CHAPTER II

THE FORM OF MARRIAGE FROM THE DECREE OF GRATIAN (CA. 1140) TO THE COUNCIL OF TRENT (1545-1563)

ARTICLE I. THE DISPUTE BETWEEN THE SCHOOLS OF BOLOGNA AND PARIS.

WHEN Gratian (+ca. 1157) set out to make a collection of the existing canons, he found a maze of seemingly contrary, and at times contradictory, texts and decretals. In fact, the name he gave to his collection—*Concordia Discordantium Canonum*—is well descriptive of its contents. It is to be expected that he encountered the same difficulty in regard to the canons on the formation of marriage.

At the time he made his collection, there were four possibilities, or theories, if one may use that term, that he had to keep in mind. Naturally he had to remember that the Church, from the very beginning, held to the Roman concept that consent, and not sexual relations, made the marriage. Secondly, there was the theory that consent was not sufficient; that a *copula carnalis* was necessary to conclude the marriage, since only then would the union of Christ and His Church be symbolized and the sacrament be present. Thirdly, he needed to advert to the great importance that the *desponsatio* held in the Church. It was believed that the consent given at the *desponsatio* became in time the marital consent. Finally, he had to recall that the requirement that each couple receive the nuptial blessing before they began to cohabit was still being observed by some and neglected by others.

Because of these various possibilities, it was inevitable that a dispute would arise when Gratian presented his solution for the problem. Two schools of thought arose as to what really constituted marriage in its full existence, viz., the School of Bologna, which followed Gratian, and the School of Paris, which followed Hugh of St. Victor (+ 1141) and Peter Lombard's treatment of marriage in his

Book of Sentences (1150-1152). The former School held for the *copula* theory; the latter held for the consent theory, championing the existence of a true marriage between the Blessed Virgin Mary and St. Joseph. When this dispute was settled, it was decided once and for all what was essential in the formation of marriage.

A. *The Decree of Gratian and the School of Bologna*

In question 2 of the 27th Cause, Gratian offered his doctrine on the formation of marriage. In the first section of this question [1] he cited texts that seem to substantiate the theory that consent alone brings the marriage into existence; that such consent is present in the *desponsatio*; and that the *sponsus* and *sponsa* are true *coniuges*. In the following section of the same question [2] he presents the contrary thesis, namely, that a *copula carnalis* was necessary for the constituting of the marriage,[3] and that the *desponsati* are not true *coniuges*. In his *Dictum* to c. 29, there is found the weakest point of his whole solution, for there he proceeded contrary to tradition by maintaining that the Blessed Virgin and St. Joseph were not man and wife.[4]

The solution he reached was that through the *desponsatio* (es-

[1] Cc. 1-15, C. XXVII, q. 2.

[2] Cc. 16-34, C. XXVII, q. 2.

[3] He cited a text from St. Augustine (c. 16) and one from Pope Leo I (c. 17). According to Friedberg, *Corpus Iuris Canonici* (2. ed., 2 vols. in 3, Lipsiae, 1879-1881), I, pars 2, col. 1066, footnotes 123 ff. to c. xvi, the one ascribed to St. Augustine is spurious, and the one ascribed to Pope Leo I is not reproduced as it is found in the original; a *non* was inserted to change the meaning of the original, viz., Gratian has: "Cum societas nuptiarum ita a principio sit instituta, ut praeter communionem sexuum *non* habeant in se nuptiae Christi et ecclesiae sacramentum . . .," while the other reading, as found in MSS of Pope Leo's writings, and as found in Burchard and Ivo, has instead of "*non habeant*," the word "*haberet*." However, Friedberg added immediately that the text in Gratian is also found in Ivo's *Panormia*, VI, 23: ". . . in Pan. tamen VI, 23 sunt ut ap. Grat." The Correctors in the edition of 1582 allowed it to remain "ut respondeat verbis Gratiani, qui manifeste utitur hoc loco depravato, itemque Magistri, et glossae, et posteriorum doctorum, nihil est in textu mutatum." Friedberg also allowed it to remain.

[4] "Unde apparet eos non fuisse coniuges."

pousals) marriage was indeed begun, but was completed only through a union of the sexes. Hence, between the spouses there is only an inchoate or incipient marriage. Summarizing his theory one must say that marriage was brought into existence only with the *copula*. The consent, which was necessary, was simply a *conditio sine qua non*; the *copula*, however, was essential. The consent effected an incipient marriage (*matrimonium initiatum*), but only the *copula* made it a complete and perfect marriage (*matrimonium ratum*).

In treating of clandestine marriages in *Causa XXX, q. 5*, he showed that they were forbidden. However, if they did take place, they were indeed to be judged as illegal, but nonetheless as true marriages, valid and indissoluble.

The Bolognese School of canonists adhered strictly to the teaching of Gratian; what is more, they went even further. Whereas in c. 50, C. XXVII, q. 2, Gratian seemed not to allow the breaking of a solemn espousal blessed by the Church, the School did not accept this as an exception to the rule that a *copula* after a second espousal nullified the first espousal if it had not been accompanied with a *copula*.[5] Besides, they enumerated eight reasons in consequence of which an unconsummated "*desponsatio*" could be dissolved.[6]

B. *Peter Lombard and the School of Paris*

The other view prevalent at the time also found many defenders. St. Peter Damian (+ 1072) rejected as absurd the contention that the *copula* made the marriage.[7] However, it was the University at Paris and the French Church that bore the brunt of the defense of the traditional doctrine. It fell to Peter Lombard (ca. 1100-ca. 1160) in his Four Books of Sentences to present the view held by the School of Paris. He it was who introduced the distinction between the *consensus de praesenti* and the *consensus de futuro* to explain the two different kinds of *desponsatio*. It served to eliminate the

[5] *Summa Paucapaleae*, C. XXVII, q. 2—ed. Von Schulte (Giessen: Roth, 1890), p. 114.

[6] E.g., Rufinus, *Summa Decretorum*, C. XXVII, q. 2—ed. H. Singer (Paderborn, 1902), p. 443.

[7] *De tempore celebrandi nuptias—MPL*, CXLV, 660.

arbitrary usage of the latter term in two distinctly different senses. His one big aim was to vindicate the relationship between the Blessed Virgin and St. Joseph as a true marriage.

According to Peter Lombard, the efficient cause of marriage is consent, not any consent, but one that is expressed in words of the present, and not in words of the future tense. If the consent were *de futuro*, or merely internal and not externalized in any manner, marriage would not be effected.[8] It should be apparent that consent brings marriage into existence even if no *copula carnalis* either preceded or followed the exchange of consent. Using this distinction, he was able to explain the existence of a true marriage between the Blessed Virgin and St. Joseph and also the fact that *sponsi* could leave each other, exchange consent with someone else or choose to enter a monastery as long as the first *desponsatio* had remained only *de futuro*. If it was *de praesenti* this could not be done.

As for clandestine marriages, they were considered prohibited and sinful if there was not a sufficient reason for contracting them thus. However, they were valid.[9]

C. *Settling of the Dispute*

A solution for this problem which evoked such a diversity of opinion, which in turn led also to a diversity of practice, was reached toward the end of the twelfth and the beginning of the thirteenth century, largely through the course of action adopted by Pope Alexander III (1159-1181). The latter, as Rolando Bandinelli, prior to his elevation to the papacy, wrote a *Summa Decretorum*, in which he followed the Bolognese School; as Pope, on the other hand, he leaned more toward the School of Paris. He decided in favor of

[8] *Lib. IV Sententiarum*, Dist. xxvii, c. 3—*Libri Sententiarum Quatuor* (2. ed., 2 vols., cura et studiis PP. Collegii S. Bonaventurae, ad Claras Aquas [Florentiae], 1916), II, 917; cf. also *MPL*, CXCIV, 910. In the same vein also St. Thomas Aquinas, *Super Libris Magistri Sententiarum Libri Quatuor*, lib. IV, Dist. xxvii, art. 2.—*Opera Omnia* (25 vols., Misurgia: New York, 1948-1950) XXII, 403-408.

[9] *Lib. IV Sententiarum*, Dist. xxviii, q. 2.—*MPL, loc. cit.*; ed. PP. Coll. S. Bonav., II, 926.

the theory that consent alone was sufficient if it was a consent *de praesenti*.[10]

If one sought briefly to summarize the doctrine of Alexander III, one could say that he held for the sufficiency of a consent *de praesenti* in the constituting of marriage; consummation made the marriage indissoluble. He put an end to the dispute, once and for all; the Church's doctrine on the efficient cause of marriage was definitely established. The succeeding popes issued decretals totally in harmony with this doctrine. Nevertheless, it took some time before a uniformity in practice was reached. Innocent III (1198-1216) reprimanded the diocese of Modena for not disposing of the old custom and for not keeping the law of Rome.[11]

Article II. Clandestine Marriages Before the Council of Trent

A matter which was a source of much trouble and grief to the Church in the Middle Ages now merits attention—the matter of clandestine marriages. Although the Church had not prescribed any form of marriage that had to be observed under pain of nullity, it seems that the Church had little, if any, trouble with clandestine marriages in its early history. The complete lack of conciliar legislation and papal decretals on this matter seems to bear evidence to this contention. Even Pope Nicholas I stated that it would not be a sin for poor people if they did not observe the ceremony of marriage as described by him.[12] It hardly seems incongruous to assume that, had there been any difficulty in this regard, the popes would have seized their opportunities to prohibit clandestine unions.

That many persons in time must have contracted marriages secretly, i.e., without seeking the Church's blessing, is quite evident from the complaint of Bishop Jonas of Orleans (+ 844),[13] and from

[10] C. 14, X, *de sponsalibus et matrimonio*, IV, 1; c. 3, X, *de sponsa duorum*, IV, 4; c. 2, X, *de conversione coniugatorum*, III, 32.

[11] C. 5, X, *de sponsa duorum*, IV, 4.

[12] *Responsa ad Bulgaros—MPL*, CXIX, 980; *MGH, Epistulae* VI, pars II, fasc. 1, pp. 569-570.

[13] *De Institutione Laicali*, II, c. 2—*MPL*, CVI, 171.

the compiler of the Pseudo-Isidorian Decretals.[14] Once the trouble began, the Church had no peace in this regard till the reform at the Council of Trent.

A marriage could be considered clandestine if:

(1) it was contracted apart from the presence of witnesses who, if the occasion arose, could testify to its celebration;
(2) the solemnities mentioned by Pope Nicholas I in the *Responsa ad Bulgaros* and incorporated in C. XXX, q. 5 of the *Drecretum Gratiani* were omitted;
(3) later, i.e., after the IV General Council of the Lateran (1215), the banns, then a prescribed formality, were omitted.[15]

Despite the prohibitions from the ecclesiastical and civil laws, such marriages had to stand as valid unions. They ran the risk of being judged as concubinage until the contrary could be proved. It is interesting to note that the two schools of thought on the formation of marriage, even though they engaged in acrimonious disputes on the main point at issue, nevertheless agreed that clandestine marriages were valid.[16] No evidence is found that the popes ever declared marriages invalid on the ground of clandestinity. Finally, conciliar legislation forbidding such marriages in the strongest terms never questioned their validity.[17]

[14] Hinschius, *Decretales Pseudo-Isidorianae et Capitula Angilramni* (Lipsiae, 1863), 87.

[15] *Glossa ordinaria* sub v. *clandestina*, ad c. 4, X, *de clandestina desponsatione*, IV, 3. Cf. also Hostiensis, *Summa Aurea* (Venetiis, 1570), p. 334, where a fourth type was added, namely, a marriage contracted without the permission of the bishop, if, for some reason, the person was forbidden by the Church to marry.

[16] *Dictum* post c. 8, C. XXX, q. 5; *Summa Paucapaleae*, C. XXX, q. 5, ed. Von Schulte, p. 123; St. Thomas Aquinas, *Super Libris Magistri Sententiarum* Liber IV, Dist. xxviii, art. iv: "Nam de essentia matrimonii sunt personae legitimae ad contrahendum quasi materia, et consensus per verba de praesenti expressus quasi forma. Alia sunt de solemnitate sacramenti; unde cum desunt in matrimonio clandestino, veritatem matrimonii non tollunt, licet contrahentes peccent nisi habeant excusationem legitimam."

[17] *IV Concilium Lateranense* (1215)—Mansi, XXII, 1038; *Concilium Lan-*

Why did it not declare all such marriages invalid and avoid all the confusion and difficulty stemming from such marriages? Joyce, in his *Christian Marriage,* p. 116, gives the following answer:

> The answer is that it was widely believed that she lacked the power to take such a step. The greater number of theologians held that the matter and form of each sacrament had been determined by Christ Himself; that the Church had authority only as regards their administration but could not make any law affecting the validity of the sacred sign itself. . . . From this it seemed to follow that if two persons, whose union was not hindered by a diriment impediment, chose to give each other the mutual pledge which was commonly held to furnish the matter and form of the Sacrament of Matrimony, not even the Church herself could prevent the sacrament from efficaciously being conferred. All that could be done was to forbid such marriages under the pain of mortal sin and impose the greatest ecclesiastical censures on all who should violate the command.

gensiense (Langeais) (1278)—Mansi, XXIV, 627; *Praecepta Antiqua Dioecesis Rotomagensis* (Rouen) (1235)—Mansi, XXIII, 383.

CHAPTER III

THE DISCIPLINE FROM THE DECREE *TAMETSI* OF THE COUNCIL OF TRENT TO THE DECREE *NE TEMERE* (1907)

When the Fathers of the Council of Trent came together in the year 1545, they were faced with what seemed a superhuman task of clarifying and explaining the dogmas of the Church, and with what seemed even more insurmountable, a sorely needed disciplinary reform. One of the matters that cried for reform was the marriage discipline, especially the grave evil of clandestine marriages which had been plaguing the Church for about five hundred years, necessitating legislation by particular and even general councils as well as iterative condemnation in the decretals of the Roman Pontiffs. It was here that for the first time a universally prescribed form of marriage was proposed and adopted.

Article 1. The Form of Marriage According to the Decree *Tametsi*

Despite the fact that it was clearly evident that some type of reform had to take place in regard to clandestine marriages, many of the Fathers at the Council rebelled at the idea of invalidating clandestine marriages. When the first draft of the marriage discipline was proposed, there were many objections. The usual reasons given were, first, that such marriages had always been recognized as valid in the eyes of the Church; [1] secondly, that if the proposal were accepted, then the Church would be overstepping its bounds by tampering with the matter and form of a sacrament, a power not accorded by its Divine Founder, and, thirdly, that the Church could not forestall the reception of a sacrament as long as a couple other-

[1] Conc. Trident., sess. XXIV *de ref. matrim.,* c. 1: "Tametsi dubitandum non est clandestina matrimonia libero contrahentium consensu facta, rata et vera esse matrimonia quamdiu ecclesia ea irrita non fecit. . . ."—Schulte-Richter, *Canones et Decreta Concilii Tridentini* (Lipsiae, 1863), pp. 216-217 (hereafter cited Schulte).

wise capable of entering marriage would exchange consent in terms of the present, for that was all that was required by the natural law for the contract of marriage.

The arguments against these objections were well explained by Laymann (1574-1635),[2] who used the analogy of the State invalidating *ipso iure,* for the common good, contracts of minors, profligates, etc., by rendering these persons *inhabiles* (incapable) and the contracts null if they lacked certain solemnities. If this was so, then the Church, because of the fact that marriage is a sacrament and consequently falls under its jurisdiction, could aso, for the good of souls, render those who attempted to contract marriage secretly, i. e., without the prescribed solemnity, incapable of contracting marriage. He thereby answered the difficulty of the Church's apparent changing of the matter and form in the sacrament of matrimony. He conceded that the Church cannot directly (*per se*) change or invalidate the matter or the form of a sacrament as instituted by Christ. However, he added, it can do so indirectly (*per accidens*). It does this by invalidating the natural contract of marriage if it is entered into clandestinely. Such a contract thenceforth would not be *"legitimus"* and *"ex institutione Christi in legitima viri ac foeminae coniunctione seu contractu sacramentum fundatur."*

After three proposed texts proved unsatisfactory, a fourth one was proposed and finally adopted on November 11, 1563, even though a large number of dissident votes were cast. The approved text became the universal marriage discipline under the well-known name of *Tametsi,* taken from the first word of the text of the law.

A. *The Essential Points of the Decree* Tametsi

Despite the fact that the Council of Trent instituted a universally prescribed form of marriage, nevertheless this form did not bind everywhere in the world. The Fathers of the Council enjoined each ordinary, as soon as he possibly could, to promulgate this as the Law of the Council of Trent in every parish of his diocese, and

[2] *Theologia Moralis in quinque Libros Distributa—editio nova ab auctore recognita et primum in Italia excussa* (Venetiis, 1630), lib. V, tract X, pars II, c. 4 (hereafter cited Laymann).

that this should be done as often as possible in the first year, and afterwards as often as he deemed it expedient. Further, the Council prescribed that only after thirty days from the first day of publication in a parish was this law to take effect there.[3]

The territoriality of this law depended on its promulgation and explanation in the parish in question. If the ordinary did not promulgate it in his diocese; or, if he promulgated it in Latin without explaining it, it would not bind in his diocese. Promulgation and explanation of the decree *Tametsi* as the law of the Council of Trent, but only in some of the parishes of the diocese and not in the others, would make the law obligatory only within the boundaries of the parishes within which it was promulgated. It was for this reason that there were many places throughout the world where this law did not bind because of its non-promulgation. In those places the former discipline of the Church obtained.

Just as the decree *Tametsi* was not universally binding in its territorial aspect, so too it was not universally obligatory in its personal aspect. Inasmuch as it was a purely ecclesiastical law, it could bind only baptized persons, whether Catholics or heretics, who because of their baptism became subject to the laws of the Church. The heretics were not exempt from this form, for they were not to benefit through their defection from the Faith. Because of this fact, many invalid marriages were contracted by heretics.[4] Since it was baptism that made one subject to this law, non-baptism left one free of this obligation. Hence, infidels, even though they lived in a territory where the law was promulgated, were not bound by this law. They had to follow the prescripts of the civil law, if any, or follow the prescripts of the natural law.

Besides, it was necessary to have a domicile in the territory where the law obliged, for marriage had to be contracted before one's proper pastor, or a priest delegated by the pastor or the ordinary. If the baptized party had a domicile where the law obliged,

[3] Conc. Trident., sess. XXIV *de ref. matrim.,* c. 1—Schulte, p. 216.

[4] This was so until the Benedictine Declaration of Pope Benedict XIV on November 14, 1741, by which heretics were freed from the obligation of observing the decree *Tamesti.* Cf. Denzinger, *Enchiridion Symbolorum et Definitionum* (ed. decima emendata et aucta a Clemente Bannwart, Friburgi Brisgoviae, 1908), nn. 1452-1457.

he could not, to circumvent the law, go to a place where the law did not oblige, in order to contract marriage there. However, a person bound by the decree *Tametsi,* when wishing to contract marriage with a person not bound thereby, was freed of this obligation because of the well-known principle in pre-Code jurisprudence: the party free of the obligation of observing the form communicated this immunity to the other party.[5]

To conciliate the divergent opinions and to avoid giving the impression that they were changing the matter and form of the sacrament of matrimony, the Fathers of the Council of Trent made clandestinity a diriment impediment to marriage. They decreed that anyone who would in the future attempt to contract marriage in any other way than in the presence of the pastor, or of another priest delegated by the pastor or the ordinary, and of two or three witnesses would be completely incapable of contracting such a marriage, and all such marriages would be null.[6] To contract marriage validly, then, wherever the decree *Tametsi* obliged, the parties had to do so in the presence of the proper pastor, who did not necessarily have to be a priest,[7] or in the presence of some authorized priest and of at least two witnesses. If this form was not observed, the marriage was termed clandestine and, as such, invalid, because of the diriment impediment of clandestinity.

B. *Provisions When the Form Could Not Be Observed*

Because of the general wording of the law, seemingly not admitting any exceptions, a natural question arose quite soon after its adoption at the Council of Trent. What would happen in the event that no priest was present to witness the marriage? Would it mean that the people in those circumstances would be incapable

[5] ". . . pars immunis a forma servanda communicat cum altera parte suam immunitatem."—Benedictus XIV, *De Synodo Dioecesana* (2 vols., secunda Parmensis editio, Parmae, 1744), lib. 6, c. 6, n. 1 (hereafter cited *De Synodo*).

[6] Schulte, p. 217.

[7] At the time, a parochial benefice could be conferred upon a cleric, i. e., one who had already received at least Tonsure. Under the present discipline (c. 453, § 1), it is necessary that one have received the Sacred Order of Priesthood before one can be appointed pastor.

of entering marriage? Such an unhappy eventuality would not affect those who were not held to the prescribed form.[8] For these people what would normally be a clandestine marriage would be a valid marriage under any circumstances. It would be illicit if no excusing reason was present. The difficulty would arise when one had to deal with persons held to the form of marriage. It was the development of the discipline in answer to this difficulty that led to the present-day institute of the extraordinary form of marriage.

In a work that appeared shortly after the Council of Trent, Dominic Soto (1494-1560), in commenting on the opinions of Peter Lombard in the latter's *Book of Sentences,* asked himself whether clandestine marriages would ever be licit. His reply[9] mentioned four cases which to him seemed to permit one to contract clandestinely: first, after a union had been contracted *in facie ecclesiae* but with an occult impediment, the validation could take place secretly; secondly, in case of urgent necessity, when witnesses could not be had, e. g., in an invasion or in a case of patent fornication, the couple could with view to saving their life, contract marriage immediately to pose as husband and wife; thirdly, if a girl were to lose her patrimony through the machinations of her guardian; finally, if later there would be no opportunity of marriage. To this list Tanner (1571-1632) added a fifth case, namely, that the marriage could not without grave damage be contracted openly.[10] One must keep in mind that Soto died before the decree *Tametsi* was approved, even though the edition of his work here cited was not published till after his death.

[8] Cf. S. C. S. Off. (Sutchuen), 15 ian. 1784—*Collectanea Sacrae Congregationis de Propaganda Fide* (Romae: Typographia Polyglotta S. C. de Prop. Fide, 1893), n. 1394 (hereafter cited *Collectanea S. C. de Prop. Fide,* ed. 1893); *Collectanea Sacrae Congregationis de Propaganda Fide* (2 vols., Romae, 1907), n. 566 (hereafter cited *Collectanea S. C. de Prop. Fide,* ed. 1907); *Codicis Iuris Canonici Fontes,* cura Emi Petri Card. Gasparri editi (9 vols., Romae: Typis Polyglottis Vaticanis, 1923-1939. Vols. VII-IX, ed. cura et studio Emi Iustiniani Card. Serédi), n. 846 (hereafter cited *Fontes*).

[9] *Commentarium in Quartum Sententiarum* (2 vols., Venetiis, 1584), lib. IV, dist. 28, q. 1, art. II.

[10] Apud Schmalzgrueber (1663-1735), *Ius Ecclesiasticum Universum* (5 vols. in 12, Romae, 1843-1845), lib. IV, tit. III, c. 2, n. 104 (hereafter cited as Schmalzgrueber).

This opinion allowing clandestine marriages under such circumstances never found much favor, and was reprobated by subsequent authors, usually indirectly, but at times even directly.[11] The classic explanation of the nature of the form prescribed by the Council of Trent was given by Sanchez (1550-1610).[12] He categorically stated that, no matter what the necessity, a marriage contracted without the presence of an authorized priest and at least two witnesses would be invalid. His reason was the following: by stating that marriage cannot take place in any other way (*aliter*), the Council of Trent made this the form of marriage, and since a thing cannot exist without its form, neither can marriage. The Council was very specific when it rendered altogether incapable of marriage (*omnino inhabiles*) those who contracted otherwise, and there was no necessity that could supply for the invalidity of the matter or the form in a sacrament. He went further in saying that the divine law was also involved because of the precept that no one is allowed to know carnally one who is not his or hers, and in such cases the parties could not be each other's because of the impediment. The use of *epikeia* was not allowed in such a case, for the law was not merely a *lex praecipiens aut prohibens,* but a *lex inhabilitans,* requiring a substantial solemnity in the action. As to the cessation of ecclesiastical laws in grave necessity, that could indeed have obtained but for the presence also of the divine law. This explanation was accepted by many of the authors who came after Sanchez. They perhaps changed the wording, but their meaning remained substantially the same.[13]

[11] *Diana Coordinatus seu Omnium Resolutionum Moralium eius ipsissimis verbis ad propria loca et materias, per v.p. Martinum de Alcolea fideliter dispositarum tomi 10* (10 vols. in 5, Venetiis, 1728), Tom. II, tract 6 (*de matrim.*), res. 73 (hereafter cited as Diana); Verde (+ 1706), *Institutionum Canonicarum Libri Quatuor* (2 vols., Neapoli, 1735), lib. II, tit. 12 (*de sacr. matrim.*), c. 23, n. 4040 (hereafter cited as Verde); Pontius (1569-1629), *De Sacramento Matrimonii Tractatus* (Venetiis, 1756), lib. V, c. 6, n. 243 (hereafter cited as Pontius).

[12] *Disputationum de sancto matrimonii sacramento tomi tres* (3 vols., Antuerpiae, 1626), lib. III, disp. XVII, cc. 3-5 (hereafter cited as Sanchez).

[13] Pontius, lib. V, c. 6, n. 3; Perez (1578-1660), *De Sancto Matrimonii Sacramento-Opus Morale-Theologicum* (Lugduni, 1646), disp. XXXIX, sectt. 2-6 (hereafter cited as Perez); Reiffenstuel (1642-1703), *Ius Canonicum Universum-iuxta titulos quinque librorum decretalium* (5 vols. in 6, Romae, 1831-1834), lib. IV, tit. III, c. 3, n. 133 (hereafter cited as Reiffenstuel); Leurenius (1646-1723), *Ius Canonicum Universum* (3 vols., Venetiis, 1729), Vol. II, quaest. 144 ad lib. 4, tit. III (*de cland. desp.*) (hereafter cited as Leurenius); Schmalzgrueber, lib. IV, tit. III, c. 2, nn. 103-107.

It was not long before the Sacred Congregation of the Council, which had been instituted for the purpose of interpreting the laws of the august Council of Trent, was being besieged with problems in regard to the procedure to be followed when an authorized witness was unavailable. It began to issue replies and thus established norms of action in such eventualities. Inasmuch as replies from the Holy See to the difficulties presented to it showed a definite development, it will be helpful for the sake of clarity to show this unfolding of the mind of the Holy See in regard to, first, the inability of having the pastor or an authorized priest present for the marriage; secondly, the presence of witnesses; thirdly, the annotation of such marriages; and, finally, the obligation of receiving the nuptial blessing.

1. Unavailability of a Priest

With the spread of Protestantism in Europe and with the growth of persecutions not only in Europe but throughout the world, even as far as China and Japan, it was not a rare occurrence to find parishes wherein the decree *Tametsi* had been promulgated to be without resident pastors or any priest at all, either because they had been killed off or exiled, or because they remained in hiding for fear of the heretics and infidels. At times, because of the prescripts of the civil law, a pastor, though present, could not officiate at a marriage ceremony because of fear of reprisals from the civil government. In response to all such eventualities, replies had been forthcoming from the Holy See.

Actual physical absence of a priest. As early as the year 1602, not quite fifty years after the Council of Trent, the Sacred Congregation of the Council was faced with a problem from Belgium as to what was to be done in the case wherein the decree *Tametsi* had been promulgated but no pastor was on hand inasmuch as the parish was vacant, and the diocese lacked both a bishop and a chapter,

either of which could have delegated another priest to assist at the marriage. If one adhered strictly to the wording of the law, no marriage could then be contracted. The Congregation decreed that the contracting of a marriage undertaken in such circumstances without the presence of the pastor could nevertheless be valid as long as two witnesses were present.[14]

In the year 1625, the Sacred Congregation for the Propagation of the Faith issued two replies to the Bishops in Japan in reference to problems that affected people in that part of the world. On June 13th, it decreed that in regard to marriages that were to be contracted, the decree of the Council of Trent notwithstanding, if in the place in question or in the neighboring place there was no pastor or other priest, secular or religious, delegated by the bishop, the marriages could be contracted solely in the presence of witnesses. Two weeks later, the same Congregation issued a reply to the request that the Holy Father deign to dispense by supplying the defect of the necessary solemnities omitted in the marriages that had already been contracted without the presence of the pastor in Japan after the persecution of 1614, which brought about a great lack of priests. This favor was requested because it would be very difficult to validate all such marriages. The reply was that the law of the Council of Trent did not oblige in Japan (this, even though it had been promulgated there) and that the marriages that had been contracted were and continued to be valid as long as two witnesses were present. On July 2nd of the same year, Pope Urban VIII (1623-1644) approved this decision when stating that it was in accord with the one that had been given by the Congregation of the Council for Holland, Zeeland, and Friesland.[15]

[14] Pallottini, *Collectio omnium conclusionum et resolutionum quae in causis propositis apud Sacram Congregationem Cardinalium S. Concilii Tridentini Interpretum prodierunt ab eius institutione anno MDLXIV ad MDCCCLX distinctis titulis alphabetico ordine per materias digesta* (17 vols., Romae, 1868-1893), Vol. XIII, s.v. *Matrimonium,* c. XV, n. 86 (hereafter cited as Pallottini).

[15] *Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1386, 1387; *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 17. Cf. also S. C. S. Off., *Vic. Ap. Sutchuen,* 15 ian. 1784—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1394; (ed. 1907), n. 566; *Fontes,* n. 846, where almost the identical words are used and mention is made that the Holy See has answered often in the same manner when the same question was proposed.

The Congregation of the Council adverted to the reply of Cardinal Bellarmine (1542-1621) as quoted in Rota Decision 308, n. 25, coram Dunozetto,[16] in its reply to the Archbishop of Cologne, when it stated that if there was no Catholic pastor, a marriage would be valid without his presence. It mentioned that at other times it had also decided in this manner, always insisting, however, on the presence of witnesses.[17]

Pope Pius VI declared that the Congregation of the Council had often declared that, if the presence of the pastor could not be had, the purpose of the Council of Trent was satisfied when marriage was contracted in the presence of two witnesses.[18] Even as late as the nineteenth century, the Holy Office stated that the law of the Council of Trent remained suspended as to its effects as often as it could no longer be observed because of insurmountable difficulties, such as the absence of the pastor.[19]

Difficulties also arose in regard to cases when indeed pastors were not absent, but for one reason or another proved unavailable. In this regard the Congregation of the Council decreed that marriage could be contracted without the pastor or a priest if really and truly it was unknown where the pastor or the bishop was, or

[16] *Sacrae Romanae Rotae Decisiones Recentiores* (ed. Pr. Farinacius, Paulus Rubeus, et Joannes Baptista Compagnus, pro annis 1518-1684, 25 vols., Romae, 1618-1703), Pars IV, t. 2, Annotatio ad Dec. 431, n. 35 ff (hereafter cited *S. R. Rotae Decisiones Recentiores*); cf. also the letter of Pope Pius VI (1775-1799) to the Archbishop of Rouen, dated April 22, 1795, where the reply of Bellarmine is quoted. The letter may be found in *Pii VI Pontificis Maximi Acta Quibus Ecclesiae Calamitatibus in Gallia consultum est* (2 vols., Romae: Typis S. C. de Prop. Fide, 1871), II, 112.

[17] S. C. C., *Colonien.,* 27 ian. 1728—*Thesaurus Resolutionum Sacrae Congregationis Concilii* (167 vols., Urbini, 1718-1741; Romae, 1741-1908), IV, 153 (hereafter cited as *Thesaurus Resolutionum*). Cf. also Benedictus XIV, *De Synodo,* lib. XII, c. 5, n. 5, where mention is made of another decision of the same Congregation on March 30, 1669, and reference is made to the authors who agree with this decision.

[18] *Pii VI Pontificis Maximi Acta Quibus Ecclesiae Catholicae Calamitatibus in Gallia consultum est,* II, 12-16.

[19] S. C. S. Off., instr. (ad Praef. Mission. Martinicae, etc.), 6 iulii, 1817—*Collectanea S. C. de Prop Fide* (ed. 1893), n. 1400; (ed. 1907), n. 725; *Fontes,* n. 855.

if it was morally impossible to find him.[20] If it was known where he was, the Holy See in various instances declared that marriages could be contracted apart from his presence: (1) when he was in hiding and it was not safe to approach him; [21] or (2) when the pastor was not free to come to the parties; [22] or (3) when he could not be approached without danger; [23] or (4) when he could not be reached safely or easily; [24] or (5) when, because of persecutions, Christians did not have easy access to him.[25]

Exceptions also obtained outside the cases of danger. The Congregation for the Propagation of the Faith was asked whether marriages could take place without the assistance of the pastor if in a certain place he could not be had because of his very great distance from that locality or his exile from it. The reply of July 7, 1670, pointed to the decree given to the Bishop of Tricarico on January 18, 1663.[26] A similar reply was given to the Vicar Apostolic of Tunkin on March 1, 1784. The reply was not as demanding, however, for it postulated only such a distance in consequence of which the pastor could not conveniently be had. On July 1, 1863, a further step was made. The Holy Office stated that one could forego the presence of the pastor at marriage if it was difficult to get to him and one did not know when he would be available and

[20] S. C. C., *Tricarien.*, 18 ian. 1863—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1388, ad 5um; (ed. 1907), n. 149, ad 5um. S. C. C., *Colonien.*, 27 ian. 1728—*Thesaurus Resolutionum*, IV, 153.

[21] S. C. C., *in una Belgii*, 26 sept. 1602—Pallottini, XIII, s.v. *matrimonium*, n. 86; *Tricarien.*, 18 ian. 1663—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1388; (ed. 1907), n. 149.

[22] Benedictus XIV, *De Synodo*, lib. XII, c. 5, n. 5; S. C. S. Off., *Quebecen.*, 17 nov. 1835—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1402; (ed. 1907), n. 842; *Fontes*, n. 872.

[23] S. C. S. Off. (Sutchuen.), 15 ian. 1784—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1394; (ed. 1907), n. 566; *Fontes*, n. 846.

[24] S. C. S. Off., instr. (ad Praef. Mission. Martinicae, etc.), 6 iulii, 1817—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1400; (ed. 1907), n. 725; *Fontes*, n. 855.

[25] S. C. de Prop. Fide (C. P. pro Sin.—Vic. Ap. Tunk.), 2 iulii, 1827—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1401; (ed. 1907), n. 794.

[26] *Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1389; (ed. 1907), n. 190 and 567.

it was foreseen that he would be away from that place at least a month.[27]

Moral absence of an authorized priest. The Holy See also gave attention to the cases of moral absence of authorized priests, i. e., when they were actually present but when, because of the prohibiting prescripts of the civil law, they could not witness the marriage in question. A celebrated case of this type is seen in the Instruction of the Congregation for the Propagation of the Faith to the Prefect of the Missions on Curaçao in the year 1785.[28] Being a Dutch possession, the island was in the hands of rulers inimical to the Church. There was enacted a law that required a sum of 50 florins to be paid before marriage. Many of the Catholics were poor and could not pay this amount. If the priest, nevertheless, assisted at the marriage, he ran afoul of the law and subjected himself to very grave penalties. As an answer to this dilemma, the Congregation advised that a priest, having apprised himself of the fact that no canonical impediment was present and likewise that the couple was unable to pay the required civil tax, could permit such a couple to contract marriage in the presence simply of two witnesses. *"Ita se gerat Praefectus Missionis in casu necessitatis et magnae contrahentium inopiae."* A warning, however, was issued that the priests should beware of all fraud and should obviate all danger that could result from the reaction of the civil authorities if such a course of action were pursued too often.

Another instance that might be adduced is the decision of the Congregation of the Council on May 27, 1893, in regard to a marriage case presented to it. The facts were the following: a French Baron and a 16 year old girl eloped to Switzerland and contracted marriage there. Because of the civil laws in regard to age, they could not contract marriage in France. Since they had no domicile

[27] ". . . et ignoratur quandonam parochus haberi possit et praevideatur spatio unius mensis a loco abfuturus. . . ." S. C. S. Off., *Vallispraten.*, 1 iulii, 1863—apud Wernz, *Ius Decretalium* (6 vols., Romae, 1898-1914), IV (*Ius Matrimoniale Ecclesiae Catholicae*) (Romae, 1904), footnote on page 267 (hereafter cited as *Ius Matrimoniale*); cf. also *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 1240.

[28] *S. C de Prop. Fide*, instr. (ad Praef. Miss.—Curaçao), a. 1785—*Collectanea S. C. de Prop. Fide* (ed. 1907), n. 571.

in Switzerland and had no delegation from their proper pastor, the validity of the marriage was impugned on the ground that the decree *Tametsi* was not observed. The Defender of the Marriage Bond upheld the validity of the marriage on the ground that, if a couple could not go to their proper pastor, and if there were no other impediments to stand in the way, they could validly contract marriage simply in the presence of at least two witnesses. This was the constant practice of the Holy See. In the case at issue, the couple had the right to marry according to the divine and ecclesiastical law, but were prohibited from exercising that right till the girl became 21 years of age, the required age according to the civil law. In order that the divine and ecclesiastical law be not frustrated and the couple barred from the free exercise of their natural right to contract marriage, they could contract marriage anywhere outside of France, apart from all need of their proper pastor to issue a delegation to the priest who would assist at their marriage. It was the farthest from the mind and purpose of the Council of Trent to hinder the freedom to contract marriage. The Congregation upheld his position and the validity of the marriage was sustained.[29]

Not having the benefit of the replies of the Holy See, as the subsequent authors had, it is no wonder that Sanchez and Perez made no allowance for the contracting of a clandestine marriage even in the case wherein no authorized priest was available. In fact, when Perez adverted to the declaration of Pope Clement VIII (1592-1605) that marriages could take place apart from the presence of the pastor in the towns where there was no pastor, he stated that it did not reflect a general principle, but pointed rather to a dispensation pure and simple.[30]

Despite their intransigence on these points, Sanchez,[31] Perez,[32] and Pontius [33] were ready to acknowledge as valid the marriages of Catholics who were held prisoners in heathen lands, even though they had been held to the form of the decree *Tametsi* before their capture, if they contracted their unions apart from the presence of

[29] *Thesaurus Resolutionum,* CLII, pp. 345-358.
[30] Perez, disp. XXXIX, sec. 6.
[31] Lib. III, disp. XVIII, c. 35.
[32] Disp. XXXIX, sec. 6.
[33] Lib. V, c. 9, n. 7.

the pastor, as long as the pastor could not be had. They felt that the law could not be observed by such Catholics who, if held to its observance, would have to remain celibate and thus be deprived of their right to marry. The contracting of these marriages, however, had to take place in a public manner.

It is remarkable, on the other hand, that sixteenth century authors like Vega, Veracruz and Capua, as mentioned by Sanchez and Perez, held as probable the opinion that recognized as valid a marriage apart from the presence of the pastor when there was no *copia parochi.* Sanchez, Perez, Pontius and Coninck (1571-1633) held for the invalidity of such marriages.[34] But once the Holy See began to reply to such difficulties and the replies became available, then the commentators accommodated their opinions accordingly.

In order to explain how this could be permitted in view of the explanation of Sanchez on the form of marriage and its essential nature, Sylvius (1581-1649) [35] referred to the reply of St. Robert Bellarmine on December 30, 1600, to Octavius, the Bishop of Tricarico. In it, Bellarmine said that the matter was taken up by the Pope and the Congregation of the Council. It was the common opinion that such marriages were valid and that the decree of the Council of Trent did not pertain to them since it could not be observed in such places, and that accordingly it did not extend to those places where there were no pastors.

Reiffenstuel enumerated the three reasons usually given. He rejected the first two and adhered to the third. He rejected the one which, as based on a Rule of Law, contended that no one is obliged to do the impossible,[36] and likewise the other, which was based on the claim of necessity. He conceded that these arguments would

[34] Sanchez (lib. III, disp. XVII, c. 5) reported the opinion of these men as follows: it is probable that the decree of the Council of Trent is to be understood as binding *ubi est copia parochi;* hence, in countries of heretics and in the new world, where there is no *copia parochi* or where he has not been available for a year, marriage probably can be celebrated simply in the presence of witnesses.
[35] *Commentarium in 3. part. Summae S. Thomae* (Antuerpiae, 1667), q. 45, art. V, quaer. IV, as cited in *Acta Pii VII Pontificis Maximi,* II, footnote on page 112.
[36] Reg. 6, R. J., in VI°.

hold if the laws in question were *praecipientes aut prohibentes*, but not when as invalidating (*irritantes*) laws they prescribed a substantial form. The reason, he felt, that satisfactorily accounted for this departure from the Tridentine law was the fact that the Sacred Congregation of the Council, in using *epikeia* and by judging what was just and equitable in such cases, decreed that such cases do not fall under that law, since the Council of Trent in endeavoring to obviate the difficulties arising from clandestine marriages did not wish to go so far as to take away from the people the freedom to marry in places where there were no pastors.[37]

Still another explanation is found in Verde, who offered the explanation given by the Salmanticenses. It is the following: in those places where a pastor could not be had or was not present, there was not a true parish, so that the effect of the promulgation of the decree *Tametsi* no longer obtained, since the disappearance of the parish or the diocese, the very existence of which was postulated for the act of promulgation, carried with it also the dissolution of the promulgation itself.[38]

In enumerating the reasons which served to excuse one from observing the law as to the prescribed form, the commentators listed those which were substantially the same as the ones found in the replies from the Holy See mentioned above. In the same context, however, commentators made mention of the fact that marriages in such eventualities would be valid if they took place in the presence of a Protestant minister or even without him,[39] but they always insisted that at least two witnesses be present [40] and, if possible, a notary.[41]

[37] Lib. IV, tit. III, c. 3; cf. also Schmalzgrueber, lib. IV, tit. III, c. 2, n. 116.

[38] Verde, lib. II, tit. XII, c. 23, n. 4074 in the footnote.

[39] Laymann, lib. V, pars II, c. 4; n. 7; Schmalzgrueber, lib. IV. tit. III, c. 2, n. 116.

[40] Schmalzgrueber, *loc. cit.;* Reiffenstuel, *loc. cit.;* Verde, lib. II, tit. XII, c. 23, nn. 4074-4076.

[41] Fagnanus (1588-1678), *Commentaria in secundum librum Decretalium* (5 vols. in 8, Romae, 1661), *de foro compet.*, c. 5 (*si clericus*); Schmier (1680-1728), *Iurisprudentia Canonico-Civilis seu Ius Canonicum Universum iuxta quinque libros decretalium* (2 vols., Venetiis, 1754), lib. IV, tract. III, c. 5, sect. 4, n. 158 (hereafter cited as Schmier).

Since the usual excusing causes given by the Roman Congregations and the commentators could be taken either in the general sense, as affecting all in the same condition, or in a particular sense, as affecting merely a given singular case, Van Espen (1646-1728) hastened to note that the excusing causes were valid only in the case of a general or inevitable necessity.[42] This was the common opinion of the authors, as is evident from Gasparri (1852-1934) and others.[43] It was on the basis of this opinion that a marriage was declared null by the Rota, Cardinal Lega presiding.[44]

On the other hand, there were others who proposed the opinion that even a particular impossibility would excuse one from this law. Antonius Ballerini (1805-1881) in his annotations to the Moral Theology of John Gury (1801-1866) was its chief protagonist, basing his opinion on the principles of St. Alphonsus. The latter, in reply to a question as to whether in a particular case, when the equitable purpose of the law ceases, the law ceases with it, answered that, if the matter of the law was rendered harmful or very difficult in a particular case, everyone admitted that the law did not oblige. Therefore, argued Ballerini, according to the great Doctor's principles, even in a particular case, necessity will make capable of contracting marriage those whom otherwise the law in general renders incapable (*inhabiles*). Besides, he added, in a *casus*

[42] "Porro quod dictum est, nec necessitatem supplere defectum parochi, id expresse restrinxi ad necessitatem particularem; nam si generalis aliqua et inevitabilis necessitas fuerit, etiam Concilii Decretum cessabit. . . ."—*Opera Omnia Canonica in sex partes distributa—Ius Ecclesiasticum Universum hodiernae disciplinae praesertim Belgii, Galliae, Germaniae et Vicinarum Provinciarum accommodatum* (6 partes in 3 vols., Lovanii, 1732), pars II, sec. I, tit. XII n. 31.

[43] *Tractatus Canonicus de Matrimonio* (3. ed., 2 vols., Parisiis, 1904), n. 1175; Wernz, *Ius Matrimoniale*, footnote on page 267; De Smet, *De Sponsalibus et Matrimonio* (Brugis, 1909), pp. 85-86; De Becker, *De Sponsalibus et Matrimonio Praelectiones Canonicae*, footnote 2 on page 127; Feije, *De Impedimentis et dispensationibus matrimonialibus* (3. ed., Lovanii, 1885), p. 191; Zitelli, *Apparatus Iuris Ecclesiastici* (ed. altera novis curis auctior et emendatior, Romae, 1888), p. 423.

[44] *S. Romanae Rotae Decisiones seu Sententiae* (Romae: Typis Polyglotti Vaticani, 1912-), Vol. II (1910), Decisio XXI (*coram Lega*), pp. 199-207. There it is stated that ". . . eiusmodi impossibilitas aut difficultas debet esse communis. . . ." (hereafter referred to as *Decisiones*).

perplexus (when everything is prepared for a marriage and an impediment is discovered), it is highly probable from the benign interpretation of the will of the Church that an impediment will cease and thereby a particular necessity will render *habilis* one who was *inhabilis*. *A pari,* even in a case of particular impossibility, it is highly probable that the impediment of clandestinity will cease. Since there is a *dubium iuris,* one cannot urge the existence of the impediment with certainty.[45]

Ojetti (1862-1932), while holding the common opinion, and proposing furthermore that the impossibility must have perdured for at least a month, felt that the same perhaps would apply even if there was a case of particular necessity which had perdured for a month.[46] Gasparri found it difficult to contradict Ballerini's argumentation, but asserted that in practice one must not recede from the common doctrine until the Holy See has expressed a liberal mind on the subject.[47]

2. Presence of Witnesses

In all the replies of the Congregations mentioned above, there was always an insistence that there be present at such extraordinary marriages, when an authorized priest could not be had, at least two or three witnesses. The Congregations usually added that the form prescribed by the Council of Trent should be observed as far as possible, i. e., that two or three witnesses be present.[48] This in-

[45] ". . . An cessat, cessante fine adaequato, in casu particulari, S. Doctor Alphonsus (I, n. 199) clarissime respondit: si cessat contrarie, quando scilicet materia legis redderetur in eo casu nociva vel valde difficilis, tunc omnes asserunt legem non obligare. Ergo iuxta generalia principia a S. Alphonso admissa, etiam in casu particulari necessitas eos habiles ad contrahendum reddit quos alioquin lex in genere reddit inhabiles."—Gury-Ballerini, *Compendium Theologiae Moralis* (9. ed., 2 vols., Romae, 1887), II, notes on pages 818-819; cf. also Ballerini-Palmieri, *Opus Theologicum-Morale* (3. ed., 7 vols., Prati, 1898-1901), VI, 819.

[46] *Synopsis Rerum Moralium et Iuris Pontificii* (3. ed., 4 vols., Romae, 1909-1914), I, s.v. *Clandestinitas*, n. 1062.

[47] *De Matrimonio*, n. 1175; cf. also Feije, *De impedimentis et dispensationibus matrimonialibus*, p. 191.

[48] E. g., S. C. C., *Tricaricen.*, 18 ian. 1863—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1388; (ed. 1907), n. 149; *Colonien.*, 27 ian. 1728—*Thesaurus Resolutionum*, IV, 153.

sistence derived from the fact that the Council of Trent had demanded their presence to prove the existence of the marriage in question.[49] This stand of the Congregations was so unswerving that the Holy Office in its reply to the Archbishop of Quebec on November 17, 1835, stated that a marriage contracted without two witnesses in a place where the decree *Tametsi* was in force was invalid because according to the decree *Tametsi* witnesses *had to be* present.[50] The decision was based on the premise that parishes were constituted in that territory, and consequently that witnesses were available.

This position of the Holy See was quite reasonable, because, whereas one might at times not have a priest available, one could presumably always find two witnesses. The foregoing of their presence would lead to the assumption that one wished to contract marriage clandestinely. On the other hand, one could envision the case wherein even two witnesses could not be had. What then? The writer could find nothing bearing directly on this eventuality. However, one might say that it was touched on implicitly. In many of the replies, the Congregations insisted that the form prescribed by the decree *Tametsi* be observed *in so far as it could be done.*[51] The reply of the Holy Office to the Prefects of the Missions on Martinique and Guadalupe on July 6, 1817, is interesting in this regard. It stated that the law of the Council of Trent *quoad suum effectum* remained suspended even in those places in which it was published as often as it could no longer be observed because of

[49] ". . . Concilium Tridentinum non alia de causa duorum vel trium testium praesentiam in matrimonio celebrando praescripsit quam ut de matrimonio certo constaret idque a testibus affirmari possit."—Pallottini, XIII, s.v. *Matrimonium*, c. XV, p. 224.

[50] *Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1402; (ed. 1907), n. 842; *Fontes*, n. 872.

[51] ". . . servata tamen in eo in quo potest forma Concilii."—S. C. C., *Tricaricen.*, 18 ian. 1663—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1388; (ed. 1907), n. 149; ". . . sic servata fuerit, quantum potuit forma Concilii." S. C. C., *Colonien.*, 27 ian. 1728—*Thesaurus Resolutionum*, IV, 153.

insurmountable difficulties and dangers.[52] It gave as examples the cases in which no pastors were present or could be reached safely and easily. One might ask also, couldn't the same reasoning apply to the case wherein witnesses were absolutely unavailable? Benedict XIV said that the Fathers of the Council of Trent did not wish to take away the freedom to marry.[53] One could ask whether that would not have been the case when no witnesses were available It may have been this reasoning that led certain authors in the cases wherein witnesses could not be had to be ready to dispense with the need of them. Schmier implied that even when witnesses could not be had the marriage would be valid.[54]

In the celebrated reply to Curaçao, the Congregation for the Propagation of the Faith advised the priest who had permitted a couple to marry without his presence and simply in the presence of two witnesses to tell the couple that it should, as soon as possible after the celebration of the marriage, return and tell him (the pastor) of the contracted marriage, so that he could make the necessary annotation of it, at least a secret one, in his register, with the date and mention of the names of the witnesses who were present.[55]

In order to make certain that such marriages would be contracted properly, the same Congregation issued an instruction to the Vicars Apostolic in China on June 23, 1830. In substance it stated that the parents should choose two witnesses who would go with the bridal pair and relatives to a church where, on bended knees, all would recite in common the acts of faith, hope, charity and contrition. In this manner the couple would dispose itself properly for the contracting of marriage. After this was done, the couple would rise and in the presence of the witnesses express their consent to the marriage in words of the present. Then they could

[52] *Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1400; (ed. 1907), n. 725; *Fontes,* n. 855.

[53] *De Synodo,* lib. XII, c. 5, n. 5.

[54] ". . . quod hactenus de praesentia testium et parochi dictum est, ad omne matrimonium spectat . . . nisi contingat ut parochus et *testes* [italics those of the writer] haberi non possint, velut in locis quibusdam Hollandiae."—*Iurisprudentia Canonico-Civilis,* lib. IV, tract. III, c. 5, sec. 4, n. 158.

[55] *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 571.

give thanks and return to their homes. If this could not be done at a church, it could be done also at home.[56]

The Holy See was always anxious to keep before the minds of the people the sanctity of marriages even when contracted apart from the presence of a priest. It was for this reason that in numerous replies it had strongly admonished the couple to receive, as soon as possible, the nuptial blessing of the pastor. It hastened to warn, however, that, even without it, the marriage would still be valid.[57] On one occasion, the Holy Office supported the opinion which taught that those who decline to seek this blessing are hardly worthy of absolution, inasmuch as they refuse to obey the Church in a very grave matter.[58]

Before concluding this article, one should furthermore consider the opinions of the authors concerning danger of death as a cause excusing parties from observing the prescribed form of marriage. With but few exceptions, such as Dominic Soto and Tanner, the commentators overwhelmingly held that the necessity for people in danger of death to contract marriage in order to legitimate the offspring already born, or to safeguard the good name of the woman, did not suffice to offer an excusing cause from the obligation of the Tridentine law. If that law was neglected, the contracted unions were invalid.[59] In the annotations to a case of nullity decided by the Rota on March 11, 1624, *coram Dunozetto,*[60] the compiler, Paulus

[56] *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 816.

[57] S. C. S. Off., (ad Vic. Ap. Sutchuen.), 15 ian. 1784—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1394; (ed. 1907), n. 566; *Fontes,* n. 846; cf. also S. C. de Prop. Fide. instr. (Vic. Ap. Sin.), 23 iun. 1830—*Collectanea S. C. de Prop. Fide* (ed. 1907), n. 816.

[58] Instr. (ad Praef. Mission. Martinicae, etc.), 6 iul. 1817—*Collectanea S. C. de Prop. Fide* (ed. 1893), n. 1400; (ed. 1907), n. 725; *Fontes,* n. 855.

[59] Sanchez, lib. III, disp. XVII, c. 4; *S. R. Rotae Decisiones Recentiores,* Pars IV, tom. 2, Adnotatio ad dec. 431, nn. 35 seqq; Perez, disp. XXXIX, sec. 4; Diana, tom. II, tract. 6, res. 73; Leurenius, lib. IV, tit. 3, q. 144; Pontius, lib. V, c. 6, nn. 2, 3; Pirhing (1606-1679), *Ius Canonicum Novo Methodo Explicatum* (5 vols. in 4, Dilingae, 1674-1678), lib. IV, tit. III, n. 7; Engel (1643?-1674), *Collegium Universi Iuris Canonici* (Beneventi, 1670), lib. IV, tit. III, c. 9; Reiffenstuel, lib. IV, tit. III, c. 3, n. 133; Schmalzgrueber, lib. IV, tit. III, c. 2, nn. 106-107.

[60] *S. R. Rotae Decisiones Recentiores, loc. cit.*

Rubeus, stated that the contracting of marriage was not necessary in such cases since other provision could be made for the salvation of the dying person's soul. In the same context, he mentioned that neither *epikeia* nor good faith offered an excuse. Pontius felt that it would be better for one private person to suffer harm than to open the door to the danger of clandestine marriages.[61] It seems that the reasoning behind this opinion was based on the fact that not even the greatest necessity could free one from an invalidating law or put an end to a diriment impediment in a particular case.[62]

In itself, then, the danger of death was never considered as a reason that allowed one to contract marriage without a pastor or witnesses. This was the opinion that prevailed until the time of Pope Leo XIII, when he made provision for dispensing in such cases. If the union was entered apart from the presence of the pastor, one can find commentators who held it as probable that marriage could be celebrated in the presence of but two witnesses. Sanchez and Perez mentioned Vega, Veracruz and Capua as holding this opinion; however, they along with Pontius and Coninck, whom Perez also mentioned, held for the invalidity of such marriages.

An interesting exception to the general rule in such a case was mentioned by Verde, who acknowledged a clandestine marriage when a dying Catholic king needed to marry in order to legitimate his son and thereby make him his heir, if otherwise the kingdom would have fallen into the hands of heretics. The reason adduced was that in such cases the law would work to the detriment of the Church. The law accordingly ceased since it could only have served an evil purpose.[63]

To summarize, then, the opinions of the commentators, after they had the benefit of the replies from the Holy See concerning the impossibility of observing the prescripts of the decree *Tametsi* from the time of the Council of Trent to the time of the promulgation of the decree *Ne temere,* one might say that an impossibility, whether there was a physical or only a moral impediment—the latter in cases of long-standing great difficulty or grave danger—of

[61] *Op. cit.,* lib. V, c. 6, n. 3.
[62] Perez, disp. XXXIX, sec. 4; Reiffenstuel, lib. IV, tit. III, c. 3, n. 133.
[63] Lib. II, tit. XII, c. 23, n. 4078.

approaching the pastor or an authorized priest for the purpose of contracting marriage according to the law of the Council of Trent, excused a couple from observing this law, provided that this impossibility was general for the respective community, and not merely an isolated incident for the couple in question, and provided, further, that the form prescribed by the Council of Trent be observed in so far as it could be, i. e., that the marriage take place in the presence of at least two witnesses.[64] The opinion allowing the use of this extraordinary form in the case of a particular impossibility, though meriting extrinsic probability, was not to be followed in practice.

Article 2. Dispensation From Impediments In This Period

Thus far there has been considered the historical background of the form in extraordinary cases; now it remains to look into the development of the institute mentioned in Canons 1044-1045, namely, that of dispensation from matrimonial impediments for the benefit of parties in danger of death and in cases of grave necessity, inasmuch as references are made in those canons to Canon 1098. For the purposes of clarity, this article will be divided into two sections, the first tracing the history from the Council of Trent to February 20, 1888, when a grant of faculties was made to the ordinaries through the Congregation of the Holy Office, and the second from the latter date to the decree *Ne temere,* which became law on April 19, 1908.

A. *From the Council of Trent To February 20, 1888*

Inasmuch as the Pope is the supreme legislator, it has always been taught that he has power to dispense from all impediments of the ecclesiastical law. As to the bishops, they had no power over the impediments of the common law by reason of their office, for as subordinate legislators they could not derogate from any of the laws of the supreme legislator, in this case from the law of the Council of Trent. They could point to no concession either by reason of the common law or by reason of immemorial custom or tacit

[64] Oesterle, "Elucubratio Historica circa Declarationem c. 1098," *Ius Pontificium,* VIII (1928), 174-182.

approval on the part of the Popes in regard to the public diriment impediments of the ecclesiastical law.[65] By reason of their office, they consistently had been considered as having the power to dispense from ecclesiastical impedient impediments such as existed in consequence of the sacred seasons, in connection with a ban (*vetitum*) or as a result of private non-reserved vows.[66]

In regard to the diriment impediments of the ecclesiastical law, by reason of long-standing custom, which itself served as the best interpreter of the law, and because of the fact that the popes had tacitly conceded such a power to the bishops, the latter could by reason of their ordinary power dispense their Catholic subjects *for the internal forum only* from diriment matrimonial impediments under the following conditions: (1) that a marriage had been celebrated with all the necessary solemnities in the Catholic Church; (2) that at least one of the spouses was in good faith in consequence of ignorance of law or of fact; (3) that the impediment was occult and of the type from which the Holy Father could and usually did dispense through the Sacred Penitentiary; (4) that the case was so urgent that the Holy Father or his delegate could not be reached easily; and, finally, (5) that scandal would arise were the spouses to be separated.[67]

The power mentioned in the preceding paragraph related to marriages that had already been contracted. As to marriages that were to be contracted, Sanchez[68] proposed the opinion, which was later generally followed, that in such cases the bishop could dispense with the same ordinary power in the internal forum if the impediment was occult, if there was a very grave reason, and if

[65] Suarez, *Opera Omnia* (26 vols., editio nova a Carolo Berton), Vols. V and VI (*De Legibus et Legislatore Deo,* Parisiis, 1856), VI, c. 14, nn. 3, 4, 8; Bendictus XIV, *De Synodo,* lib. IX, c. 1, n. 5, and cc. 2, 3; Wernz, *Ius Matrimoniale,* n. 616; Reiffenstuel, *Appendix ad Librum Quartum Decretalium,* c. 1, n. 19; Schmalzgrueber, lib. IV, tit. XVI, c. IV, n. 72.

[66] Reiffenstuel, *App. ad Libr. Quart. Decret.,* c. 1, n. 10; Schmalzgrueber, lib. IV, tit. XVI, c. IV, n. 62.

[67] Sanchez, lib. II, disp. XL, n. 3; Benedictus XIV, *De Synodo,* lib. IX, c. 2, n. 1; Pontius, lib. VIII. c. 13, n. 6; Perez, disp. XLIV, sect. 6, n. 11; Reiffenstuel, *App. ad Libr. Quart. Decret.,* c. 1, n. 15; Schmalzgrueber, lib. IV, tit. XVI, c. IV, nn. 78-79; Wernz, *Ius Matrimoniale,* n. 618.

[68] *Op. cit.,* Lib. II, disp. XL, n. 5.

there was not time to approach the Holy See or a Legate of the Holy See by letter. Although this doctrine did not enjoy the same certainty as the other, it had its adherents and protagonists in large numbers.[69] It was followed in practice and had the tacit approval of the Holy See inasmuch as the latter did not reprobate it.[70]

This power was ordinary and therefore could be delegated even habitually. The Vicar General could not use this power without a special mandate.[71] Since pastors were without ordinary jurisdiction in the external forum, even the jurisdiction of a non-contentious character, they had no power of dispensing from matrimonial impediments, either from the law or through custom.[72]

By reason of faculties from the Holy See a greater power could indeed be enjoyed, as it was by missionaries and certain bishops.

The writer has been unable to find that any provision was made whereby a priest, even though not authorized by law or delegated by the pastor or the bishop to assist at a marriage, was given power to dispense from matrimonial impediments in a marriage that was brought to his attention. In fact, the Holy See in its replies almost always inserted a phrase or a clause in which, while allowing the extraordinary form of marriage, it permitted the marriage to take place provided that no canonical impediment was present.[73]

As to whether impediments ceased in such cases of impossibility, the opinions of the authors were in agreement with the opinions mentioned above with reference to the causes excusing from the observance of the form of marriage.

Although bishops had ordinary power, which could be delegated, of dispensing from occult impediments under the conditions stated above, and this surely obtained for the cases in which the parties

[69] Wernz, (*op. cit.,* n. 619, footnote 83, page 891) asserted that St. Alphonsus followed Sanchez' opinion and that it had become the common opinion of the authors. Cf. also Pontius, lib. VIII, c. 13, n. 6; Perez, disp. XLIV, sec. 6, n. 12; Schmalzgrueber, lib. IV, tit. XVI, c. IV, n. 83.

[70] S. C. S. Off., 23 apr. 1890—*Fontes,* n. 1120.

[71] Reiffenstuel, *op. cit.,* c. 1, n. 34; Wernz, *op. cit.,* n. 618.

[72] Suarez, *De Legibus,* lib. VI, c. XIV, n. 10.

[73] *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 571; Pius VI, *Epistola ad Ep. Lucionensem,* 28 maii 1793: ". . . si nihil aliud obstet. . . ."—*Pii VI Pont. Max. Acta,* II, 12-16.

were constituted in danger of death or grave necessity, no provision was made for the granting of dispensations from the public diriment matrimonial impediments of the ecclesiastical law, or in the external forum, not even in danger of death. This was the situation until the Holy See acted on February 20, 1888.

B. *From February 20, 1888, to the Decree* Ne temere

Realizing that their power was restricted and that in many cases they could not by way of dispensing be of help to those who were in danger of death, the bishops of the world began to appeal to the Holy See for wider faculties in the matter of dispensing from matrimonial impediments. The Supreme Sacred Congregation of the Holy Office in an encyclical letter, dated February 20, 1888,[74] stated that Pope Leo XIII (1878-1903) had asked it to consider the advisability and feasibility of granting faculties to the local ordinaries for dispensing from public diriment impediments their subjects who lived in a civil marriage or in concubinage, when these subjects were in danger of death and there was no time to approach the Holy See, so that they might contract marriage in the Church and provide duly for the needs of their consciences.

After the matter had been seriously considered, the Pope approved the proposal of the Congregation and granted the favor in virtue of which local ordinaries would be able to dispense, either by themselves or through some suitable ecclesiastical personage, sick people who were in grave danger of death, when time did not allow for recourse to the Holy See, from all public impediments of the ecclesiastical law, except for the impediments arising from the Sacred Order of Priesthood and from affinity in the direct line when it derived through licit carnal intercourse.[75]

[74] S. C. S. Off., litt. encycl., 20 febr. 1888—*Fontes,* n. 1109; *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 1685; *Acta Sanctae Sedis* (41 vols., Romae, 1865-1908), XX (1887), 543 (hereafter cited as *ASS*).

[75] S. C. S. Off., litt. encycl., 20 febr. 1888: ". . . Sanctitas Sua benigne annuit pro gratia, qua locorum Ordinarii dispensare valeant sive per se, sive per ecclesiasticam personam sibi benevisam, aegrotos in gravissimo mortis periculo constitutos, quando non suppetat tempus recurrendi ad S. Sedem, super impedimentis quantumvis publicis matrimonium iure ecclesiastico diri-

Suitable provision thus was made in aid of people in danger of death who wanted to achieve a rectification of their illicit relationship. For all the impediments but the two mentioned a dispensation could be granted by the ordinaries or their delegates. One must realize that clandestinity was still listed as a diriment impediment. It appears in virtue of this faculty that an ordinary could dispense even from the observance of the form of marriage as prescribed by the decree *Tametsi,* for the faculty did not exclude this. However, a question arose concerning this matter, for which some specific attention is warranted.

In itself, it was not quite clear from the faculty whether the ordinary could grant subdelegation to one person only, and whether he could subdelegate this faculty habitually. This was important, for at times it could prove difficult, if not impossible, to reach the ordinary. Accordingly, the Holy Office was asked whether ordinaries could, by reason of the faculties granted to them on February 20, 1888, grant habitual subdelegation to pastors and to approved confessors. The Fathers of the Sacred Congregation, having duly considered the matter on January 9, 1899, decided to petition Pope Leo XIII to decree and declare that the ordinaries who enjoyed this faculty could grant a general subdelegation, but only to pastors and only in cases wherein even the ordinary could not be reached in time and wherein there would be danger in delay. The pope acceded to their wishes the very same day.[76]

Clandestinity was a diriment impediment, as was mentioned above. Since the potential granting of a dispensation from it was not excluded in the faculties, one could naturally suppose that it fell within the power of the ordinaries to dispense from it. Nevertheless, a question arose which necessitated action on the part of the Holy See. It was asked whether in virtue of these faculties a pastor when he enjoyed a habitual subdelegation from his ordinary could dispense from the impediment of clandestinity. For example, could he assist at a marriage of non-subjects by dispensing from

mentibus, excepto sacro Presbyteratus Ordine et affinitate lineae rectae ex copula licita proveniente."—*Fontes,* n. 1109; *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 1685; *ASS,* XX (1887), 543.

[76] S. C. S. Off., litt. encycl., 1 mart. 1889—*Fontes,* n. 1113; *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 1698; *ASS,* XXI (1888), 696.