the necessity of the presence of their proper pastor, or even at a marriage of his own subjects by dispensing from the necessity of having at least two witnesses present, in the event that there were not present any persons who could act as witnesses? The reply was in the affirmative and the Pope's approval confirmed the decision.[77]

[77] S. C. S. Off., 13 dec. 1899—*Fontes,* n. 1231; *Collectanea S. C. de Prop. Fide* (ed. 1907), n. 2072; *ASS,* XXXII (1899-1900), 500-501.

CHAPTER IV

THE LAW ON THE FORM OF MARRIAGE AFTER THE DECREE *NE TEMERE*

Despite the development after the Council of Trent, despite also the favorable replies from the Congregations and the wide faculties given to the ordinaries and their delegates, there was still great need and much room for reform in the Church Law on the form of marriage. Clandestine marriages, which the Church had abhorred for centuries, and which it tried to abolish, were still being contracted, both culpably and inculpably. The decree *Tametsi* had not been published everywhere, so there existed a varying discipline within the Church. Where it had been published, there could remain a doubt as to who was to be considered the proper pastor. It was no wonder, then, that the Holy See was besieged with pleas from the bishops of the world that some revision be made. Pope Pius X (1903-1914) referred the matter to the Sacred Congregation of the Council for its mature judgment and pertinent suggestions. After hearing its proposals as well as those of the Commission of Cardinals to whom was entrusted the monumental task of preparing the Code of Canon Law, the pope ordered that the revised discipline as to the form of marriage be promulgated on August 2, 1907, and that it take effect on the following Easter Sunday, April 19, 1908. This was the law which, from the opening words of the decree, came to be known as the *Ne temere.*[1]

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

In Article III of the decree *Ne temere* there is stated the law on the ordinary form of marriage; it is substantially the same that is now to be found in the Code of Canon Law. Valid were only those marriages which were contracted in the presence of the pastor, of the local ordinary, or of a priest delegated by either of these, and of

[1] S. C. C., decr. *"Ne temere,"* 2 aug. 1907—*Fontes,* n. 4340; *ASS,* XL (1907), 525-530.

at least two witnesses. The pastor and the ordinary assisted validly at marriages from the day they had taken possession of their benefices, and exclusively within the limits of their territory, provided that they still retained jurisdiction therein; the delegated priest, only within the limits of the mandate. For the first time due provision was made for marriages in extraordinary cases.

In Articles VII and VIII, the decree made provision for such extraordinary cases: in Article VII for the case of danger of death; in Article VIII for other cases of grave necessity. The centuries-old practice of the Church thus became molded as the common law of the Church.

A. *The Form of Marriage With Persons Constituted in Danger of Death*

Article VII reads as follows: when danger of death is imminent and the pastor, the local ordinary, or a priest delegated by either of these cannot be had, then, in order that provision may be made for relief of conscience and, if the case demands it, for the legitimation of the offspring, marriage can be contracted validly and licitly in the presence of any priest and two witnesses.[2]

It should be noted that the decree spoke simply of the danger, and not of the instant, of death (*periculum mortis,* and not *articulus mortis*). Ojetti felt that any sickness that proved dangerous to life offered a sufficient reason for the use of this exceptional norm; in fact, if extreme unction could be administered, this form could be used.[3]

With reference to the words *nequit haberi* (cannot be had), all that was necessary was a probable judgment that the pastor, the local ordinary or a priest delegated by either of these was unable to come to the house of the sick person. This judgment was to

[2] S. C. C., decr. *"Ne temere,"* 2 aug. 1907, art. VII: "Imminente mortis periculo, ubi parochus vel loci Ordinarius vel sacerdos ab alterutro delegatus haberi nequeat, ad consulendum conscientiae et (si casus ferat) legitimationi prolis, matrimonium contrahi valide ac licite potest coram quolibet sacerdote et duobus testibus."—*Fontes,* n. 4340; *ASS,* XL (1907), 529.

[3] *Synopsis,* I, s.v. *Clandestinitas,* n. 1124; Gennari, *Breve Commento della Nuova Legge sugli Sponsali e sul Matrimonio* (2. ed., Romae, 1908), p. 30.

be gained with due reliance on prudence, and not necessarily with the aid of mathematical certification. Extraordinary means were not called for.[4]

B. *The Form of Marriage in Other Cases of Grave Necessity*

Article VIII made the following provision: If it happen that in some locality there cannot be had the pastor, the local ordinary or a priest delegated by either of them as the one before whom marriage can be celebrated, and this condition of things has already lasted for a month, then the marriage can be contracted validly and licitly by the couple expressing their formal consent to the union in the presence of two witnesses.[5]

A few months after the decree *Ne temere* had become the law for the universal Church, the Congregation of the Council found the following doubt presented to it: "Whether, and if so, in what way, could provision be made for the case wherein a civil ceremony cannot take place before the Catholic ceremony, and there is urgent need of contracting marriage for the salvation of the soul and, nevertheless, pastors are forbidden by the civil law to assist at the marriages of the faithful except when a civil ceremony has first taken place. The answer given was: "Non esse interloquendum," or, in other words, the Congregation did not think the question should be answered.[6]

Although it was the intent of the Holy See to clarify the law on the form of marriage, there were still many questions unanswered in regard to the cases of urgent necessity to which Article VIII of the decree *Ne temere* adverted. Ojetti noted that the decree did not touch the question whether a general or a particular impos-

[4] Ojetti, *loc. cit.;* Gennari, *op. cit.,* p. 31.

[5] S. C. C., decr. *"Ne temere,"* 2 aug. 1907, art. VIII: "Si contingat ut in aliqua regione parochus locive Ordinarius aut sacerdos ab eis delegatus, coram quo matrimonium celebrari queat, haberi non possit, eaque rerum conditio a mense iam perseveret, matrimonium valide et licite iniri potest emisso a sponsis formali consensu coram duobus testibus."—*Fontes,* n. 4340; *ASS,* XL (1907), 529.

[6] S. C. C., *Romana et aliarum,* 27 iul. 1908—*Fontes,* n. 4350; *Thesaurus Resolutionum,* CLXVII (1908), 449-493.

sibility was postulated, or whether the absence of the priest was to be measured in a physical or a moral sense.[7]

One of the difficulties, however, did receive an answer from the Holy See. The latter was asked what was meant by the term *regio,* or, in other words, how far distant from an authorized priest the parties needed to be before they might contract marriage in the presence simply of two witnesses. The Congregation of the Sacraments formulated a general reply by answering that the marriage could always be celebrated thus when, after a month had elapsed, a competent priest could not be approached or had without serious inconvenience.[8]

Still many problems remained unsolved. Was the serious inconvenience mentioned in this reply to be restricted simply to terms of distance in the matter of approaching the priest? Or could it also exist as the postulated hindrance, even in a moral sense?

Ojetti, writing prior to this reply, based his opinion on the wording of Article VIII, which, so it seemed to him, studiously avoided the phrase *absens sit* for *haberi non possit;* he likewise looked to the spirit and the character of the legislation. In consequence, he held that any impossibility of having a priest sufficed to make operative the exceptional norm expressed in the Article.[9] Writing after the reply, Wernz (1842-1914) felt constrained to accept the opinion of Ojetti and De Smet in this matter, inasmuch as their opinion was definitely not improbable, within the tenor of the reply from the Sacred Congregation.[10]

Another aspect of the same problem which required the attention of the authors was whether the impossibility had to be a common one, i. e., for all or nearly all in the territory, or simply a particular one, i. e., one that was such for this one couple. Ojetti made the problem very specific, using the very example that had been brought to the attention of the Sacred Congregation of the Council on July 27, 1908. He felt that the postulated impossibility

[7] *Synopsis,* I, s.v. *Clandestinitas,* n. 1132.

[8] S. C. de Sacramentis, *Romana et aliarum,* 13 mart. 1910—*Fontes,* n. 2101; *Acta Apostolicae Sedis* (Romae, 1909-), II (1910), 193-196 (hereafter cited as *AAS*).

[9] *Synopsis,* I, s.v. *Clandestinitas,* n. 1134.

[10] Cf. Oesterle, *Ius Pontificium,* IX (1929), 142.

existed when the pastor was barred from assisting at the marriage by reason of the civil law. He based his reason both on the analysis implied in the decree *Ne temere* and on the tenor of the law. In support of his interpretation he cited the instruction sent at a much earlier time to the Prefect of Missions on the Island of Curaçao.[11] He regarded the refusal of the Congregation of the Council to settle the doubt merely as proof that it did not want to issue a general norm which could appear to advocate the violation of civil laws; it was preferable to have bishops recur in particular cases.[12]

De Smet (1868-1927), while crediting Ojetti's opinion with probability, tried to find a middle course between the latter's opinion and the one calling for the existence of a general impossibility. He felt that probably an *impossibilitas aliqua media* would suffice, i. e., one that affected not all the people in a certain territory or only an individual case, but one that in a certain locality affected certain classes of persons; in the latter event, one might regard it as the equivalent of a regional impossibility. It seemed to him that this opinion was in conformity with Article VIII of the decree *Ne temere,* inasmuch as the two prior schemata that would have required a common necessity were rejected in the final analysis by the Congregation of the Council when it adopted the final draft.[13] Once the probability of these opinions was admitted, there existed accordingly a *dubium iuris* with reference to the existence of a diriment impediment, in which situation the Church was known to supply for the deficiency, that might have actually obtained.[14]

Cronin[15] noted that it had been the common opinion of theologians prior to the promulgation of the decree *Ne temere* that the impossibility had to be common in a certain locality and not merely particular, i. e., for the parties in question. However, since the

[11] *Vide supra,* p. 33.

[12] Ojetti, *Synopsis,* I, s.v. *Clandestinitas,* n. 1135; De Smet, *De Sponsalibus et Matrimonio,* pp. 85-86.

[13] *De Sponsalibus et Matrimonio,* pp. 85-86; cf. also *ASS,* XL (1907), 565, 574.

[14] De Smet, *loc. cit.*

[15] *The New Matrimonial Legislation* (2. ed., revised and corrected. London: Washbourne, 1909), p. 219.

decree *Ne temere* makes no distinction in this regard, "in both cases the marriage would be valid."

De Becker (1857-1936), on the other hand, rejected the opinion regarding the sufficiency of a particular impossibility as proposed by Ojetti and De Smet. He claimed that this opinion lacked even extrinsic probability.[16] According to Oesterle, the reply of 1908 did not favor moral impossibility as a sufficient excusing factor because, even though subsequent to it there had been replies that allowed this in particular cases, these replies were never published. In fact, one could presume that what was thus allowed was not to be considered a general norm, since in the reply given on November 26, 1909, the Congregation for the Propagation of the Faith appended the phrase *in casu,* and in its reply of July 27, 1908, the Congregation of the Council gave faculties to the ordinaries of China to dispense in such cases. Surely, if the decree *Ne temere* really provided for such contingencies, the Congregation could have replied: *"Provisum* in Article VIII of the Decree *Ne temere,"* as they are accustomed to do, and all doubt would have been settled.[17]

Bearing in mind this troublesome divergence of opinion, certain ordinaries, were faced with the very practical problem of what to do in their territories, where pastors were forbidden to assist at marriages unless a civil marriage had preceded and, even though a civil marriage could not take place beforehand, a marriage had to be contracted in order to forestall certain evils and make provision for the good of souls. Despite the fact that in 1908 a similar problem had been presented to the Congregation and no guiding answer had been forthcoming, these bishops appealed to the Sacred Congregation of the Sacraments, asking the very same question, namely, whether, and if so, in what way, could provision be made in such circumstances.

On January 28, 1916, the aforementioned Congregation, meeting in a plenary session, decided that recourse should be made in each case, except in the case of danger of death, when any priest

[16] *De Sponsalibus et Matrimonio Praelectiones Canonicae,* etc., appendix, p. 52.

[17] *Ius Pontificium,* IX (1929), 141-144.

could dispense from the impediment of clandestinity, and thus permit the marriage to take place in the presence of two witnesses alone. Pope Benedict XV (1914-1922) confirmed this decision and decreed that it be made public.[18]

One would think that this reply should have settled the matter; but, such was not to be the case. Authors once again began disputing and taking sides as to whether the recourse in question was necessary *ad validitatem,* or merely *ad liceitatem.* Cappello was of the opinion that the reply did not settle the theoretical question, but simply indicated a norm of action. An invalidating law must be drawn up with an invalidating clause either expressly or equivalently. Such a clause or such a phrase was not to be found in the reply. In practice, therefore, as long as time was available, the recourse was to be made; but, once the marriage was contracted, *standum est pro valore,* even when the recourse had not been made.[19]

Those who supported the opinion which held that recourse was required for validity in every case appealed to the general wording of the reply, viz., that *one* should have recourse, and not simply that *they* (the petitioners in the case presented) should have recourse.[20] The fact that the Pope called for the publication of the reply seemed to prove that the reply was meant as an answer not merely in a particular case but rather as a general one for everybody. Their chief argument, however, derived from the reply of the Sacred Congregation of the Sacraments to the Bishop of Paderborn on March 9, 1916, protocol number 792/16, which was never officially published, but which is found in many manuals.[21] It seems that many foreign workers came to Paderborn during the war (1914-1918) and contracted marriage there apart from the presence of a priest. The priest could not assist at their marriages because of the civil laws. No recourse to the Holy See had been undertaken.

[18] S. C. de Sacramentis, 31 ian. 1916: ". . . recurratur in singulis casibus."—*Fontes,* n. 2114; *AAS,* VIII (1916), 36-37.

[19] *De Sacramentis* (3 vols. in 5, Vol. III [*De Matrimonio*], Taurinorum Augustae: Marietti, 1923), III *(De Matrimonio),* n. 694.

[20] The wording is *recurratur* and not *recurrant.*

[21] E.g., Linneborn, *Grundriss des Eherechts nach dem Codex Iuris Canonici* (2. und 3. Auflage, Paderborn, 1922), footnote 3, page 331; Leitner, *Lehrbuch des katholischen Eherechts* (3. ed., Paderborn, 1920), p. 208.

The bishop referred the matter to the Holy See for adjudication and received the following reply: the ordinary should not account it as undignified to have recourse in every case according to the decree of January 31, 1916, as issued by this Sacred Congregation. As to the past, the ordinary was given the faculty of sanating the marriages about which the aforementioned letter spoke, but he had to make sure in each case of the continuance of the consent of the putative spouses, and he was to do whatever else the law required.[22]

The reply itself received varying interpretations. Leitner (1862-1929) believed that if dispensations from the impediment of clandestinity had been given without recourse, and in good faith, outside the danger of death, then all such marriages would have to be sanated. It was his opinion that the Holy See did not regard these marriages as invalid, because it said, in the words of his translation of *"Ordinarius ne dedignetur recurrere,"* that the ordinary should have the goodness or courtesy to recur to the Holy See in accordance with the decree of January 31, 1916.[23] Knecht (1866-1932) claimed that the dispensations were given simply *ad cautelam*.[24]

Vermeersch (1858-1936)-Creusen held that even outside the danger of death one can validly in such circumstances contract marriage before two witnesses until such time that the Holy See authentically declares otherwise. The reasons they proposed were: (1) this opinion had the authority of many authors in support of it, so that there was at least a *dubium iuris,* a positive and probable doubt regarding the impact of the law, and so it did not bind; and

[22] "Ordinarius recurrere non dedignetur in singulis casibus iuxta decretum editum ab hac S. Congregatione die 31 ianuarii, 1916. Quod spectat ad praeteritum, eidem Ordinario tribuitur facultas sanandi in radice matrimonia, de quibus in praedictis litteris, constito tamen sibi prius in singulis casibus de perseverantia consensus putatorum coniugum ceterisque de iure servandis."

[23] Leitner, *op. cit.,* p. 209; Oesterle *(Ius Pontificium,* IX [1929], p. 145) disagreed with this interpretation that the Holy See did not consider these marriages that had been contracted as invalid. He believed that if the Congregation did not consider these marriages as invalid, it would not have termed the people in question *putativi coniuges.*

[24] *Handbuch des katholischen Eherechts* (Freiburg im Breisgau: Herder, 1928), p. 647. Oesterle *(loc. cit.)* maintained that this cannot be found either in the text or in the context.

(2) there was no reply in which the Holy See stated directly that the marriages thus contracted were invalid.[25]

Vidal (1867-1938) and Vlaming (+ 1935) held invalid all such marriages which took place without the prescribed recourse.[26] The former went even further in stating that, after the reply of January 31, 1916, which was made public at the order of the Pope, and therefore should refer to all similar cases, he could not understand how the opinion which held that marriages could take place without the prescribed recourse had retained any probability. De Smet didn't go quite so far in the fourth edition of his work. He there expressed the opinion that after this reply one could not contract marriage before two witnesses alone in grave necessity unless recourse was had in each case. However, he was not without sympathetic understanding for the stand taken by Cappello, Vermeersch, Creusen, and others, inasmuch as the law seemed doubtful, and also inasmuch as the private reply given to the Bishop of Paderborn had not been promulgated as binding law.[27]

As all these authors have written also after the Code, whose law is substantially the same as that of the decree *Ne temere,* one can readily see that also after the Code's promulgation the problem of recourse remained as an unsettled question. Most of the authors felt that the reply of the Pontifical Commission for the Interpretation of the Canons of the Code, dated June 25, 1931, settled the matter satisfactorily.[28]

[25] *Epitome Iuris Canonici* (2. ed., 3 vols., Brugis, 1923-1925), II, n. 405; cf. also Vermeersch, *Theologia Moralis* (4 vols., Romae et Brugis, 1922-1924), III, n. 797.

[26] Wernz-Vidal, *Ius Canonicum ad Codicis Normam Exactum* (7 vols. in 8, Vol. V. [*Ius Matrimoniale*] 2. ed., Romae, Apud Aedes Universitatis Gregorianae, 1928), p. 644, footnote n. 68; Vlaming, *Praelectiones Iuris Matrimonialis* (3 ed., 2 vols., Bussum, 1919-1921), II, n. 590.

[27] *Tractatus Canonico-Moralis De Sponsalibus et Matrimonio* (4. ed., a Codice altera, Brugis: Beyaert, 1927, pp. 111-112 (hereinafter cited as *De Sponsalibus et Matrimonio*).

[28] "Whether the physical absence of the pastor or Ordinary mentioned in the reply of March 10, 1928, includes also a case where the pastor or Ordinary, although materially present in the place, is unable by reason of grave inconvenience to assist at the marriage, asking and receiving the consent of the contracting parties?"—The reply was in the affirmative.—*AAS, XXIII* (1931), 388.

In regard to the other condition required in Article VIII, there was unanimity among the authors regarding the required lapse of a full month in which an authorized priest could not be had before this extraordinary form of marriage could be invoked. Once the month had elapsed, even if the priest was expected momentarily, a marriage celebrated without his presence stood as valid, and even licit if necessity demanded it.[29]

Article 2. The Faculty of Dispensation From Diriment Impediments From the Decree *Ne temere* to the Code of Canon Law (1918)

It has been noted in the previous chapter that it was the common law teaching for many centuries that ordinaries could, under certain conditions, dispense in the forum of conscience from certain occult diriment impediments, certainly so when it was a question of convalidation, and most probably so when it was a question of a marriage still to be contracted. In the encyclical letters of 1888 and 1889, faculties were given to local ordinaries. These faculties could be habitually subdelegated to the pastors, and implied the power of dispensing in danger of death from public diriment impediments of the ecclesiastical law with a view to providing relief of conscience for the parties and legitimation for their children, if there were any. The faculty was to be used by the bishop when there was no time to refer the matter to the Holy See, and by the pastor when there was no time to reach the bishop. The faculty availed for all impediments but two, namely, the impediments arising from the Sacred Order of Priesthood and the impediment of affinity in the direct line when it derived through a *copula licita.*

These faculties had not been revoked, and therefore could be enjoyed even after the promulgation of the decree *Ne temere.* According to Article VII of the decree *Ne temere,* in the event that there could not be had for assistance at the marriage, either the pastor or the ordinary, or a priest delegated by either of these,

[29] Ojetti, *Synopsis,* I, s.v. *Clandestinitas,* nn. 1132-1133; De Becker, *De Sponsalibus et Matrimonio,* appendix, p. 52; Gennari, *Breve Commento della Nuova Legge sugli Sponsali e sul Matrimonio,* p. 32.

then any priest could assist at that marriage if a danger of death existed for either of the parties. However, even this provision could prove worthless if he found that there existed a diriment impediment between the parties. Accordingly, the Ordinary of Parma and others appealed to the Sacred Congregation of the Sacraments to grant a priest so assisting the same faculties that were granted to the bishops and pastors in 1888 and 1889. On May 7, 1909, the Congregation considered the matter in a general session, and on May 9th Pope Pius X approved its proposal to grant the priest mentioned in Article VII the faculty as requested.[30]

The encyclical letter of the Holy Office by which the faculties had been originally granted to the ordinaries remarked that the Supreme Sacred Congregation was asked by the Pope to consider the matter of granting faculties in the cases of danger of death when people who were living in a civil union or in concubinage wished to rectify their relationship and to make provision for the relief of their consciences. On the other hand, the grant of these faculties did not include the words "living in a civil union or in concubinage." A natural question arose: "was the faculty to be restricted solely to the latter case?" In answer to a query as to whether the priest mentioned in Article VII of the decree *Ne temere* and to whom faculties to dispense had been granted on May 14, 1909, was to be restricted in their use solely for the case of those living in a civil union or in concubinage, or whether he could use them even in the case wherein the parties were not living in such sinful relationships, but there existed some other reason for providing relief for the consciences of the parties and, if the case demanded it, for the legitimation of the offspring, the Congregation of the Sacraments answered in the negative to the first part, and in the affirmative to the second part.[31]

[30] " . . . quemlibet sacerdotem, qui ad normam art. VII decreti *Ne temere,* coram duobus testibus matrimonio adsistere valide ac licite potest, in iisdem rerum adiunctis dispensare quoque posse super impedimentis omnibus etiam publicis matrimonium iure ecclesiastico dirimentibus, excepto, sacro Presbyteratus Ordine et affinitate lineae rectae ex copula licita." S. C. de Sacramentis. *Parmen. et aliarum,* 14 maii 1909—*Fontes,* n. 2097; *AAS,* I (1909) 468-469.

[31] S. C. de Sacramentis, *Venetiarum,* 16 aug. 1909—*Fontes,* n. 2099; *AAS,* I (1909), 656.

On July 29, 1910, a reply was given to the final doubt to be resolved by this Congregation in this regard before the Code. It was decreed that within the scope of the phrase *quemlibet sacerdotem* (any priest), pointing to the priest who according to Article VII of the decree *Ne temere* assisted at a marriage when the danger of death was present and to one to whom faculties to dispense had been granted on May 14, 1909, was to be included also the pastor, even though he had not been given habitual subdelegation by his ordinary to dispense in such cases.[32]

[32] S. C. de Sacramentis, *Romana et aliarum*, 29 iul. 1910—*Fontes*, n. 2102; *AAS*, II (1910), 650.

Part Two

Canonical Commentary