validate the marriage in question.[109] One should note that fraud perpetrated by the parties or others to secure the assistance of the priest will not render such assistance invalid, since the Code does not mention it as invalidating the assistance.[110]

Article 2. Unavailability of a Qualified Witness

If a marriage cannot, without serious inconvenience, be contracted according to the ordinary form, then the obligation to observe it ceases.[111] Inasmuch as the form is divisible as to the presence of a qualified priest and as to the presence of ordinary witnesses, there must be observed that part of the form which can be observed.[112] In Canon 1098, the legislator prudently made provision for cases in which a qualified witness would be unavailable to the parties. The matter of witnesses will be taken up in a subsequent chapter.

In the preceding article it was shown who can act as a qualified witness for the Church at a marriage. It was seen that some do so in virtue of the office they hold; others, in virtue of the delegation they have received. Both groups must follow certain prescriptions in order that their assistance at a marriage may be valid. Outside these limitations the rendered assistance is invalid and the marriages thus contracted are null. In the ordinary course of events, when a Catholic, or for that matter one who is bound by the juridic form of marriage,[113] desires to contract marriage, he must invoke the assistance of such a qualified witness. Unless he or she does so, the attempted marriage will have no juridic effects.[114] However, at times this ordinary form is impossible of observance; it is then that the exception, the extraordinary form of Canon 1098, may be allowed. In order to avoid uncertainty and ambiguity, the legislator himself

109 *De Matrimonio,* n. 979.

110 Gasparri, *loc. cit.*

111 Gasparri, n. 988.

112 Such was the usual reply of the S. C. of the Council whenever it allowed marriages to be contracted without the observance of the form prescribed by the decree *Tametsi. Vide supra,* p. 39.

113 Canon 1099.

114 Canon 1094.

wisely decreed what type of impossibility would suffice for one to be excused from observing the ordinary form.

The legislator postulated that a pastor, a local ordinary, or a delegated priest, who according to Canons 1095 and 1096 could act as a qualified witness *cannot be had (haberi)* and *cannot be approached (adiri).* The *nequit haberi* pertains to the priest himself, when it is he himself who is impeded.[115] He cannot be had if he cannot be called either by the party or by others, or also, though he has been called, if he cannot get to the parties in order to ask and receive their consent,[116] e.g., for the reason that he is sick, is confined in prison, or has become insane. Likewise the same can be said if the priest who can be had cannot assist validly because he has become legally disqualified,[117] is sojourning outside the limits of his territory,[118] or lacks the needed delegation and cannot receive any. In all these cases, even though materially he is at hand, he is not to be had in the sense required by the canon, i.e., for assistance in accordance with the requirements of Canons 1095 and 1096.

A qualified witness cannot be approached or gotten to *(adiri)* as long as even one of the parties cannot go to him for the purpose of contracting marriage,[119] e.g., one of the parties is sick or crippled, or there is no qualified witness in the region. This latter impossibility of being unable to get to a qualified witness will be the more likely occurrence in cases of danger of death; the former one the more likely occurrence in cases of a foreseen month's absence.

One must keep in mind that the canon pertains to all possible qualified witnesses. It does not refer simply to one possible qualified witness or to one's proper pastor or local ordinary or to a priest delegated exclusively by them when it deals with an unavailable agent. The wording is quite general; it postulates the unavailability of all possible qualified witnesses as a condition for the valid

115 Coronata, *De Matrimonio,* n. 565.

116 Cappello, *De Matrimonio,* n. 691; Payen, II, n. 1816, footnote 4; Regatillo, *Interpretatio et Iurisprudentia Codicis Iuris Canonici* (Santander: Sal Terrae, 1949), p. 380; Gasparri, n. 1004; Wernz-Vidal, *Ius Matrimoniale,* n. 544, footnote 62.

117 Canon 1095, § 1, 1°.

118 Canon 1095, § 1, 2°.

119 Cappello, *loc. cit.;* Coronata, *loc. cit.;* Gasparri, *loc. cit.*

use of the extraordinary form. If a neighboring qualified witness can, without serious inconvenience, be approached or had in his own territory, the condition is not fulfilled and the canon will be inoperative. Further it must be noted that the conjunction *vel* as used by the legislator in his joining of the words *haberi* and *adiri* must be taken in the conjunctive, and not in the disjunctive, sense. The *vel* has the force not of *aut . . . aut,* but rather of *nec . . . nec. . . .* Both impossibilities must be in evidence, otherwise the extraordinary form cannot be invoked.[120]

The impossibility of having or getting to a qualified witness must be, but also suffices if it is, personal, i.e., it must affect both parties in the matter of having a priest or either party in getting to the priest.[121] The impossibility need no longer be *communal,* i.e., affecting the entire community, as was required under the Tridentine discipline, nor must it be *local,* as postulated by the decree *Ne temere.* In fact, if the impossibility is common and local but not personal, it will not suffice. This is evident, first, from the wording of the text of the canon which does not postulate a communal or local impossibility. It postulates only a serious inconvenience. If the impossibility is not personal, there is no inconvenience.[122] Secondly, it is evident from the common opinion of the commentators who have written since the Code has come into effect.[123]

[120] Sipos, "Forma Celebrationis Matrimonii extra Mortis Periculum,"—*Ius Pontificium,* XX (1940), 94; Miceli, "De Forma Celebrationis Matrimonii iuxta c. 1098,"—*Monitor Ecclesiasticus,* LXXV (1950), 235; Schönsteiner, *Grundriss des kirchlichen Eherechts* (2. ed., Wien: Ludwig Auer, 1937), p. 727.

[121] Coronata, *loc. cit.;* Payen, II, n. 1816; Gasparri, n. 1006; S. R. Rotae, *Nullitatis Matrimonii,* 29 iul. 1926, coram R.P.D. Josepho Florczak, dec. XXXVI, n. 4—*Decisiones,* XVIII (1926), 289; *Nullitatis Matrimonii,* 7 dec. 1931, coram R.P.D. Andrea Jullien, dec. LV, n. 3—*Decisiones,* XXIII (1931), 473.

[122] S. R. Rotae, *Nullitatis Matrimonii,* 29 iul. 1926, coram R.P.D. Josepho Florczak, dec. XXXVI, n. 4—*Decisiones,* XVIII (1926), 289.

[123] De Smet, *De Sponsalibus et Matrimonio,* n. 131; Payen, II, n. 1816; Cappello, *loc. cit.;* Coronata, n. 565; Chelodi-Ciprotti, n. 136; Rossi, p. 111; Cerato, *Matrimonium a Codice I.C. integre desumptum* (ed. IV., Patavii, 1929), p. 164 (hereafter cited as Cerato); Chrétien, *De Matrimonio (Praelectiones)* (2. ed., Metis: Typis Imprimerie du Journal "Le Lorrain," 1937), n. 340; Knecht, *Handbuch des katholischen Eherechts,* p. 645; Vlaming, *Praelectiones Iuris Matrimonialis,* II., n. 201.

The impossibility must be actual, i.e., a priest *de facto* cannot be had and cannot be approached; in other words, a priest is *actually* unavailable. This much is clear from the text of the canon. With reference to the unavailability, nothing is said about a prudently foreseen or possible unavailability. The text clearly states that the consequences obtain only if the stated condition is verified. A priest is not unavailable if he is merely thought to be, or also adjudged to be, or even prudently foreseen to be, unavailable. All these would predicate merely a condition which in the judgment of the parties could be subjectively regarded as true, but objectively remained erroneous. Such a practice would be fraught with danger and could lead to frequent clandestine marriages. The Pontifical Commission for the Interpretation of the Canons of the Code in the interpretation given to the canon on November 10, 1925, stated that the *fact* of the absence of a pastor was not sufficient for the use of this canon; it demanded that this condition be foreseen to last for a month.[124] Therefore, the *fact* of absence is essential; it is the starting point for the application of the canon. Logically, it is impossible to have a prudent prevision that a *presumed absence* will last a month. It is the actual impossibility that is postulated by the Rota in its jurisprudence.[125] Therefore, a mere presumption on the part of the parties as to the unavailability of a competent priest, even an otherwise prudent judgment as to his unavailability, will

[124] *AAS,* XVII (1925), 583; Bouscaren, *Digest,* I, 542.

[125] S. R. Rotae, *Nullitatis Matrimonii,* 30 ian. 1926, coram R.P.D. Maximo Massimi, pro-Decano, dec. IV, n. 3: ". . . requiritur in primis *factum* quoddam quod nempe haberi vel adiri nequeat sine gravi incommodo parochus vel loci ordinarius vel sacerdos delegatus qui matrimonio adsistant."—*Decisiones,* XVIII (1926), 18; *Nullitatis Matrimonii,* 7 dec. 1931, coram R.P.D. Andrea Jullien, dec. LV, n. 3: ". . . *Factum* imprimis a lege requiritur, seu *rerum conditio* sunt ipsa verba cit. canonis, ob quam *reapse* et *objective* haberi vel adiri nequeat sine gravi incommodo sacerdos competens. . . . Sed quia falsa nostra existimatio rei veritatem non mutat, si partes, ex vana imaginatione vel errore etiam excusabili, existiment haberi vel adiri non posse sine gravi incommodo sacerdotem competentem, deest factum seu non verificatur conditio rerum requisita a lege et invalidum est matrimonium contractum coram solis testibus. Non sufficit ergo quaelibet subjectiva persuasio, sed requiritur impossibilitas seu gravis difficultas saltem moralis, innixa fundamento reapse existente."—*Decisiones,* XXIII (1931), 472-473. [Italics are the writer's.]

not suffice. An objectively false judgment, even one that is excusable, will not change the facts of a determined case.[126] Accordingly, unless the *fact* of a priest's unavailability is established, the canon may not be used. Prudent prevision refers to and only follows upon an actual absence or impossibility. Prudent judgment is to be made about the *duration* of the absence, and not about the *fact* of the absence. This pertains to both eventualities mentioned in number 1° of the canon.

In view of this requirement, it seems inadmissible to subscribe to the opinion of Payen[127] and Vlaming,[128] whom Payen cited in support of his own opinion, which states that as long as one has prudently judged that a competent priest cannot be had or approached without serious inconvenience a marriage contracted apart from his presence would be valid, even though, *de facto,* this judgment is objectively erroneous. The reason they give is that all that the canon requires is a human conviction as to the unavailability of a qualified priest. Since it is only a human judgment, so they contend, it is not infallible. Both authors seem to fall into the error of applying here with reference to the factual absence of a qualified witness the prudent judgment which is later required in the canon (1°) with reference to a continued state of things. The prudent judgment is postulated by the canon only *after* the *factual* absence has been established, and it is restricted to the expected duration of the said actual absence or unavailability. Vlaming identified the prudent judgment regarding an extant case of danger of death with the prudent judgment regarding the unavailability of a competent

126 S. R. Rotae, *Nullitatis Matrimonii,* 30 ian. 1926, coram R.P.D. Maximo Massimi, pro-Decano, dec. IV, n. 3: "Hinc, si quis per errorem, licet excusabilem, credat ministrum catholicum . . . haberi vel adiri non posse sine gravi incommodo, coram solis testibus contrahere nequit."—*Decisiones,* XVIII (1926), 18; *Nullitatis Matrimonii,* 7 dec. 1931, coram R.P.D. Andrea Jullien, dec. LV, n. 3; "Sed quia falsa existimatio rei veritatem non mutat, si partes, ex vana imaginatione vel errore etiam excusabili existiment haberi vel adiri non posse sine gravi incommodo sacerdotem competentem, deest factum seu non verificatur conditio rerum requisita a lege . . . non sufficit ergo quaelibet subiectiva persuasio, sed requiritur impossibilitas seu gravis difficultas saltem moralis, innixa fundamento *reapse existente.*"—*Decisiones,* XXIII (1931), 473.

127 *Op. cit.,* II, n. 1816.

128 *Praelectiones Iuris Matrimonialis,* II, n. 589.

priest. In the case of a danger of death, a prudent judgment is all that can be expected; still, this must follow upon the fact of a factual unavailability of a qualified witness. Even in danger of death, if it is taken for granted that a priest is unavailable and *de facto* he is available and could assist at the marriage, a marriage contracted without his assistance would be invalid. As for the unavailability of a competent witness, it is a case that differs widely from the case of a danger of death. The judgment, even though innocently erroneous, will not change the fact of a priest's availability. If the judgment is erroneous, the marriage will be invalid.[129]

In postulating only a serious inconvenience as an excusing cause, the legislator demonstrated that he did not demand an absolute or physical impossibility. Such would be the case, for example, if there were no priest in the region, as would happen on a deserted island, or if there were no means of reaching him, as would happen in a village in the mountains that is blocked all winter by snowdrifts. In such cases the natural right of a person to marry would supersede the obligation of the ecclesiastical law, and the latter would cease to bind. The Church itself acknowledges this. All that the legislator demands is that there be a moral or relative impossibility of having a priest assist at one's marriage, i.e., for these persons and in these circumstances. If it is only with great difficulty that a person can get to a priest or vice versa, the requirement in this canon will have been fulfilled. In determining what would constitute a serious difficulty, the legislator indicated that such a difficulty would obtain if the parties could not approach the priest, or the priest the parties, except with serious inconvenience. He does not demand a most serious inconvenience (*gravissimum incommodum*).[130]

What constitutes a serious inconvenience? This is a difficult question, one to which a definitive, all-inclusive answer can hardly be given. Because of the various circumstances and various combination of circumstances that could produce an inconvenience serious enough to excuse one, it is impossible to formulate a general norm. Gasparri very prudently noted that an inconvenience which is light for one

129 S. R. R., *locc. citt.*

130 Payen, II, n. 1817.

may be serious for another.[131] One must judge each case individually, taking into consideration the parties and the priest, their capabilities, the circumstances of time and place, the means at their disposal, etc.

It can be said that a grave inconvenience is present if, in getting to a qualified witness, notable moral or material harm would befall the parties, the priest, or the common good.[132] The material harm could arise from natural or free causes. In the former category one may list the following: the danger of contagion, of floods, of oppressive heat (for people who are weak), of heavy storms, and the like. These usually obtain in cases wherein people are constituted in danger of death. Among those deriving from free causes, one may point to serious riots, persecutions of Christians, danger from marauding bands, etc. As for moral harm, authors list the case wherein a penitent reveals in a confession on his deathbed that, despite the fact that everyone believes he is married, he had never contracted marriage with the woman with whom he has been living in concubinage. It is held that the penitent need not grant permission to the confessor to seek delegation to assist at his marriage from a competent priest who is physically absent. The reasons given are that the good name which must be spared might be endangered if delegation were to be sought from the pastor or the ordinary and that at times there would be danger of violating the sacramental seal.[133] One might question the validity of this argument, in a case in which the sacramental seal would not be involved. Unless it should be that the pastor or the local ordinary are very good friends of the penitent, and it would be most difficult for the penitent to have them know of the situation, the reason would seem not to be a valid one. The pastor may be trusted with the secret as much as the other witnesses whose presence the canon requires. The pastor is trusted with the revalidation of any and all invalid relationships.

131 *De Matrimonio,* n. 1006: ". . . incommodum enim quod mihi grave est, tibi potest esse leve."

132 Gasparri, *ibid.;* P.C.I., 3 maii, 1945—*AAS,* XXXVII (1945), 149; Bouscaren, *Digest, Supplement through 1948,* p. 157.

133 Payen, II, n. 1817; Cappello, *De Matrimonio,* 691; Chelodi-Ciprotti, n. 136, b; Vlaming, *Praelectiones Iuris Matrimonialis,* II, n. 587; Wernz-Vidal, *Ius Matrimoniale,* n. 544.

In danger of death, the priest may in virtue of Canon 1044 dispense the parties from the form of marriage.

Circumstances could be such that they would cause serious harm to the common good if one were to observe the ordinary form of marriage. It could very well happen that the priest is the only one in the territory and that his assistance at the marriage would cause the loss of his ministrations, e.g., during an epidemic when people are dying, or run the risk of his imprisonment or of the prohibition to exercise his priestly functions. The same situation could obtain in the case of a doctor or a nurse who could, as far as they themselves are concerned, get to a priest, but who seem barred from making that approach in view of the fact that their ministrations are essential to so many sick people, especially if they are the only ones in the region. The serious harm to the common good would excuse them from observing the ordinary form of marriage if the other conditions postulated in Canon 1098 are present.

Serious inconvenience would also be present when there are not available the ordinary means of getting to a priest, or of having a priest come to the parties. As an ordinary means of contacting a priest in order to have him come, or to have him delegate someone, there exists the possible use of a messenger or of an ordinary letter,[134] or even the ready employment of special delivery or air mail service.[135] The parties are not obliged to make use of extraordinary means that indeed may be at their disposal. The commentators are of the opinion that the use of the telephone, telegraph, cablegram and the like is not mandatory, inasmuch as such a means of communication is in the jurisprudence of the Holy See considered as an extraordinary means.[136] They base their arguments on two replies from the Holy See which exclude the use of the telephone and the

134 Chrétien, *De Matrimonio (Praelectiones),* n. 340; Ubach, *Compendium Theologiae Moralis* (2 vols., Friburgi Brisgoviae: Herder, 1926-1927), II, n. 855; Sipos, *Ius Pontificium,* XX (1940), 95; Payen, II, n. 1817; Wernz-Vidal, *op. cit.,* n. 544.

135 Heylen, *Tractatus de Matrimonio* (ed. 9., Mechliniae: Dessain, 1945), p. 269.

136 Regatillo, *Interpretatio et Iurisprudentia Codicis Iuris Canonici,* p. 380; Aertyns-Damen, *Theologia Moralis* (2 vols., 14. ed., 6. post Codicem, Torino: Marietti, 1944), II, n. 842; Heylen, *loc. cit.;* Wernz-Vidal, *loc. cit.*

telegraph as means of contacting the Holy See for dispensations or for receiving notification of the same.[137] It has always been the practice of the Roman Curia to consider these as extraordinary means. It has been felt that these are unsafe means because of the danger of having the *gratia* exposed to nullity and because of the fact that information is had by people (operators) who have no right to the same. There are authors, however, as Chrétien,[138] Bender,[139] Sipos,[140] who do not consider the use of the telephone and the telegraph as something extraordinary, since today their use is quite frequent and the telephone has become an ordinary means of communication. They feel that there is no danger to be feared in their use if one considers merely the securing of a delegation or a contacting of the pastor or the ordinary. This opinion seems the better one to the writer, since the purpose underlying the replies from Rome would not be verified in such a case. Besides, the canon does not mention extraordinary means; it merely postulates the presence of a serious inconvenience. If the use of a telephone or of the telegraph is not a serious inconvenience to the parties in question, how can the requisite condition of the canon be verified? However, one must remember that their use is still considered as something extraordinary by the Holy See [141] and according to the

[137] The first was from the Secretariate of State to the Bishop of Strasbourg on January 5, 1892. It read as follows: "Ad nonnulla evitanda incommoda quae hisce temporibus evenerunt, Emus Cardinalis a secretis Status mihi in mandatis dedit, nomine Sanctitatis Suae ut Amplitudini Tuae, sicut et aliis Ordinariis in Germania significarem quod, si quae gratiae seu dispensationes a sacris Congregationibus Romanis et ab aliis Ecclesiasticis Institutis impetrandae sint: eaedem non per telegraphum, sed in scriptis, petatur."—*ASS,* XXIV 1891-1892), 447. The second was a reply from the Holy Office, dated August 14, 1892, which read: "Se sia valida una dispensa matrimoniale eseguita dall' Ordinario dietro l'avisso telegrafico, prima di avere ricevuto il documento autenico della grazia concessa. *R. Negative,* nisi notitia telegrafica transmissa fuerit ex officio auctoritate S. Sedis. SSmus adprobavit.—*ASS,* XXIX (1896-1897), 642.

[138] *Op. cit.,* n. 340.

[139] Vlaming, *Praelectiones Iuris Matrimonii* (ed. 4., a L. Bender, Bussum in Hollandia: Paulus Brand, 1950), p. 429 (hereafter cited as Vlaming-Bender).

[140] *Ius Pontificium,* XX (1940), 95.

[141] P.C.I., 12 nov. 1922, ad Vum—*AAS,* XIV (1922), 662; Bouscaren, *Digest,* I, 502.

common opinion of the authors. Accordingly, if the only means available to the parties of reaching the pastor are the telephone and the telegraph, it is to be considered a grave inconvenience and consequently, until the Holy See declares otherwise, one may proceed as if he were unavailable. One might say that a *dubium iuris* exists and therefore the law does not bind.[142]

The distance to be traveled may constitute a grave inconvenience. Once again all the circumstances will have to be considered. Most certainly the parties or the priest are not expected to undergo a great expense or to make a dangerous trip to get to one another. A short railroad trip can hardly be classed as a serious inconvenience. Payen believes that a round trip that would require in all three days would be a serious inconvenience.[143] Under ordinary circumstances the distances between parishes would not be classed as something extraordinary, for otherwise the people would even be excused from attending Mass on Sundays and holydays. The use of the aeroplane is not to be considered mandatory at all. As for the use of the automobile, many authors [144] hold that its use is to be considered as an extraordinary means and therefore to be disregarded. However, as Cappello observes,[145] one must consider the circumstances of each place to determine whether its use is something ordinary or extraordinary. This appears true especially in the United States, where the automobile has become practically a common necessity. Its use would hardly constitute a serious inconvenience for the greater number of people, especially if they have one or easily can get the use of one. In such a case, the serious inconvenience would hardly be classed as *personal* to the parties, as indeed it must be if it is to serve as an excuse from the law. Each case would have to be judged individually for a determining of whether a serious inconvenience is present.

What distance would excuse the parties or the priest if an automobile or the like is unavailable? Once again it would be necessary

[142] Canon 15.

[143] *De Matrimonio,* II, n. 1817, 4), 4°, a.

[144] E.g., Vlaming, *Praelectiones Iuris Matrimonii,* II, n. 586; Aertnys-Damen, *loc. cit.*

[145] *De Matrimonio,* n. 237.

to consider the circumstances of the case, the pecuniary condition of the parties, the condition of the roads, the weather, the safety in taking such a trip, etc. One is not expected to take a trip that is not safe or one that would necessitate a risk to one's life or health. In all these problems one must be guided by the cardinal principle: "What is serious for me may be light for you," and that the inconvenience must be a personal one, since a common one will not invariably suffice. If the parties or the priest can without serious inconvenience do whatever is to be done, they are obliged to do it, for otherwise the inconvenience would not be a personal one and the essential condition of the canon would not be verified.

A question that proposes itself now is whether the canon is applicable in a case where a qualified witness is indeed available in that he is not physically absent, but at the same time refuses to assist at the marriage. There is no doubt that the exceptive provision of the canon will not apply if the competent witness refuses to assist because of some impediment, or because of a lack of certainty regarding the free state of the parties. This canon must be understood in conjunction with the other canons on marriage; it is not to be taken alone. The priest must always accommodate his action to the ruling of Canon 1019, which prescribes that a priest is not to assist at a marriage until he has attained moral certainty that there is nothing to stand in the way of its valid and lawful celebration. Until he has that certainty, he is not allowed to assist at such a marriage. A refusal on this account is completely in accord with the law. Were this type of refusal to constitute him as "absent" for the parties or as causing them a serious inconvenience, it would destroy the very safeguards instituted by the legislator. The subjective persuasion of the parties as to their free state in regard to marriage is not sufficient; it must be demonstrated.[146] For a priest to act in any other way would make the law ridiculous, for on the one hand the law forbids his assistance, and on the other it would allow the parties to contract apart from his presence.

If the only possible qualified witness is manifestly unjust in his refusal to assist at a marriage, would that constitute him as absent and thereby allow the parties to invoke the provisions of Canon

[146] E.g., Canon 1069, § 2.

1098? An example might illustrate the point at issue. The parties are not bound by an impediment either of the divine or the ecclesiastical laws. They have fulfilled all the requirements of the civil and ecclesiastical law in preparation for the contracting of marriage. There is absolutely no doubt about their free state. The only reason the priest may have is his dislike for the parties. Must the couple be kept from contracting marriage or, granted that all the other conditions as postulated in Canon 1098 are present, may they contract marriage apart from his presence?

It seems that this type of "absence" is not comprehended by the legislator in Canon 1098. Such an action would indeed be a rare occurrence for which the legislator would not seek to make provision by way of an enacted law.[147] The canon does not distinguish between a priest who is willing and a priest who is unwilling to assist. Finally, it is only by stretching the meaning of the words of the canon—but as furnishing an exceptive norm it must be interpreted strictly—that one can consider such a priest as one who is absent, or as one who cannot be had or approached. Accordingly, the provisions of Canon 1098 would not apply to such a case.

Still, some provision must be made for the parties under such circumstances when they rightfully wish to marry. There is no express provision in the law for such a case. However, in virtue of Canon 20, it seems that Canon 1098 could be invoked as a norm of action in this case. One can say that Canon 1098 exists as a law enacted in a given similar case, i.e., when a priest cannot be had. Secondly, the general principles of law when applied with the equity that is proper to Canon Law seem to demand such a course of action. It has been a commonly accepted rule in ecclesiastical jurisprudence that in any equal conflict between the ecclesiastical law and the natural law, the latter prevails. Such would be the case with the natural right of marrying. Hence, if all the other conditions postulated in Canon 1098 are verified, the parties may contract marriage according to the norm of Canon 1098. This they may do, not primarily in virtue of Canon 1098, but rather in virtue of Canon 20.

[147] For laws are to be adapted to events which frequently occur rather than to such as rarely happen. In fact what happens only once or twice, as Theophrastus says, legislators omit."—D. (1.3) 5, 6.

The situation is quite different where the priest is available but, in view of some grave harm which threatens either him, the parties or the common good, is either unable or unwilling to assist. This would usually happen when the civil laws conflict with the laws of the Church. There were instances, e.g., in Mexico, when priests were forbidden to assist at marriages under the penalty of death. In other countries, a non-observance of the civil laws by the priest in assisting at marriages could lead to heavy fines or even imprisonment. The parties may be free to contract marriage as far as the Church is concerned, but are forbidden to do so because of some impediment of the civil law which the Church does not recognize. This can happen, e.g., when the civil law forbids miscegenation; when it demands that a man have completed his military training before it allows him to marry; when it refuses to grant a marriage license to the parties because one or both parties are legally bound by former ecclesiastically invalid marriages; when medical certificates are required before the issuance of a marriage license and a medical certificate is refused. In such a case the parties have a natural right to marry, but the priest cannot assist at their marriage for fear of grave harm. Could one consider that a priest in such circumstances could not be had or approached *sine gravi incommodo,* or, in other words, would Canon 1098 apply to such a case?

This problem has had a long history in the matrimonial discipline of the Church beginning with the famous reply to Curaçao in 1785 and ending with the replies of the Pontifical Commission for the Interpretation of the Canons of the Code in 1931 and of the Congregation of the Sacraments in 1935.[148]

With the publication of the Code of Canon Law, this matter had not been settled. The commentators who took sides on the interpretations of the decree *Ne temere* continued in the same vein of thought. Those who claimed that this case fell within the purview of the law as it was found in the Code, offered the following arguments:

[148] P.C.I., 25 iul. 1931—*AAS,* XXIII (1931), 388; S. C. de Sacramentis, ad Epum. Metensem, 24 apr. 1935—*Periodica,* XXVII (1935), 45.

(1) The words of the canon are very general and are not to be restricted;
(2) The decrees of the Congregation of the Sacraments, dated January 31, 1916, and to the Bishop of Paderborn, March 9, 1916, did not settle the theoretical question, but merely gave a norm of action. There was no invalidating clause in either reply;
(3) If time is had, recourse should be made to the Holy See; however, if it is not, one must hold for the validity of the marriage according to Canon 1014;
(4) There is a doubt of law and therefore Canon 15 applies;
(5) Nowhere has the Holy See declared such marriages invalid; until it does so authentically, such marriages cannot be held invalid.

The proponents of the other view fall back on the practice of the Roman Curia under the discipline of the decree *Ne temere.* Since the Code practically restates Article VIII of that decree, it is really not a new law, and hence must be interpreted as the earlier law in virtue of Canon 6, 2°. The legislator, therefore, implicitly accepted the replies of the Congregation of the Sacraments, which was the official interpreter of the decree *Ne temere.* It was their contention that recourse to the Holy See, which was demanded by the Congregation, was still in effect. They claimed a further victory in the private reply of the same Congregation to the ordinary of the diocese of Metz. This reply was dated May 25, 1920. It showed that the Sacred Congregation still demanded recourse to itself in such cases.[149] It was but a private reply, and consequently did not have a universal binding force. It pertained merely to the problem at Metz. On June 16, 1922, the ordinary of the Diocese of Bruges was allowed by the Congregation of the Sacraments to permit a marriage in the presence of witnesses alone.[150] The course of action pursued by the Congregation seemed to indicate that the canon did not pertain to the case in point. Since the replies were

[149] "Ordinarius provideat per opportuna media ad hoc ut opifices exterarum nationum in sua dioecesi commorantes sibi comparare valeant documenta pro explendis nuptiis etiam coram civili magistratu: quatenus vero id obtineri nequeat, recurrendum est ad S. Congregationem in singulis casibus."—apud De Smet, *De Sponsalibus et Matrimonio,* p. 110, footnote 3.

[150] Cf. De Smet, *op. cit.,* p. 110, footnote 1.

merely of a private nature, the commentators continued to hold the opinions they espoused previously. Finally, the problem seemed settled by an authentic interpretation of the Code Commission in the year 1928. It was asked whether Canon 1098 was so to be understood that it referred only to the physical absence of a pastor or local ordinary. The reply was in the affirmative.[151]

Canonists immediately began to interpret this reply in the sense that only a physical absence of a qualified witness from the place where the marriage was to be celebrated would allow Canon 1098 to be invoked. A moral absence—when a priest was indeed present, but refused to assist at the marriage because of some grave harm threatening him for such contemplated assistance did not suffice.[152] This reply also disallowed the use of the concession in the canon in cases wherein a pastor refused to assist at a marriage because he felt that by so doing he could forestall a misalliance, e.g., a mixed marriage, or because there was a great disparity in the ages of the parties, or in view of the extreme youth of the parties, and the like.

The reply did not settle the controversy. Canonists began to reason that the reply could have two meanings, viz., physical absence from the place of the marriage and, also, a presence indeed in the place, but a physical absence from the act of the celebration of the marriage. Hence the controversy continued,[153] and necessitated a further reply from the Pontifical Code Commission. It was asked whether the physical absence of the pastor or the ordinary mentioned in the reply of 1928 includes also a case wherein the pastor or the 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 parties. The reply was in

151 P.C.I., 10 mart. 1928: "An Canon 1098 ita intelligendus sit ut referatur tantum ad physicam parochi vel ordinarii loci absentiam. *R. Affirmative.—AAS,* XX (1928), 120; Bouscaren, *Digest,* I, 542.

152 Maroto, "Animadversiones ad responsa ad proposita dubia 10 martii, 1928"—*Apollinaris,* I (1928), 334-339; De Becker, "De Recta Canonis 1098 Codicis Iuris Canonici Interpretatione," *Ephemerides Theologicae Lovanienses,* IX (1932), 284-291.

153 *Periodica,* XXI (1932), 42-45.

the affirmative.[154] Cardinal Gasparri, the eminent president of the Code Commission, in the new (1932) edition of his treatise on the matrimonial discipline of the Code, stated that by the grave inconvenience mentioned in this reply the Code Commission had in mind especially the inconvenience arising from civil laws which forbid or prohibit certain marriages.[154a] Many commentators understood the reply in that sense.[155]

However, there were those who could not see how the reply referred to the moral absence of a qualified witness. For them it was just a wider interpretation of the term physical absence. A qualified witness could be physically absent if, even when he was materially present in a place, he could assist at a marriage by asking and receiving the matrimonial consent of the parties because of some *physical* impediment, e.g., the danger of contracting sickness or a disease; very bad weather, especially at night; a serious riot inducing danger to one's life or bodily integrity. All these had to be considered as physical and not as moral impediments to his presence. These were what the Code Commission referred to in its reply of July 25, 1931.[156] This group continued to teach that it was unwarranted to apply this response to the case wherein a priest was impeded by the civil law from assisting at a marriage. There was no room for an exception. All such cases, except in danger of death, would have to be referred to the Holy See in accordance with the policy adopted by the Congregation of the Sacraments prior to and subsequent to the publication of the Code. In danger of death, provision was made for relief through the faculty of dispensing as enjoyed by the persons mentioned in Canons 1043 and 1044.

154 P.C.I., 25 iul. 1931: "An *ad physicam parochi vel Ordinarii absentiam,* de qua in interpretatione diei 10 Martii 1928 ad canonem 1098, referendus sit etiam casus, quo parochus vel Ordinarius, licet materialiter praesens in loco, ob grave tamen incommodum celebrationi matrimonii adsistere nequeat requirens et excipiens contrahentium consensum. *R. Affirmative.—AAS,* XXIII (1931), 388; Bouscaren, *Digest,* I, 542.

154a De Matrimonio, n. 1017 *in fine.*

155 Jelicic, "Consultationes," *Ius Pontificium,* XV (1935), 126; *Ius Pontificium,* XI (1931), 255-256; *Periodica,* XXI (1932), 43-45.

156 Maroto, *Apollinaris,* IV (1931), 381; De Becker, *Ephemerides Theologicae Lovanienses,* IX (1932), 289.

At first glance, the reply of 1931 seems to be in apparent conflict with the repy of 1928. The latter postulates the physical absence of a qualified witness; the former seems to allow the use of Canon 1098 in the case of the moral absence of a priest. This is a serious problem. Either the replies are in complete accord, or they are at variance. If they are at variance, then the first is either declarative and the second extensive, or the first is restrictive and the second extensive. There is no reason to suspect that such is the case. One is not to presume that legislation in such an important matter would be changed in such a short time. It must be presumed, then, that the replies are in harmony.

Gasparri maintained that in the first reply (March 10, 1928), the Code Commission had in mind the fact that the moral presence of a priest at a marriage would not suffice for the validity of the marriage; that a physical, active participation in asking and receiving the consent of the parties was necessary. In the second reply (July 25, 1931), it had in mind the case wherein some serious inconvenience (*grave incommodum*) arose from the civil laws.[157] If one keeps in mind that the Code Commission had in mind two distinct, separate cases, then one can harmonize the two replies.

The reply of 1928 gives no indication that the physical absence there spoken of was related to the question of the asking and the receiving the matrimonial consent. Still, according to Gasparri, that is exactly what was implied. An example may help to illustrate the point. A priest wishing to forestall a marriage at which he is constrained to assist is present at its celebration but takes no active part, since he neither asks for nor receives the consent of the parties. He is indeed present in the material sense of the term but in reality is morally absent. The Code Commission replied that only his physical absence would allow the use of Canon 1098. This is in keeping with the other canons of the Code. If it allowed the use of Canon 1098 in the cases of a moral absence in this sense, then it would contradict Canon 1095, § 1, 3°; active participation by a priest would be of no consequence, because, in the event that he was only materially present but took no active part, the marriage would still be valid, *servatis servandis ad normam canonis 1098.*

[157] *De Matrimonio,* n. 1017.

He would be considered absent. Therefore, according to the Code Commission the physical presence but the moral absence in the sense described would not fall within the purview of Canon 1098.

In the 1931 reply a completely different situation is contemplated. The qualified witness is at hand and, were it not for the prohibition by the civil law, could physically be present and actively assist. However, to do so would cause him, the parties, or the common good a serious inconvenience. Therefore, he cannot assist at the marriage. He may be materially present in the place where the marriage is being contracted, even in the next room. However, he is actually absent, in the physical, material sense of the term from the celebration of the marriage, even though he may be considered as morally present. In such a case Canon 1098 could be invoked according to the reply of the Code Commission.

A closer inspection of the text of the canon will show that this type of case does fall within the comprehension of the canon. It is quite general, requiring an unavailability of a qualified witness in consequence of some serious inconvenience. There is no specification of the type of inconvenience in the canon itself. Knowing the great controversy that had been raging at the time, the legislator could have specified the inconvenience had he so intended. Since he had not, the presumption is that he did not want to. A further presumption favoring the inclusion of this type of case under Canon 1098 can be gleaned from the fact that to the wording of Article VIII of the decree *Ne temere* has been added the phrase *"sine gravi incommodo."* Truly, a prohibition by the civil law constitutes a serious inconvenience. *Ergo.*

In view of Gasparri's explanation as to the mind of the Pontifical Commission for the Interpretation of the Canons of the Code and in view of the private reply to the Bishop of Metz,[158] it is safe to conclude that the prohibition by the civil law, when threatening serious harm, e.g., fines, imprisonment, etc., constitutes a serious inconvenience which makes a qualified witness unavailable, and thus allows the use of the extraordinary form of marriage. Recourse to the Holy See is no longer necessary.

[158] S. C. de Sacramentis, ad Epum Metensem, 24 apr. 1935—*Periodica,* XXVII (1935), 45.

Since the replies of 1928 and 1931 were merely declarative interpretations of the law, explaining the words of the law which in themselves were certain and clear but whose meaning had been called into doubt through a misinterpretation by the authors, they have a retroactive effect which reveals whatever binding force they had since the Code of Canon Law has come into effect.[159]

In practice, then, if all the conditions postulated by the canon are verified, one need not fear to use the concession granted by the canon in cases in which a priest is forbidden by the civil law to assist at a marriage. The law makes provision for such cases, and it should be made use of. There are authors who recommend that instead of using Canon 1098 the ordinary should allow the use of the marriage of conscience,[160] or delegate some unknown priest who is passing through the territory and need not fear reprisals from the civil law. What purpose this would serve is hard for the writer to see. The danger of harm from the civil law will still threaten the priest for assisting at a marriage of conscience, even though it is highly secret. It will also threaten the parties for entering a civilly forbidden or even a civilly bigamous marriage. As for the selecting of an unknown priest, one runs the risk of incurring the anger of the civil authorities against all priests and against the Church in general. The Code had these eventualities in mind. The fact that no mention is made of them in the canon leads one to the conclusion that they may not be looked upon as conditions for the valid use of the extraordinary form.

In its latest interpretation given to this canon, the Code Commission has declared that the *grave incommodum* (serious inconvenience) mentioned in Canon 1098 is not merely that which threatens the pastor or the ordinary, but also that which threatens either or both of the contracting parties.[161] It seems that the serious in-

[159] Jelicic, "Consultationes," *Ius Pontificium,* XV (1935), 126.

[160] Canons 1104-1107.

[161] P.C.I., 3 maii 1945: "Utrum grave incommodum de quo in canone 1098 sit tantum illud quod immineat parocho vel Ordinario vel sacerdoti delegato qui matrimonio assistat, an etiam illud quod immineat utrique vel alterutri matrimonium contrahenti." *R. Negative* ad primam partem; *affirmative* ad secundam.—*AAS,* XXXVII (1945), 149; Bouscaren, *Digest,* Supplement through 1948, p. 157.

convenience that threatens the parties must be of the type whose source is unjust, e.g., an unjust civil law, and not one whose source is not unjust, e.g., the loss of a job because the firm does not keep married parties, or the loss of a pension because the party contracts marriage. Such a loss seems not to offer any excuse from the observance of the ordinary form of marriage. The example of the loss of a pension was presented to the Holy See but it was declared by the Congregation of the Sacraments after World War I that the practice of the Congregation should be followed namely that the loss of a pension was not a sufficient cause for permitting the celebration of marriage without the civil rite (this question was proposed by the Bishops of Italy).[162]

In view of this latest response, it seems that, even if a priest is willing to assist at the marriage of a couple, the parties may insist that they be allowed to use the concession of Canon 1098. An example may illustrate the point at issue. A couple may be unable to fulfill the requirements of the civil law in regard to marriage, requirements which in their case are unjust. They may be unable to obtain a license because of the fact that one or the other is still bound by a civil marriage which is invalid in the eyes of the Church but still binding in the eyes of the civil law. The legal obtaining of a divorce may be beyond the means of the parties. A priest may be willing to risk the danger of harm from the civil law. Must the parties do so likewise? To have the priest assist at their marriage may involve them with the civil law because of an attempted civilly bigamous marriage. In such a case, they may ask the priest or the bishop to allow them to contract marriage according to the extraordinary form. The serious harm that threatens them would be the type of harm that would make a priest unavailable for the parties in such circumstances.[163]

[162] "Non esse recendendum a praxi S. Congregationis, ideoque amissionem pensionis non esse causam sufficientem permittendi celebrationem matrimonii absque ritu civili."—Apud Gasparri, *De Matrimonio,* n. 1295. Cf. also Vermeersch, *Theologia Moralis,* III, n. 689, who says that the extraordinary form is not to be used even if it means the loss of certain benefits which are *indebita* (unwarranted).

[163] Aguirre, "Annotationes," *Periodica,* XXXIV (1945), 284.