of the civil law. The Sacred Penitentiary, in the instruction mentioned above, prudently cautioned the parties not to forget that in complying with the civil law they were doing nothing more than going through a civil ceremony, since they were already married. In the event that a priest performs this civil ceremony he is to take care to warn the parties and the witnesses that the parties are already married. At all costs he is to preclude the possibility of having the sacrament of matrimony simulated. Simulation of a sacrament, i.e., placing the sacramental sign without having the sacrament come into existence, is never allowed, since it is an action that is intrinsically evil. It would be advisable that the compliance with the civil requirements take place privately.

CHAPTER IX

THE DISPENSING POWER OF A PRIEST ASSISTING AT A MARRIAGE ACCORDING TO CANON 1098

In allowing marriage to be contracted according to the extraordinary form, the legislator did not thereby relax the laws in regard to matrimonial impediments. The prescripts of Canon 1035 still obtain. Canon 1098 is so to be understood as to allowing this form of marriage in certain circumstances to parties who are not prohibited by law from entering marriage. The parties will still be bound, as parties are in contracting marriage according to the ordinary form, by Canon 1036 in regard to impedient and diriment impediments. If an impedient impediment is present and is not dispensed from by a competent ecclesiastical authority, the marriage would nonetheless be valid.[1] The use of the extraordinary form is not made dependent on the absence of impediments. Canon 1098 does not have a clause to that effect. In virtue of Canon 11, the use of the extraordinary form would not be invalid in the event that an impediment was present. However, if a diriment impediment is present and is not dispensed from, the marriage contracted according to the extraordinary form would be invalid, not by reason of the form of marriage employed, but by reason of the incapacitating effect of the impediment.[2]

It is not within the proposed scope of this dissertation to go into the problem of the cessation of law in regard to impediments. It may be briefly noted, though, that impediments of the natural or the positive divine law do not cease. As for ecclesiastical laws, the general rule is that neither a *grave incommodum* nor the impossibility of seeking a dispensation, whether the impossibility be of a private or of a common character, excuses one from the incapacitating effect of a diriment impediment. They may excuse one from a serious sin, but cannot restore capability which the law has taken

[1] Canon 1036, § 1.
[2] Canon 1036, § 2.

away. There is an exception to this general principle that is generally admitted by canonists. It is the case wherein the natural right of a person to contract marriage supersedes the ecclesiastical law constituting such an impediment. In such an eventuality, a person would otherwise have to abstain from marriage. The impediment, in such a case, as opposed to the natural law, would cease.[3]

The example given by Gasparri is taken from a problem presented to the Holy Office. A Chinese Catholic man lived among pagans in China and it was impossible for him to go anywhere else. There were no Christians in the region. He contracted marriage with a pagan woman. The Holy Office said that the parties were not to be disturbed. Considering the circumstances, one can readily see why commentators restrict this doctrine solely to the impediment of disparity of worship. It seems not to obtain in the case of any other impediments.

Some authors opine that an invalidating law would also cease *ex epikeia* in a case of a *gravissimum incommodum,* when it is a question of an impediment from which a dispensation is usually granted.[4] Cappello explains his opinion in the following manner:

1. If the purpose of the law becomes harmful to the common good, the law ceases to bind, because it may be presumed that the legislator would not want such harm to result.

2. If in a particular case the law would tend toward the *damnum animarum,* e.g., when a dying person involved in concubinage and being bound by an impediment from which he could not seek a dispensation with a view to contracting marriage would be in a proximate danger of sin and losing his soul. In such a case the law would not bind. This would also be probably true if the impediment was a diriment one.[5] All authors agree that after the use of *epikcia* in an invalidating law one must look, if possible, to the

[3] Gasparri, nn. 260 and 595; Cappello, *De Matrimonio,* n. 199; Wernz-Vidal, *Ius Matrimoniale,* n. 273, footnote 41; Payen, I, n. 567.

[4] E.g., Cappello, *loc. cit.;* De Smet, "Responsa," *Collationes Brugenses* XII (1907), 548-549.

[5] Ballerini-Palmieri, *Opus Theologicum Morale,* I, n. 318; Vlaming, *Praelectiones Iuris Matrimonii,* I, n. 198.

validity of the act by means of a subsequent dispensation or sanation.[6]

Foreseeing that at times such an impediment or impediments might be present and the concession in Canon 1098 would be meaningless, the legislator benignly granted certain faculties in the law itself to the priest who would be assisting at such a marriage.

When the parties are in danger of death, then, in order to provide for the consciences of the parties and, whenever the case demands it, for the legitimation of their offspring, and with reference both to the form to be observed in the celebration of marriage and to all of the impediments of the ecclesiastical law, public or occult, even multiple, except the impediments arising from the sacred order of priesthood and from affinity in the direct line when the marriage has been consummated, local ordinaries can dispense their subjects anywhere and everyone actually staying in their territory, provided that scandal be obviated and that when a dispensation is granted from the impediments of mixed religion and of disparity of worship, the usual promises are given.[7] This concession is extended by the Code, in the cases wherein the local ordinary cannot be reached, to a priest who assists at a marriage that is being contracted according to Canon 1098.[8]

Outside of the case of danger of death, whenever an impediment

[6] Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici* (1 vol. in 5 toms., Tom II [De Legibus Ecclesiasticis], Mechliniae: H. Dessain, 1930), Tom II, n. 294.

[7] Canon 1043: Urgente mortis periculo, locorum Ordinarii, ad consulendum conscientiae et, si casus ferat, legitimationi prolis, possunt tum super forma in matrimonii celebratione servanda, tum super omnibus et singulis impedimentis iuris ecclesiastici, sive publicis sive occultis, etiam, multiplicibus, exceptis impedimentis provenientibus ex sacro presbyteratus ordine et ex affinitate in linea recta, consummato matrimonio, dispensare proprios subditos ubique commorantes et omnes in proprio territorio actu degentes, remoto scandalo, et, si dispensatio concedatur super cultus disparitate aut mixta religione, praestitis consuetis cautionibus.

[8] Canon 1044: In eisdem rerum adiunctis de quibus in can. 1043 et solum pro casibus in quibus ne loci quidem Ordinarius adiri possit, eadem dispensandi facultate pollet tum parochus, tum sacerdos qui matrimonio, ad normam can. 1098, n. 2, assistit, tum confessarius, sed hic pro foro interno in actu sacramentalis confessionis tantum.

is discovered when everything is already prepared for the marriage and the marriage cannot, without probable danger of grave harm, be deferred until a dispensation is obtained from the Holy See, the ordinaries of places can, subject to the clauses at the end of canon 1043, grant a dispensation from all the impediments mentioned in Canon 1043. This faculty may also be used when there is question of the convalidation of an invalid marriage.[9] These concessions also are extended to the priest assisting at a marriage that is being contracted according to Canon 1098. He may use this power only for occult cases and only in cases when even the local ordinary cannot be reached in time or, if he can be reached, it would involve the danger of violation of a secret.[10]

Article 1. The Subject of This Power

The wording of number 2 of Canon 1098, in prescribing the calling of another priest and his assistance at the marriage, is indeed very general. The legislator has laid down no restrictions, and therefore any priest, a member of a religious order or congregation, or a member of the secular priesthood, whether of the Latin or of one of the Eastern rites, who is not a qualified witness for the marriage in question, would fulfill the requirement in the canon. All that is called for is that he have received the sacred order of priesthood.

The mere fact that parties are constituted in danger of death does not suffice to bestow upon such a priest the acknowledged power of dispensing. The text of Canons 1044 and 1045, § 3, predicate the grant of this dispensing power on the supposition that such a

[9] Canon 1045, § 1: Possunt Ordinarii locorum, sub clausulis in fine can. 1043 statutis, dispensationem concedere super omnibus impedimentis de quibus in cit. can. 1043, quoties impedimentum detegatur, cum iam omnia sunt parata ad nuptias, nec matrimonium, sine probabili gravis mali periculo, differri possit usque dum a Sancta Sede dispensatio obtineatur.

Canon 1045, § 2: Haec facultas valeat quoque pro convalidatione matrimonii iam contracti, si idem periculum sit in mora nec tempus suppetat recurrendi ad Sanctam Sedem.

[10] Canon 1045, § 3: In iisdem rerum adiunctis, eadem facultate gaudeant omnes de quibus in can. 1044, sed solum pro casibus occultis in quibus ne loci quidem Ordinarius adiri possit, vel nonnisi cum periculo violationis secreti.

priest is *assisting* at a marriage that is being contracted in accordance with the norm enacted in Canon 1098, n. 2. It has been shown that the presence of two witnesses is always required even in a marriage contracted according to the extraordinary form. Therefore, it may be said that if no witnesses are present, a marriage cannot take place even according to the extraordinary form. Were a priest to be called and were he to be present, he would not be assisting at a marriage that is to be contracted *ad normam can. 1098, n. 2*. Hence, he would not enjoy, under such circumstances, the faculties mentioned in these canons.

This seems to be the only logical interpretation of the canons involved. The grammatical sense confirms this interpretation. The canon reads "sacerdos qui matrimonio, ad normam can. 1098, n. 2, assistit." It is a priest who assists at a marriage that is being contracted according to the norm of Canon 1098, n. 2, and not a priest who assists according to Canon 1098 at a marriage. This seems the only meaning the legislator could have intended. He has made no general provision for a form of marriage without witnesses. He is not to be considered as having done so here. Had the legislator wished to give *any* priest this faculty of dispensing, whether or not the priest assisted at a marriage according to Canon 1098, n. 2, he could have used a different mode of expression, e.g., sacerdos, de quo in can. 1098, or something similar. Further, such a priest would have by law more power than a parochial assistant, to whom a general delegation to assist at marriages could be given. The law gives such an assistant no power of dispensation, even in danger of death.

The burden of proof would fall on those who claim that this power could be exercised even though no witnesses are present. They cannot fall back on the *finis legis*, i.e., that the legislator wanted to make provision for cases of danger of death. Provision is made in the very same canon. Power of dispensing is given to a confessor, to whom the law also gives the faculty of hearing the confession of anyone constituted in danger of death. The priest could hear the party's confession and grant the necessary dispensation in the internal sacramental forum.[11]

[11] Canon 882 cum c. 1044.

In assisting at such a marriage, the priest does not necessarily have to take an active part. As long as he is present at the celebration of the marriage to be celebrated according to Canon 1098, in the presence of at least two witnesses, or, as has been explained above, probably even in the presence of one other witness besides himself,[12] he can be considered as assisting, and thus fulfills the requirement of Canons 1044 and 1045, § 3.

The general law has indeed given these priests wide faculties. Their use, however, must be accommodated to the rules of the Code on the loss of jurisdiction in priests who are under excommunication, under a general suspension, or under suspension from the power of jurisdiction, regardless of whether this disqualification is accompanied by a declaratory or a condemnatory sentence passed on the delinquent priest.[13] An act of jurisdiction—and the granting of a dispensation from a matrimonial impediment is an act of jurisdiction—whether placed in the internal or the external forum by an excommunicated cleric is unlawful. Once a declaratory or a condemnatory sentence has been passed, or if the cleric is a "*vitandus*," such an act is invalid, except in the case wherein a party, in danger of death, requests sacramental absolution and, in the same circumstances, if other priests are unavailable, the other sacraments and sacramentals.[14] If no sentence has been passed and the priest is not a *vitandus*,[15] then an act of jurisdiction may even be lawful. This would eventuate where the faithful reasonably request sacraments and sacramentals, especially when other ministers cannot be had.[16] The same restrictions that circumscribe the jurisdiction of an excommunicated priest apply also to a priest under suspension *ab officio* or *a iurisdictione*.[17]

In wishing to contract marriage, the parties would be making a reasonable request of an excommunicated priest when they seek a dispensation. The canon does not state that a priest may exercise jurisdiction only in the *conferral* of a sacrament. He may use it

[12] *Vide supra*, p. 136 and p. 137.

[13] Canons 2232, § 1; 2258, § 2; 2261, 2264, 2278, 2279, § 2, n. 1; 2284.

[14] Canon 2264 cum c. 2261, § 3.

[15] Cf. Canons 2258, § 2; 2343; 2266.

[16] Canon 2264, cum c. 2261, § 2.

[17] Canons 2279, § 1; 2284.

whenever the faithful request (*petere*) a sacrament or sacramentals, as was noted above. The parties are the ministers of the sacrament of matrimony. However, if a diriment impediment is present, they cannot confer or receive the *sacrament* of matrimony. Requesting a dispensation in such a case is equivalent to requesting a sacrament.[18] It can be said, then that when a priest assists at a marriage that is being contracted according to the extraordinary form described in Canon 1098 he may:

1. if he is excommunicated or suspended *ab officio* or *a iurisdictione* and no sentence has been passed upon him to that effect, and if he is not a *vitandus*, validly use the faculties granted him both in Canon 1044 and in Canon 1045, § 3, and even do so licitly if requested by the parties;
2. if his excommunication or suspension is accompanied with a condemnatory or a declaratory sentence, or if he is a *vitandus*, validly use the grant of power conceded in Canon 1044 when he is requested by the parties, but not the power mentioned in Canon 1045, § 3.[19]

Article 2. The Nature of This Power

The Code itself defines a dispensation as the relaxation of a law in a special case.[20] Inasmuch as a dispensation has to do with releasing a subject from observing a law, it must stem from the legislator himself, from his successor, from his superior, or from one to whom this faculty has been given.[21] One can readily see, then, that a dispensation denotes an act of jurisdiction.

Jurisdiction, the Code tells us, can be ordinary or delegated. When the power of jurisdiction is attached to an ecclesiastical office by the law itself, it is called ordinary power. When it is committed to a person, it is known as delegated.[22] The office spoken

[18] Canon 19; Leges quae poenam statuunt . . . strictae subsunt interpretationi.

[19] Interdict has not been mentioned above because it does not entail the loss of jurisdiction. Consequently, a priest under interdict, assisting at a marriage being contracted according to Canon 1098, may validly use the power of dispensing in such circumstances.

[20] Canon 80.

[21] Canon 80.

[22] Canon 197, § 1.

of must be taken in the strict sense of the term, i.e., as it is defined in Canon 145, § 1, and not in the broad sense.[23] The power must be attached to an office which is constituted by divine or ecclesiastical ordination as a fixed entity, conferred according to the norms of the sacred canons, and contains in itself at least a participation in ecclesiastical power whether of orders or of jurisdiction. If the power is not ordinary, it must be delegated, because the Code has made the two mutually exclusive.[24] Ordinary power may be delegated to others unless there be a rule to the contrary. Delegated power, when shared *ad universitatem negotiorum,* may be subdelegated further. But delegated power when shared for the performance of a single act and when deriving from an authority lower than that of the Holy See, cannot be subdelegated further apart from a special provision to the contrary.

The question that must be determined here is whether the power of dispensing as enjoyed by a priest who is assisting at a marriage that is to be contracted according to the norm of Canon 1098 is, in virtue of the grant made by the general law of the Church, an ordinary or a delegated power. There is no doubt that this power is not ordinary, for such a priest does not have an office in the strict sense of the term. Since the power is not ordinary, it must be delegated. In view of the fact that it is not a delegation from a person, it must be a delegation *a iure,*[25] and, therefore, may not be subdelegated to others.[26]

Article 3. The Extent of This Power

The power given to the assisting priest may be exercised over anyone who calls him to assist at his or her marriage that is being contracted according to the extraordinary form. The person may belong to his rite or to another rite. In view of the grant made

[23] Kearney, *Principles of Delegation,* The Catholic University of America Canon Law Studies, n. 55 (Washington. D. C.: The Catholic University of America Press, 1929), p. 51.

[24] Kearney, *op. cit.,* p. 56.

[25] This prescinds from the possibility that the priest in question may have received a delegation of this power from the pastor or from the local ordinary, who hold it as ordinary power, attached to their offices.

[26] Canon 199, § 4.

by the supreme legislator in the Oriental Law on the matrimonial discipline, it may be exercised even over the faithful of the Oriental rites whenever a priest of the Latin rite assists at a marriage of the faithful of the Oriental rites which is being contracted according to the extraordinary form, as outlined in Canon 89 of the Oriental Code on Marriage Discipline.[27] Since the powers of dispensing granted by the Code to such priests are different according as it is a case of danger of death or not, it is indicated to treat the two cases separately.

A. *Dispensatory Power When Parties Are In Danger of Death*

The power that is granted may be used when either or both parties are in danger of death.[28] It may be exercised even when it is the party who is not bound by an impediment that is in danger of death.[29] Whereas formerly the use of the faculty had been restricted to cases in which the parties had been living in concubinage or in an invalid or civilly attempted marriage, this restriction no longer obtains in the present discipline. It may, therefore, be used even when marriage is being contracted for the first time.

This grant is made to the assisting priest for cases in which the local ordinary cannot be reached in time. At times this will be understood, for otherwise one is not free to employ the extraordinary form of marriage, since the ordinary can delegate the priest to assist at the marriage. However, in cases in which the extraordinary form is to be invoked and the local ordinary can be reached, the assisting priest will not enjoy this faculty. The Code Commission has decided that it is to be considered that the ordi-

[27] Pius XII, motu propr. *Crebrae Allatae Sunt,* cann. 89, 33, 34, 35—*AAS,* XLI (1949), 89-119.

[28] Since the *urgens mortis periculum* of Canon 1043 is to be understood in the same sense as the *mortis periculum* of Canon 1098 (O'Keeffe, *Matrimonial Dispensations—Powers of Bishops, Priests and Confessors,* The Catholic University of America Canon Law Studies, n. 45 [Washington, D. C.: The Catholic University of America, 1927], p. 111), *vide supra,* pp. 104-109.

[29] Gasparri, n. 393; De Smet, *De Sponsalibus et Matrimonio,* n. 759; Wernz-Vidal, *Ius Matrimoniale,* n. 413; Cappello, *De Matrimonio,* n. 231; Chelodi, *Ius Matrimoniale iuxta Codicem Iuris Canonici* (Tridenti, 1921), n. 41 (cited hereafter as *Ius Matrimoniale*); S. C. S. Off., 1 iul. 1891—*Fontes,* n. 1139.

nary cannot be reached if he can be reached only by telephone or telegraph.[30] As explained above, one must remember that the usual means of communication with the local ordinary is by letter or by personal approach. Therefore, one is not bound nor is one expected to use extraordinary means or to undergo serious inconvenience (*grave incommodum*) in order to contact the ordinary.[31] In this connection it should be noted that the use of the faculty is granted when the *ordinary* cannot be reached. Therefore, one does not have the obligation of approaching his delegate for a dispensation, even in the event that this delegate can easily be approached. This may be done, however.[32]

The scope of this power is as wide as the ordinary's power. The priest may dispense from all impediments of the ecclesiastical law, whether impediment or diriment, public or occult, whether single or multiple, with the exception of the diriment impediments arising from the sacred order of priesthood and from affinity in the direct line when the marriage has been consummated. In regard to affinity, it must be remembered that the restriction rests on the fact of the marriage's consummation. If the marriage had not been consummated, the dispensation could be granted. Oesterle [33] and Bender [34] reason that one may apply the provision of Canon 1019, § 2, in such a case. The canon accepts a sworn statement in certification of the free state of the parties if there is danger of death,

[30] P.C.I., 12 nov. 1922: Whether in cases mentioned in cc. 1044 and 1045, § 3, it is to be considered that the Ordinary cannot be reached when recourse can be had to him neither by letter, nor by telegraph nor by telephone; or also when it is impossible to reach him by letter, though he can be reached by telegraph or telephone. *R.* In the negative to the first part; in the affirmative to the second; that is, for the effect mentioned in cc. 1044 and 1045, § 3, it is to be considered that the Ordinary cannot be reached if recourse to him can be had only by telegraph or telephone.—*AAS, XIV* (1922), 662; Bouscaren, *Digest,* I, 502.

[31] *Vide supra,* pp. 89-94; Cappello, *De Matrimonio,* n. 237; Payen, I, n. 668, footnote 1, page 500; Gasparri, n. 397.

[32] De Smet, *op. cit.,* n. 792; Oesterle, *Consultationes de Iure Matrimoniali,* p. 110. Vlaming (*Praelectiones Iuris Matrimonii,* II, n. 412) holds the contrary opinion.

[33] *Consultationes de Iure Matrimoniali,* p. 118.

[34] Vlaming-Bender, *Praelectiones Iuris Matrimonii,* p. 299.

provided that there are no indications to the contrary, and as long as no further proof is available. The legislator knows that a solemn process to investigate the non-consummation of the marriage in question would be impossible in a case wherein danger of death threatens. If such were his purpose, the words *consummato matrimonio* would be superfluous and meaningless. Accordingly, as long as the party whose marriage caused the impediment of affinity swears that his or her marriage has not been consummated, the sworn statement can be accepted and the dispensation may be granted.

The faculty given to the local ordinary in Canon 1043 also includes the power to dispense from the formalities to be observed in the contracting of marriage. There are canonists who extend this power to the priest assisting at a marriage that is being contracted according to the norm of Canon 1098, n. 2.[35] This opinion seems to rest on a superficial reading of the two canons involved. True, Canon 1044 states that the same power is enjoyed by the priest assisting at a marriage that is being contracted according to Canon 1098 as is enjoyed by the local ordinary through Canon 1043. However, Canon 1044 states that this assisting priest is assisting at a marriage that is being contracted according to the norm of Canon 1098, n. 2. A closer inspection of the texts involved seems to deny to such a priest this power of dispensing from the form. If he were able to dispense from the form, he could dispense either from the presence of a qualified witness, or from the presence of the witnesses, or from both. There is no necessity of dispensing from the presence of a qualified witness, for his absence or unavailability is presupposed in Canon 1098 and it is on this absence that the use of the extraordinary form is predicated.

As for dispensing from the presence of the witnesses, this seems highly illogical. First, there is no reason to dispense from their needed presence, for they are already present. Then, his entire power is based on the fact that he is assisting at a marriage *una cum testibus,* as Canon 1098, n. 2, states. If there are no witnesses, he is not assisting at a marriage in the manner of the priest mentioned

[35] Cappello, *De Matrimonio,* n. 239; Payen, I, n. 668; Wernz-Vidal, *Ius Matrimoniale,* n. 426; Heylen, *Tractatus de Matrimonio,* n. 671, Gasparri, n. 397.

in Canon 1098, n. 2. Granted their presence, it seems that he cannot dispense from the need of their presence, for one may justly ask whether it is possible to dispose of the very basis of one's power and still retain that power.

The fact that Canon 1044 grants such a priest the same power that is granted to the ordinary in Canon 1043 is no argument for the grant of the power of dispensing from the form. The legislator did not have to expressly exclude this, for the very notion of a priest assisting at a marriage that is being contracted according to the extraordinary form presupposes the presence of witnesses and therefore precludes the possibility of dispensing from their presence. Not everything is always expressed; some things are to be understood from the context.[36] Canon 118 declares that only clerics can receive the power of jurisdiction. Yet, the Roman Pontiff upon his election obtains the fullness of jurisdiction. If one were to consider Canon 118 alone, then one would have to say that only a cleric can be elected pope. This is not true. The two canons must be understood together in the sense that, even though at his election the Roman Pontiff is not a cleric, he nevertheless automatically receives jurisdiction. For these reasons, then, it is the opinion of the writer that, even though the canon seems to imply that such a priest may dispense from the form, he does not have that power. On the other hand, because of the extrinsic probability of the opposite opinion, in consideration of the canonists who espouse it, it may, in virtue of Canon 15, be followed in practice till such time that the Holy See declares otherwise.

Every dispensation requires a just and reasonable cause, with due regard to the gravity of the law from which one is dispensing, otherwise the dispensation granted by a subordinate is illicit and invalid.[37] The faculty under discussion would also require a just and reasonable cause for its use. According to the common interpretation, the legislator has listed two causes in consideration of which the faculty can be used. They are: (1) the making of due provision for the consciences of the parties, and (2) the making of

[36] Canon 18: Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem *in textu et contextu consideratam*. . . .

[37] Canon 84.

due provision, should the case so require it, for the legitimation of the offspring.[38] The *et* joining the two causes or conditions is, according to the common opinion, to be taken disjunctively, even though at times it will be found that they are simultaneously present. Some commentators, and with merit, very expressly declare that either of these two must be in evidence for the validity of the dispensation. They base their argument on the text of the canon, viz., *ad consulendum*. . . . They argue that this denotes the reason for the faculties' use. A further argument can be found in the historical background, for in the original grant in 1888, in the Leonine Faculty, these clauses were inserted even though in the proposed draft submitted to the Holy Office they were lacking.

Recently an opinion has been proposed by Oesterle,[39] and espoused by Bender,[40] that the canonical cause is the *urgens mortis periculum*. The provision for the consciences of the parties and for the legitimation of the offspring is to be regarded simply the motive which the legislator had in granting this faculty. The argument is based on the verbal signification of the preposition *"ad"*; on a different interpretation of the Leonine Faculty and of the schema proposed to the Holy Office, and, finally, on the interpretation of Article VII of the Decree *Ne temere* taken in conjunction with the later replies which accorded the priest mentioned therein the power of dispensing.

The common opinion seems the better of the two. It is an axiom in jurisprudence that in every law each word must have some meaning, so that it is not superfluous. *Verba in legis interpretatione non debent esse superflua. Verba debent aliquid operari et non debent esse superflua.*[41] To espouse Oesterle's opinion would necessitate

[38] Gasparri, n. 394; Wernz-Vidal, *Ius Matrimoniale*, n. 413; Payen, I, n. 646 (where this interpretation is called certain); Coronata, *De Matrimonio*, n. 136; Cappello, *De Matrimonio*, n. 231; O'Keeffe, *Matrimonial Dispensations —Powers of Bishops, Priests and Confessors*, p. 59 (where it is held that either of these two causes is *required* for validity since the grant of this faculty was made precisely for that purpose); Heylen, *Tractatus de Matrimonio*, n. 658 (where the same opinion as O'Keeffe's is maintained).

[39] *Consultationes de Iure Matrimoniali*, pp. 105-106.

[40] Vlaming-Bender, *Praelectiones Iuris Matrimonii*, pp. 299-300.

[41] Barbosa, *De Axiomatibus Iuris usufrequentioribus* — apud *Tractatus Varii* (Lugduni, 1660), Axioma 222.

the view that the clauses which according to his claim simply reflect motives are totally unnecessary and add nothing to the law. The legislator does not need to account to his subjects for his law or to express the *finis legis* in the law itself. In practice, though, the discussion seems to be of a purely theoretical nature, since in every case either one or the other condition will be present. The wording is so general that it will encompass almost every case.

Ad consulendum conscientiae. Since no distinction is made, it may be for the peace of conscience even of the party who is not constituted in danger of death. This may eventuate from the removal of sin, the occasion of sin, or temptation. There have been some who claim that the unrest against which the provision is sought must arise from sins of impurity. However, the legislator does not distinguish; therefore, the source of the unrest is not to be considered. It may arise from any cause whatsoever, e.g., from hatred, enmity, or the lack of peace among the families; it may seek alleviation through the removal of scandal, through making good the damage that had been done, through precluding the possibility of future harm or through a restoration of the good name of the party or parties, or also of the families. All these can be considered as valid reasons. In a word, whenever the party's conscience would be soothed through the contracting of marriage which in conscience seems strongly urged, there would exist a sufficient reason for the granting of the dispensation.[42]

[*Ad consulendum*], *si casus ferat, legitimationi prolis.* Legitimacy has many beneficial juridic effects.[43] The legislator wishes to make a benign provision for these and therefore has granted this privilege of dispensing. The term *proles* was advisedly chosen. It pertains not only to the children already born but also to the children still unborn but already conceived at the time. For a child conceived but not yet born, the dispensation that is granted will in connection with the subsequent marriage produce the legitimacy of status since the child is born of a valid marriage.[44] The illegitimate status of a child at birth can indeed be regularized. But the consequent legitimation

[42] Gasparri, *loc. cit.;* Wernz-Vidal, *loc. cit.;* Payen, *loc. cit.*

[43] Cf. Canons 232, § 2; n. 1; § 1, n. 1; 504; 984.

[44] Canon 1114.

does not cancel out the earlier illegitimate status; at best, it simply abstracts from it, even in the case of a sanation. Among children born of unmarried parents canonists distinguish between the *naturales* and the *spurii.* In the former class is the child born of parents between whom from the time of conception of the child to its birth a valid marriage could have been contracted; in the latter category is the child born of parents between whom at no time a valid marriage could have been contracted because of a diriment impediment. Among the *spurii,* authors further subdistinguish between:

1. *adulterini*—born of parents of whom at least one was actually married to someone else;
2. *sacrilegi*—born of a union in which one or both parents were bound by solemn religious vows, or when the father was a cleric in major orders;
3. *incestuosi*—born of a union in which the parents were related either by affinity or by consanguinity in the collateral line;
4. *nefarii*—born of parents related in the direct line of consanguinity.

It is certain that Canons 1043 and 1044 legislate for children who are listed as *naturales;* such are legitimated by the very grant of the dispensation.[45] As for children termed *spurii* (except the *adulterini* et *sacrilegi*), it is certain that this legislation was intended for them, because, although they will not be legitimated by the subsequent marriage of the parents, their legitimation will be effected by the very grant of the dispensation.[46] The *nefarii* are definitely excluded from the benefit of legitimation by the way of

[45] Canons 1051 and 1116.

[46] Canon 1051. Cf. also Bender, "Legitimatio prolis sola dispensatione quin sequatur matrimonium. (Canon 1051.)"—*Monitor Ecclesiasticus,* LXXVII (1953), 102-108, who defends well the opinion which states that legitimation follows *upon the very grant of the dispensation* in accordance with Canon 1051, even though for any reason whatsoever the marriage does not take place. Normally, one would expect that the marriage will follow, and in view of this fact legitimation is granted to the offspring already conceived or even born. It is for this reason that there are others who would exclude from the benefit of legitimation the offspring of parents who do not contract marriage after the dispensation has been granted. The writer adheres to the opinion defended by Bender as being more in accord with the wording of Canon 1051.

dispensation since their parents can never entertain the hope of securing a dispensation, even in danger of death.[47]

A further question arises in regard to the *adulterini* and *sacrilegi*. May the legitimation of *adulterini et sacrilegi* be adduced as a reason for invoking the power of dispensing that is granted in Canons 1043 and 1044? The more common opinion holds that in such a case the power may not be invoked.[48] Their argument is based on the text of Canons 1051 and 1116 and on the reply of the Holy Office on July 8, 1903. Canon 1051 precludes from legitimation the *sacrilegi* and the *adulterini;* Canon 1116 provides for legitimation through the subsequent marriage of the parents only in a case when a valid marriage could have been entered between them at the time either of the conception, or of the gestation, or of the birth of the child in question. The Holy Office decreed that a legitimation of the *spurii* would follow from the use of the faculty granted on February 20, 1888,[49] without the need of a special rescript from Rome, except in the case of the *adulterini* or *sacrilegi*.[50]

There are others who unreservedly say that the faculty may be invoked, since the legislator makes no distinction in Canon 1043, and since, as Cappello contends, a peremptory argument cannot be drawn from the canons or from the reply of the Holy Office. Till the Holy See declares otherwise, this opinion, so it is claimed, may be considered safe in practice.

Still others, seeking a middle road between the strict opinion which denies the allowable use of the faculty, the opinion which allows its use without question, espouse what may be termed the *mediate opinion*. They allow the use of this faculty of dispensing in order that a marriage may subsequently be contracted. They reason that, with the parents married, a rescript of legitimation from

[47] Canon 1076, § 3.

[48] Wernz-Vidal, *Ius Matrimoniale,* n. 413, 2°; Vlaming, *Praelectiones Iuris Matrimonii,* II, n. 401; De Smet, *De Sponsalibus et Matrimonio,* n. 759, footnote 2,; Leitner, *Lehrbuch des katholischen Eherechts,* p. 324; Wouters, *Commentarius in Decretum "Ne temere" ad Usum Scholarum compositus* (2. ed., *Amstelodami-Galopiae,* 1909), p. 156; Vermeersch, *Theologia Moralis,* III, n. 758.

[49] *Vide supra,* p. 46; cf. also Canons 1043-1045 and 1051.

[50] *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 2171; *Fontes,* n. 1267.

the Holy See is more easily obtainable. The reply of the Holy See did not say that the *adulterini* or *sacrilegi* could not be legitimated by means of a particular rescript from the Holy See. Therefore, a contracted marriage and consequently the antecedent dispensation could prepare the way for the legitimation of such children. For this reason the faculty may be invoked.[51] In view of the extrinsic as well as the intrinsic probability of this opinion, it may be followed in practice.[52] It may be said, then, that as long as there is question of the legitimation of the offspring, provided only the children are not *nefarii,* the faculty may be employed.

The legislator demands further that in the use of the faculty two precautions be taken, namely that scandal be obviated and that with reference to any needed dispensation from the impediments of disparity of worship and of mixed religion, the usual *cautiones* (promises) be given.

Scandal is to be obviated. This condition is required for the licit use of this power; one cannot claim that it is called for under the pain of nullity.[53] All possible means must be employed for warding off any possible scandal. This is required by the natural law itself. Past scandal must be repaired; future scandal precluded. Prudence will dictate how this is to be done. If it is a public impediment from which the parties must look to the dispensing agent for a dispensation, the dispensation should be given in the external forum, before witnesses, when this is possible. If it is occult, it should be taken care of in the internal, either sacramental or non-sacramental forum. The manner of repairing scandal when given by one in major orders or by one who is solemnly professed, through a life of concubinage, was suggested in the original grant of these faculties on February 20, 1888. Although the directive as

[51] Cappello, *De Matrimonio,* n. 231; Payen, I, n. 646; O'Keeffe, *op. cit.;* p. 70; Vermeersch, *De forma Sponsalium ac Matrimonio post Decretum "Ne temere,"* n. 73; Wernz-Vidal, *Ius Matrimoniale,* n. 413.

[52] Canon 15.

[53] Motry, *Diocesan Faculties According to the Code of Canon Law,* The Catholic University of America Canon Law Studies, n. 16 (Washington, D. C.: The Catholic University of America, 1922), p. 133; Cerato, n. 35; Payen I, n. 646, 3.

then given is not obligatory today,[54] it may be regarded as a norm that can be followed in the repairing of this and of other types of scandal. The original grant decreed that, if it proved necessary for the removal of scandal, the parties were to be enjoined to betake themselves to a place where they were not known; or, when this is not possible, a salutary penance was to be imposed with a view to repairing the harm already done. The dispensation could then be granted even when the scandal is irreparable.[55]

Usual Cautiones. When there is question of a dispensation from the impediment of mixed religion or of disparity of worship, it is necessary to recall the strict warning of Canons 1061 and 1071 to the effect that the Church does not dispense from these impediments unless the usual promises (*cautiones*) be given. The non-Catholic party must promise that all danger of perversion will be removed from the Catholic party. Both parties must promise that all the children will be baptized only in the Catholic church and raised in the Catholic faith exclusively. Further, there must be moral certitude that these promises will be kept. There is no reason to believe that Canons 1043 and 1044 excuse one from this obligation. One must hold that these *cautiones* are necessary for the validity of the dispensation.

Despite the fact that there have been commentators who held it as probable that a dispensation without these *cautiones* could still be valid, after the decree of the Holy Office, confirmed by Pius XI on January 14, 1932,[56] this opinion can no longer be sustained. The decree drew the attention of the bishops as well as the pastors and persons mentioned in Canon 1044 to the fact that dispensations from the impediments of mixed religion and of disparity of worship were not to be granted unless the parties had given in advance the promises whose faithful execution no one could prevent, even in virtue of the civil laws to which they were or would be subject; for *otherwise, the dispensation itself was to be entirely null and void.* Whenever possible, as a general rule, these should be given in writing.[57]

[54] Wernz-Vidal, *Ius Matrimoniale,* n. 413; De Smet, *De Sponsalibus et Matrimonio,* n. 762.

[55] O'Keeffe, *op. cit.,* p. 82.

[56] *AAS,* XXIV (1932), 25; Bouscaren, *Digest,* I, 505-506.

[57] Canon 1061, § 2.

After the dispensation has been granted, the priest assisting at a marriage that has been contracted according to Canon 1098 must take care that the dispensation is properly recorded. If it was granted in the external forum, the local ordinary is to be notified as soon as possible, and an annotation of it is also be made in the matrimonial register.[58] On the other hand, if it is granted in the internal non-sacramental forum, it should be noted in the secret book kept for this purpose in the diocesan curia.[59] At times, even a dispensation granted in the external forum should be noted there instead, in order to preclude the danger of scandal, whenever the dispensation and the celebration of the marriage have to remain secret.

B. *Dispensatory Power in Cases of Grave Necessity*

Prior to the publication of the Code, canonists discussed and disputed among themselves the course of action to be followed whenever a *casus perplexus* arose. This was the case in which a pastor learned at the last moment of the existence of a diriment impediment between the parties so that he was barred from assisting at the marriage despite the threat of grave evils and harm that argued for the contracting of the marriage. With the power given in Canon 1045, it definitely appears that the celebrated *casus perplexus* can no longer arise, that the legislator has dealt it a death-blow.[60]

Realizing that cases of grave necessity could likewise arise when marriage is to be contracted according to the extraordinary form, the legislator wisely provided in Canon 1045, § 3, for such an eventuality by extending the power granted to the local ordinaries

[58] Canon 1046.

[59] Cappello, *De Matrimonio,* n. 231, e; Payen, I, n. 646, *ad finem.*

[60] Chelodi, *Ius Matrimoniale,* n. 44; Cappello, *De Matrimonio,* n. 234; 11°; Vermeersch-Creusen, *Epitome Iuris Canonici,* II (6. ed., Mechliniae: Dessain, 1940), n. 308. There are authors, however, who insinuate that not all possible situations from which a *casus perplexus* could arise are covered in this canon, e.g., Arendt, "Dispensatio a forma matrimonii in casu perplexo,"—*Periodica,* XVI (1927), 1*-17*; De Smet, *De Sponsalibus et Matrimonio,* n. 837; Van Hove, *De Legibus Ecclesiasticis,* n. 294; Oesterle, *Consultationes de Iure Matrimoniali,* p. 126, footnote 67.

in the first two paragraphs of the same canon, to the priest assisting at such a marriage.[61]

The canon studiously omits mentioning the prescribed form of marriage. The fact that such mention was made in Canon 1043 but omitted in Canon 1045, leads one to believe that the legislator intended not to include it here. This is the interpretation of by far the greater number of canonists,[62] among whom there are some who discredit the opposite opinion to such an extent that they say it lacks all probability.[63]

The proponents of the opinion that a dispensation from the observance of the juridical form is also included in the faculty that is granted in Canon 1045 use the following arguments:

1. *ubi eadem est ratio, eadem esse debet legis dispositio;*
2. clandestinity was a diriment impediment before the Code and is still listed as an impediment in the alphabetical index to the Code;
3. the lack of the observance of the juridical form could eventuate as a *casus occultus* when people do not know of the lack of delegation or believe that the priest has complied with whatever the law calls for;
4. the *finis legis* is the same whether it is a question of impediments or of the form.[64]

[61] Canon 1045, § 3.

[62] Gasparri, n. 399; Wernz-Vidal, *Ius Matrimoniale,* n. 413; Claeys-Bouuaert—Simenon, *Manuale Iuris Canonici,* II, n. 252; Cappello, *De Matrimonio,* n. 234; Eichmann-Mörsdorf, *Lehrbuch des Kirchenrechts auf Grund des Codex Iuris Canonici,* II, 200; Knecht, *Handbuch des katholisches Eherechts,* p. 225; Triebs, *Praktisches Handbuch des geltenden kanonischen Eherechts in Vergleichung mit dem deutschen staatlichen Eherecht* (Breslau: Ostdeutsche Verlanganstalt, 1933), p. 178; Schäfer, *Das Eherecht nach dem Codex Iuris Canonici* (6. and 7. ed., Münster, 1921), p. 105; Cerato, n. 37; Chelodi, *Ius Matrimoniale,* n. 41; Vermeersch-Creusen. *Epitome Iuris Canonici,* II (6. ed.), n. 309; Payen, I, n. 648; Coronata, *De Matrimonio,* n. 137; O'Keeffe, *op. cit.,* pp. 145-146.

[63] Cappello, *De Matrimonio,* n. 234; Claeys-Bouuaert—Simenon, *loc. cit.;* Payen (I, footnote on page 483) denies that the opinion has any intrinsic probability whatsoever; however, he acknowledges the fact that it has extrinsic probability by reason of the authority of the men who espouse it; Wernz-Vidal, (*Ius Matrimoniale,* n. 413) calls the argument of De Smet weak.

[64] Arendt, *Periodica,* XVI (1927), 1*-17*; Oesterle, *Consultationes de Iure Matrimoniali,* pp. 135-138 Durieux, *Le mariage en droit canonique* (6. ed., Paris, 1928), n. 167; Arendt, "Ad Can. 1045 Iterum de Dispensatione a Forma Matrimonii in Casu Perplexo," *Ius Pontificium,* VII (1927), 147-150; "Casus de Forma Matrimonii eiusque Dispensatione," *Periodica,* XIV (1925), (122)-(124); Vermeersch, *Theologia Moralis,* III, n. 755.

Despite this intricate reasoning, it must be said that this opinion lack intrinsic probability, for as Claeys-Bouuaert—Simenon say, no opinion or interpretation of the commentators is equivalent to the law itself.[65] However, in view of the extrinsic probability, one must hold that in view of Canon 15 and Canon 209, until the Holy See settles the question, it cannot be said that the juridical form is excluded from Canon 1045 as an element susceptible of the granting of a dispensation.[66]

This dispute in no way affects the powers of the priest assisting at a marriage that is to be contracted according to Canon 1098. The writer maintains that, just as in Canon 1044, so also here in Canon 1045, § 3, the power of dispensing from the canonical form of marriage is excluded from the granted faculty by the very nature of his position.[67]

The use of the faculty in Canon 1045, § 3, is predicated on the following conditions:

1. its restriction simply to the impediments of the ecclesiastical law, with the exception of the impediments arising from the sacred order of priesthood and from affinity in the direct line when the marriage has been consummated;
2. the removal of scandal;
3. the exacting of the usual promises;
4. the fact that an impediment has been discovered when everything is prepared for the marriage;
5. the fact that the marriage cannot be deferred without probable danger of grave harm till the necessary dispensation is received from the Holy See;
6. the impossibility of reaching even the local ordinary in time;
7. the fact that the case is still occult in character.

[65] *Op. cit.,* II, n. 252.

[66] Payen, I, footnote 1 on page 483; D'Angelo, "In c. 1045 Codicis I.C. excursus," *Apollinaris,* I (1928), 255; Hanstein, *Kanonisches Eherecht* (2. Auflage, Paderborn: Ferdinand Schöningh, 1948), p. 69.

[67] *Vide supra,* pp. 159-160, 165-166.

What has been said heretofore in regard to the impediments, the removal of scandal, the exacting of the usual promises and the means to be employed in reaching the local ordinary, also pertains here. Now it remains to consider the other conditions. The other three conditions must be in evidence together, conjunctively, otherwise the faculty cannot be invoked.

An impediment has been discovered when everything has been prepared for the Marriage. This must not be understood in the strict sense, i.e., as pointing only to a case in which the parties and the priest are completely unaware of the impediment until everything has been prepared for the marriage. Since the canon does not distinguish, there is comprehended also the case in which the impediment was previously known to the parties but only then became known to the priest.[68] In the event that the parties kept this information from the priest *mala fide* till this very moment, the canonists are in disagreement as to whether the faculty can still be operative. Vidal (1867-1938) [69] argued that no one should benefit from his deception, and that the parties are themselves responsible for their predicament. The faculty may not be invoked. Cappello [70] claims that the bad faith of the parties does not affect the dispensing power inasmuch as the Code does not discriminate against them. The purpose of the law is not only the welfare of the contracting parties but also the avoidance of public harm and scandal. The parties have need of the dispensation, and it matters little to them whence it will have its

[68] P.C.I., 1 mart. 1921: Whether, according to Canon 1045, § 1, the clause *"quoties impedimentum detegatur cum iam omnia parata sunt ad nuptias"* is to be taken in the strict sense; namely, as meaning that the impediment was before that entirely unknown and then becomes known: or is it rather to be understood in the sense that, although the impediment was known before, it is only then that it is reported to the pastor or to the ordinary? *R.* In the negative to the first part; in the affirmative to the second.—*AAS,* XIII (1921), 177; Bouscaren, *Digest,* I, 502.

[69] Wernz-Vidal, *Ius Matrimoniale,* footnote 59, page 535.

[70] *De Matrimonio,* n. 234 bis, 7°, Oesterle (*Consultationes de Iure Matrimoniali,* footnote on page 129) agrees with Cappello. Payen (I, n. 650) calls this opinion at least probable.

source. Creusen [71] steers a middle course in saying that, *servatis servandis,* in such a case the local ordinary may refuse to grant the dispensation. However, once he granted it, it would nonetheless be valid. In practice, then, one may grant a dispensation whether or not the bad faith of the parties was the reason why the knowledge of the impediment came to the priest only when everything was ready for the marriage.

Cum omnia parata sunt ad nuptias. This is not to be understood in the strict sense, as meaning that *everything* has been done, and that only the celebration of the marriage still awaits its fulfillment. This must be taken in the moral or equivalent sense. Therefore, if a day is set, the invitations mailed, the reception arranged, the vacations or furloughs planned and arranged, the banns already published, the presence of these factors would suffice.[72] Others wish to restrict the use of the dispensatory power simply to the cases in which all the *canonical* preparations have been attended to.

Cappello [73] and O'Keeffe [74] wisely note that the phrase *omnia parata* is not to be taken as a *conditio sine qua non* for the granting of the dispensation. It would be ridiculous to have the validity of a dispensation depend on different interpretations of the same phrase, with some commentators demanding more than others. Further, one would have to accept the word *omnia* in its full meaning, and that would restrict the canon too much. The phrase was used by the older commentators as an example rather than as a cause. Finally, the *mens legislatoris* undoubtedly seeks to make provision for cases of true, urgent necessity. He has done so in Canon 81 in regard to all ecclesiastical laws regarding which the Holy See customarily grants dispensations; in Canon 990, § 2, in regard to irregularities; in Canons 882, 2252, 2254 in regard to absolution from sins and censures. The same may logically be presumed in regard to the contracting of marriage. Provision was made for the grave necessity of danger of death in Canon 1043; provision is made for cases

[71] Vermeersch-Creusen, *Epitome Iuris Canonici,* II (6. ed.), n. 308.

[72] Chelodi, *Ius Matrimoniale,* n. 41, 3; Claeys-Bouuaert—Simenon, *Manuale Juris Canonici,* II, n. 252; Oesterle, *Consultationes de Iure Matrimoniali,* pp. 130-131.

[73] *Loc. cit.*

[74] *Op. cit.,* pp. 133-143.

the power that is accorded in these canons. The danger spoken of must be an impending danger or one that is feared for the future.[81]

As a final condition, the Code allows the use of this faculty to the priest assisting according to the norm of Canon 1098, n. 2, only in occult cases. Prior to the reply of the Code Commission, dated December 28, 1927, there was a great dispute among authors concerning the significance of the phrase *"casus occultus."* This interpretation settled the problem definitively. It was asked whether the words *"pro casibus occultis"* of Canon 1045, § 3, are to be understood only of matrimonial impediments which are by their nature and in fact occult, or also of those which are by their nature public and in fact occult. The reply was in the negative to the first part, and in the affirmative to the second part.[82]

Some had previously taken it as the equivalent of *impedimentum occultum* according to Canon 1037, i.e., an impediment that could not be proved in the external forum. Others had held that the word *casus* was of much wider import than and not to be confused with *impedimentum*. An impediment could be public in the sense of Canon 1037, but the case could nonetheless be occult. Canon 2197 defines a delict as public when it has been spread about or is constituted in such circumstances that one can prudently foresee that it will easily be made public knowledge. The term *public* in Canon 1037 and the term *public* in Canon 2197 do not have the same meaning. A delict would be occult if it is not public. By analogy, one could apply the meaning of the term public and occult as found in Canon 2197 to the phrase *casus occultus*. This latter position was upheld by the Code Commission.

As long as an impediment remains *de facto* occult, i.e., is not publicly known, even though legally it be public in the sense of Canon 1037 and the local ordinary cannot be reached in time, the priest assisting at a marriage in accordance with the norm of Canon 1098, n. 2, has power to dispense from it.[83]

[81] S. R. R., *Nullitatis matrimonii,* 4 martii 1927, coram R.P.D. Francisco Parrillo, dec. X, n. 6—*Decisiones,* XIX (1927), 74; cf. also Bouscaren, *Digest,* II, 278.

[82] P.C.I., 28 dec. 1927—*AAS,* XX (1928), 61; Bouscaren, *Digest,* I, 503.

[83] There are authors who hold it as probable that, in virtue of the reply of the Code Commission and the wide interpretation that should be given Canon 1045, even in a case wherein an impediment is public by its nature and the fact inducing the impediment is public knowledge, the case could still be a *casus occultus,* namely, if the people do not know that such a fact induces the impediment in question. Cf. Vromant, *De Matrimonio,* n. 116; Payen, I, n. 669; Oesterle, *Consultationes de Iure Matrimoniali,* p. 143, footnote 100.

According to the faculty, the power of dispensing may be used either when marriage is being contracted for the first time or when it is being undertaken as the convalidation of an illicit union.

The obligation of publishing the banns of marriage binds in all marriages in which two Catholics contemplate marriage. The only exceptions mentioned in the Code pertain to mixed marriages and to marriages of conscience.[84] One will notice that the power to dispense from the publication of the banns receives no mention in Canons 1043, 1044, 1045. The power has already been given to the local ordinaries in Canon 1028. The legislator has not given this power to the persons mentioned in Canons 1044 and 1045, § 3. Accordingly, in danger of death, if time permits, recourse should be had to the ordinary for delegation and a dispensation from the publication of the banns. If time does not permit—and this must usually be presupposed in the case of the priest who is assisting at a marriage according to the extraordinary form—the obligation to publish the banns ceases, inasmuch as the law itself makes provision for such an eventuality in Canon 1019, § 2.[85] Outside of the danger of death, it would indeed be a rare case for the emergency to be so great that it justified the omission of the banns without a dispensation.[86] As for marriages contracted according to the extraordinary form, two possibilities present themselves, namely, the local ordinary cannot be had or approached, or he is unavailable in view of the harm threatened by the civil law. In the first case, the assisting priest, assured of the free state of the parties from other sources, may declare that the obligation of the banns no longer urges in such a case.[87] Strict compliance with the law in such a case

[84] Canons 1022; 1026; 1104; Payen, I, n. 468.

[85] Roberts, *The Banns of Marriage,* The Catholic University of America Canon Law Studies, n. 64 (Washington, D. C.: The Catholic University of America, 1931), p. 96.

[86] Vermeersch-Creusen, *Epitome Iuris Canonici,* II (6. ed.), n. 291.

[87] Cappello, *De Matrimonio,* n. 162; Wernz-Vidal, *Ius Matrimoniale,* n. 123; Payen, I, n. 468; Roberts, *op. cit.,* p. 97.

would not only be useless but also positively harmful. The legislator is not to be presumed as insisting upon its observance.[88] Finally, to demand that this obligation be fulfilled would make Canon 1098, which allows the extraordinary form, inoperative.

In the other eventuality, when it is possible to reach the local ordinary, this must be done. True, the very purpose of the use of the extraordinary form in such circumstances would preclude the very idea of publishing the banns. Nevertheless, the ordinary is to be consulted. He may declare that the law no longer obliges in such circumstances or, if he chooses, he may grant a dispensation from the publication of the banns. The pastor should not take it upon himself to pass judgment in such a case. The ordinary is the competent authority in passing judgment in such cases.[89]

[88] Van Hove, *De Legibus Ecclesiasticis*, n. 291.
[89] Roberts, *op. cit.*, p. 97.

CONCLUSIONS

1. Prior to the Council of Trent, at which for the first time a juridical form of marriage had been instituted to be observed under the pain of nullity, there was no need of an "extraordinary form" of marriage. A mere exchange of consent, even when accomplished clandestinely, sufficed for validity (pp. 20, 22).

2. Under the Tridentine discipline, provision had been made for eventualities in which a qualified witness could not be had. The Sacred Congregations on various occasions declared that in a place where the decree *Tametsi* was binding and a qualified witness could not be had, a couple could contract marriage validly by observing that part of the form prescribed by *Tametsi* which could be observed, namely, the exchange of consent *de praesenti* in the presence of at least two witnesses (pp. 29-39).

3. In the *Ne temere* discipline, provision was made for the first time for an "extraordinary form" of marriage to be employed when the contracting parties or party was constituted in danger of death or in other cases of grave necessity. There was a disagreement among canonists as to whether Article VIII of *Ne temere* included the case in which a qualified witness could be considered as morally absent because of harm threatened by the civil law. Some demanded recourse in each case to the Holy See under pain of nullity. Others held that this was merely a directive norm to be observed when there was time for recourse. A definitive decision had not been given by the Holy See (pp. 50-58).

4. Under the present discipline of the Code, the use of the extraordinary form is predicated on the actual (not presumed) unavailability of any qualified witness who could assist validly at the marriage in question. The qualified witness is to be considered unavailable if he cannot get to the parties, or they cannot get to him, without serious inconvenience. To excuse the parties the serious inconvenience must be personal. It may affect the priest, the parties or the common good. The use of extraordinary means would normally constitute a serious inconvenience and consequently may be

disregarded. The simple refusal of assistance on the part of a qualified witness will not constitute him as unavailable (pp. 85-96).

5. Serious harm threatened by the civil law may be considered a serious inconvenience and is and always has been comprehended in the text of the canon allowing the use of the extraordinary form (pp. 96-103).

6. The mere actual unavailability of a qualified witness will not suffice. There must be conjoined to it a probable danger of death which could arise from any source and could affect either of the contracting parties. Any danger that would allow the administration of Holy Viaticum would suffice here. It suffices that parties wish to contract marriage; no other reason is necessary. Where there is no danger of death, the fact of unavailability must be such that anyone can prudently foresee that it will perdure for at least a full month, as it is found in the calendar. The *terminus a quo* is the period of time when one can say that *omnia parata sunt ad nuptias* because only then would serious inconvenience result (pp. 104-119).

7. The matrimonial consent exchanged between the parties must have the same qualities as the matrimonial consent exchanged by parties when they contract marriage according to the ordinary form. All that is required is that the parties intend a real, true, valid marriage and exchange consent *de praesenti*. Even though they know nothing of the extraordinary form, the law recognizes the consent exchanged in such circumstances as juridically efficacious (pp. 124-127).

8. Two witnesses are required for validity. As long as they witness the exchange of the consent between the parties, they fulfill the requirements for their position. Even a civil official or non-Catholic minister in his official capacity can be considered as one of the two witnesses who are necessary for validity. The priest who is called to assist is not excluded by law from serving as a witness, especially if only one witness be present and no other witness is available. When no witness at all or at most only one witness is available, even though there is no provision in law for such a rare occurrence, marriage could be validly contracted in the presence of the one available witness or also in the absence of any witness at all (pp. 127-139).

9. Wherever this can easily be done, another priest, i.e., one who is not qualified to act as an official witness according to Canons 1094 and 1095, if he is available, should be called no assist at such marriages. If it should happen that the priest is under excommunication or suspension *post sententiam* or is a *vitandus*, he should not be called, for the parties are relieved of the obligation of calling him. He may be called if the parties are constituted in danger of death, because he may be of service to them if a dispensation should be necessary or if the parties wish their marriage blessed. In any other circumstances an excommunicated or suspended priest need not be called. He may, however, be called to assist because he too may prove helpful (pp. 144-147).

10. Approval of the local ordinary in allowing the use of the extraordinary form of marriage cannot be demanded under pain of nullity if all the conditions required by the canon are verified (p. 142).

11. The dispensing power of a priest called to assist at a marriage that is to be contracted according to the extraordinary form as depicted in Canon 1098 depends on his assistance at such a marriage that is to be contracted in accordance with the norm of Canon 1098, n. 2. Hence, if there are no witnesses, he does not assist according to Canon 1098, n. 2, and has no dispensing power as assisting priest. Because of his peculiar position, he has all the powers mentioned in Canons 1044 and 1045, § 3, except the power of dispensing from the form of marriage (pp. 158-160; 165-166).