ceremony solely for the purpose of freeing her from her contract. It was definitely agreed and understood between the parties that they did not intend to become man and wife, that they never would consummate the marriage or cohabit as man and wife, and would never assume the responsibility of marriage. With this understanding the ceremony took place. Shortly thereafter action was brought for annulment of the marriage. No defense to the action was pleaded by the defendant, and therefore the Court was left to decide, purely as a matter of law, whether or not the marriage had been a voidable one as a result of jest. In refusing an annulment, the Appellate Court of Illinois said:

It is true, as urged by appellant, that marriage is a civil contract and like other contracts requires mutual assent of the parties thereto. But counsel for the appellant fails to distinguish between an agreement to marry and the marriage contract itself. It matters not what the previous agreement was, so long as the parties had the capacity to enter into a marriage contract and in doing so mutually consented thereto in legal form. . . .

From our previous discussion of the canon law on the subject, it is evident that the West Virginia decision in the *Crouch* case was based upon the same general concept that the parties could not possibly have intended to enter into the marriage state when all of the purposes, ends, and effects of marriage had been eliminated. In other words, their agreement did not constitute a mutual assent to be man and wife.

Contrary to the provisions of canon law, at civil law, if the parties, before marriage, intend or even agree to get a divorce in the event that the marriage does not work out satisfactorily, it would not invalidate the marriage. This is true because under the terms and concepts of civil law the parties to the marriage have the legal right to terminate it for legitimate and sufficient grounds under the divorce statute in the event that the marriage proves unsuccessful.

We have seen that under canon law any intention on the part of either or both of the parties to the marriage to completely exclude any possibility of the procreation of children would result in a void marriage. In the civil courts the question as to whether or not the intent of the parties to completely exclude consummation of the marriage would result in a voidable union has presented some problems. In England, the Matrimonial Causes Act¹⁴ provides:

¹⁴ Matrimonial Causes Act, 1937, § 7(1) (a).

In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage. . . .

In the United States some courts have granted annulment generally on the basis that the party who refuses to consummate the marriage has been guilty of fraud which has rendered the marriage voidable. However, Massachusetts has refused to grant an annulment in such a situation.¹⁵ In this regard it is well to remember that the Massachusetts court has said:

Massachusetts has always taken an extreme position on annulment of marriage because of fraud.¹⁶

What has thus far been said about Defective Intention in civil law has presupposed that the marriage was a ceremonial one in which the mutual consent of the parties has been expressed in keeping with the ceremonial form. In case of a so-called "common law marriage," still recognized in many of the jurisdictions of the United States, where the parties may validly marry by the mere private expression of mutual consent here and now to be man and wife, the exclusion by the parties of an essential element of marriage would be held to have nullifying effect. The problem presented in that situation is to determine whether or not the parties actually agreed to be joined in marriage. For example, it repeatedly has been held that the parties had not entered a marriage but had made an agreement for concubinage where the parties to an attempted common law marriage agreed to cohabit as man and wife "so long as it was mutually satisfactory," thus excluding the permanence or perpetuity of the marriage.

One of the striking differences between the civil and canon law in the matter of annulment is to be found in the question of annulment for fraud which induced the consent of one of the parties. As we have seen, no annulment will be granted in canon law on the basis of fraud unless it has resulted in an error of the person. Of course, the same rule was followed in the ecclesiastical courts of England where the grossest types of fraud in the inducement were denied the effect of invalidating a marriage. Since the matter of annulment of marriage in the United States was under the jurisdiction of the equity courts, it is not too difficult to understand how the doctrine that fraud in the in-

¹⁵ *Sasserno v. Sasserno*, 240 Mass. 583, 134 N.E. 239 (1922).

¹⁶ *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N.E. 609 (1929).

ducement of the marriage consent would render the marriage voidable became a part of our civil law. From the earliest days it was considered that all matters of fraud were especially within the jurisdiction of the equity court. It was common practice for the courts of equity to grant rescission of commercial contracts which had been induced by the fraudulent practices of one of the parties thereto. Since the exchange of expressions of consent in a marriage ceremony have certain features in common with commercial contracts, it is not surprising that the courts applied substantially the same principles to the matter of permitting rescission by the offended party of the marriage agreement by the granting of an annulment. With few exceptions, the doctrine of annulment of marriage for fraud in the inducement thereof does not appear in case decisions of the United States until the second half of the nineteenth century. In the early cases annulment was granted only where fraud of the grossest type was clearly proven, generally in the matter of illicit premarital pregnancy by another man. After the doctrine was once instituted, one is not surprised to find a gradual and constant liberalization of the doctrine, especially when one recalls that during the same period of time there developed a growing disrespect for the age-old doctrine of the absolute indissolubility of marriage which showed itself in the adoption of divorce statutes by the various states.

From the earliest times of the doctrine of annulment for fraud, the courts have adopted the principle that only fraud which dealt with the so-called essentials of marriage would be sufficient to invalidate the marriage consent. The essentials of marriage were generally understood to refer to matters touching upon sexual intercourse and procreation of children. As time went on, even the concept of marriage essentials was liberalized and broadened, perhaps at least partially under the influence of the courts of certain states whose divorce laws were exceptionally stringent. Apparently the requirement that necessary fraud must be such as affects the essentials of the marriage was rejected by the New York Court in 1933 in *Schoenfeld v. Schoenfeld*, 260 N.Y.477, (1933) when the Court said:

. . . Not every fraud by reason of which the particular individual may have given consent to the marriage is an adequate basis for annulment. On the other hand, the fraud need not necessarily concern what is commonly called the essentials of the marriage relation—the rights and duties connected with cohabitation and consortium attached by the law to the marital status.

In the same case the Court said:

Any fraud is adequate which is "material, to that degree that, had it not been practiced, the party deceived would not have consented to the marriage." . . .

As we have seen above (footnote 6), under canon law a valid but unconsummated marriage may be dissolved under certain circumstances. There is no comparable rule in civil law. However, generally the equity courts are more liberal in granting annulment of a marriage that has not been consummated than they would be where there has been consummation of the marriage. This principle is well exemplified in the case of *Nocenti v. Ruberti*, 3 A. 2nd 128 (N.J., 1933). In that case two Catholic young people went through a civil marriage ceremony with the complete understanding that it would be followed by a marriage in the Catholic rite. After the civil ceremony had taken place, the young man refused a second marriage in the Church and the young lady refused to cohabit with him. She brought an action for annulment of the civil marriage. In its decision, the New Jersey Court said:

Where a marriage has not been consummated, it is so inchoate and incomplete that the status of the parties is similar to that of parties to an executory contract, and it may be annulled without violating any considerations of public policy.

No satisfactory reason of the law will justify the courts in declaring valid such a contract of marriage when tainted with fraud or duress, where the only effect will be the punishment of the innocent and the confiscation of his or her property by the deception. If the marriage is declared valid, it will exist in name only, preventing both parties from marrying again and bringing the marriage relation into disrepute. Every reason for relief from fraud is applicable here, where a denial of relief is fraught with evil consequences much greater than those flowing from ordinary contracts.

In many states the inexperience and indiscretion of youthful complainants has caused them to be considered particularly entitled to the protection of the equity court. In many instances the courts have applied exceptionally liberal rules to protect the interests of such complainants. This is well exemplified in the case of *Brown v. Scott*, 140 Md. 258 (1922). In that case a professional swindler who had spent considerable time in penitentiaries and reformatories and who, after the marriage, was immediately arrested for crimes committed before the marriage, led an 18-year old, by his misrepresentation and lies, to believe that he was an honored member of society and that he had served in World War I with exceptional distinction. While, as we have

seen, courts will not ordinarily grant annulment for fraud as to health, wealth, character, reputation, etc., but will require that the fraud deal with matters essential to marriage, still, in this case, due to the youthful age of the complainant, the Maryland court granted an annulment and had this to say:

To approve and sanction a fraud so gross and destructive, and to condemn this schoolgirl to live out her life bound by the ties of marriage in an alliance so degrading, would be revolting to the common sense of justice, and would profane the very marriage relation itself. She was, it is true, culpably imprudent and indiscreet, but she was only a child, and therefore peculiarly an object of the solicitude and protection of a court of chancery, and the appellee should not be permitted by it to retain the profits of his fraud, which succeeded only because of that very imprudence and want of discretion so often associated with youth, upon which he relied.

Fraudulent representations which induce the other party to marry in violation of religious principle are not held to be sufficient fraud upon which to predicate an annulment. This is exemplified by *Oswald v. Oswald*, 146 Md. 313 (1924). In that case the woman was a divorcee, and her former husband was still living. She falsely represented to Oswald that her former marriage had been terminated by the death of her husband. Believing that she was a widow, as she represented, Oswald married her in a Catholic ceremony. After nine years of cohabitation Oswald discovered that the previous husband was still living and that at the time of their marriage his wife had been a divorcee. Knowing that the marriage was void in canon law and that his cohabitation with her was illicit, he left her immediately and brought action for annulment. Counsel for the complainant argued that due to the religious faith of the complainant and the canons of the church, the false representations in this case did go to the essentials of the marriage contract. In denying the annulment the Court said:

. . . The question is raised whether members of one church can succeed in nullifying a marriage upon false representations, when the same representations would afford no cause of action to members of other churches. We are not inclined to give our sanction to such a proposition. . . .

It is to be remembered that in the Oswald case we have a situation where the parties had cohabited for nine years prior to the annulment proceedings. Under a similar set of facts, but where the marriage had not been consummated, it is believed that the courts of several states would grant the annulment.

As has been indicated, perhaps there is no area in the law of annulment where greater divergence between State and Church law can be

found than in the question of annulment of marriage because of fraudulent representations which procured the marital consent.

III. MANDATORY FORM

A third requirement for a valid marriage in either Church or State is the conformance with all mandatory (invalidating) procedure as to the manner or method of entering the marriage relation.

A. IN CHURCH

Canon 1094 provides that only those marriages are valid which are contracted before the pastor, Bishop, or a priest delegated by either of them, and at least two witnesses.

Two exceptions to the required presence of the pastor, Bishop, or their delegate are made in Canon 1098. If none of the named ecclesiastics can be approached or be present without grave inconvenience, the parties may marry before the witnesses alone:

1. in danger of death, and
2. without the danger of death, if it is prudently foreseen that the same set of facts (unavailability of a proper ecclesiastic) will continue for at least a month.

Provision is made for marriage by proxy in Canon 1091, which also establishes certain restrictions upon the use of a proxy.

B. IN STATE

In most of our states consent or common law marriages were recognized in the early days of our country and they therefore became part of our common law on marriage.¹⁷ Since then all of the states have adopted statutes setting forth the procedural requirements for entering into marriage, e.g. procurement of a license, recording of marriages, the civil and religious officers who are authorized to assist at ceremonial marriages, and others. Such statutes are generally held to be only directory, and therefore failure to comply with them does not invalidate the marriage. Such statutes tell how a valid marriage *may be*, not how it *must be*, entered. Therefore, they are not interpreted as abrogating common law or informal marriages, unless the statute expressly so provides.

In more than half of the states their statutes do abrogate informal marriages, and require a ceremony before one of the designated civil or religious officials in order for the marriage to be held valid. In such

¹⁷ But see *Gabaldon v. Gabaldon* (1934) 38 N.M. 392, 34 P. 2d 672 (1934).

a statutory state lack of a formal or ceremonial marriage would render the attempted marriage absolutely void.

While, as we have seen, canon law makes express provision for proxy marriages, few of the states have dealt with the problem by statute. In states which do not have a statutory provision, the decisions as to whether or not a proxy marriage was valid are in considerable disagreement. Apparently, some of the decisions have been influenced by a consideration of whether or not a common law marriage is valid in the state.

CANONICAL PROCEDURE FOR ANNULMENT

While the reader is conversant with the civil procedure in an equity court for the annulment of a marriage and probably also is acquainted with the basic facts of procedure in the ecclesiastical court, still the author feels that this article would be incomplete without some brief reference to the organization, personnel, and procedure of a canonical court.

Lower Court

Except in cases which are expressly reserved to the Holy See (Rome), the Bishop, within his diocese, is the *ex officio* judge of all matters and may exercise his jurisdiction either personally or through others (C.1572). In each diocese the Bishop is required to appoint an Officialis (Official judge) and may appoint one or more Vice-Officials (C.1573). The Official presides over the diocesan court.

The court personnel, in nullity cases, is further comprised of (1) an Auditor, whose duty it is to summon and examine witnesses and to do such other things as may be assigned to him. His position is somewhat similar to that of the Master in Chancery in the civil equity courts, except that he is not authorized to make findings of fact or recommendations; if needed, other Auditors may be appointed (C.1580); (2) the Promoter of Justice, whose duty it is to take part in any case in which the public welfare is concerned, e.g., if scandal has resulted from the public cohabitation of the parties to an invalid marriage, if neither party seeks an annulment, the Promoter of Justice has the duty of petitioning the decree of nullity (CC. 1586 to 1590). The position of the Promoter of Justice has much in common with that of the State's Attorney in civil law; (3) the Defender of the Bond (*Defensor Vinculi*), an officer of the court whose duty it is to attempt in each case to establish and defend the validity of the mar-

riage by attacking the flaws and weaknesses in the evidence presented which tends to prove nullity, and to call witnesses of his own whose testimony will tend to strengthen the case for the defense. (It is interesting to note that by statute some states have created the *advocate vinculi* who represents the state in all annulment cases and whose duties are similar to those of the Defender of the Bond) CC. 1586 to 1590); (4) Procurators (attorneys), who, in the United States, are always priests who are especially trained in Canon Law. One is appointed by the court to represent the plaintiff (libellant) and one may be appointed for the defendant (respondent); (5) the Notary, whose duty it is to transcribe all the testimony given on trial (similar to a court reporter in a civil case), to attest records, furnish certified copies, etc.; and (6) other necessary personnel.

Each Catholic diocese has a court constituted in this manner. If it is the court of an archdiocese, it is called a Metropolitan Court; if of any other diocese, it is referred to as the Court of the Ordinary. These are lower courts or courts of first instance, for all cases arising in the diocese; but, as appears hereafter, they may act as courts of review.

Courts of Review

If a case is appealed from the Court of the Ordinary, the review court is that of the Metropolitan; if a case is appealed which was first heard in the Metropolitan Court, it is reviewed by a Court of the Ordinary which the Archbishop has chosen, with the approval of Rome, as the court of review for all cases originating in the Metropolitan Court.

If a case was heard in a lower court by only one judge, it will be reviewed by one judge. If it is an appeal from a three-judge court (Collegiate Court), it must be reviewed by a court of three judges (CC, 1594 to 1596).

The court of second or final appeal (the Supreme Court) in all cases originating in any lower court is the Sacred Roman Rota (C.1598). It is ordinarily referred to as the Roman Rota. Any party has the right to appeal his case directly from the lower court to the Roman Rota.

Ordinarily, an appeal is decided upon a record of testimony from the lower court and the briefs which are presented therewith. However, the court of review may, if it sees fit, re-call witnesses, summon new ones, and investigate new evidence.

There are certain other types of courts provided for in Canon Law, but mention of them is not essential to our present discussion.

Procedure

Canon law provides for two different procedures for the declaration of nullity of a marriage. The type and nature of the case in question determines which procedure is to be followed:

1. *Summary process*.—This is a simple form and applies only to those cases in which it can be known for certain from authentic documents that a marriage was invalid because of certain impediments; namely, disparity of cult, holy orders, solemn vow, chastity, previous marriage, consanguinity, affinity, or spiritual relationship. These cases are always heard by one judge and the court which hears such cases is often referred to as the Document Court. A high percentage of marriage cases are heard in this summary process.

2. *Formal trial*.—Any marriage case which does not qualify to be heard by the summary process must be decided in a formal trial, which is always heard by a three-judge court (Collegiate Court).

When a marriage problem is first submitted to the Catholic Chancery Office, generally by the plaintiff's pastor, an Advocate is appointed to investigate the facts and make a preliminary report. If his report is favorable, an Auditor is appointed who goes more thoroughly into the facts and makes his report as to probable cause and the competency of the court to hear the case. If there is probable cause, the plaintiff or his attorney prepares a libel, or complaint, which is filed with the Official. The Official then designates the Collegiate Court of three judges who determine the questions of jurisdiction and the right of the plaintiff to be heard. In case of defects, amended complaints are permitted. If the court accepts the complaint, an Auditor is appointed to summon witnesses and hear their testimony. The witnesses are heard in private and under oath. The judges of the court are not present when the witnesses are testifying in order that their judgment may not be prejudiced by the appearance, conduct, or testimony of the witnesses. During the giving of testimony, ordinarily there are present besides the witness only the Auditor, the Promoter of Justice, the Defender of the Bond, and the Notary. Before the witness is admitted to testify, questions to be asked are submitted by the Defender of the Bond, and if he wishes, also the Promoter of

Justice, to the Auditor who is to examine and question the witness. The Notary reduces to writing all questions and answers.

After the hearing has been completed and all witnesses heard, the official transcript is completed by the Notary. The plaintiff's attorney prepares a brief and the attorney for the defendant may do likewise. These briefs are delivered to the Defender of the Bond who then prepares his own brief in which he points out any matter that tends to prove the validity of the marriage or which tends to weaken the argument of the plaintiff.

The transcript of the hearing, together with all briefs which have been filed, are then submitted to the judges, each of whom reviews the entire case and writes a separate opinion. Thereafter, at an appointed time, the three judges meet and discuss the matter, and, if possible, reach a decision. If no decision can be reached at that time, further testimony and other witnesses may be required. When a decision is finally reached, it will be either that "nullity has been proven" or "nullity has not been proven."

If the decision of the lower court is that the marriage is invalid, the Defender of the Bond is obligated under law to appeal the case. If the decision of the lower court has been that the marriage is valid, the plaintiff may or may not take an appeal, as he sees fit.

If the decision of nullity of the lower court is approved by the court of review, the Defender of the Bond may appeal to the Roman Rota within ten days after the judgment of the reviewing court or consider the matter adjudicated, depending upon his conscientious opinion as to whether or not a further appeal is necessary. If no appeal is perfected by the Defender within ten days, the marriage stands as null and the parties thereafter may remarry.

CONCLUSION

While the author is conscious of the fact that this has been a cursory and far from exhaustive presentation of Canon Law on the matter of annulment of marriage, still it is his hope that it may assist in a small way to enable some of his colleagues in the legal profession to recognize and appreciate the dual obligation upon the Catholic client in matters matrimonial and to thus enable them to better practice the role of a social physician, which the author feels is the especial duty of an attorney.

REFERENCES

1. Codex Juris Canonici, Typis Polyglottis Vaticanis, Roma, Italia (1929).
2. Manual of Canon Law—Ramstein, Terminal Printing & Publishing Co., Hoboken, N.J. (1948).
3. Canon Law—Bouscaren & Ellis, The Bruce Publishing Co., Milwaukee, Wis. (1951).
4. Madden on Persons and Domestic Relations, West Publishing Co., St. Paul, Minn. (1931).