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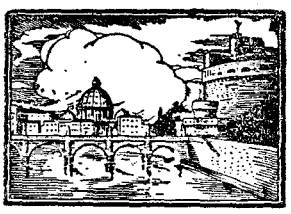

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THE NULLITY OF MARRIAGE FOR REASON OF INCAPACITY TO FULFILL THE ESSENTIAL OBLIGATIONS OF MARRIAGE

Every year tens of thousands of marriages are declared invalid by tribunals of Roman Catholic dioceses, especially in the English-speaking world, because of an alleged incapacity, distinct from impotence, in one or both of the partners to fulfill the essential obligations of marriage. Evidently, no other *caput nullitatis matrimonii* even approaches this one in the frequency with which it is being invoked in ecclesiastical marriage nullity cases today. Thus there would appear to be no need to justify a discussion of it here. Indeed, one wonders why it has occasioned so little literature over the past two decades in which it has become so dominant. For among issues canonical, it would seem to have no equal, first, in terms of its enduring impact upon the lives of large numbers of the faithful, but also in terms of its implications regarding the ·dity of Catholic teaching in matters as fundamental as marriage and family life.

The method which we will follow is that which was adopted in a similar piece published in 1983 in the *Ephemerides iuris canonici,* under the title, « The Nullity of Marriage for Reason of Insanity or Lack of Due Discretion of Judgement » (vol. XXXIX, pp. 9-54). We will therefore propose a series of principles and conclusions in thesis form and comment on them one by one. Again, all footnotes and bibliographical apparatus will be eschewed, since what we have to say we wish to present without interruption, without presuming to involve others in our affirmations, and without seeming to suggest that what has been left obscure here might be clarified in books or articles elsewhere. The author of these pages has written and published many Rota decisions concerning *incapacitas adimplendi necessaria matrimonii onera,* all embellished, at times profusely, with references to tracts on law and

psychiatry in various languages. He now wishes to cut through whatever is accessory, peripheral, or merely decorative in this matter and focus upon what Rota judges have in other contexts rather grandly called « *ipse argumenti nucleus* ».

I. - *That to which one gives consent in marriage is marriage and nothing else.*

Over the past several years, a new genre of Canon Law essay has come into being. The format has been repeated so often as virtually to constitute an art form, something on the order of the sonnet or the sonata. The author opens by announcing with evident pleasure that a wondrous, new discovery has recently been made regarding the nature of marriage. The discovery is this : Whereas theologians and canonists had for centuries held that Titius and Titia consent to conjugal acts on their wedding day, in our more enlightened times we have come to know that to which they actually consent is rather marriage itself.

The opening theme or premise having been exposed and developed, the author then moves on to drawing a series of conclusions from his and our discovery. And the conclusions, in a variety of formulations, come more or less to these : (1) The « merely physical », « carnal », even « animal » view of marriage which so long stalked the unhappy path of Catholic theological and canonical thinking has at last been abandoned ; (2) In its place we are now to admit a more « spiritual », « human », and « personal » understanding of marriage in which the central issue is the relationship between the partners, their mutual fulfillment, « completion », integration, and enrichment ; (3) Hence, we are finally in a position to acknowledge that a marriage in which such a relationship has not been achieved or at least could not have been achieved in appropriate measure is invalid and susceptible of being declared such by tribunals of the Roman Catholic Church.

Faced with commenting on this kind of thing, one hardly knows where to begin. For not only is the premise false, there does not even seem to be any reason why the conclusions might flow from it were it other than false. Be that

as it may, in this first section of our paper we address ourselves only to the premise by asserting that, if in the history of Catholic Theology and/or Canon Law anyone of stature ever seriously suggested that the object of marriage consent might be something other than marriage, that individual was not only mistaken but also at odds with the explicit assertions or at least manifest assumptions of both Thomas Aquinas (see, for example, his *Summa theologiae*, Suppl., quaest. XLVII) and Thomas Sanchez (see, for example, his *De sancto Matrimonii Sacramento*, lib. II, disput. XXVIII, n. 4), of both Francis Suarez (see, for example, his *Opera omnia*, Parisiis : Vivès, 1856-1878, tom. XIV, p. 783, n. 9, and tom. XV, p. 452, n. 18) and Francis Schmalzgrueber (see, for example, his *Jus ecclesiasticum universum*, lib. IV, pars I, tit. I, nn. 262-263), of both John De Lugo (see, for example, his *Tractatus de Sacramentis in genere*, disput. VIII, sect. VIII, n. 129, and *Tractatus de justitia et jure*, disput. XXII, sect. VII, nn. 159-160) and John Prior (see, for example, his decision of July 18, 1911 in *S. R. Rotae Decisiones*, vol. III, decis. XXXII, n. 2), indeed, of both Peter Lombard (see, for example, his *Sententiae in quattuor libris distinctae*, lib. IV, dist. XXVIII, cc. 3-4) and even the much-maligned Peter Cardinal Gasparri (see, for example, his commentary on « his » Canon 1134 in *Tractatus de Matrimonio*, 2nd ed., vol. II, n. 1,191).

In our estimate, therefore, the new discovery mentioned above is neither new nor a discovery. Who marries does so by consenting to something which has never been in doubt among Catholic theologians or canonists, and that something is marriage and nothing else.

II. - *One consents to marriage by giving to and receiving from another of the opposite sex not the right to marriage nor even the right to a marriage relationship, but rather the exclusive right to conjugal acts as long as both parties are alive.*

Marriage is a reality which has been constituted by the Divinity and which is not available to substantial alterations by lesser beings. Thus, if Titius and Titia give to and receive from each other, « until death do them part », a moral faculty,

denied everyone else, to perform together acts which may by their very nature result in procreation, they marry. If they do anything else, they do something other than marry. Or at very least, no one has to date been able to identify any element or elements which might be added to or subtracted from the traditionally recognized object of that right which must be given and received by a couple when they consent to marriage, without ending up with something which is simply not marriage.

But perhaps you object that in some quarters an addition has in fact been made, inasmuch as some now hold that Titius and Titia, in order to marry, must also exchange the right to a conjugal interpersonal relationship. Indeed, we believe we hear you remarking with rising voice and perhaps a hint of impatience that, in the most advanced of quarters, it is currently being taught that the conjugal interpersonal relationship in question must be not only conjugal, interpersonal, and relational, but also one or another or all of such agreeable qualities as fulfilling, « completing », integrating, and enriching, if marriage in the full sense of the word is to be had.

Let us treat the first addition first. To do this, we must ask our reader to permit us a momentary brush with Scholastic clarity. The word, « marriage », has two meanings in virtually all languages, to wit : (1) the act of consent that is elicited when a male exchanges with a female, and vice versa, the exclusive and perpetual right to conjugal acts and which moralists and canonists have for centuries styled « *matrimonium in fieri* », and (2) the relationship that uniquely and inevitably results from these acts of consent and which the selfsame moralists and canonists have for centuries styled « *matrimonium in facto esse* ».

It makes no difference whether the first of these « marriages » is termed an act of conjugal consent, a conjugal contract, or even a conjugal covenant, just as it makes no difference whether the second is termed a conjugal union, a conjugal society, or even a conjugal interpersonal relationship. For each set of three is but a group of synonyms whose *denotation* is identical. When we say « marriage », we mean either (1) the act of consent which in our Western culture is

commonly played out before a public official by a blushing lady with a bouquet in her hands and a nervous gentleman with a boutonnière on his lapel, or (2) the condition or state of life which is to be lived out by the afore-mentioned lady and gentleman from the moment of consent forward.

With all of this in mind, we do not hesitate to affirm that it is patently absurd to suggest that, in order to consent to marriage (in order to effect a valid *matrimonium in fieri*), one must give and receive the right to marriage (one must give and receive the right to a *matrimonium in facto esse*). And should anyone require reasons for anything so obvious, perhaps from the many at hand we might simply choose the fact that there exists no such thing as a right to marriage which is capable of being given or received. Titius enjoys the right that he not be impeded from legitimate efforts to marry, and so does Titia. Still, neither can give anyone the right to marry him or her or even receive such a right from another. To speak, therefore, of a « *ius ad coniugalem relationem interpersonalem* » necessarily being exchanged in order to marry validly is to use words which may sound appealing or intriguing at first but which, upon a moment's reflection, must be dismissed as devoid of any identifiable link with reality. In short, if by « conjugal interpersonal relationship » you mean the state or condition of being married, that is, *matrimonium in facto esse*, no right to it is or need be given or received in order that a valid act of marriage consent, *matrimonium in fieri*, be realized. Indeed, no right to it is even available to be given or received at least on this side of Alice's looking-glass.

Our imagined objector (Oh, that he were only imagined !) will surely not be satisfied with this. We can almost hear him in our mind's ear protesting : « The conjugal interpersonal relationship of which I speak is not to be reduced to a mere *matrimonium in facto esse*. It is something much finer, much nobler, much more precious, spiritual, human, and personal. It is the shared fulfillment of the parties, their mutual completion and integration in virtue of their actualized ' complementarity ', nay more, their truest, most profound, and most intimate enrichment ».

In the face of such rhetoric, many over the past twenty years have simply retreated in confusion and disarray. « Who »,

they seemed to plead, « would even dare to challenge anything so high-sounding, so compassionate, so 'personalist', so modern ? ».

Any thoughtful canonist, we would hope. For while everyone of us, canonist or not, earnestly desires that all married couples achieve the kind of fulfillment, « completion », integration, and enrichment to which reference is made above, if they do not or even cannot, it does not follow that their marriages are invalid. And the reason is crystal clear : Between a marriage that is unsuccessful or could not be other than unsuccessful because of certain qualities in one or both of the spouses, and a marriage that is invalid, there is simply no correlation. If there were, the divorce courts of the world could be closed down and replaced with offices that do nothing more than pronounce invalid those marriages which have proved to be unhappy for lack of fulfillment, « completion », integration, enrichment, and the like, or at least those marriages in which the couple, when they married, were for reasons of character, temperament, tastes, aspirations, and the like, quite unable — in the current patois — to « make a go of it ».

In this vale of tears, however, there are many members of both sexes who know what marriage is (no question, therefore, of ignorance of the essential notes of marriage), who are not insane (no question, therefore, of lack of use of reason), who consider the wisdom of entering their marriage with at least that minimum measure of deliberation which something as serious as marriage demands (no question, therefore, of lack of due discretion of judgement *in the precise and proper sense of this formula*), who are under no psychological compulsion to enter their marriage (no question, therefore, of lack of internal freedom), who are psychologically capable of the marriage act (no question, therefore, of psychic impotence, again *in the precise and proper sense of this formula*), who are capable of standing by their commitment to perform that act only with the other party as long as he or she be among the living (no question, therefore, of incapacity to fulfill the essential obligations of marriage, yet a third time *in the precise and proper sense of this formula*), but who nevertheless, because of nature, nurture, or both, offer no guarantees, evoke the

gloomiest of forecasts, or — if you insist — are morally certain to fail, as regards conjugal fulfillment, « completion », integration, enrichment, or any other word or combination of words that may be conjured up to signify a successful, conjugal, interpersonal relationship.

Nor has any legal system in history, whether civil or religious, ever even suggested that such persons necessarily marry *invalidly*. On the contrary, the marriages of such persons, when they have proved to be utterly unsuccessful, are either said to be dissolved in those societies which admit of divorce or pronounced by a public authority no longer to require cohabitation. In brief, they are universally understood to be valid and unsuccessful, two qualities which, in the juridical traditions of all civilized communities known to us (from our study, for example, of G. Prader's *Il matrimonio nel mondo*, Padova, 1970), are quite autonomous or — to put it another way — devoid of a relevant « inter-real » relationship.

Are we then saying that a man, for instance, who ignores his wife totally except in the marriage act (the extreme case which, like all extreme cases, is regularly brought forward only *in extremis*) is validly married ?

On the basis of such a meager *species facti*, we confess we do not know. Still, most willingly do we concede that, if at the time of his marriage the man in question were truly incapable of a more relational behavior, his marriage was undoubtedly invalid for reasons very much prior to and very much more basic than incapacity to fulfill relational obligations. There are, you see, in the real world no men (and neither are there any women), who know what marriage is, are not insane, can sufficiently consider the wisdom of marrying, marry freely, are capable of the marriage act and capable too of honoring their commitment to the permanence and exclusivity of marriage, but who are somehow unable to relate to a spouse except in intercourse. Such beings can be imagined, like unicorns or mermaids ; but they do not exist.

« Very well », you reply, « let us abandon the extreme case. What about those persons whose relational abilities are remarkably limited ? Are their marriages valid ? »

Again, we do not know, since the *species facti* is again inadequate. Nonetheless, we are confident we can provide an

answer that will serve for all possible questions of this sort ; and the answer, practically identical to the one just proposed, is as follows : If the individual about whom we are concerned knows what marriage is, is not insane, can sufficiently consider the wisdom of marrying, marries freely, is capable of the marriage act and capable too of honoring his or her commitment to the permanence and exclusivity of marriage, there can be no serious question of insufficient relational capacity to marry. For a human being is an entity that relates to other human beings as a unit and not in virtue of a « faculty » or whatever, which is apart from intellect, will, emotions, and body, and whose distinct function is to relate. Accordingly, when both partners at the time of their marriage enjoy that fundamental, though considerable, soundness of intellect, will, emotions, and body which precludes ignorance of the essential notes of marriage, lack of use of reason, lack of due discretion of judgement, lack of internal freedom, psychic impotence, and incapacity to fulfill the essential obligations of marriage (all in the precise and proper sense of these formulae), whoever accuses their marriage of invalidity for lack of sufficient capacity to relate is simply operating outside the limits of reality, given the substantial unity of the human person because of which all human acts of the same individual — whether acts of knowing, willing, relating, or anything else — are performed in virtue of the same healthy or unhealthy intellect, will, emotions, and — according to the nature of the act — body. In short, if you are just one person and you can do all that, you can do this too.

We hasten, of course, to observe that by « sufficient capacity to relate » we mean that *minimum* relational ability in the absence of which a marriage would be clearly invalid for *defectus habilitatis ad debitam nectendam consuetudinem* (to invent a formula which, because of its utter uselessness, cries to be forgotten), just as by « sufficient capacity to deliberate » we mean that *minimum* deliberative ability in the absence of which a marriage would be clearly invalid for *defectus debitae iudicii discretionis*. We do not therefore have in mind that *ideal* measure of geniality or congeniality which might ensure or at least render highly probable a harmonious marriage relationship.

Thus in résumé: If a male and a female can consent to marriage by exchanging a permanent and exclusive right to perform the marriage act, they can marry validly; and there is no point whatever in attempting to complicate the matter by claiming that they must also be able to exchange a right to marriage (nonsense) or even a right to a marriage relationship which is understood to mean a successful marriage relationship, even if this never be said out loud. For, while there are things in life which can be effectively obscured through artfully manipulated absurdities and tautologies, marriage in its essentials is not among them. It is just too common and everyday a reality.

III. - *If «per absurdum» it were necessary for a valid marriage that the partners exchange a right to a successful marriage relationship, only a perpetual, irremediable incapacity to posit such acts as might foster that relationschip would render the marriage invalid.*

Rights and obligations go hand in hand. I have a right that you do or do not do something; you have an obligation to do that something or not to do it. Thus it is that obligations are either *affirmative* (to do something) or *negative* (not to do something).

Curiously, however, the two kinds of obligations bind the persons obligated in different ways, inasmuch as an affirmative obligation binds throughout its duration but not at every moment, whereas a negative obligation binds not only thoughout its duration but at every moment as well.

Applying all of this to the matter at hand, we note, first, that in their marriage Titius gives Titia and Titia gives Titius the right to perform conjugal acts, a right which carries with it a correlative obligation, and, second, that this obligation, being affirmative (to do something), binds throughout the duration of the marriage, even though not at every moment. In the Latin formulation, it binds *semper sed non pro semper.*

But Titius is given by Titia, and Titia by Titius, also the right to exclusivity as regards conjugal acts. This, however,

begets a negative obligation (not to perform these acts with others) ; and the obligation, being negative, binds not only throughout the marriage but at every moment as well, *semper et pro semper.*

Now let us suppose (in our opinion, against all logic and common sense) that to marry it be necessary to give and receive a right to a successful, conjugal, interpersonal relationship, involving fulfillment, « completion », integration, enrichment, and such. To what kind of obligation would that right give rise ?

No one seems to want to say, largely, we suspect, because no one who believes this discussion to be serious wants to admit the disappointing upshot of the answer. Accordingly, we sail out on our own in this sea of absurdity and suggest that the obligation must be affirmative, inasmuch as it can be nothing other than an obligation to perform those fulfilling, « completing », integrating, and enriching acts out of which successful, conjugal, interpersonal relationships are made.

If this be the case, what follows ? Our reader has already guessed. Consequently, we will be not only brief in our reply but also schematic : (1) In order that such an obligation render a marriage invalid in virtue of the party's incapacity to fulfill it, it would have to be, like all affirmative obligations, perpetual and irremediable by ordinary means, that is, such as would permit periods in which the activity in question would not be required, or better : such as would bind *semper sed non pro semper* ; (2) All of which forces us to conclude that, if after their marriage consent were given, Titius were even for a few years, months, weeks, or days to have posited acts apart from intercourse which were supportive of, agreeable to, or « caring and confirming » as regards Titia, their marriage could not be declared invalid for reason of his incapacity to fulfill the obligation arising from the presumed right to a successful, conjugal, interpersonal relationship.

« You are making this whole discussion ridiculous », you may exclaim. « All that passé, schoolish talk about obligations being affirmative and negative and binding in different ways is unworthy of a sensitive citizen of the twentieth century. We are concerned here with human beings in real, existential situations ; and you are making light of our ideas

and ideals concerning marriage. If the incapacity to fulfill the obligations of a conjugal interpersonal relationship had to be perpetual and irremediable in order to justify a marriage annulment, there would hardly be a case that would ' make it through ' on these grounds ».

To all of this we accede most willingly, though we confess that we have never understood why a « real » situation becomes more urgent or less susceptible of logical analysis when it is styled « existential » as well, or how it is that Catholics can now speak with such ease of « annulling » marriages. Be these things as they may, we maintain our passé, schoolish stand ; and we fully endorse the perhaps disappointing but nevertheless accurate conclusion of our feigned objector. We would, however, articulate the conclusion somewhat differently.

No person — we would assert — who is capable of marrying as described above in Section II (who knows what marriage is, is not insane, etc.) can be incapable of relating to his or her partner sufficiently in the real or, if you prefer, in the real, existential world. It is mindless, therefore, to talk about the invalidity of his or her marriage on such a basis. For the marriage would have been invalid for reasons far more fundamental than this one if the supposed situation of inability to relate were in fact verified.

All the same, unless those who wish to consider this hypothesis are willing to abandon not only the traditional and exact understanding (the two qualities are not always incompatible) of how a right begets an obligation and how the ensuing obligation binds, they are going to have to admit that their new *caput nullitatis* will hardly ever result in a declaration of nullity. For, if it be quite clear that those who can marry in the terms indicated in Section II are most unlikely to be incapable of fulfilling in the minimum, required measure that obligation which allegedly springs from the concession of a right to a successful, conjugal, interpersonal relationship, it is blazingly clear that those who can marry in the terms indicated in Section II will never be incapable of performing at least an act or two which might foster a successful, conjugal, interpersonal relationship. Hence, their « incapacity » will not be perpetual and irremediable, as it must be in order to

bring forth — may the Good Lord forgive us! — an « annulment ».

All of which is admittedly foolishness carried to its outer limits. We are delighted, therefore, to move on to something else.

IV. - *Nor does marriage consent consist in or require the giving of oneself to one's partner or the receiving of one's partner for oneself.*

The tendency toward Manicheanism will probably never be totally eradicated. For when we look about us, we see so much that is evil in things corporal that we cannot easily escape the temptation — and a temptation it is — to identify the carnal with the bad or at least suppose the two to be somehow by nature linked.

Small wonder then that in an era of widely diffused pornography, erotic theater, « adult » cinema, and other similar outrages, even some Catholics find themselves strangely embarrassed by the physical aspects of the « Great Sacrament » of Matrimony and anxious, therefore, to « humanize » it and « personalize » it, and thus to « spiritualize » it, by eliminating from their understanding of marriage, or at least drastically muting, whatever is of the body. Nor are they without allies, largely unwelcome, in this enterprise, such as certain groups of feminists who consider the corporal dimensions of marriage to be manifestations of male domination and certain groups of male homosexuals who consider them a focus for discrimination in their regard.

There may be other causes ; but this would appear to us to constitute the overriding reason why in so much Catholic Theology and Canon Law about marriage over the past two decades, the physical encounter of the married couple has been so generally ignored or soft-pedaled. The situation would seem to parallel that of the Sacrament of Penance, once defined by an Ecumenical Council to be a sacred rite « *ad instar actus iudicialis* », but now, in an epoch proud of its impatience with things juridical, revised down to something more

acceptable, a « dialogue », perhaps, or a consultation with one's analyst.

Whatever of this, marriage is inescapably also of the body. We say « also » because it is by no means only of the body, any more than it is only of the spirit. Two people marry by granting each other freely, and therefore after appropriate deliberation, an exclusive and lifelong moral faculty, that is, a right, to perform acts which are good in themselves, which the couple as a rule earnestly and honorably desires, and which the Creator does not scruple to use as His instrument for peopling not only His earth but also His heaven.

Presented in this way, the Catholic way, marriage requires neither humanization nor personalization. True, brute animals do something similar to what married couples accord each other the right to do. However, they do not do that something similar on the basis of a free and deliberated choice to give and receive a moral faculty ; what they do does not result in sons and daughters of the Godhead, made « unto His image and likeness » ; and there is no element of ethically or religiously embraced permanence or exclusivity in the undertaking. There is much more of the human than of the animal in marriage. It need not be humanized.

Neither need it be personalized. The couple who consent to marriage by exchanging a right to acts which are of themselves noble, beautiful, even grace-giving when performed by those in the Lord's friendship, are persons. Indeed, they cannot not be persons. For, if they were anything other, they could not be involved in the exchange of a right. Moreover, these persons knowingly and willingly choose to marry and in most instances do so because they are moved not only by a sensual attraction (something quite « honest » in the classical meaning of this word), which may be rather impersonal under certain circumstances, but also by a spiritual and eminently personal sentiment difficult to define but hardly in need of definition, love. Finally, the acts to which these persons grant each other a right are by Nature herself (read : the Creator Himself) destined to bring into existence other persons in the only way in which persons can be brought into existence in the present order of things. To try, therefore, to « personalize » marriage is something akin to trying

to « jungle-ize » the rain-forests of Brazil, to « desert-ize » the Sahara, to « musicalize » the final Quartets of Beethoven, to « mathematize » the equations of Einstein. It is not only superfluous ; it betrays an incredible ignorance of the object of one's concern.

With all of this before us, we admit that we feel very little sympathy for canonists who, preoccupied — as they think — with the human and the personal, strain to define marriage apart from its corporal reality and come up with such inventions as marriage consent is to be legally understood as an act wherein two people exchange themselves.

If a poet pens something of this sort, we may be charmed, just as if a pastor preaches something of this sort, we may be inspired. For the acts to which married people bestow upon each other a right are so intimate, human, and personal, that we can *almost* think of marriage as though it entailed a gift of the married couple themselves, one to the other. « Almost », that is, poetically or rhetorically as opposed to philosophically, juridically, precisely.

When Shelley announced that from the throat of a skylark « there proceeds a rain of melody » like that which comes from « rainbow clouds so bright to see », his ornithology was shaky, to say nothing of his climatology. His poetry, all the same, was splendid. When Paul of Tarsus caught the attention of the Athenians by pretending to explain to them the origins of a sculptured deity in their main city square, his Comparative Religion was flawed. His pastoral eloquence, however, was masterful. Still, what is permitted the poet and the pastor is rightly denied — among others — the jurist, except, of course, when the jurist be a canonist who occasionally has the good sense to set aside his toga and ascend either Parnassus or the pulpit.

The Pastoral Constitution, « On the Church in the Modern World », of the Second Vatican Council on more than one occasion referred to marriage as a mutual gift of self by the married ; and lest perchance anyone fail to appreciate the patently non-legal character of these references, the Fathers of the Council reminded one another over and again on the Council floor, at Commission meetings, in observations (*modi*) submitted to the Council secretariat, and in responses to the

observations from the Council secretariat, that they were not in their Pastoral Constitution speaking in « juridical terms or categories ».

Nevertheless, their references were seized upon as a substitute for the excessively corporal, physical, and animal understanding of marriage that was alleged to be found in traditional Canon Law ; marriage came to be defined in juridical contexts as an exchange of and by the married couple ; Shelley became an ornithologist ; Paul, a professor of Comparative Religion ; and « Gaudium et spes », a legal document.

Nor is this the first time that churchmen have gotten themselves into this kind of thing. Some three hundred years ago, a number of theologians and canonists were unbending in their desire to read the Old Testament as though it were a textbook of physics ; and we are still apologizing to Signor Galileo who, though he had never heard what German Scripture scholars of the last century had to say about the necessity of interpreting literature of all kinds according to its proper literary genre, certainly had the sense to intuit the wisdom of that insight on his own, even if some of his contemporaries did not.

Poetically, artistically, homiletically, and pastorally, it is not only meet, just, and right to exult in the pastoral eloquence of the Pastoral Constitution, « On the Church in the Modern World »; it is esthetically invigorating and spiritually refreshing as well. Juridically, however, it is not only misguided to attempt to « legalify » that eloquence ; it is manifestly erroneous. For both philosophically and juridically Titius does not have himself to give to Titia, and vice versa ; and much less is Titia able to be received by Titius, and vice versa. « *Nemo iuridice adeo de se disponit ut possit iuridice semet ipsum alteri dare, tantoque minus potest quis iuridice ab altero accipi* », as the author of these pages had dared to observe on numerous occasions, aware that he was swimming against the current but aware too that he was in consonance with the best of Catholic canonical tradition and the most elementary principles of philosophy and law.

And if anyone suspects that we are allowing ourselves to become unduly exercised about a matter of little practical import, let him inspect — we hope to his horror — just

a few of the decisions issuing each year from tribunals of Roman Catholic dioceses wherein marriages are being declared invalid because one or both of the parties on their wedding day did not give himself or herself to the other or, what comes to the same thing in virtue of the substantial unity of the human person, did not give himself or herself « totally », « one hundred percent », « with nothing held back », etc.

« Things like that simply do not happen », my reader is perhaps harrumphing. « Sensible people know the difference between rhetoric and law. You are exaggerating. Come now. Admit it. You are making it all up ».

And he raised his eyes to the heavens, whispering quietly : « Eppur si muove ».

V. - *If, again « per absurdum », it were thought to be necessary for a valid marriage that the partners give themselves to each other, any question in a marriage nullity case as to whether they gave or were able to give enough of themselves would have to be treated according to the approach proposed above regarding the giving of a right to a successful, conjugal, interpersonal relationship.*

We are once again in the Land of Oz, and we hope that there will be a wizard on hand to assist us too. For this entire discussion about giving oneself and receiving the self of another in order to marry is so foreign to the rudiments of philosophy and law that we fear we might stray from the « yellow-brick road ». Nonetheless, we push on, not because the discussion has any merit of itself, but rather and only because the incapacity to give oneself sufficiently in marriage is considered a serious basis for declaring marriages invalid in the tribunals of certain Roman Catholic dioceses, however difficult this may be for some people to believe.

Oneself is a unit which is not susceptible of division except in its purely material component. Consequently, if to marry, one had to give himself or herself to another (and receive that other in return), he or she would inevitably be faced with a situation of « all or nothing at all », to borrow the title of the once-popular love song. Fifty percent, even eighty or ninety

percent, of self would not do. Indeed, any partial giving would have as much meaning as marryng just a little or, for that matter, marrying a whole lot : none at all.

Thus, when a judge in a marriage nullity case inquires of the parties or witnesses how much of self Titius or Titia gave or were capable of giving his or her partner on their wedding day, he must be understood to be investigating something in the language of the common folk which he intends later in his ruminations and final decision to formulate in terms which are philosophically and juridically defensible. And ordinarily that something will be the right to a coniugal interpersonal relationship in the sense of a successful, conjugal, interpersonal relationship.

If such be the case, what the judge is in fact asking is how fulfilling, how « completing », how integrating, how enriching, how intimate, how profound, how happy, in a word, how *successful* a conjugal relationship Titius or Titia wanted or were capable of achieving when they were married, questions which we have already indicated to be in our estimate quite pointless in a marriage nullity case if the parties at the time of their marriage knew what marriage is, were not insane, etc. For, given the unity of the human person, such parties, even though their marriages may prove to be unhappy for any number of reasons, can safely be presumed to have been endowed on their wedding day with at least that minimum capacity to relate without which a marriage might be declared invalid for lack of relational capacity.

And the same goes for all other « incapacities » which in their final analysis come down to an incapacity to exchange the right to a successful, conjugal, interpersonal relationship. About this, however, we must add a few lines of explanation.

The *matrimonium in facto esse* of which we spoke above can be expressed in Latin (and all other languages too) by a multitude of near synonyms, among them, « *relatio coniugalis* », « *unio coniugalis* », « *communio coniugalis* », « *societas coniugalis* », « *consortium coniugale* », and « *vinculum coniugale* ». All may *also* signify a successful, conjugal, interpersonal relationship and regularly signify precisely this when accompanied by a positive, « up-beat » adjective or prepositional phrase, the most familiar example, after « *relatio coniu-*

galis », adorned by « *interpersonalis* », being « *consortium coniugale* », adorned by « *totius vitae* ».

Hence the necessity of insisting upon accurate terminology in marriage nullity cases concerning psychological incapacities, lest we slide from meaning to meaning in one and the same context with such disastrous results as in the following imagined *decisio iudicialis* : « In order to marry validly, one must be capable of a conjugal interpersonal relationship and a *consortium totius vitae.* This supposes a capacity to effect such a relationship or *consortium* by acts of concern, regard, support, and so forth. In this case, we find clearly demonstrated in the testimonies and documentation that Titius is a dour, stubborn, ungracious fellow, the kind whom our psychological consultants are wont to call ' psychopathic '. Accordingly, in line with the new insights from ' *Gaudium et spes* ', we declare Titius ' marriage to Titia invalid for incapacity to effect a conjugal interpersonal relationship and *consortium totius vitae* ».

Let us gloss this paragraph step by step. First, it is true that, in order to effect a valid *matrimonium in facto esse,* one must be capable of effecting a *matrimonium in facto esse.* It is also a pointless tautology, unless « conjugal interpersonal relationship » and « *consortium totius vitae* » already in the first sentence of our example mean something more than just marriage, that is, something more than *matrimonium in facto esse,* pure and simple. Second, it is false, however, that, in order to effect a valid *matrimonium in facto esse,* one must enjoy the capacity to effect a happy *matrimonium in facto esse* ; and in the second sentence of our example, this is what is being alleged, thanks to a slide (in our estimate, not a very adroit one) from the first meaning of the two formulae to the second. Consequently, if Titius is the psychopath that he is said to be, it would not follow, as implied in the third sentence of our example, that he could not effect a *matrimonium in facto esse* ; it would follow only that he probably would not be likely, and perhaps not even able (about this we will not cavil here), to effect a happy *matrimonium in facto esse,* something quite different, as « all the folks out there » know full well.

Thus, to sum up, the question about giving self (and receiving the self of another) in marriage is at most an exercise in

rhetoric. If, however, it must be lent a juridical significance, the best we can offer is a variation on the theme of exchanging the right to a successful, conjugal, interpersonal relationship. And the same holds true for all other variations on the same theme, for example, the exchanging of a right to a *consortium totius vitae,* which at times means nothing more than *consortium coniugale, id est matrimonium in facto esse,* and at times means *consortium coniugale, id est matrimonium in facto esse faustum sive potius beatum,* which is obviously a good deal more.

But there is a codicil to be attached to all this confusion. Some of our readers are undoubtedly aching to object : « Wait a minute. I never for a moment thought it enough to give a part of oneself in order to marry validly. It is indeed a matter of ' all or nothing at all '. You have made it too easy for yourself by discussing here how much has to be given. To marry, I insist, one must bestow his entire self (*consortium ' totius ' vitae*) upon his or her spouse and accept the spouse's entire self as well ».

We agree most enthusiastically that, if self had to be exchanged in marriage, it would have to be the whole self ; and we thought we had made that clear in Section IV. Here, however, in this Section, we wished to deal with the position of those who seem to be satisfied with the exchange of just an appropriate measure of self in marriage, whatever in the world that could possibly be thought to mean. We are delighted, however, to be afforded the occasion to repeat that in our judgement the giving of self, which could not be other than total if it could be at all, is a philosophical and juridical absurdity even if total, and to add that it would also be psychologically unhealthy.

When Titius and Titia marry, they remain distinct individuals, two human beings who may in the best of conscience enjoy distinct rights and obligations, pursue distinct goals and avocations, entertain distinct hopes and expectations, in brief, continue to be what all married couples are even after their marriage, distinct persons. In fact, if after their marriage, Titius and Titia were somehow to begin to blend into each other so that everything they thought, willed, felt, and did, was becoming one, we would hope that relatives and friends would have the charity to help them to the

office of a capable and experienced psychiatrist. Marriage is not meant to absorb or even diminish the person or the individuality of the married. And Titius and Titia would do well never to forget it if they expect to realize not just a *relatio coniugalis* or a *consortium coniugale* but rather a *coniugalis relatio interpersonalis* and *consortium totius vitae* in the second, hardly ever explicitly articulated, but always thoroughly understood meaning of these formulae.

VI. - *No diocesan tribunal is empowered to declare a marriage invalid by appealing to a «jurisprudence» according to which valid marriage consent requires the exchange of a right to a successful, conjugal, interpersonal relationship, no matter in what terms that right might be described.*

A diocesan tribunal is to *interpret* the law by applying its clear norms to particular cases. A diocesan tribunal is to *supply* for norms which are not to be found in written form or custom by appealing to norms about similar matters, general principles of law, the jurisprudence and practice of the Roman Curia, and the constant and common opinions of those learned in the law. When there exists no norm, either in written form, in custom, or in the afore-mentioned sources of supply on the basis of which a marriage might be declared invalid, a diocesan tribunal is obligated before God and the People of God to declare that the nullity of the marriage in question has not been proved.

The jurisprudence of Canon Law which alone constitutes a valid source of supply for missing norms is the jurisprudence of the Roman Curia. Such jurisprudence is not to be found in one or another or even necessarily in many decisions of a particular tribunal. It is rather that jurisprudence, or more accurately: those rules and conclusions in the decisions of the tribunals of the Roman Curia, which are repeated in many decisions, over a period of time proportionate to the gravity and novelty of the matter, constantly, and pacifically, that is, without challenge in other decisions of the same tribunal.

There exists no canonical jurisprudence in the precise and proper sense of this formula according to which valid mar-

riage consent requires the exchange of a right to a successful, conjugal, interpersonal relationship, an exchange of the spouses in whole or in part, or any other exchange which is in fact, even if not in expression, the same as one of these. For, no matter whether one holds that in a sufficient number of decisions of a tribunal of the Roman Curia it has been affirmed that any or all of these exchanges are required for a valid marriage, and affirmed over a sufficiently long period of time, it nevertheless remains an « existential reality » that such affirmations have always been and still are under challenge by other decisions of the same tribunal.

All of this we have set down in this Section without citations, embellishments, illustrations, diplomatic « escapes », or even a smile. It is all either utterly clear and true, or it is not. If it is ....

VII. - *Only two groups of psychic afflictions have thus far been established by canonical jurisprudence, in the precise and proper sense of this formula, as realities on the basis of which a diocesan tribunal may declare a marriage invalid for reason of incapacity in either partner or both to fulfill the essential obligations of marriage, namely* (1) : *satyriasis in males and nymphomania in females, because of which the afflicted is after marriage even for a time incapable of fidelity to his or her partner, and* (2) *sexual dysfunctions or aberrations, because of which the afflicted is after marriage irremediably incapable of the marriage act.*

We do not intend to present here a detailed treatment of incapacity to fulfill the essential obligations of marriage resulting from satyriasis, nymphomania, and the sexual dysfunctions or aberrations to which reference is made above. The jurisprudence of the Rota in this matter is both well-known and easily accessible ; and, what is more, even a cursory explanation of the symptoms, etiology, and divisions of satyriasis and the rest, and the various approaches to verifying their juridical effects in particular cases would carry us far afield from the original thrust of this paper. It is enough for our purposes that the reader understand that there are psychic afflictions which can interfere with capacity to fulfill the

essential obligations of marriage and which ones have to date been identified by canonical jurisprudence, properly so-called, as having this effect. Still, there are two observations to be made in this regard in order further to illustrate our fundamental theme and perhaps even to pull together some loose strands.

First, satyriasis and nymphomania impede the fulfillment of a negative obligation (not to perform the marriage act with others than one's spouse) which, because negative, binds at every moment throughout the marriage. Hence, when incapacitating at the time of a marriage, they render it invalid even if they might later be corrected by ordinary means. The sexual dysfunctions or aberrations which render a person unable to perform the marriage act, on the other hand, impede the fulfillment of an affirmative obligation (to perform the marriage act with one's spouse) which, because affirmative, does not bind at every moment throughout the marriage. Hence, even when incapacitating at the time of a marriage, they do not render it invalid if they might later be corrected, again, by ordinary means. Thus, in marriage nullity cases having to do with satyriasis or nymphomania, there is never any need to prove the affliction incurable, whereas, in cases having to do with psychic impotence, or any other impotence for that matter, proving the incurability of the condition is necessary to prove the nullity. Nor is this difference an invention of doctrine or positive law. It is rather an inescapable consequence of the distinction between obligations which are affirmative and obligations which are negative, a distinction — we might add — firmly grounded in reality.

Second, in investigating the invalidity of a marriage for reason of psychic deficiencies or afflictions, there is an order to be observed as regards the various *capita nullitatis*, an order which is based upon how fundamental (basic, radical) are the juridical effects of each *caput*. If Titius, for instance, is alleged at the time of his marriage to have lacked due discretion of judgement and to have suffered from an incapacity to fulfill the essential obligations of marriage as well, one begins his investigation of the invalidity of Titius' marriage with lack of due discretion of judgement and passes on to incapacity to fulfill the essential obligations of marriage only after lack of due discretion of judgement has been seen

either not to have existed or not to be susceptible of proof. For lack of due discretion of judgement is the more fundamentally invalidating situation, inasmuch as it precludes not just an act of *marriage* consent but any act of consent to something as serious as marriage. (Concerning this distinction, cf. Section I of the above-cited article, « The Nullity of Marriage for Reason of Insanity or Lack of Due Discretion of Judgement »).

The order, then, is as follows : first, see if the person in question did not know what marriage is ; second, see if he or she lacked the use of reason ; third, see if he or she lacked due discretion of judgement ; fourth, see if he or she were under psychological compulsion ; fifth, see if he or she were psychically impotent ; sixth and last, see if he or she were incapable of fidelity.

Two Rota decisions *Coram Egan* will perhaps clarify our point. In the one, there was question of an epileptic psychotic who at the time of his marriage hardly ever talked, exhibited signs of depersonalization, and could not be left alone even to go to the bathroom, but whose marriage was declared invalid by a diocesan tribunal for incapacity to engage in a conjugal interpersonal relationship. In the other, there was question of a hebephrenic schizophrenic who at the time of his marriage spent hours each day combing his hair and grimacing before a mirror, could not perform even the simplest of tasks as a repairman's helper, and every morning discussed his plight with an imaginary rabbit in the garden of his fiancée's family home, but whose marriage a lawyer of the Rota wished to have investigated on the grounds of incapacity to stand by a permanent marriage commitment.

In the case of the epileptic pychotic, the decision of the Rota (April 22, 1982) was in favor of the nullity « at least » for lack of due discretion of judgement, since — it was noted — a strong case could also be made for lack of use of reason. The incapacity to engage in a conjugal interpersonal relationship was dismissed as very much posterior to lack of due discretion of judgement, even though it was probably true that, among the many basic things in life the man in question could not do, relating to others might be mentioned, given the condition of intellect, will, and emotions on account of which he was judged to have been at least incapable of suffi-

ciently deliberating about something as serious as marriage. In the case of the hebephrenic schizophrenic, the decision of the Rota (July 11, 1977) was likewise in favor of nullity for lack of due discretion of judgement ; and the incapacity to stand by a permanent marriage commitment was again dismissed as a pointless complication.

The lawyer in the latter case is among the most gifted and diligent at the Rota. He was therefore not surprised by the decision and even took the time to inform the *Ponens* of this fact. He added, however, that he had hoped for what he termed a « breakthrough », that is, a decision in which it might be formally recognized that a marriage can be invalid for reason of incapacity not only as regards exclusivity but also as regards permanence. We are persuaded that the lawyer is seeking his breakthrough in vain. For, as we see it, if a person be capable of honoring a *marriage* commitment to exclusivity, he is capable of honoring it either throughout the life of the marriage, that is to say, permanently, or not at all. Still, we admit that in our judgement the lawyer is at least conducting his search for new examples of incapacity to fulfill the essential obligations of marriage in the proper venue, namely, among the true objects of that right which must be exchanged in order to consent to marriage validly. And we let the matter rest there.

Final Note

The *bona matrimonii* are in the usual language of Canon Law three components of the object of the right which Titius and Titia give to and receive from each other when consenting to marriage ; or more accurately : the object of the right (the marriage act whose natural outcome is offspring, the *bonum prolis*) plus two necessary qualities (properties) of that right (permanence, the *bonum sacramenti*, and exclusivity, the *bonum fidei*). They came to be called the « *bona* » (« goods ») of marriage because during the first flourishing of Manicheanism, certain Catholic theologians felt constrained to justify the carnal aspects of marriage in the eyes of some of the brethren by appealing to three — what shall we

say ? — « more spiritual » benefits of marriage, to wit : children, « sacramental » permanence, and faithfulness. (*Plus ça change, plus c'est la même chose* !)

These *bona matrimonii*, however, are not the purposes (ends) of marriage, even though the purposes of marriage may at times be called its « goods », for example, in these words from « Gaudium et spes » : « (*H*) *oc vinculum sacramentale intuitu boni, tum coniugum et prolis, tum societatis, non ex humano arbitrio pendet* ». Accordingly, it is of the utmost importance that, when in marriage nullity cases we speak of the *bona matrimonii*, we make it altogether clear which ones we have in mind. For, if we do not, we may come up with something as outrageous as this : « It is universally acknowledged that, if a person be incapable of giving and receiving the *bona matrimonii*, he is incapable of marriage. But we know from the Pastoral Constitution, ' On the Church in the Modern World ', that the good of the couple, the *bonum coniugum*, is among the *bona matrimonii*. Anyone, therefore, who is not able to see to the good of his or her marriage partner marries invalidly ».

We are almost ashamed to dignify this kind of thing with analysis. We shall, however, swallow our pride and do our duty. First, the *bona matrimonii* about which there exists the afore-mentioned universal agreement are those *bona prolis, sacramenti et fidei* which make up the object of the right exchanged in marriage, and not the purposes of marriage. Second, we hardly needed Vatican II to inform us that the good of the couple is a *bonum matrimonii* in the sense of one of the purposes of marriage. We knew that, if not from other sources, at least from a century of debate as to whether the *bonum coniugum* is a secondary purpose of marriage or a purpose co-equal with the other commonly recognized purpose, procreation. Third, the *bona matrimonii* in the sense of the purposes of marriage are not the object of the right which must be exchanged in marriage consent, even if one of them, procreation, has a ring very similar to *bonum prolis*. In marriage, you see, Titius does not give and receive a right to procreation ; he rather gives and receives a right to acts whose natural outcome is procreation. And neither does he give a right to the well-being of his spouse. If he gives anything in this con-

nection, the most it could be is the right to acts which favor that well-being.

All of which, we sincerely hope, pulls away the mask from the entire *bonum coniugum* approach to marriage nullity. For in the final analysis, *incapacitas quod ad bonum coniugum attinet* is nothing more than *incapacitas iungendae coniugalis relationis interpersonalis* and *incapacitas ineundi consortii totius vitae* in a new, and perhaps the most unconvincing, guise. When, therefore, Titius is said to have been incapable of the *bonum coniugum*, what is meant — though never said — is that he was incapable of doing those thing whereby Titia might be fulfilled, « completed », integrated, enriched, etc., by the marriage ; and about this we have already spoken at length. Nonetheless, we beg our reader's indulgence if we insist upon saying it all again in one unconscionably long sentence. If Titius knows what marriage is, is not insane, can sufficiently consider the wisdom of marrying, marries freely, is capable of the marriage act and capable too of honoring his commitment to the permanence and exclusivity of marriage, in virtue of the substantial unity of the human person, he will also be able to perform, at least in the minimum measure required and at least for a while, such acts, in addition to intercourse, as will be conducive to his own and Titia's fulfillment, « completion », integration, enrichment, etc., in their marriage, that is to say, such acts as will be conducive to their well-being as husband and wife. Consequently, there is no more need in marriage nullity cases to become involved in discussions about the *bonum coniugum* than there is need to become involved in discussions about conjugal interpersonal relationships or *consortia totius vitae*, unless, of course, you are « developing » the theological doctrine of the indissolubility of Christian marriage into something heretofore quite unknown.

EDWARD M. EGAN

Rev.nus D.nus Eduardus Egan, evectus ad sacrum ordinem Episcopalem, promotus ad sedem titularem Alleghenensem, nominatus est Auxiliaris Em.mi D.ni Card. Ioannis O'Connor, Archiepiscopi Neo-Eboracensis. Fausta omnia ei ominamur. Ad multos annos.