

ELEMENTS  
OF  
ECCLESIASTICAL LAW.

COMPILED WITH REFERENCE TO

THE SYLLABUS, THE "CONST. APOSTOLICAE SEDIS" OF POPE  
PIUS IX., THE COUNCIL OF THE VATICAN AND  
THE LATEST DECISIONS OF THE  
ROMAN CONGREGATIONS.

ADAPTED ESPECIALLY TO THE DISCIPLINE OF THE CHURCH IN THE  
UNITED STATES.

BY

REV. S. B. SMITH D.D.,

FORMERLY PROFESSOR OF CANON LAW, AUTHOR OF "NOTES,"  
"COUNTER-POINTS," "THE NEW PROCEDURE,"  
"COMPENDIUM JURIS CANONICIS,"  
ETC., ETC.

VOL. II.

ECCLESIASTICAL TRIALS.

*Thoroughly revised according to the Instruction "Cum Magnopere" and the  
"Third Plenary Council of Baltimore."*

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**LETTER FROM CARDINAL SIMEONI.****S. CONGREGAZIONE DI PROPAGANDA,**

Roma, li 12 Maggio, 1883.

REV<sup>DE</sup> DOMINE

Secundum volumen operis a te conscripti cui titulus "ELEMENTS OF ECCLESIASTICAL LAW," obtuli tuo nomine Ssmo Dño Nostro, qui benigne illud excepit atque acceptum habuit, tibi que Apostolicam benedictionem impertire dignatus est.

Alterum exemplar enunciati operis ad me transmissum valde gratum mihi fuit, atque tibi plurimas ago gratias, teque hortor ut quam tibi Deus Optimus Maximus ingenii vim concessit, in utilitatem Catholicae Ecclesiae impendas.

Interim fausta omnia a Domino tibi adprecor.

D. T.

Addictus

IOANNES CARD. SIMEONI PRÆFECTUS,

✱ D. Archiep. Tyren., *Secret.*

## PREFACE.

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IT is now over five years since we published the first volume of these *Elements*. The reader will naturally ask himself why we should have allowed so long a time to elapse before issuing the second volume. Our chief excuse is the difficulty of the task. There are perhaps not many persons who have an idea of the arduous nature of our undertaking. Canonists all agree that the matter—ecclesiastical judicature—of which the present volume treats is by far the most difficult and complicated portion of all ecclesiastical law. Schmalzgrueber<sup>1</sup> says: “Est hic liber” (the second book of the decretals of Pope Gregory IX., which treats of ecclesiastical trials) *omnium aliorum librorum juris canonici difficillimus, et maxime utilis.*”

This difficulty is heightened, in our case, by the peculiar circumstances under which we write. Ecclesiastical trials in criminal and disciplinary causes of ecclesiastics are to be conducted in the United States in the manner laid down by the Instruction of the Sacred Congregation de Propaganda Fide, issued July 20, 1878. This Instruction authorizes certain departures from the prescriptions of the sacred canons concerning ecclesiastical trials. It permits a simpler, easier, and less intricate mode of procedure. Yet it gives but the general features of the proceedings. Now, what are the principles which must guide the ecclesiastical judge and the canonist in filling up this sketch or outline? Evidently no others than those which are contained and embodied in the

<sup>1</sup> Lib. 2, Prooem.



sacred canons, the decrees of œcumenical councils, and the constitutions of the supreme pontiffs, as interpreted and applied by the approved canonists of every age and every clime.

The common law of the Church—and we mean not merely its letter, but also its spirit—must therefore be, so to say, the mirror before which our peculiar mode of procedure must be placed, considered, and studied. This law alone furnishes the correct key of the Instruction. Hence, throughout this volume, the peculiar trial as prescribed for this country by the Instruction of July 20, 1878, is everywhere and in all its details compared with the canonical trial as established by the sacred canons. The points of agreement as well as of divergence between the one and the other are carefully pointed out and explained.

The present volume is divided into two Parts. The first treats of ecclesiastical trials in general: namely, of the judicial power of the Church; of the *personnel* of ecclesiastical courts; of the judge and our Commissions of Investigation; of plaintiffs and defendants, procurators and advocates; of the nature, various kinds, and force of judicial proofs. The Second Part discusses ecclesiastical trials in particular—that is, chiefly the various stages and formalities of ecclesiastical trials, both ordinary and extraordinary, civil and criminal, and matrimonial. Particular attention is paid everywhere to our form of trial, and it is explained in all its details.

We are happy to call attention to the fact that their Eminences Cardinals Manning and Newman, the greatest lights of the Church in England at the present day, have been graciously pleased to approve of the first volume of this work.

S. B. S.

ST. JOSEPH'S CHURCH, PATERSON, N. J.,  
*Feast of the Assumption of the Blessed Virgin, 1882.*

## PREFACE TO THE SECOND EDITION.

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NEARLY two years have elapsed since the first edition of the present volume became exhausted. We have delayed this new edition, chiefly on account of the new legislation relative to judicial proceedings, which has taken place since that time.

The procedure laid down by the S. C. de Prop. Fide, in its Instruction of July 20, 1878, and the subsequent authentic explanations, had not fully attained the end for which it had been enacted. It was, indeed, a judicial proceeding, and yet not a canonical trial. Hence, it created some uncertainty when there was question of carrying out its principal details.

In 1884, the Holy See, wishing to remedy this inconvenience, and to provide a mode of proceeding which would be in every respect adequate to the regular administration of justice, issued the Instruction *Cum Magnopere*. This document, which had been already discussed in the conferences held at Rome, in 1883, between some of the cardinals of the Propaganda and our archbishops, outlines and prescribes the mode of proceeding, which shall be observed in future by Ordinaries before they can inflict preventive or repressive punishments. This procedure is a canonical trial, in the strict sense of the word, as we show in our *New Procedure*, or methodical explanation of the Instruction *Cum Magnopere*.

Yet this same Instruction *Cum Magnopere*, in Art. XII.,

allows, by way of dispensation, the Instruction of 1878 to remain in force *ad interim* in those dioceses where the *curia* cannot as yet be canonically established. Accordingly, there are at present a number of dioceses, especially in the West and South, where the procedure outlined and prescribed in the Instruction of 1878 still obtains, and will continue to obtain for some time to come.

Besides, the procedure laid down in the Instruction of 1878 is in force all over England, was recommended for Ireland by the Plenary Synod of Maynooth, and is, we believe, also adopted or observed in Scotland.

Hence we have retained, in this new edition, the principal explanations of and references to the proceedings as conducted by Commissions of Investigation. However, we have also given due weight to the procedure as prescribed by the latest Instruction, *Cum Magnopere*, which we explain and refer to in many places.

Moreover, we give, in this new edition, an accurate outline of the trial or procedure in matrimonial causes, as made obligatory, throughout the United States, by the recent Instruction, *Causae Matrimoniales*, issued by the S. C. de P. F. in 1884, and embodied by the *Third Plenary Council of Baltimore* in its acts and decrees.

In the Appendix, we subjoin the full text of this Instruction, as also of the Const. *Dei Miseratione* of Pope Benedict XIV. concerning matrimonial causes.

We refer with no ordinary pleasure to the gracious letter of His Eminence Cardinal Simeoni, Prefect of the Propaganda, printed on the front page of this volume. We also return sincere thanks for the many other commendatory letters kindly sent us by Prelates and Priests, not only from this country, but also from Europe.

PATERSON, N. J., }  
 Aug. 15, 1887. }

## PREFACE TO THE FOURTH EDITION.

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IN this new edition, besides correcting several inaccuracies, we have added some important supplementary notes. We call especial attention to the supplement on the *Expenses of Ecclesiastical Trials, both in the first instance and on appeal*. This subject is still new in this country; yet the Instruction *Cum Magnopere* of the S. C. de Prop. Fide, Article 44, has already brought up the question several times, to our own knowledge, during the course of ecclesiastical trials and will make its consideration more urgent every day.

PATERSON, *Feb. 17, 1890.*

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## PREFACE TO THE FIFTH EDITION.

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THIS new edition has been carefully revised and amended; some important changes and additions have been made. The question, mooted in Nos. 838, 839, whether witnesses can or should be examined *in the presence of the accused or of the party against whom they testify*, and whether they can and should be *subjected to cross-examination*, is pretty fully discussed in Appendix XI., specially added in the present edition. Then again, in Appendix XII., the *dies fatales* in EXTRAJUDICIAL appeals are explained.

We have also added, in the new Appendix XIII., a careful review of the modern practice and teaching of the Church concerning the various kinds of oaths, as taken or administered in or out of judicial proceedings. An important correction has also been made on p. 374, n. 1413, with reference to matrimonial causes.

PATERSON, N. J., January 20, 1892.

holds of churches and pious places) must show merely (*a*) that he has suffered serious loss or injury; (*b*) that he is a minor.<sup>1</sup>

1391. What is the effect of reinstatement? The effect of reinstatement as demanded, but not yet granted, is that everything should remain *in statu quo*. Hence the sentence against which reinstatement is asked cannot, as a rule, be executed so long as the request for reinstatement has not yet been decided by the judge.<sup>2</sup> Of reinstatement, as not only asked, but already granted, the chief effect is that each of the parties—that is, not only the party asking, but also the one opposing reinstatement—receives back what he had originally, and is consequently placed in the same condition in which he was, before the contract, act, or judicial sentence causing the alleged injury, took place.<sup>3</sup>

1392. *Of certain peculiar characteristics of reinstatement in spiritual causes or matters.*—So far we have spoken of reinstatement in ecclesiastical causes or matters in general. We shall now say a few words in regard to certain features which are peculiar to reinstatement in a certain kind of ecclesiastical causes—namely, in those causes or matters which are more properly spiritual in their nature. By these spiritual causes or matters we mean chiefly those which pertain (*a*) to the sacrament of marriage; (*b*) appointments to ecclesiastical offices and benefices; (*c*) and other spiritual causes of a kindred nature, such as the right to receive tithes or the offerings of the faithful, or to exercise the right of electing ecclesiastical superiors or prelates, etc.<sup>4</sup>

1393. Of the peculiarities of reinstatement, so far as ecclesiastical offices, benefices, and parishes are concerned, we have already spoken above.<sup>5</sup> As to reinstatement in spiritual causes of the third kind, such as the right of election, of

<sup>1</sup> Schmalzg., l. 1, t. 41, n. 46.

<sup>2</sup> L. unic. C. In integ. rest. (ii. 41).

<sup>3</sup> L. 24 ff., § 4, de Minor (4. 4); Schmalzg., l. c., n. 47.

<sup>4</sup> Cf. *supra*, n. 1099 sq.

<sup>5</sup> *Supra*, n. 1106 sq.

receiving the offerings of the faithful or tithes, it may be asked whether the person or persons spoliated of such rights is to be reinstated before all else—that is, even before he proves that he has a legitimate title or claim to these rights? The answer is, that where the common law of the Church favors the spoliator and is against the person spoliated,—*i.e.*, where the common law vests the right or title to the object in question in the despoiler and not the person despoiled,—the person spoliated must first establish his title or claim or indult or privilege, or at least the presumption of a title, before he can be reinstated.<sup>1</sup>

1394. We say, *where the common law favors the spoliator*; for where it favors the person despoiled, the latter must be reinstated before he shows any title whatever. Thus a parish priest who is deprived of the income, in whole or in part, of his parish is entitled forthwith to reinstatement. The reason is, that by the common law of the Church he has the right to receive this income.<sup>2</sup> We say, secondly, *or at least the presumption of a title*; such presumption in favor of a title would be created by a long and peaceful possession of the right in question.

1395. It now remains to say a few words in regard to reinstatement in the third kind of the above spiritual causes—namely, matrimonial causes. As a person is said to be despoiled (*spoliatus*) in property and other rights when he is unjustly deprived of them, so also is he said to be spoliated in reference to his marriage rights when he is unjustly stripped of his marriage partner. This spoliation (*spolium*) may be caused not only by a third party, but also by either of the married couple, and that chiefly in three ways: 1. When either of the pair leaves the other of his or her own authority; for the one who is thus left is unjustly deprived

<sup>1</sup> Ex cap. 2, de Rest. Spol. in 6<sup>o</sup> (ii. 5).

<sup>2</sup> Ex cap. 2, cit.; Schmalzg., l. 2, t. 13, n. 73.

by the other of his conjugal rights. 2. When the wife leaves her husband by her own authority, and becoming penitent wishes to return to him and is not received by him; for in this instance the husband refusing to take her back is said to despoil her of her marriage rights. 3. When the wife who is ejected by her husband, but is afterwards recalled by him, refuses to return, as in this case, the husband would be despoiled of his rights.<sup>1</sup>

1396. Now, in all these cases the rule is, that the ecclesiastical judge, upon due application by the injured party, should, speaking in general, forthwith decree reinstatement—that is, restore him or her to his or her conjugal rights by obliging the party that left of his or her own accord to return, unless the latter can show just cause for his or her action. We say, *unless the latter can show just cause*; that is, unless the party who left of his or her own accord can prove *v.g.*, the existence of an annulling impediment, or cruelty, or adultery, or other serious bodily or spiritual danger.<sup>2</sup> Hence, if, for instance, a wife who has left her husband shows that she has been cruelly treated by him, she should not be compelled to return to him, until he has given proper pledges that he will not molest her again. How reinstatement takes place, when an impediment is alleged, see Schmalzgrueber, l. c., n. 63.

<sup>1</sup> Schmalzg., l. c., n. 57.

<sup>2</sup> Cap. 8, 10, 13, de Rest. spol. (ii. 13); Schmalzg., l. c., n. 61 sq.



## CHAPTER VI.

### ECCLESIASTICAL CIVIL TRIALS PECULIAR TO MATRIMONIAL CAUSES, ALSO IN THE U. S.

(*Processus in Causis Matrimonialibus.*)

1397. If, after a marriage has been contracted, an annulling impediment is discovered, by which such marriage is invalid, this defect or impediment should be removed and the marriage healed, either in the ordinary way, by a dispensation, or in the extraordinary manner—*i.e.*, by a dispensation *in radice*. But if the impediment cannot be taken away—*v.g.*, where it is of the law of nature, and therefore not dispensable by the Church, or where the parties prefer to regain their matrimonial liberty rather than have the marriage healed—the cause must be submitted before, tried and decided by the proper or competent judge or tribunal. In other words, the question whether the marriage is invalid or not must be adjudicated by the proper judge. We shall, therefore, in this chapter speak, 1, of the competent forum and judge for matrimonial causes; 2, of the *personnel* of this forum or tribunal; 3, of the form of trial common to matrimonial causes in general; 4, of the peculiar mode of procedure in divorces from bed and board; 5, of the special form of trial in causes of nullity; 6, of the mode of procedure to ascertain the *status liber*. All these questions will be discussed under separate heads, and the relations they bear to our peculiar circumstances in the United States, will also be considered.

## ART. I.

*Which is the competent Forum for Matrimonial Causes?—Relation of Church and State in this matter, especially in the United States.*

1398. Among those matters which fall under the jurisdiction of the ecclesiastical forum, by their very nature, marriage holds a prominent place. The Council of Trent has expressly defined that matrimonial causes belong to ecclesiastical, not to secular judges.<sup>1</sup> However, as Pope Benedict XIV. well explains, not everything that relates to marriage pertains, by that very fact, to the ecclesiastical forum.<sup>2</sup> For there are three kinds of matrimonial causes or questions. First, some have reference to the validity of the marriage contracted. That these questions belong exclusively to the ecclesiastical forum, no Catholic can deny. Thus the Church has the sole right to declare whether an impediment exists or not. In like manner, it is her province to pronounce upon the legitimacy or illegitimacy of the children, because questions of this kind depend upon the validity or nullity of the marriage. Hence, as it belongs to the Church to declare whether a marriage is valid or not, so also is it her right to pronounce children either legitimate or illegitimate, at least so far as the ecclesiastical effects are concerned.<sup>3</sup>

1399. Secondly, others regard either the validity of betrothments or the right of having a divorce from bed and board. These, in like manner, because of their relation to the sacrament of matrimony, pertain solely to the ecclesiastical forum.<sup>4</sup> We say, *because of their relation*, etc.; for it is evident that betrothments are a preliminary step to marriage, and divorces destroy the rights arising from marriage.

<sup>1</sup> C. Trid. sess. 24, can. 12, de Sac. matr.

<sup>2</sup> De Syn., l. 9, cap. 9, n. 3.

<sup>3</sup> Cap. 1-15, Qui filii sint legitimi (iv. 17).

<sup>4</sup> Cap. 10, de Sponsal. (iv. 1); cap. 3, 4, de Divort. (iv. 19).

1400. Thirdly, there are those which are connected indeed with matrimony, but yet have a direct bearing only on temporal or secular matters, such as the marriage dower or gifts, the inheritance, alimony, and the like. These belong to the secular forum, and not, at least directly, to the ecclesiastical judge.<sup>1</sup> We say, *not, at least directly*; for when they come up before the ecclesiastical judge incidentally,—*i.e.*, in connection with and during the trial or hearing of matrimonial questions concerning the validity of a marriage, betrothment, or the right to a divorce *a thoro et mensa*, they can be decided by him.<sup>2</sup>

1401. *Relations of Church and State existing at present, especially in the United States, in regard to matrimonial causes.*—In the United States (as in most countries of the continent) marriage is regarded by the law as merely a civil contract,<sup>3</sup> and hence certain secular magistrates, equally with the ministers of the Gospel (we use the words of Hudson), have the right to solemnize it.<sup>4</sup> The persons who are generally authorized by law in this country to solemnize marriages are, chiefly: 1. “Any regularly ordained minister of any religious society.” 2. “Any justice of the peace.” 3. “Any religious society, agreeably to its forms and regulations.”<sup>5</sup>

1402. Thus in the State of New Jersey the law is: “Every judge of any court of common pleas, and justice of the peace, and mayor of a city of this State, *and every stated and ordained minister of the Gospel*, is hereby authorized to solemnize marriages between such persons as may lawfully enter into the matrimonial relation; and every religious society in this State may join together in marriage such persons as are of the same society, or when one of such persons is of such society,

<sup>1</sup> Ex cap. 7, Qui filii sint legitimi (iv. 17).

<sup>2</sup> Ex cap. 1, t. c.; Bened. XIV., l. c., n. 5. Kutschker, l. c., vol. v., p. 448.

<sup>3</sup> Walker, American Law, p. 246, § 102.

<sup>4</sup> Hudson, Law for the Clergy, p. 7.

<sup>5</sup> Walker, l. c., p. 248, n. 4.

*according to the rules and customs of the society to which they or either of them belong.”*<sup>1</sup>

1403. As will be seen from this, the civil government in the United States does not require, for the legality of the marriage, that a civil marriage or separate marriage ceremony be performed before the civil magistrate, besides that which may be solemnized by the ecclesiastical authority. On the contrary, it allows “all persons belonging to any religious society, church, or denomination to celebrate their marriage according to the rules and principles of such religious society, church, or denomination.”<sup>2</sup> Hence also it is plain that the State, with us, is anxious not to infringe upon the liberty of conscience guaranteed by the Constitution, also in regard to marriages. It recognizes as valid and legal in the eyes of the law any marriage celebrated by a minister, priest, or other clergyman, according to the rules and principles of his church or sect. Nay, as a rule, the law in all our States is, that the parochial registers of marriages shall be admitted as evidence in all courts of law and equity.<sup>3</sup>

1404. Generally speaking, however, the civil government with us prescribes that the person officiating at a marriage, whether he be a minister or priest or civil magistrate, shall forward within a certain time a certificate of the marriage to the county clerk or other official designated. Thus in New Jersey the law is: “That every justice of the peace and minister of the Gospel, or other person having authority to solemnize marriages, shall make and keep a particular record of all marriages solemnized before him, and transmit a certificate of every particular marriage within six months after the solemnization thereof, to the clerk of the court of common pleas for the county in which the marriage was solemnized.”<sup>4</sup>

<sup>1</sup> Revision of Statutes of N. J., p. 1351, sec. 1; cf. *ib.*, p. 631, sec. 2.

<sup>2</sup> Cf. Statutes of Illinois, ap. Hudson, p. 29, sec. 5.

<sup>3</sup> Cf. Revision of Statutes of N. J., p. 633, sec. 10. Trenton, 1877.

<sup>4</sup> Revision of Statutes of N. J., p. 632, sec. 6.

1405. Moreover, the State with us generally requires those who solemnize marriages to use all due diligence to ascertain whether the parties are *in statu libero*,—*i. e.*, whether there is any impediment or disability in the way,—and authorizes them to examine the parties and also witnesses, on their oath, as to the legality of the intended marriage.<sup>1</sup> For further particulars concerning the relation of Church and State, with us, in reference to matrimony and divorces, see our *Notes on the Second Plenary Council of Baltimore*,<sup>2</sup> where we have discussed the matter in a fuller manner.

## ART. II.

*Organization or Personnel of Ecclesiastical Courts for Matrimonial Causes, also in the United States.*

1406. The *personnel* or organization of ecclesiastical courts for matrimonial causes is, with the exception of the defender of the marriage, the same as that of ecclesiastical courts for other ecclesiastical causes, civil and criminal. The bishop may if he chooses, establish in his diocese a separate or special tribunal or court for matrimonial causes, or he may have but one and the same tribunal or court both for matrimonial causes and all other causes, civil and criminal, provided, when there is question of matrimonial causes involving the validity or invalidity of a marriage already contracted, the defender of marriage be added to the court.

1407. As a matter of fact, in many parts of Europe, there are frequently, owing to the multiplicity of these causes and their complicated nature, and for their more expeditious hearing, separate or special diocesan tribunals or courts established for matrimonial causes.

1408. Whether the ecclesiastical court for matrimonial causes is the same with that for other causes, or whether it

<sup>1</sup> Hudson, l. c., p. 100.<sup>2</sup> Pp. 246–263.

is a separate tribunal, it consists, like all other ecclesiastical courts, chiefly of a judge, and a secretary, to whom in causes of nullity the defender of marriage must be added. This is, at present, the *personnel*, also in the United States, of the ecclesiastical court for matrimonial causes. For, according to the Instruction of the S. C. de Prop. Fide *Causae Matrimoniales* of 1884, and the *Third Plenary Council of Baltimore* (n. 305), the *curia*, in the United States, for matrimonial causes, involving the validity or nullity of marriages already contracted, is composed of the bishop, or his delegate, as judge; of the defender, and of the secretary. We shall therefore describe the office and duty of each of these officials in relation to the hearing or trial of matrimonial causes.

1409. I. *The judge*.—By the law of the Church, as in force at the present day, the hearing and adjudication of matrimonial causes (no less than of all other ecclesiastical causes, civil and criminal) belongs in the first instance exclusively to the Ordinary of the diocese, that is, to the bishop, *sede plena*, and to the vicar-capitular (with us, administrator), or to one delegated by him, *sede vacante*, and no longer, as formerly,—*i.e.*, before the Council of Trent,—to inferior ecclesiastics, such as rural deans and archdeacons.<sup>1</sup>

1410. The Ordinary may authorize or delegate his vicar-general, or any other worthy ecclesiastic, to hear and pass final sentence in matrimonial causes, and that *universally*—that is, not only in this or that matrimonial cause, but in general in all such causes. For the power of the bishop concerning these causes or matters is ordinary, and may therefore, like any other ordinary power, be delegated to others. Nay, the more probable opinion is, that the vicar-general is empowered to hear and decide or pass final sentence on matrimonial causes by virtue of his office, without any special mandate.<sup>2</sup>

<sup>1</sup> C. Trid., sess. 24, cap. 20, de Ref.; cf. cap. 7, de Off. ord. in 6°.

<sup>2</sup> Mansella, de Processu jud. in caus. matr., p. 173. Romae, 1881.

1411. However, the plaintiff (*actor*) in a matrimonial cause cannot bring such cause before any episcopal court he pleases, but only before that tribunal or court which is competent. Now, as a rule, that tribunal is competent to whose authority and jurisdiction the *defendant* is subject. Hence the axiom: "Actor sequitur forum rei." But, as we have shown above,<sup>1</sup> when speaking of the competency of tribunals, a person becomes subject chiefly to the tribunal or forum or judge of the place where he has his permanent dwelling-place or *domicilium*. This forum of domicile, as we have seen above,<sup>2</sup> is the true, natural, ordinary, and general forum or court to which a person is amenable.

1412. Hence, in order that a matrimonial cause may be brought before the proper or competent court or judge, the residence or domicile of the married couple must be principally taken into consideration. As the wife contracts the domicile, and therefore becomes subject to the forum or judge of her husband, it follows that a married couple, so far as matrimonial causes are concerned, falls under the jurisdiction of the bishop, in whose diocese the husband has his domicile or residence.<sup>3</sup>

1413. To this rule, however, there are two exceptions, namely, where the cohabitation of husband and wife has been broken up (*a*) by a separation *a mensa et thoro*, (*b*) by the husband's maliciously deserting the wife. In the *first* case, each party can make use of the right, which may belong to it against the other party, of asking for the annulment of the marriage, before the bishop of the diocese where the spouse against whom the annulment is asked has his or her domicile. In the *second* case, the wife who is maliciously deserted can institute her action before the bishop of the diocese where she has her domicile. For, wherever the deserting husband is, he remains subject to the bishop of that diocese where he had his domicile at the time of the desertion, since the domicile is not changed by such desertion.<sup>4</sup> Finally, we observe that once a party has

<sup>1</sup> *Supra*, n. 784.

<sup>2</sup> *Supra*, n. 784.

<sup>3</sup> Mansella, l. c., p. 174, n. 6.

<sup>4</sup> Mansella, l. c., pp. 172-174.

been duly cited for trial or the hearing in a matrimonial cause, it makes no difference whether he changes his domicile or not. He remains subject, so far as concerns the cause in which the citation was issued, to the bishop or judge who issued the citation.<sup>1</sup>

1414. The bishop is perfectly free to sit personally in court in matrimonial causes, or, as we have seen, to appoint others to do so in his stead. As a matter of fact, in the greater part of Europe, as has been already stated, bishops do not personally take cognizance of such causes, but appoint others—*v.g.*, their vicars-general, or a collective body of judges—to adjudicate upon them. Thus Cardinal Kutschker, in his celebrated work on the “Canon Law of Marriage,”<sup>2</sup> informs us that in Austria the bishop, in the hearing and deciding of matrimonial causes, makes use of a special ecclesiastical tribunal or court, consisting of a president and of assessors, whose number shall not be less than four nor more than six, and who shall have a decisive voice.<sup>3</sup>

1415. The bishop is at liberty to give these delegated judges or tribunals, whether consisting of individuals or collective bodies, power either to hear and pronounce final sentence upon the case, or only to hear or try it, and to reserve to himself the final sentence. Here we may remark that these collective bodies of judges, which we have just mentioned, are greatly favored both by the letter and by the spirit of the law of the Church.<sup>4</sup> Thus Pope Celestine III. says: “*Illa quippe fuit antiqua Sedis Apostolicæ provisio, ut hujusmodi causarum recognitiones, duobus quam uni, tribus quam duobus libentius delegaret.*”<sup>5</sup> The reason is thus stated in the words immediately following the above: “*Cum (sicut canones attestantur) integrum sit iudicium, quod plurimorum sententiis confirmatur.*”<sup>6</sup>

1416. As in other trials or causes, so also in those relating

<sup>1</sup> Mansella, n. 7; supra, n. 1008. <sup>2</sup> Eherecht, vol. v., p. 482. <sup>3</sup> *Ib.*, p. 485.

<sup>4</sup> *Ib.*, pp. 482, 484.

<sup>5</sup> Cap 21, de Off. del. (i. 29).

<sup>6</sup> *Ib.*



to marriages, exception can be taken to the judge, whether he be the bishop, or other person appointed by him to take cognizance of such causes. As we have already seen, when an exception is made against an ecclesiastical judge, arbitrators must be chosen to decide whether such exception has any foundation or not. Cardinal Kutschker holds that an exception taken against one of the members of a collective judicial body is decided by that body itself, and not by arbitrators.<sup>1</sup>

1417. *Ecclesiastical tribunals for matrimonial causes in the United States.*—Formerly, matrimonial causes, with us, even where they involved the validity or nullity of a marriage already contracted, were, as a rule, decided by the bishop or also sometimes by the rector of the parties, without any formality whatever. Only in one or two dioceses was a defender of marriage made use of, in cases where there was question of the validity or nullity of a marriage. This state of things was owing mainly to the missionary condition of the country. Now, however, that this missionary character has given way, at least in most of the Eastern and in many of the Western States, to a fuller and more perfect development of our ecclesiastical organization, which admits of a better observance of the general law of the Church, the Sacred Congregation de Prop. Fide, by its Instruction *Causae Matrimoniales* of 1884, has ordained, and the *Third Plenary Council of Baltimore*, Nos. 304, 305, has accordingly enacted, that in future, the general law of the Church, as laid down chiefly in the *Const. Dei Miseratione* of Pope Benedict XIV., shall be observed also in the United States, whenever there is question of hearing and deciding matrimonial causes, especially those which involve the validity or invalidity of marriages already contracted.

1418. Under the general law of the Church, the bishop is at liberty to hear matrimonial causes *in person*, or to ap-

<sup>1</sup> Canon Law of Marr., vol. v., p. 556.

point either a single person, or several persons acting as a collective body, to do so for him and in his stead. The above Instruction of the S. C. de Prop. Fide of 1884—*Causae Matrimoniales*—also enacts: “Munus moderatoris actorum episcopus vel ipse sibi assumet, vel suum vicarium generalem, aut alium probum et expertum virum e clero ad illud delegabit.” Instr. cit. § 6; C. Pl. Balt. III., n. 305.

1419. II. *The secretary*.—In all judicial proceedings, summary as well as ordinary or formal, whether in civil or criminal causes or matters,<sup>1</sup> and consequently also in matrimonial causes or trials, especially when there is question of the validity of a marriage already contracted, a secretary must be present, and take down the minutes of the proceedings.<sup>2</sup> These minutes should contain chiefly the names of the persons present—namely, of the judge or judges, of the defender of the marriage, of the husband and wife whose marriage is under examination; the chief or essential formalities of the trial, especially the documents read before or submitted to the court; the depositions of the married couple and other witnesses; all decisions, interlocutory or final.<sup>3</sup> The greatest care should be taken by the secretary or notary to record accurately and *verbatim* both the questions or cross-questions proposed to the married couple or the witnesses, and the answers thereto by these parties.<sup>4</sup>

1420. It is superfluous to remark here, that also in the United States, in matrimonial trials or processes, a secretary should be present at the proceedings, whose duty, as above described, it is to keep a careful and correct record of the proceedings.

1421. III. *Defender of marriage*.—Besides the judge and the secretary, a third official, called the defender of marriage (*defensor matrimonii*), necessarily forms part of the matrimo-

<sup>1</sup> Cap. 11 x, de Probat.      <sup>2</sup> Cf. Instr. S. C. C., 22 Aug., 1840, § Praefinita die.

<sup>3</sup> Cf. cit. Instr. S. C. C.; Kutschker, l. c., p. 534.

<sup>4</sup> Cf. cit. Instr., § Cum itaque.

nial court in certain cases. We say, *in certain cases*—namely, in those cases where there is question of the validity or nullity of a *marriage already contracted*.<sup>1</sup> In other matrimonial causes—*v.g.*, where there is question of the validity of a marriage *about to be contracted*, or of separation *a mensa et thoro*,—this defender is not required. Of the rights and duties of this official we shall speak a little further on, when we come to discuss the mode of procedure in causes of nullity of marriages.

1422. All the above officials should first make the profession of faith of Pope Pius IV.,<sup>2</sup> as amended by Pope Pius IX. on January 20, 1877, and be also sworn.<sup>3</sup> The defender of marriage must be sworn not only when he is appointed to his office, but at the beginning of every matrimonial trial.

### ART. III.

#### *Form of Trial or Mode of Procedure to be followed at present in Matrimonial Causes in general.*

1423. By the law of the Church, as enacted by Pope Clement V. (1312), the trial, or judicial proceedings in all matrimonial causes whatever, whether they relate to divorces from bed and board, betrothments, or even to the validity of a marriage already contracted, can be summary (*processus summarius*), and therefore need not be conducted with all the formalities of the ordinary trial, or *processus ordinarius*.<sup>4</sup>

1424. This law is still in force, at least, with regard to all matrimonial causes, where there is no question of the nullity of a marriage already contracted. We say, *at least*; for it is not clear whether, so far as causes of nullity are concerned, it has been altogether repealed by the constitution *Dei misera-*

<sup>1</sup> Bened. XIV., const. *Dei miseratione*, § 5 *Quod vero*.

<sup>2</sup> Cf. C. Trid., sess. 25, cap. 2, de Ref.; our *Elements*, vol. i., p. 446.

<sup>3</sup> Cf. Kutschker, l. c., p. 499.

<sup>4</sup> Clem. *Dispendiosam* 2, de Jud. (ii. 1); cf. Kutschker, l. c., p. 524.

tion issued by Pope Benedict XIV. on the 3d of November, 1741. It is true that this constitution prescribes many formalities to be observed in causes of nullity of marriages which were not obligatory before that time. But apart from these special and peculiar formalities, the constitution in question nowhere states that the trial cannot be summary, so far as concerns the other parts of the trial or proceedings, which are not mentioned.<sup>1</sup> Hence it would seem that even matrimonial causes of nullity may at present be tried summarily, so far as this summary procedure is compatible with the observance of the peculiar formalities laid down in said constitution, as explained and developed by the Sacred Congregation of Council, in its Instruction, dated Aug. 22, 1840, on trials for matrimonial causes. We have just said *may*, not *must*; for the ecclesiastical judge not only can observe the formalities of ordinary trials, together with those prescribed in the constitution of Benedict XIV., but will, according to Bouix,<sup>2</sup> act more prudently and safely by doing so, as the general context of said constitution appears with sufficient clearness to suppose that the form of trial in matrimonial causes of nullity should be solemn or formal.

1425. *General form of trial for matrimonial causes in the United States.*—With us, the form of trial prescribed by the S. C. de Prop. Fide, in its Instruction *Causae Matrimoniales*, issued in 1884, and embodied in the acts of the *Third Plenary Council of Baltimore*, p. 262 sq., is obligatory at present, and that on pain of nullity, in all matrimonial causes, involving the validity or invalidity of marriages already contracted. The above Instruction is a synopsis of the *Const. Dei Miseratione* of Pope Benedict XIV., and of the Instruction of the S. C. C. issued Aug. 22, 1840; it is, therefore, a complete *resumé* of the general law of the Church on matrimonial causes, as in force at the present day.

<sup>1</sup> Craisson, n. 6092.

<sup>2</sup> De Jud., vol. ii., p. 446.

1426. *Q.* Here it may be asked whether the swearing in of the officials of the court and of the witnesses is feasible, or even obligatory, in matrimonial causes in the United States?

*A.* Before answering, we observe that the general rule is that all officials who take part in judicial proceedings—that is, not only the judge himself, but also the assessors, secretaries, etc.—must take an oath, when they are appointed, to discharge their duties faithfully. Thus Monacelli says: “Et est etiam generale, quod officiales in ingressu officii, jurare debeant, quamvis sint solum assessores, vel iudices.”<sup>1</sup> This holds, of course, also of officials in matrimonial causes or trials.<sup>2</sup> So far as the defender of marriage is concerned, the law of the Church is particularly strict on this head. In regard to the swearing of witnesses, the general law of the Church is, that they cannot testify otherwise than under oath.<sup>3</sup> This law is expressly declared by the S. C. C., in its Instruction of August 22, 1840, to be binding in matrimonial causes or trials of nullity.<sup>4</sup>

1427. We now answer. That it is feasible, with us, to administer the oath to the officials and witnesses under consideration, there can scarcely be any doubt. The only objection that could be urged would be that our civil law considered such oaths illegal, which, as we have seen, is not the case. Our civil law simply holds itself neutral with regard to such oaths, neither recognizing nor forbidding them.

1428. That it is *obligatory* at present, is undoubted. For the Instruction of the S. C. de Prop. Fide, *Causae Matrimoniales*, issued in 1884, expressly prescribes that the defender of the marriage shall take the oath. Its words are: “Defensor matrimonii antequam munus sibi commissum suscipiat, coram actorum moderatore *juramentum praestabit*,

<sup>1</sup> Form. Leg. Pract., tit. 7, form. 10, n. 2 (Pars I., p. 246).

<sup>2</sup> Kutschker, l. c., p. 499.

<sup>3</sup> Supra, n. 840, 841.

<sup>4</sup> Cf. Instr. cit., § Cum itaque.

tactis sanctis evangelii, de munere suo diligenter et incorrupte adimplendo, spondens se omnia voce et scripto deducturum quae ad validitatem matrimonii sustinendam conferre judicaverit.”<sup>1</sup>

The same Instruction also enacts, in accordance with the general law of the Church, that the witnesses shall take the oath. The words are: “Ab omnibus et singulis testimonium dicturis moderator actorum ante omnia *juramentum* exiget de veritate dicenda, et si res ita postulet, etiam de secreto servando, praemissa congrua monitione de juramenti sanctitate, praesertim si examinandi rudes sint et ignari. Juramentum praestandum erit tactis sanctis evangelii, et in singulis examinibus eodem modo repetendum.”<sup>2</sup>

<sup>1</sup> Instr. Causae mat., § 10.

<sup>2</sup> *Ib.*, § 12.

## ART. IV.

*Form of Trial or Mode of Procedure peculiar to Divorces "a mensa et thoro."*

1431. Causes of this kind are usually introduced into the bishop's court for matrimonial causes, by the statement or report of the case sent by the parish priest or rector of the parties to the bishop. Before sending in this statement, the rector should use all the means in his power to effect a reconciliation between the married couple applying for a divorce *a mensa et thoro*. This report should summarily state the request of the plaintiff for a divorce, the grounds upon which it is based, the character of both parties, and in general all the particulars of the case.

1432. When all efforts at reconciliation have failed, the trial is begun by the citation. In other words, the defendant—that is, the husband or wife against whom the divorce is demanded—is cited by the ecclesiastical court for matrimonial causes to appear in person, on a certain day, in said court, for the trial of the cause. This citation is now usually executed or served upon the parties through their rector or parish priest. If on the appointed day the parties appear in court, the complainant—*i.e.*, the husband or wife seeking for a divorce—first states the complaint, and the defendant puts in his or her plea or general denial of the complaint, and thus the cause is said to be contested—*lis contestata*.

1433. Observe, however, that this part of the trial may also be conducted by letters. In other words, the parties, instead of appearing personally in court to lodge their complaint, may make their formal complaint and put in their plea by means of letters to the court. In this case the complainant's letter containing the charges or formal complaint must be communicated by the court to the defendant to

enable him to send in his plea. Of course in these as also in all the other stages of the proceedings, the parties may be, and in Europe are generally, assisted by counsel.

1434. The next step is the production of the proofs, which is the main part of the trial. When the defendant has denied the plaintiff's statement, it becomes the latter's duty to sustain them by canonical proofs. These usually consist principally of the depositions of witnesses. The manner in which these are examined in trials for divorces is the same as that for criminal causes, which has been already fully explained. The defence next brings its proofs, witnesses, documents, and the like. Finally, the counsel on both sides sum up the case, after which the judge renders his decision, which becomes *res judicata* unless an appeal is lodged against it within ten days.<sup>1</sup> From what has been said, it will be seen that the ecclesiastical summary trial for matrimonial causes of separation *a mensa et thoro* is substantially the same with the summary trial of other causes, civil or criminal.

1435. *By whose authority and for what causes separation from bed and board can take place.*—Divorces are of two kinds, as we have shown elsewhere,<sup>2</sup> namely, (a) *a vinculo* from the bond of matrimony, which totally severs the marriage tie; (b) and *a mensa et thoro*, from bed and board, which merely separates the parties without dissolving the marriage bond. While the Church teaches on the one hand that a marriage which has once been validly contracted and also consummated by the faithful can never be dissolved as to the *vinculum*, except by the death of one of the married couple,<sup>3</sup> she also affirms on the other that a divorce or separation from bed and board may be allowed for various reasons and in various cases. Thus the Council of Trent expressly teaches: "Si quis dixerit Ecclesiam errare, cum *ob multas*

<sup>1</sup> Permaneder, *Manual of Canon Law*, § 326-330.

<sup>2</sup> Our Notes on the Second Plenary Council of Baltimore, n. 280.

<sup>3</sup> Cf. Feije, de Imp., p. 452.



*causas, separationes inter conjuges, quoad thorum seu cohabitationem ad certum incertumve tempus fieri posse decernit, anathema sit.*"<sup>1</sup>

1436. As the heading of this article indicates, we shall here confine ourselves to the latter kind of divorce—namely, that from bed and board. It can take place, and that either for life or only for a time, (*a*) by the mutual consent of the married couple—*v.g.*, where both agree to embrace the religious state, even after they have consummated the marriage, or where the party guilty of adultery, cruelty, etc., voluntarily assents to the separation demanded by the innocent party, without obliging the latter to have recourse to the ecclesiastical judge to obtain the divorce; (*b*) or even against the will of one of the married couple. Of this latter separation we here speak.<sup>2</sup>

1437. *Q.* What are the causes or reasons that render a divorce or separation from bed and board against the will of either of the married couple lawful in the eyes of the law of the Church?

*A.* We premise: The divorce in question can take place only for grave causes, expressed in or approved by the sacred canons.<sup>3</sup> These causes are chiefly the following: 1. Adultery. 2. The falling into heresy or infidelity of the husband or wife. 3. Danger of the soul's salvation. 3. Cruelty or bodily danger in general. We observe, however, that only in one of these cases—namely, in the case of adultery—is this divorce or separation perpetual or for life. In the other cases it is *per se* but temporary, lasting only as long as the reason for which it was granted continues to exist.

1438. We observe, secondly, that, as a rule, the separation should be made by authority of the proper ecclesiastical judge (namely, the bishop to whom the couple is subject) or

<sup>1</sup> C. Trid., sess. 24, can. 8, de Sac. matr.

<sup>2</sup> Cf. Reiff., l. 4, t. 19, n. 26, 27.

<sup>3</sup> Feije, l. c., n. 577.

<sup>4</sup> Cf. Feije, l. c., n. 578.

tribunal, but not by the parties themselves.<sup>1</sup> For nobody is a competent judge in his own cause. We say, "by authority of the proper *ecclesiastical judge*;" for it is not permitted, at least *per se*, to have recourse to the civil or secular courts for a divorce, whether *quoad vinculum* or only *quoad thorum*. Yet, as we have shown in our "Notes on the Second Plenary Council of Baltimore,"<sup>2</sup> from Kenrick,<sup>3</sup> whose opinion is indorsed by the illustrious Feije,<sup>4</sup> Catholics, not only in the United States but also in Europe, may at times apply to the secular authorities for a divorce, not indeed as though they recognized in the civil power any authority to grant divorces, but simply and solely for the purpose of obtaining certain civil effects, which have been fully described in our above "Notes."

1439. It is true that in the United States the ecclesiastical judge—that is, in the first instance, the Ordinary or the tribunal, if any, established by him—is rarely invoked by Catholics for divorces *a thoro*. In most cases they either apply to the civil court or separate of their own accord. They should be instructed at least to take the advice of their rector or confessor. We think that, considering our peculiar circumstances, the permission given by the rector or confessor is usually sufficient, at least *pro foro interno*. Rectors or pastors should carefully weigh cases of this kind brought before them, consult the bishop, and, if possible, keep a record of the testimony collected by them.

1440. We now proceed to discuss the chief cases where the separation can take place according to ecclesiastical law. I. *Adultery*.—The first and chief canonical cause for which separation from bed and board may take place, and that for life, is adultery committed by either the husband or wife. This is plain from the words of our Lord himself,<sup>5</sup> and from

<sup>1</sup> Kutschker, l. c., p. 652. <sup>2</sup> N. 284–288. <sup>3</sup> Theol. Mor. Tr. xxi., n. III, 112.

<sup>4</sup> De Imp., n. 583.

<sup>5</sup> Matth. xix. 9.

express texts of canon law.<sup>1</sup> However, in order to produce this effect, the adultery must be (*a*) formal, not merely material; (*b*) consummated; (*c*) not condoned, nor committed with the consent, express or tacit or at the instigation of the other party; (*d*) nor compensated, so to say, by the adultery of the party applying for the divorce.<sup>2</sup> Here we remark that the wife is not, as a rule, supposed to give any tacit consent to adultery committed by her husband, even when she knows for certain that he has been guilty of this crime. The reason is, that ordinarily women are afraid to reprove men.

1441. (*c*) Finally, the adultery must be *proved*, or juridically established, before the juridical sentence of separation can be pronounced by the ecclesiastical judge.<sup>3</sup> Now, as Pope Celestin III. says, the *copula carnalis*—in the present case, adultery—is proved either by eye-witnesses, or in their default, by other means, such as violent presumptions.<sup>4</sup> However, canonists commonly maintain that for the purposes of a divorce the proofs need not always be absolutely conclusive, but may be based upon vehement or violent presumptions, which must nevertheless be of such a nature as to create a moral certainty. The cap. Litteris 12, *de Praesumpt.* (ii. 23), clearly and fully explains the subject thus: “Nobis innotuit, quod . . . accusatores matrimonii produxerunt testes firmiter asserentes, quod . . . solum cum sola, nudum cum nuda, in eodem lecto jacentem, ea, ut credebant” (testes) “intentione, ut eam cognosceret carnaliter, viderunt, multis locis secretis, et latebris ad hoc commodis, et horis electis . . . Respondemus quod ex hujusmodi violenta et certa suspitione fornicationis, potest sententia divortii promulgari.” Note here, that the violent indications of guilt in the case are not to be taken on mere hearsay, but must be proved to exist, by competent witnesses.<sup>5</sup>

<sup>1</sup> Cap. 4. 5. 8, ed Divort. (iv. 19).

<sup>2</sup> Cap. 27 x, de Test. et attest. (ii. 20).

<sup>5</sup> Schmalzg., l. 4, t. 19, n. 117.

<sup>3</sup> Feije, l. c., n. 579.

<sup>4</sup> *Ib.*

1442. Q. Can the innocent party leave the adulterous of his or her own accord?

A. There are two opinions. The first is absolutely in the negative, and contends that the separation can never take place, save by the sentence and intervention of the ecclesiastical court,<sup>1</sup> even where the adultery is notorious.<sup>2</sup> Thus the *can. Saeculares* expressly ordains that husbands who leave their wives without the intervention of the ecclesiastical judge shall be excommunicated.<sup>3</sup>

1443. The second opinion distinguishes thus: It is either sufficiently certain that adultery has been committed by either the husband or the wife, or it is doubtful. Where it is doubtful, the innocent party cannot separate from the adulterous of his or her own accord.<sup>4</sup> If it is certain, we must again distinguish: The certainty is either private—that is, the innocent party knows the crime, though only privately; or it is public—that is, the crime of adultery is public and notorious. In this latter case, the innocent party can leave the adulterous of his or her own accord. In the first case—that is, where the innocent party is certain *privately* of the adultery of the other party—the matter is controverted. But the more common opinion allows the innocent party to leave of his or her own accord, even in this case,<sup>5</sup> at least *pro foro conscientiae*, and apart from scandal.

1444. For the rest, it is always better that the separation should *never* take place except by the intervention of the ecclesiastical court.<sup>6</sup> We remark here in passing, that the innocent party is never *obliged* to make use of this right of separating from the guilty party, except when the correction of the latter or the avoiding of scandal makes it really necessary.<sup>7</sup>

1445. II. *Apostasy and heresy*.—According to the law of

<sup>1</sup> Cf. *ib.*, n. 109.   <sup>2</sup> Ex cap. 6, de Adulter. (v. 16); cap. 3, de Divort. (iv. 19).

<sup>3</sup> *Can. Saeculares I, Caus. 33, Q. 2.*

<sup>4</sup> Ex cap. 9, de Sponsal. (iv. 1).

<sup>5</sup> Schmalzg., l. c., n. 112, 113.

<sup>6</sup> Feije, de Imp., p. 454.

<sup>7</sup> *Ib.*

the Church, as in force also with us, if either of the married couple falls from the true faith into heresy or infidelity, the other can leave him or her, and that even of his or her own accord, at least when there is *periculum in mora*—i.e., danger to the spiritual welfare of the party from delaying the separation till the ecclesiastical judge shall have pronounced his sentence of separation.<sup>1</sup>

1446. III. *Incitement to crime or danger to the salvation of the innocent party (periculum animae)*.—Where one of the married couple incites the other to commit crime, whether it be heresy, or any other grave sin,—v.g., theft, sodomy, etc.,—so that the latter cannot live with the former, without seriously endangering his or her salvation, the innocent party not only can, but is sometimes bound to separate from the guilty party.<sup>2</sup> This is clearly stated in the *can. Idolatria* 5, *Caus.* 28, Q. 1. The heading itself of this canon is: “*Licite dimittitur uxor, quae virum suum cogere quaerit ad malum.*”

1447. IV. *Bodily danger (periculum corporis)*.—By bodily danger we mean that which proceeds from cruel treatment. It is certain that a divorce *quod thorum* may be granted for cruelty.<sup>3</sup> By cruel treatment, however, we mean, not every ordinary injurious word or action, but threats to kill, frequent quarrels, blows or striking, though only if they are severe, inflicted frequently, and for slight cause. We observe that in this as well as in the foregoing case, namely, in the case of spiritual as well as bodily danger, the separation can be made only by authority of the ecclesiastical judge. If, however, there is danger in delay, a separation for a brief space of time can be made by the innocent party, of his or her own authority.<sup>4</sup>

1448. From what has been said it is apparent that, as far as possible, the divorce *quod thorum et cohabitationem* should

<sup>1</sup> Cap. 6, 7, de Divort.: cap. final., de Convers. conj. (iii. 32).

<sup>2</sup> Reiff., l. 4, t. 19, n. 34.

<sup>3</sup> Cap. 8, 13, de Restit. spol. (ii. 13).

<sup>4</sup> Feije, l. c., p. 455.

nearly always take place, not by authority of the parties themselves, but by authority of the ecclesiastical judge. However, Giraldus very properly writes: "It is true that these divorces cannot take place, except by the authority of the judge, whenever there is question of a perpetual divorce. But I believe that they can be made by private authority" (of the parties themselves) "for a time, because of some impending serious danger to the soul or body, which cannot be averted otherwise; or also for the purpose of seeing whether the party guilty of adultery will show signs of repentance; provided, however, that the separation (by private authority) is made without scandal, and by the advice of the confessor, or some other prudent person."<sup>1</sup>

#### ART. V.

*Peculiar Form of Trial in Matrimonial Causes where there is question of dissolving a Marriage, once contracted, absolutely or "Quoad Vinculum"—Processus in Causis Nullitatis Matrimonii.*

§ 1. *General Features of the Law, as in force at the present Day—Defender of the Marriage, also in the United States.*

1449. In matrimonial causes of nullity there is question not merely of the rights of either of the contending married couple, but also, and that chiefly, of the marriage bond, and therefore of preventing collusion on the part of the married couple for the purpose of breaking their marriage. Hence the Church, especially in more recent times, has wisely ordained that in the hearing of matrimonial causes, particularly those involving the validity or nullity of a marriage already contracted, the mode of procedure to be followed by the ecclesiastical judge should be different from that which is

<sup>1</sup> Giraldi, *Expos. Jur. Pont.*, pars. i., sect. 734, p. 541. Roma 1784.

prescribed for other causes, especially civil, falling under the ecclesiastical forum.

1450. This peculiar trial or mode of procedure, as in force at the present day all over the world, is contained in the Constitution of the great Pope Benedict XIV., beginning with the words *Dei Miseratione*, and issued November 3, 1741. This celebrated Constitution defines principally the rights and duties of the ecclesiastical judge, and of the defender of the marriage, and explains the force and effect of the sentences pronounced by the ecclesiastical judge in matrimonial causes. In order to evolve these points more fully, and particularly to point out clearly the formalities of the trial of such causes, the S. C. C. issued an Instruction, on the 22d of August, 1840, in which it lays down an accurate method of conducting trials in matrimonial causes of nullity. In this admirable Instruction, the judge, the defender of the marriage, and the secretary will find their chief duties pointed out to them, and the course to be followed and the steps to be taken in the causes in question traced out and explained.

1451. These two documents--namely, the above Constitution of Benedict XIV. and the Instruction of S. C. C. of 1840--form at the present day the law of the Church concerning the trial or mode of procedure to be followed all over Christendom in matrimonial causes of nullity.<sup>1</sup> Where circumstances do not allow of the full and complete observance of each and every item prescribed in the above Constitution of Benedict XIV., as authentically explained by the Instruction of the S. C. C. of 1840, a dispensation can be obtained from the Pope to that effect. In fact, the Holy See frequently grants such dispensation, and permits the trial in causes of nullity to be conducted informally--that is, without the observance of all the various judicial formalities prescribed in the above documents. But the Holy See always insists,

<sup>1</sup> Mansella, l. c., p. 182.

even when it gives the dispensation, on the observance of the *substantial* formalities required by the above documents and especially on the presence of the defender of the marriage.<sup>1</sup>

1452. We shall now, before proceeding to describe the formalities of the trial in matrimonial causes of nullity, give a synopsis of the chief features of the Constitution *Dei Miseratione* of Pope Benedict XIV. In the preamble of the Constitution the great Pontiff deplores the facility and haste with which marriages were being pronounced invalid in some of the ecclesiastical courts,<sup>2</sup> and the scandal thus given.<sup>3</sup> Next, the causes of this abuse are enumerated. Among these causes the Pope points out these: (*a*) That certain ecclesiastical judges pronounce marriages invalid upon slight or no investigation; (*b*) that frequently but one of the married couple—namely, the husband or wife who demanded the nullity—appeared at the trial, the other failing to appear and defend the marriage. Whence it happened that the party demanding the annulment of the marriage easily obtained a sentence of nullity, and was thus enabled to remarry.

1453. (*c*) That even where both appeared for trial, it often came to pass that if the sentence declared the marriage invalid, neither of them appealed to the higher (ecclesiastical) court, and that either because they were in collusion with each other for the purpose of having their marriage declared invalid, or because, even where they had acted in good faith, the defendant or party that had sustained the validity of the marriage, once sentence of invalidity was rendered, failed to appeal—*v.g.*, because he or she was destitute of the money or other means of prosecuting the appeal, or also because he or she underwent a change of mind on the subject.<sup>4</sup>

1454. To remedy these grave evils the Pope lays down

<sup>1</sup> Cf. Kutschker, l. c., vol. v., p. 525.

<sup>2</sup> Const. Dei Miseratione, § 1.

<sup>3</sup> *Ib.*, § 2.

<sup>4</sup> Const. Dei Miseratione *cit.*, § 3.



the following enactments, which constitute the law of the Church in this matter at the present day, all over Christendom, and at present also in the United States: 1. Each and every Ordinary of the whole Catholic world shall appoint in his diocese a *defender of marriage* (*matrimonii defensor*), who shall, if possible, be an ecclesiastic, and skilled in canon law, and of unblemished character.' 2. This defender is to be regarded *tanquam pars necessaria ad iudicii validitatem*, in all cases where there is question of the validity or nullity of marriages—that is, in all cases where there is question of annulling, *v.g.*, because of an alleged annulling impediment, a marriage *already contracted*, but not where there is question of the validity of a marriage *about to be contracted*. Hence all proceedings in such causes of nullity are null and void if the defender of the marriage is not properly cited to act in the case, and is therefore absent. Nay, he must be cited, not merely once,—namely, at the beginning of the trial,—but at every subsequent stage or judicial act, and any act whatever of the court to which he is not called is of no effect whatever. Thus Pope Benedict XIV. expressly says: “Quaecunque eo” (defensore) “non legitime citato, in iudicio peractae fuerint, nulla declaramus.”<sup>1</sup>

1455. 3. *Now, what are the chief duties of this defender of the marriage?* (a) He is strictly bound to be present at all the proceedings in the case. In fact, he is a necessary or legal co-defendant in every cause of nullity, and as such must assist at all the proceedings at which the real defendant—that is, the husband or wife against whom the annulment of the marriage is asked—has a right to assist, and that even when the latter is present in person. Hence the defender is obliged to be present at the examination of witnesses, etc.' But he is moreover, *ex officio*, a necessary member and official of the court itself, and as such has the right and duty to

<sup>1</sup> Const. Dei Miseratione cit., § 5.

<sup>2</sup> *Ib.*, § 7.

<sup>3</sup> *Ib.*, §§ 6, 7.

assist at all the sessions or meetings of the court, and to have free access at all times to the documents and testimony of either of the contending parties.<sup>1</sup>

1456. (b) He should carefully examine the facts in the case, and both orally and in writing submit to the court all possible proofs and arguments in favor of the validity of the marriage, and in rebuttal of the proofs and arguments advanced by the party seeking to have the marriage set aside.<sup>2</sup> (c) He must, as we have seen, take an oath to fulfil his duties faithfully, and that not only when he is first appointed, but every time he acts in a cause.<sup>3</sup> He is appointed by the bishop, and removable by him for cause.<sup>4</sup>

1457. (d) If in the first instance the marriage is sustained as valid, he should not appeal. But if the contrary happens, he is bound to appeal, even though the party against whom the sentence was pronounced does not wish to appeal. If the court of the second instance, like that of the first, also pronounces the marriage invalid, he need not appeal again unless he thinks proper. We say, *unless he thinks proper*; for he may and should appeal a second time, namely, to the Holy See, where he believes that he cannot conscientiously acquiesce in the sentence of nullity pronounced by the court of the second instance—*v.g.*, because the sentence seems to him manifestly unjust or invalid, or because it reverses the sentence declaring the marriage valid as given in the first instance.<sup>5</sup>

1458. So far as the husband and wife in the case are concerned, whose marriage is being called in question, they are forbidden, on pain of incurring all the penalties established by the Church against polygamists and others<sup>6</sup> who contract marriage against the prohibition of the Church, to consider their marriage as dissolved, and pass to a new marriage, pend-

<sup>1</sup> Instr. S. C. C., 22 Aug., 1840, § Hisce praemissis, in fine.

<sup>2</sup> Const. cit., § 6; Kutschker, l. c., p. 494.

<sup>3</sup> Const. cit., § 7.

<sup>4</sup> Ib., § 5.

<sup>5</sup> Ib., § 11.

ing any of the above appeals.<sup>1</sup> Only after their marriage has been declared invalid *twice*,—that is, both in the first and second instance,—can they remarry, provided the defender of the marriage does not appeal also from the second decision. In the latter case they must wait for the issue of the trial in the third and last instance.<sup>2</sup>

1459. However, it must be observed that even when the marriage has been, as above stated, twice declared invalid, and the parties have remarried, it is allowed *at any time* afterwards, no matter how many years may have elapsed, to produce new proofs (*i.e.*, proofs which have been either *newly* discovered or were not submitted in the former trials, either because of collusion, ignorance, etc.) in the ecclesiastical court to show that the marriage was valid.<sup>3</sup> For matrimonial causes of nullity *never* become *res judicatae*.<sup>4</sup> The only exception is, where both of the married couple are dead, and thirty or forty years afterwards the legitimacy of their children is impugned, on the ground that their marriage was null and void.<sup>5</sup>

This is a summary of the regulations made by Pope Benedict XIV., in his renowned constitution *Dei Miseratione*. Hence, whenever it is sought to have a marriage, which has been already contracted, dissolved because of an alleged annulling impediment,—*v.g.*, consanguinity, affinity,—the defender of the marriage has to be called to the proceedings, as above stated, and that on pain of nullity of the trial.

1460. The constitution *Dei Miseratione* of the immortal Pontiff, Benedict XIV., is now obligatory, also in the United States. This is expressly stated by the *Third Plenary Council of Baltimore*, n. 304, which says: “In agendis hisce causis (matrimonialibus) pro rei gravitate exacte servetur tum constitutio Benedicti XIV. *Dei Miseratione*, 3 Nov. 1741,

<sup>1</sup> Const. cit., §§ 9, 11.

<sup>2</sup> *Ib.*, § 11.

<sup>3</sup> *Ib.*, § 11.

<sup>4</sup> Cap. 7, de Sent. (ii. 27); *ib.* Glossa, v. Permanere.

<sup>5</sup> Schmalzg., l. 4, t. 18, n. 27.

<sup>6</sup> *Supra*, n. 1407, 1417.

turn Instructio a S. Congr. de Prop. Fide nobis communicata, quae incipit *Causae Matrimoniales*.”<sup>1</sup> The same is manifest, also from the above Instruction of the Propaganda mentioned by the *Third Plenary Council of Baltimore*, in the passage just quoted. For, this Instruction embodies in its provisions all the enactments of the constitution *Dei Miseratione* relative to the *defensor matrimonii*, as explained already above, n. 1452 sq.

§ 2. *Various Stages of the Trial.*

1461. Having thus far pointed out the rights and duties of the judge, secretary, and defender of the marriage, we shall now briefly describe the trial itself, or its various formalities and stages. These formalities are laid down in the above-quoted Instruction of the S. C. C., of August 22, 1840, which is obligatory all over Christendom, and constitutes the law at present in force everywhere. The provisions of the latter document are applied to the United States by the S. C. de Prop. Fide, in its latest Instruction issued in 1884, and beginning with the words *Causae Matrimoniales*, which is now obligatory all over this country. The trial for matrimonial causes involving the validity of marriages already contracted (of which alone we here speak), as outlined in these Instructions, is conducted in the following manner.

1462. When the ecclesiastical judge is about to take cognizance of a marriage which is alleged to have been contracted with an annulling impediment, he shall receive the complaint or accusation of the nullity of the marriage (*accusatio matrimonii*), that is, the demand for its annulment, only from those persons who are qualified by ecclesiastical law to make the demand. For, as we shall see, in the case of some impediments the married couple alone has the right and is allowed to demand the annulment. In the case of others,

<sup>1</sup> Cf. Kutschker, l. c., vol. v., pp. 520, 524.

the parents and relatives, or any other persons whatever, can make the demand ; finally, in the case of other impediments, the judge himself can and is sometimes even obliged to inquire *ex officio* into the validity of the marriage. The accusation of the marriage should be made in writing, no matter whether it is made by the married couple itself, or others.<sup>1</sup> In receiving this accusation, the ordinary or judge should also endeavor to obtain from the plaintiff, or accusing party, a full statement of the case, together with a list of the witnesses and of the other proofs.<sup>2</sup>

1463. Having thus received the complaint or accusation of the marriage, the bishop appoints (*a*) another ecclesiastic—*v.g.*, his vicar-general, or some other worthy and learned ecclesiastic—to act as judge for him, unless he has already permanently appointed one beforehand, or prefers to adjudicate the cause in person ; (*b*) a secretary ; (*c*) and a defender of marriage.<sup>3</sup> Of course, where these officials are appointed *permanently* in a diocese, it is unnecessary to make these appointments each time a cause presents itself.

1464. The matrimonial court being thus organized, the trial begins with the examination of the plaintiff and defendant, and other witnesses. The order in which these various persons are examined, as laid down in the above Instruction, is as follows : First, the plaintiff—that is, the spouse or other person who demands the annulment of the marriage or contends that it is null—is examined or heard, and that under oath, and in the presence of the judge or his deputy, the defender, and the secretary.<sup>4</sup> The mode of examination is this: The defender of the marriage having previously prepared written questions or interrogatories, hands them sealed to the judge or secretary in court, and in the presence of the complainant.<sup>5</sup> Next, at the request of the defender, the

<sup>1</sup> Instr. S. C. C., 22 Aug., 1840, § Hisce praemissis.    <sup>2</sup> Mansella, l. c., p. 184.

<sup>3</sup> Supra, n. 1421.    <sup>4</sup> Instr. S. C. C. cit., § Praefinita.    <sup>5</sup> Ib., § Cum itaque.

judge, or by his command the secretary, opens them, and puts them one by one to the plaintiff. The judge himself, as also the defender, may *ex officio* add other questions in the course of the examination, as he sees fit. The secretary or notary will carefully write down, and that *verbatim*, both the questions and the answers thereto.<sup>1</sup>

1465. When the examination is over, the secretary will read aloud, in a clear and intelligible voice, the deposition or answers of the plaintiff, and the latter shall have the right to change or explain his answers as he pleases. Then he shall again swear that he has told the truth, and that he will not divulge either the interrogatories put to or the answers given by him before the publication of the proceedings.<sup>2</sup> Finally, he shall sign his deposition, and if he cannot write, put a cross (+) in the place of his name. Afterwards the judge, the defender, and the secretary affix their signatures.<sup>3</sup>

1466. The plaintiff should in his examination give a clear and full *exposé* of the case, or of the grounds of his demand for the annulment of the marriage, indicate the various kinds of proofs by which he believes he can sustain his demand, state all the circumstances which he either knows of his own personal knowledge or has heard from others, and if he affirms that he can prove his assertions by the testimony of witnesses, he should name them, and they should afterwards be examined. Whether one of the married couple demands the annulment, or none of them, both must always be cited and heard during the trial, in order that they may defend their rights, and rebut any proofs brought against them.<sup>4</sup>

1467. The spouse or plaintiff thus examined can, either immediately after his or her examination, or later on in the course of the trial, though before the publication of the proceedings, submit interrogatories to the judge, on which the defendant or spouse against whom the annulment of the mar

<sup>1</sup> Instr. S. C. C. cit., § Interim.

<sup>2</sup> Mansella. l. c., p. 186.

<sup>3</sup> *Ib.*, § Si examen.

<sup>4</sup> *Ib.*

riage is sought shall be examined by the judge, in the presence of the defender of the marriage. And if, in turn, the defendant wishes also to submit questions to be put to his or her spouse who is the plaintiff, the judge shall receive them, and put them to the plaintiff, in the presence of the defender.<sup>1</sup> This mode of examination is to be observed in all the other examinations of witnesses. All the persons in the case—that is, the married couple as well as the witnesses—are examined apart from each other and under oath.<sup>2</sup>

1468. After the examination of the plaintiff or spouse who seeks the annulment of the marriage follows that of the defendant—that is, of the spouse against whom it is sought to have the marriage declared invalid. This examination is, as we have seen, conducted in the same manner with that of the plaintiff above described. The questions put to the defendant may be either the same with those put to the plaintiff, or others, as the defender of the marriage may see fit.<sup>3</sup>

1469. Next comes the examination of the witnesses. The witnesses for the plaintiff are examined first; those of the defence afterwards. The mode in which the witnesses are examined is the same with that of the plaintiff and defendant as described above.<sup>4</sup> The married couple shall be free to produce any witness of good character they choose. When the witnesses have all been examined, and the other proofs, such as instruments,—*v.g.*, parochial registers, private letters, etc.—submitted, the publication of the proceedings takes place.<sup>5</sup> The defence may then submit new proofs and arguments.<sup>6</sup> Finally, the parties—the plaintiff and defender—sum up the case, and the judge, after consulting canonists and theologians, pronounces final sentence.<sup>7</sup>

1470. Whether this trial or mode of procedure can be

<sup>1</sup> Instr. S. C. C., 22 Aug., 1840, § Poterit.

<sup>2</sup> Mansella, p. 125

<sup>3</sup> Instr. cit., § Expleto. <sup>4</sup> *Ib.*, § Deinde procedendum. <sup>5</sup> Cf. *supra*, n. 855.

<sup>6</sup> Cf. *supra*, n. 856-859.

<sup>7</sup> Instr. cit., § Locus erit.

conducted in a summary manner, so far as this is compatible with the above formalities, we have seen already.<sup>1</sup> We also observe that the trial as above described may and usually is preceded and inaugurated by a preliminary investigation. The object of the latter is to ascertain as far as possible all the facts in the case, and thus to enable the judge to know whether he is justified in going on with the trial or hearing of the case.

1471. This preliminary trial usually consists in the informal examination of the married couple, of the witnesses on both sides, and of all the other evidence bearing on the case. We say, *informal*, etc.; for the proceedings are informal, and the judge is not bound to observe any judicial formalities. The minutes of the proceedings, however, should be carefully kept by the secretary. Generally, the judge does not conduct this preliminary examination in person, but commissions some other person to do it and to report to him.<sup>2</sup> As in the preliminary trial for a simple divorce *a mensa et toro*, so also in the preliminary trial for the annulment of the marriage, the parish priest or rector of the parish of the parties whose marriage is being called in question is requested by the bishop's court for matrimonial causes to forward a statement of the case to the court.

1472. As a rule, a similar informal preliminary trial (*processus informativus*) takes place, as has been shown, also in causes of divorce *a mensa et toro*. However, the effect of such preliminary investigation is sometimes different in causes of nullity from its effect in causes of mere separation *a mensa et toro*. For in the latter case, if the judge discovers sufficient evidence on the preliminary trial, he may forthwith pronounce sentence; whereas in the former case—*i. e.*, in causes of nullity—the real or formal trial, as traced out above, cannot be omitted.

<sup>1</sup> *Supra*, n. 1424.

<sup>2</sup> Card. Kutschker, l. c., vol. v., pp. 763, 765, 767.



§ 3. *Formalities to be observed in regard to the Annulment of a Marriage which is ratum not consummatum.*

1473. A marriage, though validly contracted, if not yet consummated, can be dissolved in two ways: (a) by one of the parties entering a religious community approved by the Holy See, and taking solemn vows;<sup>1</sup> (b) by dispensation of the Supreme Pontiff.<sup>2</sup> Here we observe with Bouix, that petitions are not unfrequently addressed to the Holy See for such dispensations.

1474. For the *validity* of the dissolution of the marriage in the case, whether by religious profession or papal dispensation, it is necessary that the marriage has not been consummated.

1475. Now what is the mode of procedure in dissolving a marriage which is *ratum*, but not yet *consummatum*? In both cases—namely, whether the dissolution takes place by religious profession or pontifical dispensation—the non-consummation must be fully and canonically *proven*, and therefore the mere assertion or confession, even though confirmed by oath, of the married couple, is of itself insufficient. Hence, in the case of the dissolution of the marriage by religious profession, the married couple cannot separate of their own accord, but must apply to the ecclesiastical court of the diocese to which they belong, whose right and duty it is to examine the case, by a trial or judicial proceedings, and pronounce sentence.<sup>3</sup>

1476. Moreover, in the case of the dissolution of the marriage by papal dispensation, a sufficient cause should be alleged, apart from the non-consummation. Hence, in the petition for such a dispensation, two things must be clearly shown: *First*, that the marriage was not consummated;

<sup>1</sup> C. Trid., sess. 24, can. 6, de Sac. matr.; cap. Verum, de Convers. conjug.; Bened. XIV., de Syn., l. 13, c. 12.

<sup>2</sup> Const. Dei Miseratione cit., § 15. <sup>3</sup> Kutschker, l. c., vol. i., pp. 283, 284.

*secondly*, that there is just cause for the granting of the dispensation. Unless both these things be proved, the dispensation will not be granted. These two conditions, however, are required only for the licitness of the dispensation. For the dispensation would be *valid*, though illicit, even though the non-consummation of the marriage were not *proved*, provided it really were a fact.<sup>1</sup> For the causes which are usually considered sufficient for such a dispensation, see Cardinal Kutschker.<sup>2</sup>

1477. The married couple can send their petition to Rome themselves, though it is much better to do so through the Ordinary. The petition, which should be addressed to the Pope himself, should state all the facts and circumstances of the case, the causes upon which the request for the dispensation is based,<sup>3</sup> the names of both of the married couple, their residence, the parish and diocese to which they belong, the priest before whom their marriage was contracted.<sup>4</sup> Here it is necessary to observe that the Pope grants such a dispensation only when the petition therefor emanates from at least one of the spouses themselves, but not when it comes from others.<sup>5</sup>

1478. The Holy Father, upon receipt of the petition in the case, submits it to one of the sacred congregations,—generally to the Sacred Congregation of Council, whose duty it is, not indeed to grant the dispensation,—for this is reserved exclusively to the Pope,—but to examine all the facts in the case, and advise the Holy Father whether, in view of the facts ascertained, the dispensation should be granted or refused.<sup>6</sup>

1479. In order that the S. C. C., when such a case is referred to it by the Pope, may be able to give the Holy

<sup>1</sup> Bouix, de Jud., vol. ii., p. 455.

<sup>2</sup> L. c., vol. i., p. 312 sq.

<sup>3</sup> Kutschker, l. c., p. 317.

<sup>4</sup> Bened. XIV., Const. Dei Miseratione, § 15.

<sup>5</sup> S. C. C. in Agrigent., 15 Martii, 1727; cf. Kutschker, l. c., p. 316.

<sup>6</sup> Bened. XIV., Const. cit., § 15.

Father its advice or consultative vote on the petition for the dispensation, it usually writes to the Ordinary of the parties for his opinion and for further information—*pro voto et informatione*. It then becomes the bishop's duty to institute a canonical summary trial for the purpose of juridically ascertaining the non-consummation of the marriage, and the existence of legitimate causes for the dispensation.<sup>1</sup>

1480. *Q.* Is the S. C. C., and the bishop to whom it writes for information, bound, in verifying the non-consummation of the marriage and the existence of legitimate causes for the dispensation, to proceed in the manner prescribed by Pope Benedict XIV. in his constitution *Dei Misericordie*, especially so far as making use of a defender of marriage is concerned?

*A.* Cardinal Kutschker<sup>2</sup> seems to hold the affirmative, so far as the bishop is concerned, and therefore by implication also in relation to the Sacred Congregation of Council. Bouix maintains the negative. His reasoning is substantially as follows: The formalities prescribed by Benedict XIV. are binding only on judges *who are to pronounce upon the validity or invalidity of a marriage*. Now, in the case under discussion, no such sentence is or can be pronounced, as the marriage is supposed to be, and always to have been perfectly valid, though not consummated. Moreover, the dispensation in a marriage which is *ratum* not *consummatum* is reserved exclusively to the Pope, and cannot be granted by the Sacred Congregation of Council, much less by any bishop. Hence the Sacred Congregation's duty consists simply in *advising* the Pope as to whether the dispensation is to be granted or not. So also the bishop to whom the S. C. C. writes for information cannot proceed to declare the marriage null. His duty is simply to report to the Sacred Congregation whether the marriage has been consummated or not, and whether there are legitimate reasons for granting the dispensation.<sup>3</sup>

<sup>1</sup> Kutschker, l. c., p. 317.    <sup>2</sup> L. c., p. 317.    <sup>3</sup> Bouix, de Judic., vol. ii, p. 458.

1481. Whatever may be said on this head, practically speaking it will always be safer for the bishop to make use of the defender of the marriage, as prescribed by Benedict XIV. Thus the S. C. C. is accustomed to appoint and hear this defender in the causes here under consideration.<sup>1</sup> In regard to the special mode of procedure, when either or both of the married couple demand the annulment of the marriage because of alleged impotence, see the Instruction of the S. C. C., August 22, 1840, above quoted, and also the Instruction of the Supreme Congregation of the Holy Office, both of which documents we shall give in the Appendix.

§ 4. *Judicial Proofs in Matrimonial Causes of Nullity.*

1482. *Judicial proofs in these causes, in general.*—Once a marriage has been contracted in due form, or as canonists say, *in facie ecclesiae*,—that is, with the prescribed formalities,—the presumption is always in favor of its validity.<sup>2</sup> Hence, whoever wishes to have a marriage, once it has been contracted, annulled, must *clearly* and *fully* prove its nullity. In other words, he must show, by proofs which are canonically and juridically full and complete (*probatio plena*)—*v.g.*, by the testimony of two unexceptionable witnesses—that the marriage is invalid—*v.g.*, because of an annulling impediment existing at the time of its solemnization.<sup>3</sup> Hence also, when a marriage is contested as invalid before the ecclesiastical court, by either of the married couple or by others, and the ecclesiastical judge, upon due trial or investigation, finds that the invalidity is not fully and completely established, but that a doubt remains as to whether the alleged impediment exists or not, he must pronounce in favor of the validity of the contested marriage.<sup>4</sup>

1483. Consequently, whenever it is asserted by one of the

<sup>1</sup> Bouix, de Judic., vol. ii., p. 457.

<sup>2</sup> Cap. 5, de Eo qui cogn. (iv. 13): cap. 22, de Test. (ii. 20).

<sup>3</sup> Arg. cap. 1, de Consang. (iv. 14).

<sup>4</sup> Reiff., l. 4, t. 19, n. 17, 21.

married couple that an annulling impediment exists by which the marriage is null and void, it is incumbent upon this party to prove fully and beyond a doubt that such an impediment really does exist. Here we observe with Cardinal Kutschker, that where there is question of a double marriage—namely, where a party has married a second time, while the spouse of the first marriage is still living—the presumption is in favor of the first marriage, not of the second. Consequently the second marriage, even though contracted *in facie ecclesiae*,—*i.e.*, in due form,—must be presumed null and void until the first marriage is *clearly proved* invalid.<sup>1</sup>

1484. From what has just been said, it will be seen that it may happen that a married person may be perfectly certain personally of the nullity of his or her marriage (*v.g.*, if he knows that an annulling impediment existed at the time the marriage was contracted), and yet be unable to prove it *juridically* or *canonically*. What is to be done? It is certain that such a person cannot ask or render the *debitum marital* ; otherwise he would be acting against his conscience. He is, moreover, bound to separate from the other spouse, unless he can live with her, or she with him, as brother and sister. It is true that *in foro externo* the ecclesiastical judge would have to compel them to live together as a married couple, there being no juridical proof of the invalidity of the marriage. But the person in the case would be obliged to disobey this judicial mandate.<sup>2</sup>

1485. *Judicial proofs in matrimonial causes of nullity, in particular.*—Having given certain general principles concerning the proofs in question, we now proceed to touch upon each kind of proofs in particular. As we have already discussed the nature and force of the various kinds of judicial proofs, as admissible in criminal and civil ecclesiastical trials in general,<sup>3</sup> and as the proofs in matrimonial causes or trials

<sup>1</sup> Kutschker, vol. v., p. 832.

<sup>2</sup> Reiff., l. c., n. 22, 23.

<sup>3</sup> *Supra*, n. 814 sq.

partake in general of the same nature, and are governed by the same principles, we shall only say a few words in regard to each of these proofs.

1486. The chief kinds of proofs in matrimonial causes are the confession or deposition of the married couple itself; instruments; the testimony of witnesses; the inspection and testimony of experts; the oath. 1. *The confession of the married couple.*—We have seen above, that a judicial confession constitutes full proof, nay, the strongest of proofs.<sup>1</sup> This rule, however, does not hold in causes of nullity of marriages. In these causes the confession, admission, or testimony of either of the married couple, or even of both, as against the validity of a marriage contracted by them, has of itself no force, even when it is corroborated by rumor among the neighbors.<sup>2</sup> This is expressly enacted by Pope Celestine III., as follows: “Propter eorum” (conjugum) “confessionem tantum, vel rumorem vicinia separari non debent.”<sup>3</sup>

1487. The reason of the inadmissibility of the confession of the married couple lies in the evident danger of collusion on their part. For it is plain that if married people who are tired of their marriage, and anxious to break it, knew that the ecclesiastical judge would dissolve their marriage on the strength of their confession alone, they would readily agree with each other that one of them should affirm the existence of an annulling impediment (though it does not really exist), and that the other should corroborate this false statement either expressly or at least tacitly—*v.g.*, by not saying anything at all, or by not appearing in court, when cited, to defend the marriage.<sup>4</sup> This reason is thus set forth by Pope Celestine III.: “Cum quandoque nonnulli inter se contra matrimonium *velint colludere*, et ad confessionem incestus” (or

<sup>1</sup> *Supra*, n. 823.      <sup>2</sup> Reiff., l. 4, t. 19, n. 16; Permaneder, l. c., § 331.

<sup>3</sup> Cap. *Super eo* 5, de eo qui cogn. (iv. 13).

<sup>4</sup> Kutschker, l. c., vol. v., p. 845.

of some other impediment) “ facile prosilirent, si suo iudicio crederent, per iudicium ecclesiae concurrendum.”<sup>1</sup>

1488. It is partly also owing to the fear or danger of collusion in the married couple that the malicious and wilful disobedience to the citation for trial, on the part of either of the married couple, is not at all to be taken as proof against the validity of the marriage. This contumacy, as we have shown in the case of criminal and grave civil causes, has simply this effect, that the cause or trial may now go on *in the absence* of the contumacious party as though he were present; and sentence may be pronounced against the absent party, though only if the testimony as brought out during the trial is clear and complete.<sup>2</sup> Observe that in these causes the defender of the marriage is always the *ex officio* co-defendant, and it is his duty to supply the place of the party contumaciously absent.

1489. Of course, where either of the married couple is absent indeed from the trial, but not wilfully or maliciously, the trial cannot go on, and the cause must be left *in statu quo* until he or she either appears, or undoubted proof of his or her death is obtained.<sup>3</sup>

1490. We said above,<sup>4</sup> that the confession of the married couple had of itself no force as against the marriage. Observe the words *of itself*. For, taken in conjunction with other proofs, this confession or statement of the married couple may be of considerable importance, and enable the judge to arrive at a better knowledge of the facts in the case. Hence also, as we have seen, both the husband and wife whose marriage is being called in question should be examined, and that before any one else, at the trial. It is for the judge to weigh their evidence or statement, and to decide whether it is based on truth or collusion and fraud.<sup>5</sup>

<sup>1</sup> Cap. 5 cit.; Glossa, ib. v. Confessionem.

<sup>2</sup> Cap. 5, § Porro specialis, ut lite non cont. (ii. 6); cap. 10, de Sent. (ii. 27), S. C. C. in Cajet., 2 Oct., 1728, et in Milev., 1821; Kutschker, l. c., p. 775.

<sup>3</sup> Cap. 5 (ii. 6).

<sup>4</sup> Supra, n. 1486.

<sup>5</sup> Mansella, l. c., p. 187.

1491. 2. *Instruments as proofs in matrimonial causes.*—The principles laid down by us above,<sup>1</sup> concerning the various kinds and the force of instruments, apply here also. We merely observe that matrimonial registers are considered public instruments in matrimonial causes, and consequently constitute of themselves full proof. Nay, a single document of this or a similar kind has of itself greater force than the testimony of two unexceptionable witnesses. Hence the following axiom of law: “*Contra authenticum litterale instrumentum, humanum non admittitur testimonium.*”<sup>2</sup> The meaning of this axiom is not that such instruments can never be overthrown by proper evidence, but simply that they can be shown to be false only by *clear and manifest proofs* to that effect.<sup>3</sup>

1492. 3. *Witnesses as proofs in matrimonial causes.*—The third kind of proofs in matrimonial causes is the deposition of witnesses. Of this kind of proofs we have already spoken at sufficient length.<sup>4</sup> Here we shall subjoin but a few words, specially applicable to the causes under consideration. As in other causes, so in matrimonial causes of nullity, two witnesses who are above all suspicion are, as a rule, required and sufficient to prove the invalidity of a marriage. We say, *as a rule*; for when there is question of establishing the impediment of sexual impotency for the purpose of annulling a marriage already contracted, and the inspection or examination of the sexual organs of the married couple by experts—*i. e.*, physicians for the husband, and midwives for the wife—does not give a certainty but a mere probability of the existence of impotency,<sup>5</sup> then it becomes necessary for the spouses to swear that they cannot consummate the *copula*, and for *seven (septima manus)* relatives or neighbors, or in their default seven other reliable persons, to swear that they

<sup>1</sup> *Supra*, n. 864 sq.

<sup>2</sup> Cf. cap. 10, de Fide instr. (ii. 22).

<sup>3</sup> Phillips, Comp. § 263.

<sup>4</sup> Mansella, l. c., p. 188.

<sup>5</sup> *Supra*, n. 825 sq.



believe what the spouses affirm under oath to be true.<sup>1</sup> By custom, however, where seven such persons cannot be had a less number is sufficient.

1493. The questions to be put to the witnesses in matrimonial causes are, as in other causes, general and particular. The general questions are the same for nearly all matrimonial causes. They are chiefly these: What is your name, age, religion, condition or station in life, residence? Do you know the married couple, their parents, relatives, etc.? Are you a relative of theirs? In what degree, etc., etc.? Please state the facts in the case as you know them? It is well to allow the witness to tell what he knows in his own way.

1494. Next, the particular questions are to be asked. They are to be taken from and based on the statement or testimony of the married couple, and all other facts and arguments submitted to the court. They are framed by the defender of the marriage.<sup>2</sup> Of course, these particular questions vary considerably according to the various kinds of annulling impediments which are alleged against the validity of the marriage. Specimens of such questions are given by Mansella,<sup>3</sup> to whom we refer the reader.

1495. 4. *Corporal inspection by experts* is the next kind of proofs in matrimonial causes. This means is employed under certain conditions, as we have already intimated,<sup>4</sup> in those cases where the marriage is impugned because of alleged impotency or the physical inability to consummate the *copula*, or in order to prove that a *matrimonium ratum* was not consummated.<sup>5</sup> Concerning this corporal inspection by experts, see the Instruction of the S. C. C. of August 22, 1840, and the Instruction of the Congregation S. O., both of which documents lay down the mode in which it is to take place.

1496. 5. *The oath as a proof in matrimonial causes.*—As we

<sup>1</sup> Instr. S. C. C., 22 Aug., 1840; Instr. S. C. Off. de impot. impot.

<sup>2</sup> Mansella, l. c., p. 198.

<sup>3</sup> *Ib.*, p. 199.

<sup>4</sup> *Supra*, n. 1492.

<sup>5</sup> Mansella, l. c., p. 203.

have seen, not only the spouses themselves, but also all the witnesses, must depose under oath. Otherwise their testimony is of no force whatever. Hence it will be seen that the oath adds great weight to the testimony, and is therefore a necessary part of the proofs in matrimonial as in other causes.<sup>1</sup>

§ 5. *What Persons are qualified by the Law of the Church to act as (a) Plaintiffs and (b) Witnesses in Matrimonial Causes.*

1497. *Q.* What persons can and should be admitted to object to or contest a marriage (*accusare matrimonium*)? In other words, what persons can be *plaintiffs* against a marriage?

*A.* We premise: We are speaking here not of marriages *about to be contracted*. For all persons whatever who know of an impediment existing between persons about to be married can, nay, even if they are unable to prove its existence, are bound, if they can do so conveniently, to make it known, so as to prevent the marriage from taking place.<sup>2</sup>

1491. We speak, therefore, only of marriages *already contracted*, both so far as the separation from bed and board and the dissolution of the *vinculum* itself are concerned. Now in these cases not all persons are promiscuously admitted as plaintiffs. What persons, therefore, are admitted by the law of the Church, as in force also in the United States, to demand the separation *a mensa et toro*, or the annulment of the marriage? *First*, when there is question of separation *a mensa et toro*, only the innocent spouse can act as plaintiff—that is, demand the separation. The reason is, that the right of complaint or asking for such divorce is granted in favor of the innocent party, who has a perfect right to condone the injury and thus relinquish the right of preferring the complaint.<sup>3</sup>

<sup>1</sup> Mansella, l. c., p. 205.    <sup>2</sup> S. Alph. l. vi., n. 995; Konings, n. 1541, q. 3.

<sup>3</sup> Ex cap. 5, de Procur. (i. 38); cap. 4, de Adult. et stupr. (v. 16).

1499. This, however, is to be understood only of a *civil* action for such divorce—that is, only of an action instituted before the ecclesiastical judge solely for the purpose of obtaining the separation. Therefore it does not extend to a *criminal* action. Hence when there is question, not simply of obtaining a divorce, but rather of *punishing* the adulterous spouse, any person whatever can make the complaint—that is, act as accuser or plaintiff, provided he be a male and twenty-five years old.<sup>1</sup>

1500. *Secondly*, when there is question of dissolving the *vinculum* of a marriage already contracted, it is necessary to distinguish between three kinds of annulling impediments, on account of which the demand for the annulment of the marriage is made. The first kind comprises those which arise from a defective consent—namely, the impediments of fear and error. The second kind are the impediments of public propriety (*publica honestas*) and of consanguinity and affinity *ex copula conjugali*. The third includes all the other impediments—*v.g.*, the impediment of *ligamen*.

1501. Now the dissolution or annulment of a marriage contracted with an impediment of the first class can be demanded only by the married couple itself. The reason is, that if the couple is willing, either expressly or tacitly, to ratify or renew their consent given under grave fear or substantial error, and thus make the marriage valid, they can do so, and no one else has a right to interfere or complain.<sup>2</sup> Nay, the law of the Church presumes that the married couple in the case does actually ratify the marriage, if after becoming aware of the impediment they nevertheless know each other carnally.<sup>3</sup> Hence if in the latter case the married couple nevertheless wished to have their marriage annulled, they could not be heard.

1502. The impediment of impotency is placed on the same

<sup>1</sup> Schmalzg., l. c., n. 13.

<sup>2</sup> Schmalzg., l. c., n. 15.

<sup>3</sup> Cap. 4, Qui matr. acc. (iv. 18).

footing with those just described, so far as the right to act as plaintiff or accuser against the marriage is concerned.<sup>1</sup> For the married couple can, if they choose, live together as brother and sister, notwithstanding the *impedimentum impotentiae*.<sup>2</sup>

1503. In the second case,—that is, in the case of the impediments of public propriety and of consanguinity and affinity,—those persons are admitted as plaintiffs who usually are best acquainted with the facts. Such are evidently, besides the married couple itself, their parents, next their brothers and sisters and other relatives; then neighbors; finally, in default of the foregoing, all others who may have a knowledge of the facts.<sup>3</sup>

1504. In the third case, not only the married couple itself, but all persons, as a rule, who are cognizant of an impediment, are allowed to contest the marriage and demand its annulment, especially when their interest is concerned in the matter, provided, of course, they are of a good character and worthy of belief.<sup>4</sup> We observe that in the case of impediments of the second and third class the ecclesiastical judge may and sometimes should himself proceed *ex officio* against the marriage if the other parties fail to do so.

1505. What persons, in particular, are chiefly excluded from acting as plaintiffs against a marriage? All those who are not above suspicion, and therefore not worthy of belief. Hence the following persons are chiefly excluded as plaintiffs: (a) Those who accept money for acting as plaintiffs, or exact money for desisting from acting as such.<sup>5</sup> (b) Those who neglected to reveal the impediment at the time the publication of the banns took place, prior to the marriage, unless they prove under oath that owing to absence, sickness, and the like they were ignorant of the publication of the banns,

<sup>1</sup> Mansella, p. 179.

<sup>2</sup> Cap. 4, 5, de Frig. et malef.

<sup>3</sup> Cap. 3, Qui matr. acc. (iv. 18); Mansella, l. c., p. 180.

<sup>4</sup> Manseila, l. c., p. 180.

<sup>5</sup> Cap. 5, Qui matr. acc.

or that they did not become aware of the impediment any sooner.<sup>1</sup> (c) As a rule, those who impugn the marriage merely by letter, without being present personally.<sup>2</sup> The object of this law is to prevent calumnious denunciations, which would occur frequently if the complaint or accusation could be made by an absent person. Hence a person who demands the annulment of a marriage must, as a rule, present this demand in person to the judge, and that in writing.<sup>3</sup>

1506. *Q.* What persons are admissible *as witnesses* in matrimonial causes of nullity? In other words, who can *testify* for or against the validity of a marriage?

*A.* All those who have a knowledge of the impediment objected by the plaintiff, and are otherwise worthy of belief.<sup>4</sup> Hence even parents, brothers and sisters, and other relatives of both sexes, are competent witnesses in these causes, at least where there is question of dissolving the marriage on account of an impediment of consanguinity or affinity, or public propriety.<sup>5</sup> The reason is, that they are not only better acquainted with the degree of relationship existing between the married couple, but are believed, moreover, to be opposed to incestuous marriages, as bringing disgrace upon their family.<sup>6</sup> From what has been said, it will be seen that while parents and relatives are not usually admissible as witnesses in other civil causes, nor in criminal causes,<sup>7</sup> they are competent witnesses in the causes under consideration.

1507. In certain circumstances, however, the testimony of parents and relatives may become suspected, and consequently inadmissible—*v.g.*, where they testify in favor of sustaining the validity of a marriage contracted by a poor female relative with a rich, noble, and powerful man. For

<sup>1</sup> Schmalzg., l. c., n. 19.

<sup>2</sup> Can. 5, C. 2, Q. 8; cap. 2 (iv. 18).

<sup>3</sup> Card. Kutschker, vol. v., pp. 522-525.

<sup>4</sup> Arg. cap. 47, de Test. et attest. (ii. 20).

<sup>5</sup> Cap. 3, Qui matr. acc. (iv. 18)

<sup>6</sup> Schmalzg., l. c., n. 22.

Supra, n. 827, 828. .

the presumption in this and similar cases is, that the advantages of such a marriage are so great as to warp their judgment and render them incapable of giving impartial testimony.<sup>1</sup>

1508. Who are inadmissible as witnesses in matrimonial causes? Chiefly these persons: 1. Those who are induced by money to testify or not to testify.<sup>2</sup> 2. Those who testify only by letter, without being personally present in court. For a witness must be personally present in court, and give his testimony in person.<sup>3</sup> 3. Those who impugn the marriage—that is, those who are the plaintiffs in the case; on the general principle that a person cannot at the same time be plaintiff and also witness. This rule, however, admits of exceptions.<sup>4</sup> Thus plaintiffs can be also witnesses when the judge proceeds *ex officio*.<sup>5</sup>

1509. *Remedies against a sentence pronounced by an ecclesiastical judge in matrimonial causes.*—As we have seen above, after the case has been tried and the parties rest their case, the ecclesiastical judge proceeds to pronounce sentence, and that in writing, stating distinctly and clearly the reasons upon which it is based, and declaring the marriage either valid or not valid.<sup>6</sup> As we have seen above, the sentence in matrimonial causes of nullity never passes into *res judicata*, and consequently a new trial can be demanded at any time,<sup>7</sup> where sufficient reasons warrant it—*v.g.*, when new evidence of a grave character is discovered.<sup>8</sup>

1510. The remedies against a sentence in matrimonial causes are the same with those in other causes—namely, complaint of nullity of the sentence, appeals, and reinstatement.

<sup>1</sup> Schmalzg., l. c., n. 23.

<sup>2</sup> Cap. 5, Qui matr. acc. (iv. 18).

<sup>3</sup> Cap. 2, eod.; L. Testium 3, § 3 idem ff., de Test. et attest.

<sup>4</sup> Schmalzg., l. c., n. 25; Mansella, l. c., p. 180.

<sup>5</sup> Arg. cap. 4, de Test. (ii. 20); cap. 27, de Sponsal. et matr. (iv. 1).

<sup>6</sup> Mansella, l. c., p. 211.

<sup>7</sup> Cap. 7, de Sent. (ii. 27).

<sup>8</sup> Phillips, Lehrb., § 280, p. 703.

ment. The application, however, of these remedies in matrimonial causes has certain peculiarities. Thus the complaint of nullity (*querela nullitatis*) may be lodged against the sentence when either some essential formality of the trial is omitted, or the defender of the marriage has not been called to the proceedings.

1511. In regard to appeals in the causes under consideration, we observe, that when the judgment of the court in the first instance is in favor of the validity of the marriage, the plaintiff, or the one who has demanded its annulment (*accusator matrimonii*), has the right to appeal. If he appeals, and the validity of the marriage is again sustained in the second instance, or if not in the second at least in the third instance, the plaintiff or accuser has no further appeal. Where, on the other hand, the marriage is declared null and void by the ecclesiastical judge of the first instance, the defender of the marriage not only *can* but *is bound* to appeal; and if, thereupon, the marriage is again declared invalid also by the judge in the second instance,<sup>1</sup> he can indeed, if in conscience he thinks proper, appeal again, but he is not obliged to do so.<sup>2</sup> We conclude this second volume in the words of the *Glossa in Clem.*, cap. 2, lib. 5, tit. 11, v. Irritandus: "Natura vero naturans, cum ad illam redibimus, per intercessionem Virginis gloriosae, nos colloquet cum electis."

<sup>1</sup> Bened. XIV., Const. Dei Miseratione, §§ 8, 9.

<sup>2</sup> Phillips, l. c., p. 704.

FINIS.

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