CHAPTER VII

THE THIRD POSTULATED CONDITION: EXCHANGE OF MATRIMONIAL CONSENT IN THE PRESENCE OF TWO WITNESSES

Article 1. Exchange of Matrimonial Consent

Marriage is brought into existence by the exchange of consent between two parties who are capable in law of entering marriage.[1] Therefore, consent is the essential element in the celebration of marriage, as it is in the making of any contract. Adopting the principle from Roman Law, the Church has always insisted that it was the consent of the parties that constituted marriage.[2] It is plain to see, then, why the Code states that no human power can supply for the consent of the parties.[3]

A. *Nature of Matrimonial Consent*

In order to avoid the possibility of ambiguity and uncertainty, the legislator immediately states what constitutes the nature of matrimonial consent. It is the mutual giving and acceptance by the two parties in words or signs of each one's rights, perpetually and exclusively, over the other's body for the performance of acts which of themselves are suited for the begetting of children, which rights are being mutually given at the time of their acceptance.[4] To be valid, this matrimonial consent must be:

1. true, i.e., not feigned; if a person does not consent internally, marriage is not constituted, because the nature of a contract demands that one intend to bind oneself. However, once consent is externalized, it is presumed that that person also consented internally; [5]

[1] Canon 1081, § 1.

[2] ". . . nuptias enim non concubitus sed consensus facit."—D. (35.1) 15.

[3] Canon 1081, § 1.

[4] Canon 1081, § 2.

[5] Canon 1086, § 1: Internus animi consensus semper praesumitur conformis verbis vel signis in celebrando matrimonio adhibitis.

2. free and deliberate. One must realize the nature of the obligation and must at the same time be willing to accept it. Since it has to be a human act, it must proceed from both the intellect and the will; [6]
3. mutual. The contract of marriage is a bilateral and not a unilateral contract. It is essential that both parties bind themselves;
4. elicited by parties who are in law capable of entering marriage. Everyone has a natural right of marrying. However, this right may be limited by the fact that the person may be bound by an impediment of the natural or the positive divine law, or by ecclesiastical or civil law;
5. elicited in regard to a specified, certain person, who is the object of the matrimonial consent;
6. legitimately manifested. The matrimonial consent must be not only internal, but also externally manifested.[7] The authority to which the parties are subject, ecclesiastical or civil, depending on whether the parties are baptized or not, will indicate in what manner this consent is to be manifested.[8]

One may note that, with the exception of the manner in which the consent is to be manifested, all the other qualities are essential and of themselves suffice to effect a marriage contract according to the natural law. Our Divine Saviour enhanced this matrimonial contract and raised it, in the case of baptized parties, to the dignity of a sacrament. The Church did not change the matter and form of the sacrament, which is the matrimonial contract according to the natural law. It merely regulated in what manner this matrimonial consent was to be manifested if it was to be considered valid. As long as the matrimonial consent is naturally valid, between persons capable in law of entering marriage, and is legitimately manifested, the sacrament of matrimony is constituted in its essence and nothing else is required.[9]

[6] Nil volitum nisi praecognitum.

[7] St. Thomas Aquinas, *Super Libris Magistri Sententiarum*, Lib. IV, Dist. XXVII, q. un., art. II: "Efficiens causa matrimonii est consensus, non quilibet, sed per verba expressus, nec de futuro sed de praesenti. . . . Item si consentiat mente et non exprimat verbis vel aliis certis signis, nec talis consensus efficit matrimonium."

[8] Cappello, *De Matrimonio*, n. 575.

[9] Gasparri, *De Matrimonio*, n. 775.

Inasmuch as the contract of marriage is *ipso facto* a sacrament among the baptized, and inasmuch as the parties themselves are the ministers of the sacrament, it may be asked whether the parties must have the intention of administering the sacrament and the intention of receiving the sacrament of matrimony. In the minister of any sacrament there is required the intention of doing what the Church does in such a case.[10] This intention must be an actual or at least a virtual intention.[11] A virtual intention is one which here and now has an influence on the performance of the act, even though it is not adverted to at the moment. An actual intention, i.e., one which here and now is present and is adverted to, is not required; a virtual intention will suffice. A habitual intention, i.e., one which was had once, never revoked, but here and now has no influence on the act that is being performed and is not adverted to, as also an interpretative intention, i.e., one which in fact never existed but would exist if it were proposed to the person, will not suffice.

In regard to marriage, the baptized parties, even though they do not realize that they are the ministers of the sacrament, can bring the sacrament into existence. This is true even in the case where they erroneously think that matrimony is not a sacrament.[12] All that is required in them is an implicit virtual intention of doing what the Church or other Christians do. In other words, they intend to contract marriage as God instituted it and as other Christians contract it. In having at least such an intention they are presumed to have the intention of doing what the Church does.[13] All that is required, then, of the parties as ministers of the sacrament is to intend a true marriage.[14]

Because of the individual character of the sacrament of matrimony, if both parties administer it then both parties also receive it because they are also the subjects of the sacrament. If the parties intend to bring the sacrament into existence and to confer it, they also automatically have the intention of receiving the sacrament. As was just noted, as long as baptized parties intend contracting a true, valid marriage, they also intend implicitly to confer it on the partner and to receive it from him or her. Provided the parties do not *expressly* exclude the reception of the sacrament, it is received by both.[15] All this follows from the fact that among the baptized a true, valid marriage is also a sacrament. If a party excludes the contract of marriage or excludes the sacrament by a positive act of the will, the sacrament is not brought into existence. In intending to enter a true marriage, the parties are presumed to include the notion of a sacramental marriage, and likewise are presumed to have the implicit intention of receiving the sacrament. If a party alleges that he or she excluded the sacrament from the matrimonial contract, one must not be too hasty in concluding that that marriage is invalid. The party has two intentions in such a case, one of contracting marriage and the other of excluding the sacrament. It will depend on which intention prevailed at the time of marriage. If the party was merely in error about the sacramental dignity of marriage or even denied its sacramental nature, and this error remained totally in the intellect, then, in desiring to contract a valid marriage the party in fact contracted indeed a valid but also a sacramental marriage. Schmalzgrueber remarked that, as long as one intends one of two elements which are inseparably connected, one likewise intends the other element.[16] On the other hand, if the wish of the party is formed into a positive intention of excluding the sacrament, then it will depend on which intention prevailed.[17] If in doubt, one must presume that the parties wished to contract a valid marriage and therefore received the sacrament. The contrary must be proved.[18]

[10] Conc. Trident., sess. VII, *de sacramentis in genere*, can. 11: Si quis dixerit, in ministris, dum sacramenta conficiunt et conferunt, non requiri intentionem faciendi quod facit Ecclesia, anathema sit."—Schulte, p. 41.

[11] De Smet, *De Sponsalibus et Matrimonio*, n. 183; Cappello, *De Sacramentis in Genere*, nn. 39 and 40; Coronata, *De Matrimonio*, n. 18.

[12] Canon 1084: Simplex error circa . . . sacramentalem dignitatem, etsi det causam contractui, non vitiat consensum matrimonialem.

[13] De Smet, *op. cit.*, n. 183; Cappello, *De Matrimonio*, n. 32; Coronata, *De Matrimonio*, n. 18.

[14] Cappello, *loc. cit.*

[15] Cappello, *De Matrimonio*, n. 32.

[16] Lib. IV, tit. I, n. 302.

[17] Canon 1086, § 2.

[18] Canon 1014.

B. *Matrimonial Consent in the Extraordinary Form of Marriage*

The same type of matrimonial consent that is necessary in contracting marriage according to the ordinary form as depicted in Canon 1094 will be required also in the use of the extraordinary form. There is only one type of valid matrimonial consent. The law makes no distinction in this regard between the two forms of marriage. The only distinction that is made rests in what the law considers the legitimate manifestation or externalization of that consent. If the lawgiver does not distinguish, then no distinction should be invoked. A matrimonial consent that would be valid if it were manifested according to the ordinary prescribed form will also suffice and be valid if it is externalized according to the extraordinary form.[19]

In view of the foregoing it is difficult to understand how certain commentators demand something greater of the parties in the matter of consent when marriage is contracted according to the extraordinary form. Oesterle and Miceli would demand that the

[19] S. R. R., *Nullitatis matrimonii,* 7 dec. 1931, coram R.P.D. Andrea Jullien, dec. LV, n. 4: "Cum igitur conditiones, quas Ecclesia in dato casu exigit ut validum sit matrimonium absque praesentia testis qualificati, verificentur, solutio repetenda est ab eo quod partes voluerunt, utrum scilicet consensus fuerit naturaliter sufficiens, necne. Siquidem comparendo coram magistratu civili et alio teste: *aut* utraque vel alterutra pars positive excludit mutuum consensum naturalem, limitans intentionem ad ponendum verum actum civilem, quia nil aliud vult nisi obtemperare praecepto legis civilis, v.g., ad effectus civiles consequendos; unde efficitur ut positivo actu excludatur matrimonium ipsum, quod igitur exsistere nequit (can. 1081, § 1; 1086, § 2);—*aut* nupturientes volunt, quantum in se est, praestare ac manifestare consensum matrimonialem; ita, si non obstat aliquod impedimentum dirimens, validum est matrimonium, non ratione quidem actus civilis positi, sed ratione consensus naturalis praestiti et legitime manifestati coram solis testibus, seu servata forma in casu requisita a lege ecclesiastica. Enimvero cum ex iis quae Ecclesia in hisce adiunctis requirit, nil desit, contrahentium voluntas ipso facto effectum suum consequitur."—*Decisiones,* XXIII (1931), 474; *Nullitas matrimonii,* 23 apr. 1940, coram R.P.D. Alberto Canestri, dec. XXX, n. 2: "Quaerenti autem sitne validum matrimonium contractum coram magistratu civili, aut alio teste qualificato, v.g.. ministro acatholico, ab ignorantibus exceptionem canone 1098 positam, respondendum est solutionem repetendam ab intentione partium in consentiendo; si ipsae quantum in se erat nubere voluerunt, tunc matrimonium valet. . . ."—*Decisiones,* XXXII (1940), 324.

parties know that the extraordinary form of marriage is an ecclesiastically approved form of marriage and that the parties must intend an *ecclesiastical, canonical, Catholic, sacramental* marriage, otherwise it would be invalid.[20] The purpose of these men in trying to preserve the validity of such marriages and to keep abuses from creeping in is indeed very laudable. However, their demands are a bit excessive. As was seen above, all that is required of the parties to act as ministers and recipients of the sacrament of matrimony is that they have the intention of contracting a valid marriage. If this is so for the ordinary form of marriage, it must be so for the extraordinary form as well. To demand more in the latter case would necessitate demanding more in the former case as well. In that case, two baptized non-Catholics who are in error or even deny the sacramental character of marriage would not contract marriage even though they do intend contracting a valid marriage. This will not be admitted by anyone. Further, in no possible way can this demand, i.e., that the parties know of the extraordinary form and intend a sacramental marriage, be read into the canon, and even less that such is demanded under pain of nullity. In the absence of such an invalidating clause, one cannot claim that such knowledge or intention is required for validity.[21] It would be limiting the extraordinary form too much.[22] Rotal jurisprudence has never demanded this of the people in adjudicating cases brought before it. In a decision *coram R.P.D. Andrea Jullien* on December 7, 1931, it stated in its *"in iure"* section that where all the conditions postulated in Canon 1098 are verified, the solution as to the validity of the marriage in question must be sought in what the parties intended, i.e., whether the consent had been sufficient *naturaliter* (in accordance with what is required by the natural law). Either they positively excluded the natural consent by limiting the intention simply to the placing of a civil act in submission to the

[20] Oesterle, *Apollinaris,* IX (1936), 446-462; Miceli, *Monitor Ecclesiasticus,* LXXV (1950), 234-237.

[21] Canon 11. Cf. also Dalpiaz, "De validitate aut nullitate matrimoniorum a captivis ex bello in Russia initorum," *Apollinaris,* X (1937), 272-275.

[22] Eichmann-Mörsdorf, *Lehrbuch des Kirchenrechts auf Grund des Codex Iuris Canonici* (3 vols., Vol. II [*Sachenrecht*], Paderborn: Schöningh, 1950), p. 231.

civil law—in which case they excluded marriage itself by a positive act of the will and hence no marriage could be effected (Canons 1081 and 1086)—or they wished, in so far as it could be done, to manifest a matrimonial consent, and thus, *servatis servandis,* the marriage was valid by reason of the naturally valid matrimonial consent. The fact that the parties erred in thinking that a marriage contracted civilly in such circumstances would be invalid did not in any way affect the validity of their consent for marriage, because "scientia aut opinio nullitatis matrimonii consensum matrimonialem necessario non excludit" (Canon 1085).[23] It will be noted that the Rota demands merely a consent that is valid according to the natural law. It does not demand that the parties know of the extraordinary form of marriage; that they intend using it; that they intend contracting a marriage which is specifically a canonical, ecclesiastical, Catholic or sacramental marriage. By operation of the law, the naturally valid matrimonial consent is recognized by the Church as juridically efficacious.

The arguments proposed by the adherents of the stricter view are easily answered. The first argument is based on the old philosophical principle "nil volitum nisi praecognitum." How can the parties intend a marriage that is valid when they do not know that marriage can thus be contracted. This seems to be a case of *petitio principii,* i.e., an unwarranted assertion that the parties must intend a canonical or ecclesiastical marriage. This is not so, as was duly explained above. A second argument is this: the parties unknowingly would bring a sacrament into existence. It is a fact that a minister has to have at least an implicit intention *faciendi quod facit Ecclesia.* In answer one can deny that the parties are *inscii.* They know they are contracting marriage, that they are placing the contract of marriage. This much at least is necessary even from the natural law. As long as they intend a valid marriage, implicitly they are wishing to accomplish *quod facit Ecclesia.*[24] Once they have willingly placed the matter and form of the sacra-

[23] S. R. R., *Decisiones,* XXIII (1931), 474; cf. also *Nullitatis Matrimonii,* 23 apr. 1940, coram R.P.D. Alberto Canestri, dec. XXX, n. 2—*Decisiones,* XXXII (1940), 324, where the same principles are enunciated again.

[24] Cappello, *De Matrimonio,* n. 32.

ment (the contract of marriage), the sacrament is present *ex intentione Christi.* If they will the one, i.e., the contract of marriage, they must of necessity will the sacrament also, because among the baptized these are inseparable. It is argued, further, that the parties, not even thinking of an indissoluble union, will contract an indissoluble bond, even contrary to their wishes. If they do indeed positively intend a dissoluble marriage, or, in other words, positively intend to exclude the element of indissolubility from their marriage, the marriage would be null *ab initio* not only by reason of canon law (Canon 1086) but even by reason of the natural law. Such a consent is insufficient even *naturaliter,* and therefore there is no question of any marriage being effected. However, if they intend marriage, the element of indissolubility is inexorably connected with it, and, therefore, they intend the same implicitly. The objection that the Church must regard all civil marriages in such circumstances as sacraments is also not of much value. The "civil" element of the marriage is not canonized; it is the valid marriage which happened to be "civil" in its form. In itself, the argument is also weak because the Church recognizes as sacramental the valid marriage of baptized non-Catholics even though they may have been contracted before a civil official.

Article 2. The Presence of Two Witnesses

Having seen the dangers in and the difficulties arising from clandestine marriages, the legislator has demanded, ever since the Council of Trent, that matrimonial consent be manifested in the presence of at least two witnesses. This prudent provision of the decree *Tametsi* was continued in the discipline of the decree *Ne temere,* and has been retained in the Code of Canon Law.

The legislator has not laid down any requirements with reference to the capability of a person who is to act as a witness. Pallavicini (1607-1667) reported that the Council of Trent studiously omitted demanding any special qualities in the witnesses to the marriage contract. This it did, so he taught, to forestall any possible doubts or misgivings about marriages in which question could arise about the proper qualifications of the witnesses.[25]

[25] *Vera Concilii Tridentini Historia* (translated from the Italian by J. Bap-

The only requirements for a person to act as witness were those that were set by the law of nature, i.e., the use of reason and the capability of testifying about the fact of a marriage.[26] Accordingly, any man, woman or child, whether Catholic or non-Catholic, could act validly as a witness as long as he or she enjoyed the use of reason at the time the marriage was being contracted and was capable of testifying as to what had taken place.[27] If a person does not enjoy the use of reason permanently or even *in actu*, then the very notion of "witness" would imply his exclusion. Hence, an insane person, one who has not as yet reached the use of reason, a completely intoxicated person, or one who under the influence of drugs is asleep or unconscious, could not act as a witness. Likewise, the very fact of what is implied in being a witness would normally exclude a person who is both deaf *and* blind. If he is deaf but not blind, he may perceive signs or nods and thereby be able to testify; if blind but not deaf he may testify if he knows the voices of the parties well enough.

There were commentators who were of the opinion that the witnesses should have the qualities demanded of judicial witnesses as outlined in a negative way in Canon 1757. This is a gratuitous assumption, since the law makes no distinction in regard to witnesses for marriage. Unlike the position of the sponsor at baptism and confirmation, where designation of the person to act in such a capacity is necessary for the validity of the sponsorship, it is not required that the witnesses be designated or chosen beforehand.[28]

In fact, the Code of Canon Law does not enact any rules regulating the valid assistance of the witnesses at a marriage. It postulates only that the marriage take place *coram testibus*. Their assistance will be valid even though they are constrained to be present by force or fear or even though they are not aware of their position as witnesses, provided, however, that they can testify to the fact that a marriage has taken place. In each case the marriage has taken place *coram testibus*. The witnesses must be physically present and advert to what is taking place. Any sort of assistance by telephone or the like, e.g., being in another room and being able to hear by "straining one's ears," will be insufficient.[29]

An interesting problem presents itself in the question whether the parties contract validly if they are unaware that witnesses are present. The commentators distinguish. If the parties, knowing that witnesses are necessary, positively exclude witnesses by their action, the marriage will be invalid even though, by chance, witnesses may be present. Such a marriage will not be *coram testibus*. On the other hand, if the parties do not exclude witnesses by their actions when wishing to contract a valid marriage, the marriage will be valid if witnesses happen to be present, for the marriage will have taken place *coram testibus*.[30]

The number of witnesses required in the ordinary form of marriage is at least two (*coram saltem duobus testibus*). There may be more, but a smaller number never will suffice. From the wording of the law it is clear that it is an invalidating law (ea *tantum* matrimonia sunt valida). In the event that the law is not observed the act is juridically inefficacious. Ignorance of the necessity of having two witnesses will not excuse one from observing this law.[31] The Sacred Congregation of the Council declared that according to the law of the decree *Tametsi* a marriage was invalid for the simple reason that it was contracted, even though in good faith, in the presence of but one witness.[32] The same is to be held today, for

tista Giattino, S.J., 3 vols., Antuerpiae: ex Officina Plantiniana Baltasaria Noreti, 1670). lib. XXII, c. 4, n. 12.

[26] Sanchez, lib. III, disp. 41, n. 5.

[27] Benedictus XIV, *De Synodo*, lib. XII, c. 5, n. 5; Gasparri, n. 961; Cappello, *De Matrimonio*, n. 653; Wernz-Vidal, *Ius Matrimoniale*, n. 540.

[28] This is evident from the reply of the Sacred Congregation for the Propagation of the Faith to the Ordinaries in China and the Vicar Apostolic in Tunkin on July 2, 1827. The Congregation declared a marriage valid which was contracted apart from the presence of a qualified priest but which was contracted in the presence of the families, even though no witness had been formally designated. All that was required was that the witnesses were certain that the parties exchanged matrimonial consent. (Cf. *Collectanea S. C. de Prop. Fide* [ed. 1893], n. 1401; [ed. 1907], n. 794.)

[29] Gasparri, n. 964.

[30] Payen, II, n. 1763; Cappello, *De Matrimonio*, n. 653, 5°; Coronata, *De Matrimonio*, n. 553.

[31] Canon 16, § 1.

[32] S. C. C., 14 ian. 1673—Schulte, p. 227, n. 40; Benedictus XIV, *De Synodo*, lib. XII, c. 5, n. 5.

the legislator has made no change in the requirement as to the number of witnesses.

The two witnesses must be simultaneously present along with the priest and the parties as the matrimonial consent is being exchanged according to the ordinary form. If at first but the one and only later the other witness is present, the marriage will be invalid, since thus it will not have been contracted *coram testibus*. It goes without saying that each of the two witnesses must in actual fact be naturally capable of being a witness. In the event that one of the two witnesses is asleep or drunk, then there would be present simply one witness, which would be insufficient.

As for licitness, one must always remember that matrimony is a sacrament and as such demands the greatest respect and reverence. Accordingly, non-Catholics, persons excommunicated, or public sinners should not be chosen to act as witnesses.[33] Still there is no general law of the Church to exclude these from acting validly in such a capacity. Acting as a witness at a marriage is not listed as a legitimately authorized ecclesiastical act in Canon 2256, 2°; therefore, the excommunicated are not barred on that ground. In regard to non-Catholics, the Congregation of the Holy Office has declared in a particular reply that they are not to be used as witnesses. However, it did not forbid the ordinary to tolerate their acting in such a capacity for a serious reason, as long as scandal would not be present.[34]

Such are the requirements in law for persons acting as witnesses in the ordinary form of marriage. The same must be said for witnesses who act in that capacity in the extraordinary form of marriage. Canon 1098 specifically states that the marriage in such circumstances is valid and licit *coram solis testibus*. The exact number of witnesses is not indicated, but the use of the plural number (*testibus*) postulates that at least *two* witnesses be present. It is not necessary that the witnesses ask and receive the consent of the parties to the marriage. This is an obligation only of a qualified witness in the ordinary form. The witnesses are not "qualified" witnesses and the law does not place this obligation on them. It may

[33] Gasparri, n. 962; Payen, II, n. 1763; Cappello, *De Matrimonio*, n. 653.
[34] S. C. S. Officii, 19 aug. 1891—*Fontes*, n. 1044.

be done, but it is not necessary for validity.[35] Since the canon does not set any requirements for the validity of the assistance of the witnesses at such a marriage, one must of necessity fall back on the requirements for witnesses as listed for the ordinary form. To demand more would be reading into the canon what is not there. To demand less would be going contrary to the mind of the legislator because less would be demanded in regard to witnesses in the exception than in the rule itself; the exception is not in regard to witnesses but rather in regard to the absence of a *qualified* witness.

Some difficulties have arisen in this very regard. There have been commentators who would exclude from the benefit of validity marriages contracted in such circumstances, even though a naturally valid consent would have been exchanged in the presence of witnesses, if this took place in a civil or non-Catholic religious ceremony. This problem arose in regard to marriages contracted in Russia and Mexico, where priests could not be had. The proponents of this view held that the words of the canon, *"coram solis testibus,"* must be understood in the strict sense in virtue of Canon 19. As witnesses in this regard only private persons are to be considered. Therefore *ministri ut sacris addicti* or civil officials are to be excluded for the reason that they are in official positions. Further, by the positive divine and ecclesiastical laws (Canon 1258), Catholics are forbidden to take part in non-Catholic ceremonies. The Code prescribes that another priest is to assist at such a marriage if he can be had; this would be impossible in such circumstances. Finally, the interpretation of the Code Commission given in regard to Canon 1078 on March 12, 1929, stated that a *civil* marriage without subsequent cohabitation would not induce the impediment of public propriety.[36] Since the reply was given in an absolute manner, with no limitations, it referred to all civil marriages, even those that may have been contracted under the conditions mentioned in Canon 1098. In view of all these arguments it

[35] Payen, II, n. 1825; Schönsteiner, *Grundriss des kirchlichen Eherechts*, p. 729; Wouters, *Manuale Theologiae Moralis* (2 vols., Brugis: Beyaert, 1933), II, 583; Aertnys-Damen, *Theologia Moralis*, II, n. 621.
[36] P.C.I., 12 mart. 1929—*AAS*, XXI (1929), 170; Bouscaren, *Digest*, I, 516-517.

was argued that one has to exclude as invalid the marriages contracted under circumstances mentioned in Canon 1098 if they had been contracted in a non-Catholic religious or civil ceremony.[37]

The purpose of the proponents of this view is indeed laudable; however, no matter how laudable, how elevated the purpose might be, no one is allowed to do violence to the wording of the canon by twisting its meaning to suit his purpose. The legislator did not say that marriages in such circumstances, if contracted before a non-Catholic minister or a civil official, would be invalid. To have that meaning the wording of the canon would have had to be changed to read "*tantum* coram solis testibus" or "*unice* coram solis testibus." This was not done. What the mind and purpose of the legislator was in framing this canon was to insist on the possibility of proving that a marriage had been contracted. If by chance a marriage had been contracted before a non-Catholic minister or a civil official, as long as two witnesses had been present to attest to the exchange of matrimonial consent, the marriage would be valid, the type of ceremony being completely without relevance to the element of validity. All that is necessary is the exchange of matrimonial consent in the presence of two witnesses.[38] Even under the *Tametsi* discipline, there were commentators who held that such marriages would be valid, even though they had taken place in the presence of a non-Catholic minister.[39]

It is a gratuitous assumption to say that the witnesses mentioned

[37] Močnik, "An canon 1098 comprehendat etiam matrimonii celebrationes acatholicas vel civiles," *Apollinaris*, IX (1936), 304-307; "Consultationes circa Pontificiam interpretationem c. 1078," *Apollinaris*, IX (1936), 444-446.

[38] S. R. R., *Nullitatis Matrimonii*, 7 dec. 1931, coram R.P.D. Andrea Jullien, dec. LV, n. 4: ". . . Siquidem comparendo coram magistratu civili et alio teste aut . . . aut nupturientes volunt, quantum in se est, praestare ac manifestare consensum matrimonialem; ita. . . . validum est matrimonium non ratione quidem actus civilis positi, sed ratione consensus naturalis praestiti et legitime manifestati coram solis testibus."—*Decisiones*, XXIII (1931), 474; Sipos, *Ius Pontificium*, XX (1940), 99; Dalpiaz, "An canon 1098 comprehendat etiam matrimonii celebrationes acatholicas vel civiles?" *Apollinaris*, X (1937), 277; Eichmann-Mörsdorf, *Lehrbuch des Kirchenrechts auf Grund des Codex Iuris Canonici*, II, 231.

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

in Canon 1098 have to be *privatae personae*. To state that Canon 1094 excludes civil officials and non-Catholic ministers and that therefore they are to be excluded in Canon 1098 does not quite follow. A non-Catholic minister or a civil official, *qua talis*, cannot take part in a Catholic ceremony in his official capacity. They are not excluded by law from acting as ordinary witnesses in the ordinary form of marriage. In marriages contracted according to the extraordinary form, at least as far as validity is concerned, there is nothing in the law that excludes them from acting in their official capacity. The law disregards their official capacity and takes cognizance merely of the exchange of matrimonial consent in the presence of two witnesses.

As for the argument that a non-Catholic ceremony was excluded by the legislator because of the divine law prohibiting participation in a non-Catholic religious service, one may say that such was not the *finis legis* of the legislator in framing this canon. Non-Catholic ceremonies are still forbidden, even in cases envisioned in Canon 1098. However, if the parties, whether in good or bad faith, do approach a non-Catholic minister and exchange matrimonial consent, otherwise naturally sufficient, in the presence of two witnesses, the marriage will nonetheless be valid. The Church has at times recognized marriages contracted before non-Catholic ministers. Pope Pius X, in his apostolic letter "Provida," dated January 18, 1906, declared that in Germany the parties in a mixed marriage would be exempt from the ordinary form of marriage. Marriages contracted before a civil official or a non-Catholic minister were to be considered valid in such cases.[40] This exemption was later extended also to Hungary. It had been a long-standing rule under the *Tametsi* matrimonial discipline that with reference to the form prescribed by the decree *Tametsi* there should be observed that part which could be observed. Hence matrimonial consent in the presence of two witnesses was all that was required. The fact that this took place in a non-Catholic ceremony was something irrelevant and could be abstracted from.[41]

[40] *Fontes*, n. 670.

[41] This is evident from the reply of the Sacred Congregation of the Sacraments to the Bishop of Pinsk on March 4, 1925. The Congregation stated

The argument that a priest should be called to assist at the marriage, if he could easily be had, overlooks the fact that the marriage is valid even without his presence. At most, the obligation of summoning him touches an element of licitness and not one of validity. One cannot demand something for validity if it is prescribed solely for licitness.

The proponents of this view, in using the interpretation of the Code Commission in regard to the impediment of public propriety, misinterpret the meaning of "civil" marriage. The Code Commission had in mind only an *attempted* civil marriage which *was invalid* by reason of lack of proper form. It was asked whether a *civil* marriage *qua* civil marriage (i.e., a mere, so-called civil marriage) would induce the impediment. It was not asked whether a marriage contracted in the circumstances mentioned in Canon 1098, which happened to be a civil marriage, was to be included. In the case presented the attempted marriage was null *ab initio* by the operation of law and in fact had no *"species matrimonii."* The same would be true even in the circumstances mentioned in Canon 1098 if the parties intended merely a civil marriage and nothing more. It would not be true if they intend a valid marriage, even in a civil ceremony, for in such circumstances, by the very operation of law, their matrimonial consent is rendered juridically efficacious. Therefore, the interpretation in regard to Canon 1078 does not pertain to a marriage contracted in accordance with Canon 1098, which perchance might happen to be a civil act.

As a final note in this regard, one should remember that a non-Catholic minister or a civil official, when acting in his official capacity is not excluded by law from acting validly as an ordinary witness. *Ubi lex non distinguit, nec nos distinguere debemus.* Therefore, in a non-Catholic or civil ceremony, if there is present at least one other witness besides the non-Catholic minister or the civil official when the valid matrimonial consent is exchanged, the marriage according to Canon 1098 would be valid since it was

that the fact that such marriages took place in a non-Catholic ceremony affected not the validity of such marriages but only their licitness. Cf. Dalpiaz, *Apollinaris,* IX (1936), 451. Similar replies were given by the same Congregation, under the *Ne temere* discipline, on February 23, 1909, and March 15, 1909. Cf. *Archiv für katholisches Kirchenrecht,* LXXXIX (1909), 717 and 722.

contracted in fact *coram testibus.* The law does not take cognizance of their official capacity; it regards them as ordinary witnesses.[42]

There have been others who held that persons acting as witnesses in accordance with Canon 1098 must not only know that they are taking part in a canonical marriage, but also intend witnessing a Catholic marriage.[43] It is claimed that this is done in a marriage contracted according to the ordinary form; the same would have to be done when marriage is contracted according to the extraordinary form.

This is a misunderstanding of the nature of the position of a witness as required by the law. In the ordinary form of marriage, the witnesses testify primarily to the fact of the exchange of matrimonial consent, and only secondarily to the fact that this took place in the presence of a priest. *De facto,* at times they may not even advert at the time to the fact that this taking place in the presence of a priest. To demand that the witnesses must intend taking part in a Catholic ceremony would lay the validity of marriage open to question. A non-Catholic can act validly as a witness; it would be precarious to demand that he intend taking part in a Catholic ceremony. The witnesses' official position is to testify to the exchange of consent wherever this took place. One cannot demand more in the extraordinary form of marriage, because this would restrict the use of Canon 1098 far beyond what the legislator intended. His purpose was to make possible and to safeguard the validity of marriages contracted in such circumstances.[44] To demand this on the part of the witnesses would defeat the very purpose of the law, since one might never know whether the witnesses had this intention. It would be illogical to demand that the witnesses must know that they are taking part in a canonical, ecclesiastically approved, sacramental marriage, when this knowledge is not demanded of the parties themselves. Consequently, all that

[42] S. R. R., *Nullitatis Matrimonii,* 7 dec. 1931, coram R.P.D. Andrea Jullien, dec. LV, n. 4—*Decisiones,* XXIII (1931), 474; Dalpiaz, *Apollinaris,* X (1937), 275-278; Sipos, *Ius Pontificium,* XX (1940), 99.

[43] Oesterle, *Apollinaris,* IX (1936), 446-462.

[44] S. R. R., *Decisiones,* XXIII (1931), 477.

is necessary is that the witnesses can testify that the parties did exchange matrimonial consent.[45]

The second part of Canon 1098 states that, whenever possible, another priest, i.e., one who is not a qualified witness, should be called, and that he should assist at the marriage *along with the witnesses*. A question naturally presents itself: does the legislator still demand the presence of two other witnesses, under pain of invalidity, even when such a priest is present? Or, in other words, if there is only one other witness present, may the priest function as the second witness, so that the marriage can take place *coram testibus*. At first glance it could seem that the legislator does demand the presence of at least two other witnesses, even though a priest may be assisting. To have such a priest and only one other witness, or just two priests and no one else, would be insufficient and would render the marriage invalid according to Mörsdorf.[46] In support of his position he cites Article VII of the decree *Ne temere*, which allowed marriage in danger of death, in the event that no qualified witness was available, to take place in the presence of any priest *and* two witnesses.

It seems to the writer that this opinion restricts the wording of the canon too much. If the *finis legis* is considered, it is readily seen that such a priest can testify as well as anyone else. He is neither directly nor indirectly excluded by the law from being a witness. From a consideration of the possible consequences, it seems absurd to think that he is to be excluded. If there were available just one other witness beside the priest, it would be better for the priest to hide the fact of his priesthood, for then the marriage could take place. Secondly, if no one knew of the fact that he was a priest and he acted as ordinary witness with just one other witness in attendance, one would be compelled to hold that marriage as invalid. Then, too, if only one other witness is available, the marriage could not take place. Consequently, the priest would not be a

[45] Eichmann-Mörsdorf, *Lehrbuch des Kirchenrechts auf Grund des Codex Iuris Canonici*, II, 231; Dalpiaz, *Apollinaris*, X (1937), 275; Mörsdorf, "Die Noteheschliessung (c. 1098)," *Archiv für katholisches Kirchenrecht*, CXXIV (1950), 91.

[46] Eichmann-Mörsdorf, *op. cit.*, II, 232; Mörsdorf, *Archiv für katholisches Kirchenrecht*, CXXIV (1950), 91.

priest assisting at a marriage according to the norm of Canon 1098. He could not avail himself of the faculties granted in Canons 1044 and 1045. Whereas, if he can act in the capacity of the second witness, there will be a marriage according to the norm of Canon 1098; being a priest at the same time, he will be able to make use of the powers of dispensing granted him in the above mentioned canons. There is nothing in the role of this assisting priest that will preclude the possibility of his acting as the second witness. He can in his dual role still lend dignity to the marriage, see to its valid celebration, dispense if necessary, and register the marriage, even when he acts as an ordinary witness.

The argument that the legislator demands two other witnesses because of the wording of the canon (*una cum testibus*) is not too strong. The legislator has in mind things and conditions as they generally happen. The normal state of affairs is that witnesses are readily available. If so, at least two other witnesses should be used. The legislator does not make laws about contingencies that rarely happen,[47] and that is why no mention is made in law for cases when *no* witnesses are available or when only one other witness besides the priest can be had. However, he does not exclude the priest from being one of the two necessary witnesses. It is not valid to argue that the decree *Ne temere* required a priest *and* two witnesses, and that therefore the same holds true today. The Code changed the law of that decree, dispensing with the necessity of having a priest at such a marriage under the pain of invalidity, acknowledging the validity of such a marriage if it is contracted solely in the presence of witnesses. A final argument can be taken from Canon 11, which states that only those laws are invalidating or incapacitating which expressly or equivalently state that the action is null or the person is incapable. This is not true of the circumstances in respect to the canon under consideration.

Thus far, the discussions pertained to cases in which witnesses could be had. A logical question at this point would be, for example, what provision is made for cases in which no witnesses or

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

only one witness can be had. There is no provision in the law for such an eventuality, for it will rarely, if ever, happen, in consideration particularly of the fact that practically anyone can act as a witness. Still it is not out of the realm of possibility that such cases could occur. Gasparri listed two examples, namely, a party is constituted in danger of death, or he is detained in prison and a priest is present, or the civil law forbids the use of witnesses.[48]

The commentators are all in agreement that when there is a conflict between the ecclesiastical law as to the form of marriage and the natural right of marrying that a person possesses, the former has to give way to the latter. In the hypotheses considered, one must remember that, wherever possible, a competent ecclesiastical personage would have to be approached and a dispensation sought from the obligation of observing the form. If this is impossible and the prescripts of the ecclesiastical law requiring witnesses cannot be observed, the obligation ceases and a marriage would be valid if contracted in the presence of one witness or no witness at all.[49] Since the law makes no express provision for such cases, Canon 20 becomes operative in such a situation. Canonical equity would allow persons in such grave circumstances to contract marriage without witnesses, if otherwise they could never marry or could marry only after a long time. The same would be true if the parties are constituted in a proximate danger of eternal damnation.[50] Sipos [51] would extend this reasoning, and with merit, even to cases wherein parties, e.g., in Russia, although they may be bound to the juridical form of marriage, invincibly know nothing or could know nothing of the obligation of observing either the ordinary or extraordinary form of marriage. Normally, Canon 16 would not excuse from observing the law such persons who are ignorant of the invalidating effect of the law in question. However, the law of nature would supersede the ecclesiastical law (Canons 1094, 1098, 16) and a private marriage, i.e., even without witnesses,

48 *De Matrimonio,* n. 999.

49 Gasparri, n. 988; Coronata, *De Matrimonio,* n. 571; Wouters, *Manuale Theologiae Moralis,* II, n. 740; Cappello, *De Matrimonio,* n. 695; Sipos, *Ius Pontificium,* XX (1940), 100.

50 Cappello, *loc. cit.*

51 *Loc. cit.*

inasmuch as their necessity is not known by the parties, would be valid as long as matrimonial consent has been exchanged. Presuming upon the benign will of the legislator, it might be said that he would not wish to bind such people in such circumstances. Under the *Tametsi* discipline, the Congregations, in granting permission for marriages to take place apart from the presence of a priest, usually added that the form of *Tametsi* should be observed *as far as possible.* On certain occasions they also stated that the law of the Council of Trent remained suspended *quoad suum effectum* as often as it could no longer be observed because of insurmountable difficulties and dangers.[52] Finally, this is the common opinion of the commentators.

Such cases are indeed very rare and one need not fear abuse in such a matter. Usually the case will not be so urgent that witnesses cannot be summoned.

52 *Vide supra,* p. 31.