INTRODUCTION

THE Code of Canon Law has, as has been seen in the historical conspectus, adopted with but slight modifications the discipline of the decree *Ne temere*. It sets forth two forms for the contracting of marriage, one the ordinary form, as indicated in Canons 1094-1097, and the other the extraordinary form, as delineated in Canon 1098. The latter form is used when the ordinary form is impossible of observance. It is interesting to note that both forms are substantial, juridic forms, each legally valid. The form delineated in Canon 1098 is not to be considered as a mere exception to the ordinary form; it is also a juridic form as valid and as legal as the ordinary form. This is plainly evident, first, from the fact that Canon 1098 is listed under Chapter VI of the Code treating of marriage, entitled *De Forma Celebrationis Matrimonii*. Secondly, Canon 1099 lists those who are bound to observe the law as to the form of marriage and states plainly that those mentioned are bound to the *form* mentioned above.[1] It does not list the canons for the ordinary form nor does it exclude the canon depicting the extraordinary form. Accordingly, one may say that those who are obliged to observe the ordinary form of marriage must, if the said ordinary form cannot be observed, contract marriage according to the extraordinary form and that the extraordinary form is binding on all those who in the absence of abnormal circumstances are bound to the ordinary form of marriage.

In the succeeding chapters, the writer proposes to treat of (1) the unavailability of a qualified witness for the marriage; (2) the postulated conditions for the use of the extraordinary form; (3) the necessity of having witnesses; (4) the postulated conditions for the licit use of the extraordinary form; (5) the power of dispensing enjoyed by a priest assisting at a marriage according to this form.

[1] Ad statutam superius formam servandam tenentur . . .

CHAPTER V

THE UNAVAILABILITY OF A QUALIFIED WITNESS FOR THE MARRIAGE

ACCORDING to the natural law, the sole consent of the contracting parties to a marriage, externalized in words or signs, would suffice to bring the contract of marriage into existence. As long as there would be no impediment to stand in its way, marriage could be contracted in this manner. However, the Church, as a public authority and as custodian of the sacraments, prescribes certain formalities to be observed under pain of nullity in the exchange of matrimonial consent. True, it has no power over the natural value and validity of acts of the human mind and will. Still it can, and at times does, render such acts juridically inefficacious if certain prescribed formalities are not observed.[1] Accordingly, the Code states that marriage is brought into existence by the legitimately manifested consent of the parties who are capable in law of contracting marriage.[2] Unless this consent is legitimately manifested, it has no juridic effect and marriage is not contracted.

In order that consent be legitimately manifested, certain formalities must be observed. In ordinary cases, the consent must be expressed not only in the presence of two ordinary witnesses but also in the presence of an authorized or qualified witness, who assists in the name of the Church. Just as in ordinary civil matters the State may require the presence of a public notary for the validity of certain contracts, so also the Church may require the presence of its qualified witness for the marriage to be valid.[3] It is in this witness that the Church places its trust that a marriage has really taken place.[4]

[1] Wernz-Vidal, *Ius Matrimoniale* (ed. 3., a Philippo Aguirre recognita, 1946), n. 531 (hereafter this edition is used exclusively).

[2] Canon 1081, § 1.

[3] Gasparri, n. 932.

[4] Benedictus XIV, *De Synodo*, lib. XIII, c. XXIII, n. 6.

Although the Church requires the presence of a priest at the celebration of marriage, one must not forget that it is not the priest but rather the parties themselves who are the ministers of the sacrament. This can readily be seen from the fact that the marriage contract is *ipso facto* a sacrament among the baptized.[5] The importance of this doctrine becomes more evident when one realizes that if marriage is contracted apart from the presence of a priest, as long as the marriage is valid, the sacrament of matrimony is received. Nowhere in the Code is there any mention that in such an eventuality the sacrament would not be received. This would certainly be the case if the priest were the minister of the sacrament.

The wording of Canon 1098 is quite definite. The conditional clause beginning with *si* pertains equally to both sections of part 1 of the canon. It is only when the condition is verified that the extraordinary form may be used. The clause has the force of an invalidating law, since to use this form when the condition is not verified would render the marriage invalid. One may argue analogously from Canon 39, where it is stated that conditions are considered essential for the validity of rescripts if they begin with words like *si, dummodo,* and the like. The ordinary form is to be used at all times except when a qualified witness cannot be had. It will be necessary, then, first to treat of the nature of the valid assistance of a qualified witness at a marriage, and only subsequently of the nature of the impossibility of having such a qualified witness, which would permit one to use the extraordinary form of marriage.

Article 1. The Valid Assistance of a Qualified Witness At a Marriage

The Code of Canon Law in Canon 1094 lists the following as qualified witnesses to assist at marriages: pastors, local ordinaries, and priest delegates of either. Each of these within certain specified limits may validly assist at marriages. The persons mentioned in the first two classifications do so in virtue of the offices they hold and their jurisdiction may be termed ordinary;[6] the third classification lists those who have no power to assist at a marriage except that which they receive from either the pastor or the local ordinary. Prescinding for the moment from the conditions under which these persons may validly act, one must ascertain which ecclesiastical persons fall under the classifications just enumerated.

[5] Canon 1012, § 2.
[6] Canon 197, § 1.

A. *Qualified Witnesses in Law*

1. Pastors

Since there are no restricting clauses, anyone who is a pastor in the strict sense of the term (Canon 451, § 1) and anyone who has by law powers equivalent to those of a pastor (Canon 451, § 2) may fall under this classification.

PASTORS IN THE STRICT SENSE

Canon 451, § 1, defines a pastor in the strict sense as a priest or a moral person on whom a parish is conferred legally with the care of souls to be exercised under the authority of the local ordinary. A pastor can be a physical person or a moral personality. In the former case, he must be a priest.[7] This is a change from the pre-Code discipline, under which a parish could be conferred on a cleric who would subsequently become ordained. If it were to be conferred today on a cleric who had not yet been ordained a priest, the canonical provision would be invalid.[8] If the parish is given to a moral personality, e. g., to a religious house or to a capitular church and the like, then the vested care of souls pertains to the moral personality, but the effected care is entrusted to an actual vicar (*vicarius actualis*). He it is who has the exclusive care of souls with all the duties and rights of a pastor. The moral personality cannot claim any right to assist at any marriage; that right belongs to the *vicarius actualis* appointed by it.[9]

[7] Canons 451, § 1; 453, § 1; 154.
[8] Canon 453, § 1.
[9] Canons 471, §§ 1, 4; 452, § 2.

PASTORS IN THE WIDE SENSE

Under this group come all those who although they are not pastors, nevertheless have parochial obligations and rights equivalent to those of pastors and in law come under the name of pastors.[10]

1. *Quasi-pastors.* These are priests who are entrusted with the care of a quasi-parish, which is a territorial division of a prefecture or vicariate apostolic.[11] The relationship of a quasi-parish to a vicariate or prefecture apostolic is equivalent to the relationship of a parish to a diocese. The quasi-pastor has a church and has the care of the faithful in the quasi-parish to which he is assigned.[12] For purposes of clarity it is necessary to note here that, even in the vicariates or prefectures apostolic where quasi-parishes have not yet been erected, the missionaries, as far as marriages are concerned, are to be regarded as assistants of the vicars or prefects apostolic. The vicar or prefect may entrust them with the care of souls for the entire vicariate or prefecture or for a determined part of the same. Although they may have all the parochial powers delegated to them by the vicar or prefect apostolic, they are not pastors nor are they equivalent to pastors in law. In order that they may assist at marriages, they must have a general delegation from the vicar or prefect apostolic. This delegation may extend to the entire vicariate or prefecture or any determined part of it.[13]

2. *Parochial Vicars with full parochial powers.*[14]

(a) The actual vicar (*vicarius actualis*) who has the actual care of souls in a parish, the title to which is vested in a moral personality.[15]

(b) The administrator of a vacant parish (*vicarius oeconomus*). As soon as possible after a parish becomes vacant, the bishop is to appoint an administrator, who by law will have all the rights and duties of a pastor till a pastor is appointed to the parish.[16] Before

[10] Canon 452, § 2.
[11] Canons 216, § 3; 452, § 2, 1°.
[12] S. C. de Prop. Fide, instr. 25 iul. 1920—*AAS,* XII (1920), 331.
[13] S. C. de Prop. Fide, instr. 25 iul. 1920—*AAS,* XII (1920), 331 ff.
[14] Canon 451, § 2, 2°.
[15] Canon 471, §§ 1-4.
[16] Canons 472; 473, § 1.

an administrator is named by the ordinary, the care of souls devolves upon the assistant, if there is one in the parish; if there are more than one, on the senior assistant; if all have equal seniority, on the one who first came to the parish.[17] This would have little effect on the status of the assistants in the parish in regard to witnessing marriages except in cases where they have no general delegation from the local ordinary; if such should be the case, the administrator would receive this power *de iure.* If there is no assistant in the parish, the care of souls falls to the neighboring pastor; if it is a church that is entrusted to religious, it falls to the superior of the house.

(c) The substitute or supplying priest (*vicarius substitutus*) has full parochial powers unless the ordinary or the pastor himself has made certain restrictions in his power.[18] The vicar substitute supplies for a pastor whose legitimate absence from the parish is to be protracted beyond a week,[19] or is designated by the bishop to take care of a parish while an appeal is being made to a higher court or to the Holy See by the pastor against the sentence depriving him of his parish.[20] In the former case he is named by the pastor and receives approval from the ordinary. If the pastor is a religious, the substitute needs the approval not only of the ordinary but also that of the religious superior.[21] Should the departure of the pastor be unexpected and sudden, and his absence to last beyond a week, he is to inform the bishop immediately and indicate the priest who is substituting for him. The latter has by law all the rights and duties of a pastor immediately upon his selection and retains them while in such capacity unless the bishop should provide otherwise.[22]

As to the power of a priest supplying for the pastor whose absence is protracted beyond a week, the Pontifical Commission for the Interpretation of the Code has issued certain authentic interpretations. The vicar substitute may assist at a marriage *only after*

[17] Canon 472, 2°.
[18] Canon 471.
[19] Canon 465, § 4.
[20] Canons 1465, § 1; 1923, § 2; 2146, § 3; 2156, § 2; 2161, § 2.
[21] Canon 465, § 4.
[22] Canon 465, § 5.

he has received approval from the ordinary.[23] If he is a religious, he may assist at marriages after such approval even if he has not as yet received the approval of his religious superior.[24] If he was chosen by the pastor who had to depart suddenly and unexpectedly, he may assist at marriages from the moment of his selection and may continue to do so until the ordinary, whose approval in the meantime is anticipated, should decide otherwise.[25]

The Code speaks of approval by the ordinary. It does not state what type of approval is necessary. It cannot be said from the wording of the Code that explicit approval is necessary in each particular case. It would seem, according to Cappello, that a general approval given to the priests of a certain religious house in the diocese to fill such needs would suffice.[26] The power of approval by the ordinary is an ordinary power which is attached to his office. He can delegate the superior of a religious house in the diocese to select one of his own priests to act as vicar substitute for any parish in the diocese, upon the request of a departing pastor. Thus such a priest would *ipso facto* have the approval of the ordinary. If an assistant is left in charge of a parish by his pastor, he would be considered a *vicarius substitutus,* the approval of the ordinary being implicit in the fact of his designation as an assistant at that parish.[27]

If the absence of the pastor is not to last at least a week, even though provision is made for a priest to supply during his absence, this priest is not a substitute in the sense of the Code and has no power by reason of his office to assist at marriages. The

23 Pontificia Commissio Interpretationis, 14 iul. 1922 ad IIum—*AAS,* XIV (1922), 527 (hereafter cited as P.C.I.); cf. also, Bouscaren, *The Canon Law Digest* (2 vols. and Supplement through 1948, Milwaukee, Wisc.: The Bruce Publishing Co., 1934, 1943, 1949), I, 539 (hereafter cited as *Digest*).

24 *Ibidem,* ad IIIum.

25 *Ibidem,* ad IVum.

26 *Periodica de Re Morali, Canonica, Liturgica,* XIX (1930), 3* (hereafter cited *Periodica*).

27 Toso. "Consilia et Responsa," *Ius Pontificium,* X (1930), 341-342; Carberry, *The Juridical Form of Marriage,* The Catholic University of America Canon Law Studies, n. 84 (Washington, D. C.: The Catholic University of America Press, 1934), p. 53.

Code is specific in demanding an absence that is expected to be longer than a week.

(d) Vicar Adjutant (*vicarius adiutor*) who is given by the ordinary to a pastor who by reason of age, weakness and the like is unable to fulfill his parochial obligations. If the pastor is totally incapacitated, the adjutant will take the place of the pastor in all things, except in regard to the *missa pro populo.* As a rule, the question of whether he can assist at marriages will be determined in his letters of appointment.[28]

(e) Assistants who have full parochial power. As a rule the *vicarius cooperator* does not have full parochial power.[29] He is given to a pastor who, because of the great number of souls committed to his care or for other reasons, cannot satisfactorily acquit himself of his parochial duties. He may be appointed to assist the pastor in the care of souls in the entire parish or simply in a certain part of it. In regard to assistance at marriages, canonists are agreed that by reason simply of his office he is without right and power in this matter, for otherwise Canon 1096, § 1, allowing a general delegation to be given to him, would be superfluous and meaningless. Furthermore, the Code Commission in its reply of December 28, 1927, stated that assistants with general delegation could subdelegate another priest to assist at a marriage at which they could assist. This reply would also be meaningless if an assistant had the power to assist at marriages in virtue of his office.[30] The problem received an answer in a private reply by the Eminent President of the Code Commission on September 13, 1923, which declared that assistants did not have ordinary power to assist at marriages.[31] A final answer, settling the whole matter, was given by the Code Commission on January 31, 1942. It was declared that an assistant cannot in virtue simply of his office assist validly at marriages.[32]

In the decree *Ne temere,* a priest to whom the care of souls had

28 Canon 475.

29 Canon 476, § 6, states that his power can derive through a commission of it from the ordinary or the pastor.

30 *AAS,* XX (1928), 61, 62; cf. also Bouscaren, *Digest,* I, 541.

31 Cf. *Apollinaris,* VII (1934), 77; Bouscaren, *Digest,* II, 333.

32 *AAS,* XXXIV (1942), 50; Bouscaren, *Digest,* 332.

been entrusted by the ordinary in a definite territory in which parishes had not been canonically erected was to be considered the equivalent of a pastor.[33]

The Sacred Congregation of the Council on March 10, 1908, in a private reply to the ordinary of Trent stated that if *curatores animarum,* even though they were not pastors in the strict sense of the term, nevertheless had full parochial power immediately delegated from the bishop, they were to be considered equivalent to pastors as to the capability of assisting at marriages.[34] Gasparri believed that this can happen only in the case where an assistant is given full parochial power over part of a parish which is situated at a great distance from the parish church.[35] In such a case he would *de iure* have the power of assisting at marriages.[36]

3. *Personal Pastors.* According to the common law of the Code, pastors normally are termed territorial or local. The parish is a determined part of the territory of a diocese with a particular church and a determined people to whom is given a *rector* who is to be their pastor.[37] However, in virtue of an apostolic indult, parishes may be erected for a specific group of people living in a certain territory, in view, namely, of the difference in language or nationality. Likewise, there are parishes that may be termed strictly personal, e. g., for a certain family.[38] These groups constitute exceptions to the general rule that normally applies; still, at times, the allowance of such exceptions may be absolutely necessary. One may distinguish three classes of personal pastors, namely, strictly personal pastors; personal pastors who have a specified territory; pastors whose jurisdiction is partly territorial and partly personal.

[33] S. C. C., decr. *"Ne temere,"* 2 aug. 1907, Art. II—*Fontes,* n. 4340; *ASS,* XL (1907), 528.

[34] Cf. Linneborn, p. 345, n. 3.

[35] *De Matrimonio,* n. 935, 5°.

[36] Canon 476, § 2, with Canon 451, § 2, 2°. Cf. also S. C. C., *Principis Albertenen. et Saskatoonen.,* 5 mart. 1932, wherein the Congregation declares that one must look only to whether the permanent vicar has full parochial power to determine whether he is equivalent to a pastor. If he has this power, then according to Canon 451, § 2, 2°, he has all the rights and duties of a pastor. This declaration received the approval of the Pope on March 20, 1932. (*AAS,* XXIV [1932], 436-438.)

[37] Canon 216, § 1.

[38] Canon 216, § 4.

(a) Strictly personal pastors. Such pastors exercise a care of souls completely independent of the notion of territory. They may be entrusted with the care of souls of a certain family or families (*paroecia familiaris seu gentilitia*) or with the care of souls of the persons under arms (*paroecia castrensis*), as are military chaplains.[39] As to the power to assist at the marriages of their subjects, pastors who have no territory may assist at the marriages of their subjects anywhere in the world.[40]

As for military chaplains, the Code states that one must look to the particular faculties given by the Holy See.[41] The jurisdiction of the military vicar and his chaplains is strictly personal and may be exercised over their proper subjects any place on earth.[42] It embraces parochial power in regard to their own proper subjects.[43] In the list of faculties given to the Military Vicar of the United States by the Holy See, under number 17 of the faculties is listed the faculty pertaining to the valid assistance at marriages on the part of military chaplains. The military chaplains, in virtue of general delegation by the Military Vicar, may assist at marriages of all subjects of the Military Ordinariate placed under the chaplains' charge by the Military Vicar or his delegate.[44] At one time, the chaplain's powers were so personal that he could assist at marriages of only those who were attached to his post. This was changed so that a chaplain may assist at the marriages of *milites peregrini* who come to his military or naval post. His jurisdiction outside his post extends everywhere in regard to those who belong to his post; in regard to others who are subjects of the Military Ordinariate, he may assist at their marriages even at other posts, provided the post

[39] Gasparri, n. 976.

[40] S. C. C., *Romana et aliarum,* 1 febr. 1908 ad VIIum—*Fontes,* n. 4344.

[41] Canon 451, § 3.

[42] S. C. Consist., litt. ad Excmum ac Revmum Delegatum Apost. Amer. Sept., die 1 iulii, 1940, Prot. num 186/39—apud Bouscaren, *Digest,* II, 597.

[43] S. C. Consist., die 8 dec. 1939—*AAS,* XXXI (1939), 710; Bouscaren, *Digest,* II, 587.

[44] S. C. de Sacram., die 9 apr. 1941, Prot. num. 5446/41—apud Bouscaren, *Digest,* II, 597.

in question does not have a Catholic Military Chaplain of its own. Outside the military posts he has no jurisdiction over those who do not belong to his own post.[45]

The Sacred Consistorial Congregation placed the following under the jurisdiction of the Military Vicar and his chaplains:

1. All members of the Armed Forces belonging to the Army, Navy and Air Force who are in the active military service of the Federal Government or of the particular states;
2. The wives, children, relatives and servants of the men in the armed forces who reside in the same house with them;
3. All civilians staying within the limits of the military reservation;
4. All religious and others, even lay persons, who are attached to military hospitals;
5. All priests who are subjects of the Military Vicar, by reason of service with the Armed Forces.[46]

By reason of their territory, the local pastor and the diocesan ordinary have cumulative jurisdiction along with the military vicar and his chaplains over the subjects of the Military Ordinariate. The jurisdiction of the military vicar and his chaplains is not exclusively theirs; they share it with the local ordinary and the local pastor.[47] Furthermore, this jurisdiction extends merely to the Catholic parties listed among those who have been placed under the care of the Military Ordinariate. Therefore, if it is a case wherein neither party is subject to the Military Ordinariate or wherein only the person who is under the Military Ordinariate is a non-Catholic, the chaplain may not assist validly at such a marriage in virtue of his faculties. It would be necessary for him to be designated as an assistant in the parish within which the military reservation is situated and then receive general delegation to assist at marriages, or he would need special delegation for each particular marriage of this type.

[45] Marbach, "The Recent Instruction of the Sacred Consistorial Congregation Regarding Military Ordinariates"—*Jurist*, XII (1952), 149-150.

[46] Litt. ad Excmum ac Revmum Delegatum Apost. Amer. Sept. die 1 iulii, 1940 (Prot. num. 186/39)—Bouscaren, *Digest*, II, 587; *Jurist*, XII (1952), 146.

[47] S. C. Consist., instr. 24 apr. 1951 sub num. 2.—*AAS*, XLIII (1951), 561.

One might mention under the classification of strictly personal pastors the chaplains of orphanages, sanatoria, homes for the aged, universities and the like, whose institution has been taken completely away from the jurisdiction of the local pastor, the chaplain having full parochial power.[48] The jurisdiction of these chaplains to assist at marriages is not as wide as that of the strictly personal pastors mentioned above. They may assist at marriages of only those persons whose care has been entrusted to them and only in the place wherein they exercise their jurisdiction.[49]

(b) Personal pastors exercising jurisdiction in a certain territory. These pastors exercise jurisdiction over certain determined persons in a determined territory which is not strictly a territorial parish.[50] Such are, for example, parishes constituted in a large city for the faithful of another rite, or for the faithful of a different nationality or language group. It is a question of fact whether their jurisdiction is merely personal or whether they are given certain territorial boundaries within which to exercise their jurisdiction. In the United States, the so-called national parishes have become not merely personal but also territorial.[51] In the United States at least, unless the contrary be evident, the pastors of national parishes hold their territory cumulatively with the pastors of one or more territorial parishes. It is in view of this fact that pastors of these national parishes may assist validly within the limits of their respective parishes at all marriages of all Catholics, even those who are not their parishioners.[52]

In his Apostolic Constitution *Exsul Familia* of August 1, 1952,

[48] Canon 464, § 2.

[49] S. C. C., *Romana et aliarum*, 1 febr. 1908—*Fontes*, n. 4344.

[50] Coronata, *De Sacramentis Tractatus Canonicus* (3 vols., Vol. III [*De Matrimonio et de Sacramentalibus*], Taurini-Romae: Marietti, 1946), III, n. 565 (hereafter cited as *De Matrimonio*).

[51] Ciesluk, *National Parishes in the United States*, The Catholic University of America Canon Law Studies, n. 190 (Washington, D. C.: The Catholic University of America Press, 1944), p. 124. The author also mentions that there have been various objections to this view on the ground that such parishes are strictly personal and cannot be otherwise since they have no definite territory and the law requires that there be only one pastor in a given territory. Cf. *Periodica*, XVI (1927), 261*.

[52] S. C. C., *Romana et aliarum*, 1 febr. 1908 ad VIIIum—*Fontes*, n. 4344.

Pope Pius XII has made provision for the spiritual care of immigrants, displaced persons, and the like.[53] In article 32 of the constitution, local ordinaries were urged to seek indults from the Sacred Consistorial Congregation for the purpose of erecting parishes for immigrants, displaced persons and foreigners of a certain nationality or linguistic group, wherever such parishes were not already in existence. Wherever the erection of such parishes does not seem feasible in the judgment of the local ordinary, the latter is to follow the rules laid down in articles 34-40 of said constitution.

The constitution states that the local ordinaries are to entrust the care of souls of these foreigners, immigrants, etc. to priests who are of the secular clergy or belong to a religious order, who are of the same nationality or speak the same language and who have a special mandate for such work from the Sacred Consistorial Congregation. The care of *advenae* and *peregrini*[54] who are of the same nationality or language group should also be entrusted to such priests. The persons, the care of whose souls has been entrusted to such priests, would then become subjects of these priests.

Priests to whom such care has been entrusted are the equivalent of pastors in the care of souls. Their jurisdiction is personal, to be exercised solely over persons the care of whose souls has been entrusted to them. This jurisdiction they hold cumulatively with the local territorial pastor.

In regard to marriages, such a priest, to whom the care of foreigners has been entrusted, assists validly at a marriage only within the limits of the territory entrusted to him and only in a case in which at least one of the contracting parties is his subject.[55]

As for pastors of parishes constituted for the faithful of an Oriental rite, it must be said that they may assist, by reason of

[53] *AAS,* XLIV (1952), 649-704.

[54] Article 40 of the constitution *Exsul Familia* lists as belonging to this classification: (1) all foreigners, including those who may have migrated from the colonies of that country, who are staying in a foreign country, no matter what the period of time may be, no matter what the reason, even if it be for the purpose of studying; (2) their descendants in the first degree of the direct line, even in the cases where they may have already become citizens in said country.

[55] Pius XII, const. *"Exsul Familia,"* 1 aug. 1952, art. 39; S. C. Consist., 7 oct. 1953, II, a.

their office, only at marriages in which at least one of the two contracting parties is a member of his own Oriental rite,[56] or, if neither of the contracting parties is of his particular rite, at least one of the parties is considered by law his parishioner and he that party's proper pastor.[57] This situation takes place in two cases, namely, in a territory in which a hierarchy of the rite to which the party belongs has been constituted there is no pastor of this rite. In this eventuality, the party's hierarch names a pastor of another rite, with the permission of this pastor's ordinary, to care for the spiritual welfare of the people of the rite in question.[58] The second case is the one when locally there has not been constituted a hierarchy of the rite to which the party belongs. In this eventuality, the ordinary of the place becomes the proper ordinary of the party, and the pastor of the place can become his proper pastor; if there is more than one ordinary, e.g., of two different rites, then the proper ordinary is the one designated by the Holy See.[59]

(c) Pastors whose jurisdiction is partly personal and partly territorial. This situation develops when a pastor having a definite territory within which to exercise his jurisdiction has been given the care of certain determined persons or groups of persons who live outside his own proper territory.[60] These pastors validly assist at all marriages within the limits of their territory and likewise at the marriages of the parties entrusted to their care, but dwelling outside the territory, no matter where they may be. Outside his territory, it is solely at the marriages of these parties that he may assist validly.[61]

2. The Local Ordinary

In Canon 198, the Code of Canon Law very specifically enumerates the ecclesiastical personages who are to be considered local ordinaries and therefore in virtue of Canon 1094 are empowered

[56] Pius XII, litt. apost. *"Crebrae allatae sunt,"* 22 febr. 1949, Canon 86, § 1, 2°.—*AAS,* XLI (1949), 108.

[57] *Ibidem,* Canon 86, § 2.

[58] *Ibidem,* Canon 86, § 3, 2°.

[59] *Ibidem,* Canon 86, § 3, 3°.

[60] Coronata, *De Matrimonio,* n. 536, 3.

[61] S. C. C., *Romana et aliarum,* 1 febr. 1908 ad IXum—*Fontes,* n. 4344.

by law to assist at marriages. They are the following: the Roman Pontiff for the entire world; in their own respective territories, residential bishops, and abbots as well as prelates *nullius* together with their vicars general; administrators, vicars and prefects apostolic and the vicars delegate appointed by the vicars and prefects apostolic,[62] and finally those who by law or approved constitutions succeed the above-mentioned during a vacancy in the office or if the office is otherwise impeded, i.e., the cathedral chapter, acting as a corporate body according to Canon 101,[63] the abbatial or prelatial chapter[64] before the election of a vicar capitular,[65] in mission countries, the pro-vicars and pro-prefects apostolic,[66] and, in countries where cathedral chapters are not constituted, the diocesan board of consultors, whose function it then becomes to designate the administrator of the vacant diocese.[67] Such corporate bodies as such would not assist at a marriage. They would delegate a priest to act in their stead.

3. Priest Delegate

The third group of *testes auctorizabiles* (qualified witnesses) for valid assistance at a marriage according to Canon 1094 is constituted by priests delegated either by the pastor or by the local ordinary. This is a concession from the lawgiver allowing those who have ordinary power to designate another to act as a qualified witness in their stead.[68] The Code uses the words *licentia*[69] and *delegatio*[70] interchangeably to designate the power to assist validly

[62] In a letter of the Sacred Congregation for the Propagation of the Faith dated December 8, 1919, and addressed to Vicars and Prefects Apostolic, the latter were empowered henceforth to name a vicar delegate who would have all the faculties a vicar general has by law. This was a new grant because vicars and prefects apostolic did not have, in virtue of the Code of Canon Law, the power to appoint a vicar general. Cf. *AAS*, XII (1920), 120.

[63] Canon 431.

[64] Canon 324.

[65] Canon 435.

[66] Canon 309, § 2.

[67] Canon 427.

[68] Canon 1095, § 2.

[69] Canon 1095, § 2; 1096, § 1, § 2.

[70] Canon 1094; 1095, § 1.

at a marriage. This assistance is not strictly an act of jurisdiction; still it follows the rules of delegation of jurisdiction.

The canon speaks only of a *delegatus;* it does not, however, mean to exclude the *subdelegatus,* i.e., a properly subdelegated priest. The delegate receives his authorization from one who has ordinary power; the subdelegate, his from one who has either a general delegation *a iure* or a general delegation from one who has ordinary power.

Delegation and subdelegation must follow certain definite rules as enacted in Canon 1096, § 1. If these prescripts are not observed, the delegation or the subdelegation will be invalid, and the consequent assistance at marriage will also be invalid (*secus irrita est*). These rules are the following:

1. The delegation or subdelegation must be expressly given. This excludes any tacit, interpretative, or presumed delegation on the part of the delegate.

2. It must be given to a priest.

3. It must be given to a determined priest, i.e., the delegator must in some way himself determine the priest to whom he is granting delegation. He may do so explicitly or implicitly, directly or indirectly, so long as he is the one who is determining the priest to be delegated.[71] The Code Commission declared a delegation invalid because the pastor did not sufficiently determine the priest to be delegated.[72] He need not know the priest he is delegating as long as he is determining the priest himself.[73]

4. It must be given for a definite, specific marriage. It need not be restricted for one marriage only; it may be given for many at the same time as long as each one is sufficiently determined. The sole exception to this rule is the general delegation which may be given in virtue of Canon 1096, § 1, to a *vicarius cooperator* by the local ordinary or by the pastor himself, to be exercised only in the limits of the parish to which he is assigned. This power of the

[71] Cappello, *De Matrimonio,* n. 674.

[72] P.C.I., 20 maii, 1923, ad VIum—*AAS,* XVI (1923), 115; Bouscaren, *Digest,* I, 541.

[73] Cappello, *De Matrimonio,* n. 674; Carberry, *The Juridical Form of Marriage,* p. 86.

vicarius cooperator, may also be subdelegated by him to another priest for a given marriage.[74]

These are the only requirements in Canon 1096, § 1. However, as will be seen shortly, the pastor and the local ordinary may assist validly at marriages only in the limits of their respective territories. Hence, they cannot grant delegation for assistance at marriages outside these territories, for they cannot grant to another the power they themselves do not possess.[75] Even if the delegation was extorted by force or fear, it would according to the more common opinion, nonetheless be valid because of the lack of an invalidating clause to that effect in the Code.[76] The delegation may be communicated to the delegate in any manner in which people communicate with one another, even by telephone, telegraph, radiotelephone, etc.[77] On the part of the delegate, it is the more common opinion that he must at least implicitly accept the delegation which has been given.[78] If he knows nothing of the delegation that is sought and obtained for him, he cannot validly assist at the marriage.[79] However, if the delegation is given in a diocesan statute or by law, the delegate's acceptance is not required for it can be given even to a priest who is unwilling and refuses it.[80]

B. *The Postulated Conditions for Valid Assistance At a Marriage*

After enumerating those who can act as qualified witnesses at a marriage, the Code in the very same canon limits this capability by postulating certain conditions which must be fulfilled in order that the aforementioned ecclesiastical personages may assist validly at a marriage.

74 P.C.I., 28 dec. 1927—*AAS,* XX (1928), 61; Bouscaren, *Digest,* I, 541.

75 "Nemo potest plus iuris transferre in alium quam sibi competere dignoscatur."—Reg. 79, R.J., in VI°.

76 Wernz-Vidal, *Ius Matrimoniale,* n. 538; Chelodi-Ciprotti, *Ius Canonicum de Matrimonio* (5. ed., Vicenza: Società Anonima, 1947), n. 133 (hereafter cited as Chelodi-Ciprotti).

77 De Smet, *op. cit.,* p. 95, nota 5; Wernz-Vidal, *op. cit.,* n. 538, 5.

78 Coronata, *De Matrimonio,* n. 542.

79 Cappello, *De Matrimonio,* n. 675.

80 Wernz-Vidal, *Ius Matrimoniale,* n. 538, nota 46; Gasparri, n. 951.

1. Possession of One's Canonical Office

In the case of those who may validly assist at a marriage in virtue of the office they hold, it is necessary that they have taken canonical possession of their respective offices according to the prescripts of the Code.[81] As for vicars general or the vicars delegate of the vicars and prefects apostolic, they may assist at a marriage from the moment that they have entered upon their respective offices by accepting the appointments to them. The ecclesiastics who succeed to the rule of a vacant diocese by law or by approved custom, may exercise this right as soon as the diocese is vacant. The vicar capitular and the administrator of a diocese have this right upon the acceptance of their election to that office by the respective cathedral chapter or board of consultors.

This much is quite evident from the fact that the faculty to assist at a marriage is dependent on the office that is held. If one has not as yet taken canonical possession of the office, he does not enjoy this faculty. If the office is lost, the faculty is lost with it. The legislator himself determines in what manner canonical possession of an office is taken.

As for the delegate, since it is not ordinary power that he possesses, the canonical possession of an office is not necessary. All that is needed is that he have acquired a valid delegation from either the pastor, the local ordinary, or one who has a general delegation to assist at marriages, and that he stay within the limits of his mandate.

2. Absence of Legal Disqualification

Although one may hold a canonical office in virtue of which one may assist at a marriage, the Code circumscribes this right by forbidding him under pain of nullity to exercise this right if by way of sentence he has been excommunicated, suspended from his office, or placed under interdict, or also when he has been declared as such.[82] A declaratory sentence is issued by an ecclesiastical judge or legitimate superior after the guilt of the party who has

81 Canons 334, § 3; 1444, § 1; 313; 293.

82 Canon 1095, § 1, 1°.

incurred a *latae sententiae* penalty has been established.[83] A condemnatory sentence refers to penalties that are incurred as *ferendae sententiae* punishments. Once the guilt of the party in reference to a crime punishable by law has been verified, an ecclesiastical judge or a legitimate superior may be compelled by the law itself to inflict the prescribed penalty, but at times he may be allowed by the law to use his own discretion in doing so.[84] The legal disqualification, then, depends on whether a sentence has been passed on the offender. Before sentence has been passd, even though the pastor or the local ordinary may have incurred a *latae sententiae* penalty, he may assist validly at a marriage. There is one exception to this. Anyone who lays violent hands on the person of the Holy Father becomes *ipso facto* a *"vitandus"* [85] and, according to law, the customary procedure for declaring such a one a *"vitandus"* need not be observed in order that the legal disqualifications follow.[86]

The Code speaks of suspension *ab officio*. Since the question here is one of penalties, the law must be interpreted strictly.[87] Furthermore, the very wording of the canon (vel . . . vel . . . vel . . .) indicates that this is an all-inclusive enumeration.[88] Accordingly, it will not include suspensions *a divinis, a beneficio, ab ordine, a iurisdictione*.[89] The latter suspension will not deprive one of the right of assisting at marriages, for such assistance is not strictly an act of jurisdiction.[90] One must remember, however, that a general suspension also includes a suspension *ab officio*.[91] Hence the pastor

[83] Canon 2223, § 4.

[84] Canon 2223, § 2 and § 3.

[85] Canon 2343, § 1, 1°.

[86] Canons 2258, § 2; 2266.

[87] Canon 19.

[88] Gasparri, *De Matrimonio,* n. 973; Carberry, *op. cit.,* p. 67.

[89] Gasparri, *loc. cit.;* Cappello, *De Matrimonio,* n. 662.

[90] One might question the validity of excluding a suspension *a beneficio,* since a benefice (c. 1409) consists of an *office* with the established right to an income therefrom. Surely the greater, i.e., the benefice, should include the lesser, i.e., the office. However, since this is a matter of penalties, the law must be interpreted strictly. Therefore, a suspension *a beneficio* would not disqualify a priest.

[91] Canon 2278, § 2.

who has incurred a general suspension through a condemnatory sentence or has been declared to be under a general suspension, is legally disqualified from assisting at a marriage.

In the event that a declaratory or a condemnatory sentence has been passed on a pastor or a local ordinary, provision will usually be made by the legitimate superior to supply for the offender during the time of his legal incapacity.

In virtue of Canon 1095, § 2, if a pastor or a local ordinary has been legally disqualified, he cannot delegate another to act in his stead. The wording of the canon excludes this, since only those who may validly assist can grant a delegation to another to assist in their place. If despite their disqualification they could do so, they would be giving to another a power which they themselves do not have.[92] How does archbishop M. [illegible] the Thus. bishops have any office, authority, or jurisdiction to delegate priests to assist at marriages anyplace in the world? See P. 82

A very pertinent question at this point is whether the delegate falls under the same legal disqualification if he should be excommunicated, suspended *ab officio,* or sustaining an interdict after the intervention of a declaratory or a condemnatory sentence. Commentators are divided. Wouters (1864-1933) [93] and Vlaming (+ 1935) [94] hold that he does not fall under the same disqualification, since the Code does not mention this, and since in the absence of such a restriction one cannot hold that he is disqualified. Vermeersch-Creusen,[95] De Smet [96] and Cappello [97] held that in view of the purpose of the law he also is disqualified. In view of the doubt of law, one must hold that a marriage witnessed by such a delegated priest would have to be held as valid.[98]

N.B.

[92] "Nemo potest plus iuris transferre in alium quam sibi competere dignoscatur"—Reg. 79 R.J. in VI°.

[93] *De Forma Promissionis et Celebrationis Matrimonii* (ed. 5a ad Codicem Iuris Canonici accommodata, Bussum in Hollandia, 1919), p. 25.

[94] *Praelectiones Iuris Matrimonii* (3. ed.), n. 573.

[95] *Epitome,* II, 396.

[96] *De Sponsalibus et Matrimonio* (4. ed.), n. 122.

[97] *De Matrimonio,* n. 677.

[98] Canons 15 and 209.

3. Restriction Within Respective Territory or Delegated Jurisdiction

Within their respective territories the pastor and the local ordinary can validly assist at all marriages, even of those who are not their subjects. Outside their respective territories they cannot, without proper delegation, assist at any marriages, even of their own subjects,[99] unless the pastor's relationship to them is of a strictly personal nature, as was mentioned above. A church or a house of an exempt religious community is to be considered as part of the territory of the parish or diocese within which it is located and, therefore, the pastor or the local ordinary may assist validly at marriages celebrated therein.[100]

The delegate may not exceed the terms of his mandate, otherwise he would be acting invalidly.[101] He may assist at only those marriages for which he has been delegated and only within the limits prescribed by the delegator. The territorial limits may never exceed the territorial limits of the delegator himself.[102]

see P. 81

4. Unconstrained and Active Assistance

The Code demands that, for the marriage to be valid, it is necessary that the qualified witness be not constrained by force or fear in asking and receiving the matrimonial consent of the contracting parties.[103] The purpose of the law is to have marriages not take place *ex inopinato*, i.e., unknown to the pastor, and to have the assisting priest to be completely free, as the dignity and the reverence due to the sacrament demand. There is a change in the present law. No longer is passive assistance at a marriage sufficient; active assistance in the manner of asking and receiving the consent to the marriage from the contracting parties is now necessary for validity, even in cases of mixed marriages.[104] The Pontifical Commission for the Interpretation of the Code declared on March 10, 1928, that Canon 1102, § 1, revoked the faculty which was granted in some places by the Holy See of assisting passively at illicit mixed marriages.[105] It is necessary, then, that the assisting priest both ask and receive the matrimonial consent. If he were merely to ask and not receive, or not to ask and yet receive the consent, the marriage would be invalid.[106] All that is required for validity is that the priest manifest his interrogation clearly enough to be actually understood, and that the parties externally manifest their intentions to him.[107] For reasons that are obvious, a priest who is deaf and dumb or is not *sui compos* cannot assist validly at a marriage.[107a]

The active assistance given by a priest at a marriage will suffice for validity provided that he is not constrained by force or grave fear to take part in the marriage. The fear that is spoken of is one that is inflicted *ab extrinseco,* for Canon 1095, § 1, 3°, speaks of a priest being *constrained* to assist; this can mean only extrinsic fear.[108] It must be inflicted for the purpose of having the priest assist at the marriage, and it matters not whether it is inflicted by the parties themselves or by others. Gasparri declared that fear of a punishment threatened by the ordinary when a priest unjustly refuses to assist at a marriage, or a threat made by the parties to report the priest who unjustly refuses to assist at their marriage, will not in-

99 Canon 1095, § 1, 2°.

100 S. C. de Sacramentis, *Romana et aliarum*, 13 mart. 1910, ad VIII [illegible]

101 Canon [illegible]

102 Canon [illegible]

103 Canon [illegible]

104 This is evident from a reply of the Supreme Sacred Congregation of the Holy Office, dated November [illegible] 1915, to the Archbishop of Prague. [illegible] reply was not published in the *Acta Apostolicae Sedis,* but it may be found in the *Linzer Quartalschrift,* LXXIV (1921), 249. The Holy Office thereby changed its directive which was approved by Pius X on May 23, 1912, and issued on June 21, 1912 (*AAS,* IV [1912], 443-444), wherein passive assistance was allowed in certain countries in mixed marriages in which the non-Catholics refused to make the usual promises.

105 *AAS,* XX (1928), 120; Bouscaren, *Digest,* I, 546.

106 Cappello, *De Matrimonio,* n. [illegible]

107 Wouters, *op. cit.,* p. 20; Payen, *De Matrimonio in Missionibus ac Potissimum in Sinis Tractatus Practicus et Casus* (2. ed., 3 vols., Zi-ka-wei: Typographia T'ou-Se We, 1935-1936), II, n. 1774 (hereafter cited as Payen); Rossi, *De Matrimonii Celebratione iuxta Codicem Iuris Canonici* (Rome: [illegible], 1924), 81 (hereafter cited as Rossi).

107a Rossi, p. 81; Carberry, p. 76.

108 Payen, *loc. cit.;* Cappello, *De Matrimonio,* n. 668.