The Extraordinary Form of Marriage according to Canon 1098

*Nihil Obstat:*

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## FOREWORD

EVER solicitous for the eternal happiness as well as for the temporal welfare of the souls committed to its care by its Divine Founder, the Church has always given marriage and the marriage contract its special care and attention. Realizing that fallen human nature is not averse to regarding matrimony as a mere human institution, dissoluble at will, and further, realizing also the many heartaches that are a result of broken marriages and new alliances, the Church has, in order the better to establish the fact of marriage, prescribed certain formalities which are to be observed in the contracting of marriage.

The Church is fully aware of being the custodian of the sacraments and the official interpreter of God's laws. Legislating for the sacrament of matrimony, the Church has always taken care not to encroach on the natural right of marrying that each man has. What is more, the Church has always championed that right. Inasmuch as these formalities will at times be impossible of observance, one is led to believe, and rightly so, that some provision must have been made for such eventualities. It will be, then, the purpose of this dissertation to investigate the canonical institute known as the "extraordinary juridical form of marriage."

The treatise is divided into two parts: the first will deal with a historical synopsis of the development of the extraordinary form of marriage, and the second will be devoted to a canonical commentary on this institute.

The writer wishes to take this opportunity to express his heartfelt gratitude to His Excellency, the Most Reverend Thomas E. Molloy, S.T.D., Archbishop-Bishop of Brooklyn, for the special privilege of being allowed to pursue post-graduate studies in Canon Law and for his kind generosity in making this publication possible. The writer wishes also to express his sincere appreciation to His Excellency, the Most Reverend Raymond A. Kearney, S.T.D., J.C.D., Auxiliary Bishop and Chancellor of the Diocese of Brooklyn, for his kindness in suggesting the topic for this dissertation and for his continued interest in it and for his helpful encouragement. He is deeply indebted indeed to the members of the Faculty of the School of Canon Law for their helpful suggestions and their scholarly direction and assistance in the preparation of this dissertation.

# INTRODUCTION

ANY appreciably complete effort to trace the history of what canonical commentaries have termed the "extraordinary form of marriage," or the juridic form of marriage in "extraordinary cases," as appertaining to the form of marriage described in canon 1098 of the Code of Canon Law,[1] must of necessity delineate the historical development of the Church's doctrine as to what is essential in the formation of the marriage contract and simultaneously in the reception of the sacrament of matrimony, for among the baptized one cannot exist without the other.[2] That the Church has this right to declare what is required can be gleaned from the fact that it is the custodian of the sacraments and the official interpreter of God's law. Logically, one must first show what has been and what is now considered the *ordinary form* of marriage before one may satisfactorily describe the development of the *extraordinary form* of marriage.

It seems mandatory at the very outset to note in exactly what sense the term *form* is to be understood. It is not to be taken in the philosophical sense as specifying a thing in its species, e.g., in marriage, an association of man and woman as husband and wife, and not an association of any other type; nor, in the theological sense of *form,* as in the sacrament of matrimony, i.e., the mutual acceptance of the two parties in words or signs of each one's rights over the other's body for the performance of acts which of themselves are suited for the begetting of children, which rights are being given at the time of their acceptance.[3]

[1] *Codex Iuris Canonici Pii X Pontificis Maximi jussu digestus Benedicti XV auctoritate promulgatus, Praefatione, Fontium Annotatione et Indice Analytico-Alphabetico ab Emo Petro Card. Gasparri Auctus* (Romae: Typis Polyglottis Vaticanis, 1917; Reimpressio, 1934).

[2] Canon 1012.

[3] P. Gasparri, *Tractatus Canonicus de Matrimonio,* editio nova ad mentem Codicis Iuris Canonici (2 vols., Romae: Typis Polyglottis Vaticanae, 1932), I, n. 34 (hereafter rited Gasparri); Cappello, *Tractatus Canonico-Moralis de Sacramentis* (5 vols., Vol. I, *De sacramentis in genere,* 5. ed.; Vol. V, *De Matrimonio,* 5. ed., Romae: Marietti: 1947), V (*De Matrimonio*), n. 30 (hereafter

It is to be taken, rather, in the juridic sense, i.e., with reference to what is necessary for the formation of the marriage according to the law of the Church, or in respect to what is requisite for bringing marriage into existence for a man and a woman. Inasmuch as marriage is a contract,[4] one may explain the *form* as that which will be necessary to "close" the contract, that which is required for making the marriage contract a real entity. To put it in still another way, looking at it from the point of view of the contracting parties, one may regard the *form* as that which is essential for them to do in order to contract marriage in the eyes of the Church.

The Code of Canon Law states that marriage comes into being by the legitimately manifested consent of the persons capable in law of entering marriage.[5] Since by divine law, whether natural or positive, there is not prescribed any type of substantial form according to which the matrimonial consent is to be expressed,[6] the Code explains what is meant by a "legitimately manifested consent," viz., the matrimonial consent must be exchanged in the presence both of a lawfully deputed minister (bishop or priest) and of two witnesses.[7] This, then, is what is known today as the *ordinary form* of marriage.

The aim of the historical conspectus will be to trace the development of the canonical or juridic form of marriage from the beginning of the Church through the Middle Ages to the Council of Trent, in which, for the first time, there was decreed, under the pain of nullity, a universally prescribed form of marriage. With this as a background, one can trace the development of the canonical institute of the *extraordinary form of marriage* through the intervening centuries to the publication of the Code of Canon Law.

cited *De Matrimonio*); Wernz-Vidal, *Ius Canonicum* (7 vols. in 8, Vol. V, *Ius Matrimoniale*, 3. ed., a Philippo Aguirre recognita, Romae: Apud Aedes Universitatis Gregorianae, 1946), n. 43 (hereafter cited *Ius Matrimoniale*).

[4] Canons 1012, 1069, 1070, etc.

[5] Canon 1081.

[6] DeBecker, *De Sponsalibus et Matrimonio Praelectiones Canonicae* (2. ed., Lovanii, 1903 cum appendice *Commentarius in Legem Novam de Forma Sponsalium et Matrimonii*, a. 1913), p. 87.

[7] Canon 1094.

## CHAPTER I

## THE DEVELOPMENT OF THE FORM OF MARRIAGE UNTIL THE DECREE OF GRATIAN (Ca. 1140)

Struggling for its very existence during the first three centuries of the Christian Era, the Church enacted few statutes in regard to marriage. The early Councils of the Church, e.g., Elvira (305),[1] Ancyra (314),[2] and Arles (314),[3] to mention just a few examples, dealt more with the problems of adultery, bigamy, incestuous relations and mixed marriages than with a code of marriage laws. The Church tried to inculcate a clear comprehension of morality in marriage relations, busying itself with the indissolubility of marriage, the inadmissibility of divorce, and the enactment of impediments unknown to Roman Law.[4]

In leaving it the sacraments, the Church's divine Founder did not postulate any definite, external form of marriage. Accordingly, there was room for a free development regarding the form of marriage.[5] Besides, the Church was just beginning its missionary labors, converting different peoples, each with customs of its own as to the formation of marriage. It found one type among the Romans, another among the Jews, and still another among the Germanic peoples. Not wishing to do violence to these and thereby alienate these peoples, the Church adapted its practice to the existing customs wherever

[1] Concilium Eliberitanum—Bruns, *Canones Apostolorum et Conciliorum Saeculorum IV-VII* (2 vols., Berolini, 1839), II, 9 (hereafter cited Bruns); cf. also Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio* (53 vols. in 60, Parisiis, 1901-1927) II, 14 (hereafter cited Mansi); Hardouin, *Acta Conciliorum et Epistolae Decretales ac Constitutiones Summorum Pontificum* (12 vols., Parisiis, 1714-1715) I, 256 (hereafter cited Hardouin).

[2] Bruns, I, 68; Mansi, II, 525; Hardouin, I, 276.

[3] Bruns, II, 208.

[4] Feine, *Kirchliche Rechtsgeschichte* (2 vols., Vol. I, Weimar: Herman Böhlaus Nachfolger, 1950), I, 112.

[5] Freisen, *Geschichte des canonischen Eherechts bis zum Verfall der Glossenliteratur* (2. ed., Paderborn, 1893), pp. 121 ff.

it found them and accepted them, keeping whatever was not contrary to Christian principles of doctrine and morality, purifying others and adding customs of its own.[6] It realized that there were civil effects as well in regard to marriage, such as the legitimacy of the children, the right of inheritance, and the like. Therefore, it counseled the faithful to observe the civil customs and laws of marriage.[7]

When Christianity came in contact with the Romans, it was customary to have marriage preceded by a betrothal.[8] However, this was not essential for the validity of the marriage that was to follow. Mere consent was sufficient to constitute the espousals or betrothal.[9] Even though the girl had to yield to the all powerful *patria potestas* of the *paterfamilias,* the law simply invoked the presumption that she consented if she did not resist her father's wishes in the matter.[10]

Great legal value was placed on these betrothals in the later Roman Law. Justinian (527-565) declared that marriage was constituted when sexual relations followed upon a betrothal. No formal consent was required by Roman Law. The consent of the betrothal was considered as passing automatically into a consent to an actual marriage because a *maritalis affectio* was adjudged to be present.[11] The presence of this *maritalis affectio* was so essential for the Romans that once it was lost, the marriage was at an end.[12]

Marriage itself was not considered a contract in Roman Law. It was completely devoid of form. Gaius (second century) in treat-

[6] Sägmüller, *Lehrbuch des katolischen Kirchenrechts* (2 vols., Freiburg im Breisgau, 1900), I, 491; Freisen, *loc. cit.*; Joyce, *Christian Marriage* (2. ed., London: Sheed & Ward, 1948), p. 40.

[7] Pollock and Maitland, *History of English Law (before the time of Edward I)* (2. ed., 2 vols., Cambridge: University Press, 1895), II, 369.

[8] Buckland, *Textbook of Roman Law, from Augustus to Justinian* (2. ed., Cambridge: University Press, 1932), p. 112.

[9] D. (23.1) 4.

[10] D (23.1) 12.

[11] N. (74.5). This law gave rise to great disputes among the medieval canonists as to the exact moment when the betrothal consent passed into marital consent.

[12] D. (24.1) 3; (32.13).



ing of *manus* [13] stated that in prior times, i.e., prior to the second century A. D., *manus* could be acquired in three ways, namely, through *confarreatio* (a religious marriage ceremony), through *coemptio* (sale), or through *usus* (cohabitation). Since *manus* could only be acquired by marriage, he pointed accordingly to certain ways that marriage was entered into in the times prior to his. In all three ways it was usual, if not essential, to have the formal *deductio in domum mariti,* i.e., placing the woman in the man's custody, for constituting marriage in its complete legal effect.[14]

There was also a marriage without *manus.* Such a union was divested of all formalities; it was contracted simply by means of consent. It was known as "free marriage." This latter type became the only type in the later Roman Empire.[15] Despite the fact that marriage was not considered a contract in Roman Law, nevertheless, to bring it into existence there was required the consent, made manifest at times by many persons.

Roman jurists laid it down as a general principle that the consent of the parties was the essential element in marriage. Ulpian (+ 228) insisted that it was consent, and not sexual relations, that constituted marriage.[16] The consent of the *paterfamilias* was essential for the validity of the marriage. The parties' consent was regarded in time by the jurists as a requisite element. Before the fifth century, one cannot say with certainty that such was the case with the *filia familias.* Her consent could be regarded as given tacitly if she did not oppose the union, and as long as the man was not of a lower station in life or debased in his morality. Provided that she took

[13] Gaius, I, 110. *Manus* was the full power that a husband had over his wife. By this means, she broke all cognatic ties with her family and joined the agnatic family of her husband, taking on the legal position of a daughter to him, if he happened to be a *paterfamilias.* All her property and power of dealing with it went over to the husband or the *paterfamilias* in whose power the husband was. If she was not *in manu,* she remained in her own family and was subject to her own *paterfamilias.*

[14] Joyce, *Christian Marriage,* p. 41.

[15] Corbett, *Roman Law of Marriage* (Oxford: Clarendon Press, 1930), pp. 90-94.

[16] "Nuptias enim non concubitus, sed consensus facit."—D. (50.17) 30; (50.1) 15.

part in all the ceremonies, the very fact of her presence proved sufficient for sealing her marital status.[17]

Inasmuch as the required form, if it may be termed thus, looked simply to the placing of the wife in the husband's control,[18] as long as he accepted her upon her *deductio in domum mariti* when she had gone willingly with him, the requisite consent seemed duly manifested. Joyce (1864-1943) was of the opinion that the *deductio* simply afforded proof of the marriage, but did not itself effect the marriage. The consent of the betrothal was considered as passing automatically into a consent to an actual, present union.[19]

Since the earliest Christians were Jews, their customs in all spheres, with reference also to marriage, tended to have an effect and to wield an influence in the early Church's marriage laws. The early Fathers of the Church occupied themselves with the question of whether or not the relationship between the Blessed Mother and St. Joseph was a true marriage. In the course of their discussions, of necessity they spoke of Jewish marriage customs and showed how some of these customs continued to exist even in their own day.

Although the betrothment itself usually meant nothing more than a customary declaration that a marriage was in the process of being arranged, the solemn rite for the Jews meant that all the juridic effects of a marriage followed. Once the prenuptial agreement was arranged, it became binding on both parties, who then and there were regarded as man and wife in all religious as well as legal aspects, with the lone exception of cohabitation. Thus in two places where the words occur in the Old Testament, the betrothed woman is called a wife.[20] The New Testament gives us a perfect example when it speaks of the Blessed Mother and St. Joseph. The angel termed her "wife" (*coniugem tuam*) [21] even though the Evangelists declared that she was espoused to St. Joseph (*desponsata*),[22] who in turn was designated as her husband.[23]

17 Corbett, *op. cit.*, pp. 53-55.
18 Buckland, *Textbook of Roman Law*, p. 112.
19 *Christian Marriage*, p. 42, footnote 1.
20 II Kings, III:13; Deut., XXII:24.
21 Matt., I:20.
22 Matt., I:18.
23 Matt., I:19; Luke, I:27.



Rabbinical Law declared bethrothals to be equivalent to actual marriage.[24] As to the requirement of consent, very little was known. The giving of the girl's consent was implied, it seems, in the father's consent. Rab, the Babylonian, who lived toward the end of the second and the beginning of the third century after Christ,[25] acknowledged as severely punishable the act of anyone who married his betrothed partner without her consent.[26]

After the espousal, the nuptials did not take place until after a period of waiting had run its course. This was the custom despite the fact that an actual, inchoate marriage had already taken place at the espousal. The nuptials were merely a celebration which ended with the solemn escorting of the betrothed woman to the bedchamber of the man. It is interesting to note that no further expression of marital consent was deemed necessary; the consent given in the espousals was considered marital consent. For all intents and purposes the couple were considered man and wife, in an inchoate, i.e., unconsummated marriage. This helped the early Fathers of the Church to explain the espousals of the Blessed Mother and St. Joseph as a true marriage, and later served as a foundation for the opinion that the early Church considered *desponsatio,* for all intents and purposes, a true marriage.

The Roman and Jewish systems were not the only systems with which the Church had to reckon. From the fifth century onward, the Church came in contact with the Germanic peoples from the north. Their customs were widely different. Whereas normally the betrothal is a promise of a future marriage, among the Germanic tribes it was no mere promise of a future contract, but at least the

24 Neufeld, *Ancient Hebrew Marriage Laws* (New York: Longmans, 1944), pp. 84, 142-143. However, Freisen (*op. cit.*, p. 97) claimed that the betrothal did not constitute marriage; that it did not make married people of them till the *copula carnalis* took place.

25 Freisen, *op. cit.*, p. 92. The reference is probably to Abba Arika (usually called Rab), who died in 247. He was a Babylonian Rabbi who founded the Jewish Academy of Sura (on the Euphrates in Syria). He was recognized as among the greatest of the haggadists of the Babylonian schools.

26 *The Babylonian Talmud, Kidduschim* (London: Sancino Press, 1936), Kid. 13 a.

initial stage of the contract, the nuptials serving simply as a ratification of the same.[27]

One might say that the Germanic conception of a betrothal held a middle ground between the mere promise of the Romans and the actual, inchoate marriage as recognized by the Jews; if anything, the resemblance favored the latter more than the former. In the beginning not much attention was paid to the girl's will in the matter; she had to obey her *mundoaldus*.[28] However, with the advent of Christianity, greater respect was paid to the girl's wishes; her consent was required.[29]

In the Lombard Kingdom in Northern Italy (568-774), it was customary previous to the actual nuptials for the couple to make a formal declaration of their consent to the union before the local assembly. At this ceremony an *orator* or *Fürsprecher* played an important part; it was his office to ask and receive the consent of the parties to the marriage. As time went on, it became customary to relegate this to the marriage itself, with friends and relatives taking the part of the local assembly.[30] The presence of witnesses was required by law, either at the betrothal, or at the nuptials, or at both, to give them a public character; clandestine marriages were frowned upon.[31]

The betrothal was essential for a marriage with *mundium*, the only *matrimonium legitimum*. Of itself, however, it was not sufficient

[27] Joyce, *Christian Marriage*, pp. 48-50.

[28] This was similar to the *patria potestas* and the *paterfamilias* system known to the Romans.

[29] *Edictum Rothari, a. 643*, n. 182, 195; *Liutprandi Leges anno septimo decimo* (a. 729), 17 — *Leges Longobardorum — Monumenta Germaniae Historica, Leges* (5 vols., Vols. I-IV, ed. G. Pertz; Vol. V, edd. G. Pertz, G. Waitz, H. Brunner, Hannoverae, 1835-1899), IV, pp. 41, 42, 154 (*Monumenta Germaniae Historica* will be cited hereafter *MGH*); *Chlothaharici I Regis Constitutio*, n. 7—*MGH, Leges*, I, 2; cf. also the Capitulary of King Pippin in 757—*MGH, Leges*, I, 28.

[30] Von Hörmann, *Quasi-Affinität* (2 vols., Innsbruck, 1897-1906), II, 194; Friedberg, *Das Recht der Eheschliessung* (Leipzig, 1865), p. 25; Joyce, *Christian Marriage*, p. 49.

[31] *Lex Visigothorum Recessvindo rege edita a. 654*, III, 1,3 and III, 4,2—*MGH, Legum Sectio I*, Vol. I, *Lex Visigothorum* (ed. K. Zeumer, Hannoverae, 1902), p. 122; *Pippini Capitulare Vernense, a. 755—MGH, Leges*, I, 26.



to constitute marriage. There was needed besides a handing over of the bride to the groom. This *deductio* was necessary in every marriage, even in a *matrimonium non legitimum* (one recognized by law, but remaining without full legal effects), for it really sealed the marriage contract. After this *deductio* the couple remained chaste for three days and thereafter went to the church for Mass, Communion and the nuptial blessing.[32] Later it became customary to exchange consent *ante valvas ecclesiae*; in time, the priest began to take part in this ceremony. The couple then entered the church for Mass, Communion and the nuptial blessing.

The State legislated against clandestine marriages because of the divers evils that flowed therefrom. One finds even civil legislation prescribing that no one should marry without the knowledge of the priest of the place and his own relatives. At first the priest acted as an investigator whose office it was to give a *"nihil obstat"* to the marriage, and then the nuptial blessing subsequent to the marriage. As time went on his office grew in importance.

## Article II. Church Customs and Laws on Marriage

In its infancy, the Church had no ecclesiastically prescribed form for marriage. It simply accepted the customs and laws of the peoples with which it came into contact, keeping what was not contrary to its doctrine on faith and morals, and developing some customs of its own. The faithful were ordered to observe the civil laws of their native countries.[33] Never was any form of marriage prescribed for validity.

[32] Vestiges of this remained as late as the eleventh century. Cf. *Anselmi Lucensis Collectio Canonum*, lib. X, c. 2—(ed. Thaner, Oeniponte, 1906), p. 483.

[33] Tertullian, *Ad Uxorem*, II, c. 9: ". . . rite et iure nubunt."—Migne, *Patrologiae Cursus Completus, Series Latina* (221 vol., Parisiis, 1844-1855), I, 1302 (hereafter cited *MPL*); *Corpus Scriptorum Ecclesiasticorum Latinorum* (71 vols., incomplete, Vindobonae, 1866- ), LXX, 123 (hereafter cited *CSEL*). Pope Nicholas I in his *Responsa ad Bulgaros* (cf. *MPL*, CXIX, 979; Jaffé, *Regesta Pontificum Romanorum ab condita Ecclesia ad annum post Christum natum MCXCVIII* [2. ed., 2 vols., correctam et auctam auspiciis Gulielmi Wattenbach curaverunt F. Kaltenbrunner ad annum 590, P. Ewald ab anno 590 ad annum 882, S. Loewenfeld ab anno 882 ad annum 1198, Lipsiae, 1885-1888], JE, n. 2312 [hereafter cited as JK, JE, or JL]; *MGH, Epistulae*, Vol. VI [Karolini Aevi IV], pars prior [curante Ernesto Dümmler, Hannoverae,

The early Fathers of the Church treated of marriages mostly in conjunction with their doctrine regarding the true marriage between the Blessed Mother and St. Joseph and in connection with their teaching on the espousals of virgins to Christ. Since betrothals as incidental to marriage were customary among the Romans and necessary among the Jews and Germanic peoples, the early Christians found no difficulty in accepting this practice. Besides, they had the example of the Blessed Mother, who herself had been espoused. As in all the customs mentioned above, there was a period of waiting between the betrothal and the nuptials. Augustine (354-430) mentioned this in his sermons.[34]

It seems that from very early days a sacred rite was attached to the celebration of the nuptials, only subsequent to which followed the cohabitation of the wedded pair. St. Ignatius (+ 107) in his letter to St. Polycarp wrote: "For those of both sexes who contemplate marriage it is proper to enter the union with the sanction of the bishop." [35] Tertullian (ca. 160-ca. 230) spoke of a marriage ceremony that was employed perhaps as a refinement of the *confarreatio* ceremony, wherein pagan sacrifices were supplanted with the holy sacrifice of the Mass.[36]

The celebrated text regarding the formation of marriage comes from the famous *Responsa ad Bulgaros* of Pope Nicholas I (858-867).[37] In his reply to a series of questions proposed by the Bulgarian Christians, the Pope delineated the customs connected with the celebrating of marriages as they were observed at Rome. He wrote that the customs were accepted by the Church in very ancient

1902]; pars II, fasc. I [curante Ernesto Perels, Berolini, 1925], pars II, fasc. I, pp. 569-570) refers to the Roman Laws as *venerandae*—". . . nec inter eos venerandae Romanae leges matrimonium contrahi permittunt."

[34] E.g., *MPL*, XXXIV, 452; *CSEL*, XXVIII, 376.

[35] *Epistola ad Polycarpum*, V, 3—Migne, *Patrologiae Cursus Completus, Series Graeca* (161 vols., Parisiis, 1857-1866), V, 867 (hereafter cited *MPG*). Translation from *The Epistles of St. Clement of Rome and St. Ignatius of Antioch* (translation by James A. Kleist), Ancient Christian Writers, The Works of the Fathers in Translation, n. 1 (Westminster: Newman, 1946), p. 98.

[36] *Ad Uxorem*, II, c. 9—*MPL*, I, 1302; *CSEL*, LXX, 123.

[37] JE, n. 2312; *MPL*, CXIX, 979-980; *MGH, Epistulae*, VI, pars II, fasc. I, pp. 569-570.



times, and that it still held them. The Roman Pontiff then divided the entire process into four stages. There was first a betrothal, which was then followed by the rite of the *desponsatio*, at which a ring was placed on the woman's finger. Thirdly, there followed the celebration of the Mass either immediately (*mox*) or at some convenient time (*aut apto tempore*). Lastly there was the crowning of the couple as they were leaving the church. This decretal had a great influence in the development of the Church's law; it meant that the Church had accepted the classic Roman Law on the formation of marriage.[38] This, said the Pope, was the custom at Rome. However, one may say that it seems to have been the custom also in the Frankish and Lombard Kingdoms.[39]

If there was one matter that the Church stressed as essential from the very beginning, it was consent. It adopted the old Roman principle: *Consensus, non concubitus, facit nuptias.* Tertullian, speaking of betrothal, treated it as a foretaste of marriage, for *"mens per voluntatem exprimitur."* [40] It is not the deflowering of a virgin but rather the conjugal pact that constitutes marriage.[41] St. John Chrysostom (354-407), according to Pope Nicholas I, in his Homily 32, on St. Matthew, taught that *"matrimonium non facit coitus, sed voluntas."* [42]

In the same context, Pope Nicholas I made it clear that it is consent alone that brings marriage into existence. Even if all the ceremonies mentioned by him had been omitted, as long as matrimonial consent was present, there existed a marriage. Pope Hadrian II (867-872), successor of Nicholas I, in a reply to a question proposed to him in the year 872, answered that, inasmuch as a marriage was entered into *utriusque partis assensu*, it must be considered a true marriage and was not to be dissolved.[43]

It was for this reason that the Church had trouble with clan-

[38] Von Hörmann, *Quasi-Affinität*, II, 217.

[39] Von Hörmann, *op. cit.*, II, 187, footnote.

[40] *De Oratione*, c. 22—*MPL*, I, 1190; *CSEL*, XX, 196.

[41] St. Ambrose, *De Institutione Virginis*, VI, 41—*MPL*, XVI, 315.

[42] *Responsa ad Bulgaros*—*MPL*, CXIX, 980; *MGH, Epistulae*, VI, pars II, fasc. 1, pp. 560-570.

[43] JE, n. 2948; *MPL*, CXXII, 1318.

destine marriages. True, it was prescribed that marriages should take place publicly; still, if they were entered into secretly, they were considered as true marriages.

The priest is mentioned as taking part in the nuptials from the very beginning.[44] His presence was prescribed either for a confirming of the agreement (marriage) already existing, or for the blessing of it.[45] Despite the fact that his presence was either assumed or even called for, nowhere was it prescribed for the validity of the marriage. In fact, marriages contracted apart from his presence were deemed valid as long as consent had been manifested.[46]

Any history of the development of the formation of marriage in the early Church would not be complete without a mention of the meaning of the *desponsatio* ceremony and the *copula* theory. In the early Church, the *desponsatio* had a great significance. It seems that the *desponsatio* was looked upon as a real marriage, the nuptial ceremony being performed simply *"ad honestandam mulierem."* Two canonists of the Eastern Church stated that in the Mosaic Law *sponsalia* constituted a true marriage.[47]

The Fathers used the term *sponsa* for wife, i.e., at least for one who had not as yet begun physical relationship with her husband.[48] Further evidence is found in conciliar legislation and papal decretals concerning the sacredness and apparent indissolubility of the *desponsatio*.[49] In view of all these decisions it is easy to see how Von

[44] *Epistola Sti. Ignatii ad Polycarpum—MPG,* V, 867; Tertullian, *De Pudicitia,* c. 4—*MPL,* II, 987; *CSEL,* XX, 225.

[45] Possidius, *Vita Sti. Augustini Episcopi—MPL,* XXXII, 56.

[46] JE, n. 2948; *MPL,* CXXII, 1318.

[47] Matthaeus Blastares, *Syntagma Alphabeticum,* c. XV—*MPG,* CXLIV, 1186; Theodorus Balsamon, *In Concilium in Trullo,* c. 98—*MPG,* CXXXVII, 854.

[48] Ambrose, *De Institutione Virginis—MPL,* XVI, 315; Tertullian, *De Virginibus Velandis—MPL,* II, 897; Cyprian, *Epistola ad Pomponium—MPL,* IV, 368; *CSEL,* III, pars 2, p. 475; Augustine, *De Nuptiis et Concupiscentiis—MPL,* XLIV, 420; *CSEL,* XLII, p. 224.

[49] *Concilium Ancyranum* (314), c. 11—Bruns, I, 68; Hardouin, I, 276; Mansi, II, 525; St. Eusebius (+ 309)—JK, n. 169; Mansi, II, 425; Siricius (384-399), in his letter to Himerius, Bishop of Tarragona—JK, n. 255; *MPL,* XIII, 1136; Mansi, III, 655; St. Gelasius (492-496)—JK, n. 692; Nicholas I in his reply to Addo, Archbishop of Vienne (860-875)—JE, n. 2697; *MPL,* CXIX, 796; *MGH, Epistulae,* VI, pars II, fasc. 1, p. 619.



Hörmann (1865-1946) at the beginning of this century pointed to them as proof that the early Christians combined the rites of the betrothal and marriage, so that the ceremony was no longer simply a promise of a future marriage, but the actual marriage itself.[50] This opinion has probability, but a definitive answer cannot be given.

As for the *copula* theory, its origin is hidden in obscurity.[51] A staunch defense of it can be found in *"De Nuptiis Stephani et filiae Regimundi comitis"* composed by Hincmar of Rheims (+ 882). In this work, the Archbishop contended that consummation is essential to marriage, and that without it there is no union of the partners.[52] Von Hörmann thought that Hincmar held the consent to be sufficient for the marriage, but also that the *copula* was necessary if the marriage was likewise to be a sacrament.[53]

There is no difficulty in seeing the possibility of error on Hincmar's part. He based his doctrine on what he thought had been the tradition of the Church. His argument was taken from what he thought emanated from St. Augustine[54] and St. Leo I (440-461). However, although the words he quoted from St. Augustine had been ascribed to the latter during the Middle Ages, they cannot be found in any of his works.[55] In regard to St. Leo I, Hincmar simply offered a mistaken interpretation of a decretal sent by that Pope to Bishop Rusticus of Narbonne.[56]

In summary, one may say that "the variety of marriage customs current among Christian nations prevented the Church from singling out any one rite as essential. She did not want to multiply sins; hence, she moved slowly."[57]

[50] *Quasi-Affinität,* II, 1-223.

[51] Esmein, *Le Mariage in Droit Canonique* (2 vols., Paris, 1891), I, 99.

[52] *MPL,* CXXVI, 137.

[53] *Quasi-Affinität,* II, p. 423, n. 2.

[54] *MPL,* CXXVI, 137.

[55] Joyce, *Christian Marriage,* p. 56.

[56] JK, n. 544; *MPL,* LIV, 1204; Joyce, *op. cit.,* p. 56.

[57] Pollock and Maitland, *History of English Law,* II, 370.