THE NULLITY OF MARRIAGE FOR REASON OF INSANITY OR LACK OF DUE DISCRETION OF JUDGEMENT

Over the past several years, the Canon Law Faculty of the Pontifical Gregorian University in Rome has been offering a special course for judges and others engaged in marriage tribunal work, in order to review the basic principles of matrimonial and procedural law and as well to explain new developments and approaches in both these fields. It has fallen to me to teach the section of the course entitled « Amentia et defectus debitae iudicii discretionis ». What follows is a summary of my lectures, a summary that has been requested by many of the hundreds of students who have participated in the course.

As in the lectures at the Gregorian, so here too I will proceed by discussing five preliminary themes, four general rules, and three particular conclusions concerning insanity and lack of due discretion of judgement. It is my hope that with these twelve points of reference in mind those who work in diocesan tribunals will be and will feel more secure both in their handling of these grounds for the nullity of marriage and in their further study of them.

I. - *The twofold effect of psychic disorders on the validity of marriage.*

Psychic disorders, that is, mental or emotional illnesses or abnormalities, can lead to the nullity of marriage in two ways : 1. Either they render a person incapable of even positing an act of consent such as would be required by a commitment as serious as marriage ; 2. Or they render him incapable of doing that to which he consented.

Examples will clarify the distinction. A full-blown psychotic, no longer in contact with reality, hallucinating, and in need of constraint, is obviously not able to posit an act of consent sufficient for marriage. For such a one would most likely no longer know, if ever he knew, what marriage is ; and even if he did still retain some basic understanding of the nature of marriage, he would certainly not be able to consider, ponder, weigh, in anything like a suitable manner, whether or not he wished to consent to that which he somehow understood.

There are, however, people who know quite well what marriage is and have considered quite adequately the wisdom of consenting to a particular marriage but who are nonetheless incapable of doing that to which they wish to give their consent. The best known and perhaps most obvious examples are certain victims of satyriasis and nymphomania for whom fidelity to a single marriage partner is impossible because of an irrepressible drive to copulate with unreasonable frequency or with any and all members of the opposite sex.

Those in the first category are said to marry invalidly because of « insanity or lack of due discretion of judgement » ; those in the second, because of an « incapacity to fulfill the essential obligations of marriage ».

There are some, however, who are unsatisfied with this terminology since, in their estimate, it at least seems to suggest that a person who cannot do that to which he wishes to consent in marriage can nevertheless be understood in some sense to be able to posit a valid act of marriage consent. As a matter of fact, the difficulty is quite easily resolved if one keeps in mind precisely what was stated above. Those who suffer from insanity or lack of due discretion of judgement were said to be incapable of positing « an act of consent such as would be required by a commitment as serious as marriage » ; and those who suffer from an incapacity to fulfill the essential obligations of marriage, but are neither insane nor lacking in due discretion of judgement, were said to be capable of exactly the same thing. Both, however, are understood to be incapable of a valid act of marriage consent ; the former, because the positing of « an act of consent such as would be required by a commitment as serious as marriage » exceeds their capacities ; and the latter, because the object of an act of marriage consent exceeds theirs.

Titius is not able to consent to anything as serious as marriage. Caius, though able in general to consent to things as serious as marriage, is not able to consent to marriage, inasmuch as he cannot « do » marriage. The object of consent in the case of Titius is being examined only in terms of its seriousness. In the case of Caius, it is being examined specifically as marriage. The two incapacities, therefore, appear to be both neatly and accurately contraposed.

Indeed, the two incapacities, in the opinion of the author of these pages, give rise to two distinct « capita nullitatis matrimonii ». For the first directly concerns a defect in the act of consent resulting from a generic incapacity in the consenter, while the second directly concerns a defect in the consenter resulting from a specific incapacity vis-à-vis the object of marriage consent.

But the problem of the « capita » is even more complicated. In the example of the psychotic given above, it was noted that a person might be unable to consent to something as serious as marriage not only because he could not sufficiently consider whether or not to consent but also because he did not sufficiently understand that to which he was consenting. We now ask : Are both of these situations well described in terms of insanity or lack of due discretion of judgement ?

And we answer with distinctions. The inability sufficiently to consider the act of consent is unquestionably well described in terms of lack of due discretion of judgement. It is, however, not well described in terms of insanity. For if one is truly insane in the legal sense of the word, that is, if he does not enjoy the use of reason, his seeming act of consent is ordinarily so fundamentally defective that even sufficient knowledge of the object of the act is wanting ; and consequently, there can be no serious question of his ability sufficiently to consider the act of consent.

As for the sufficient knowledge, it is, of course, a necessary prerequisite for an adequate consideration of whether or not an act of consent is to be posited. However, it can be wanting for reasons that have nothing whatever to do with psychic disorders. A young lady, for example, sound of mind and eight-

een years of age, who was reared in an unduly protective environment, might not validly consent to marriage for lack of sufficient knowledge of what marriage is. One, however, would be hesitant to discuss her situation in terms of insanity or even lack of due discretion of judgement. And the reason is perhaps clear from what has been said above. Insanity and lack of due discretion of judgement are defects in the act of consent resulting from a generic incapacity in the consenter. The consenter is unable to consent to anything as serious as marriage. Sufficient knowledge of the nature of marriage, while it too is a defect in the act of consent, need not result from any incapacity whatever. The consenter may well be able to know what marriage is but simply not know because of a peculiar situation of fact.

Thus we have four distinct conditions to take into account : lack of sufficient knowledge of what marriage is, insanity, and lack of due discretion of judgement — all of which are defects of consent — plus incapacity to fulfill the essential obligations of marriage — which is most properly a defect in the consenter. Of the four, two, insanity and lack of due discretion of judgement, are often treated as though they constituted a single « caput nullitatis » since in actual cases they are frequently difficult to distinguish one from the other. The remaining two, lack of sufficient knowledge and incapacity to fulfill the essential obligations of marriage, will be treated here as altogether distinct not only one from the other but also in relation to the other two, even though 1. Lack of sufficient knowledge can result from insanity ; 2. Insanity and lack of due discretion of judgement, like incapacity to fulfill the essential obligations of marriage, are ultimately rooted in incapacities in the consenter ; and 3. Some canonists still use the formula, « lack of due discretion of judgement », also for incapacity to fulfill the essential obligations of marriage.

All of which having been said, we remind our reader that we are directly concerned here with insanity (insufficient use of reason) and lack of due discretion of judgement (incapacity adequately to consider whether or not to posit an act of consent as serious as marriage), both of which commonly result from psychic disorders of various kinds and durations and both of which, we affirm again, are not to be confused with

that other result of psychic disorders mentioned at the outset, incapacity to fulfill the essential obligations of marriage.

II. - *The psychological process whereby an act of marriage consent is posited and the manner in which that process can be rendered defective.*

The human soul is a spiritual substance which gives the body its form and carries out its activities not only on the intellectual level but also on the level of the sensitive and the vegetative as well. In briefest terms, the activity on the intellectual level is explained in traditional rational psychology as follows.

Man has five external senses (sight, hearing, taste, smell, and touch) which receive information about realities outside of him in the form of sensations. These sensations are collected and collated by an internal sense, the so-called « common sense » ; and from them another internal sense, the imagination, forms a sensible image of the object or objects in question, the « phantasm », and reproduces that image when required. In addition, man is endowed with a third internal sense, the « estimative faculty », which evaluates external realities on the level of the sensitive, and a fourth, the sensitive memory, which recalls the phantasms and the sense-level evaluations.

Futhermore, even in the province of the sensitive, man has appetites, inclinations, tendencies toward external realities which appear to be good, beneficial, fitting, and aversions disinclinations, tendencies away from external realities which appear to be bad, detrimental, unfitting. These are his emotions or, as the Scholastics express it, his « passions ».

When the phantasms are projected on the intellect, they must be despoiled of their materiality if they are to be known by the intellect in the only way the intellect can know things, namely, in their forms, in their essences, in their « quiddities », released, or better : « abstracted », from matter and quantity. The Scholastics speak of an « agent intellect » doing this work of abstraction, of a « patient intellect » receiving the forms and apprehending them, and of the intellect « as reason » comparing the apprehensions in order to make judgements, and

comparing the judgements in order to arrive at logical conclusions.

In the area of judgements, however, it is essential for our purposes to make a rather fundamental and perhaps obvious distinction. Some judgements are destined to remain within the sphere of knowledge, while others have to do with actions to be taken or not to be taken. The former are called « speculative » and the latter, « practical ».

Here is where the will, the rational appetite, enters upon the scene. The intellect presents certain realities as good (beneficial, fitting) or bad (detrimental, unfitting). However, none are all good or all bad, at least as presented. Consequently, the will is free to choose to pursue or not to pursue the particular object which the intellect offers for its consideration. The decision, however, is made in concert with the intellect. Indeed, the activity is all of a piece, a mutual effort which is in a certain sense somewhat misrepresented when the operations of the intellect and the will are described separately in order to explain the whole which they constitute. Whatever of that, the will in the last resort determines that a particular practical judgement of the intellect about the goodness or badness of an action is that on the basis of which it shall act. Thus it makes its decision, for example, to consent to a particular marriage; and the process with which we are here concerned is completed.

But our discussion is just begun. For what interests us is the way in which the process is rendered defective or, if you will, the way in which the result of the process, an act of marriage consent, for example, is rendered invalid. To get at this issue, let us retrace our steps, reconsidering the process in reverse.

The will is a spiritual faculty, and it is blind as well. It makes its decisions, as already explained, on the basis of judgements of the intellect. Similarly, the intellect is a spiritual faculty. However, it depends for its operation on faculties which are not spiritual, the external and internal senses mentioned above.

All of which leads us to two conclusions which are crucial in our discussion of insanity and lack of due discretion of judgement on the one hand and marriage consent on the other.

First, neither the intellect nor the will are ever properly called sick. For sickness, strictly speaking, is a condition only of things material. Second, although the intellect can be affected in its operation by the sickness of the sensitive faculties (which sickness may in turn be due to vegetative disorders), the will cannot, except insofar as the intellect is thus affected. In short, to speak of a sickness of the intellect or will or to speak of a sickness « directly » or « immediately » affecting the will is to speak less than accurately.

Moving on in reverse, we know that the sensitive faculties can unquestionably be sick. For they are material, corporal, and thus subject to the weakening and corruption to which all flesh is heir. Therefore, at times a man sees double, hears only in part, tastes or smells not at all, and is unable to discern the temperature and/or texture of what he is touching. In fact, at times he collects sensations only to confuse them, has imaginings that are composed of unrelated sensations and accordingly devoid of sense, produces wild phantasms of things never encountered or at least never encountered as phantasized, and inaccurately evaluates at the sense level what is before him. Indeed, at times he cannot even recall his phantasms or sense-level evaluations, ordered or disordered as they may be. And all of this, while it may have been the experience of any of us, is unquestionably well-established at least from the report of others.

In addition, man's sensitive appetites, his emotions, frequently propel him where he should not be propelled and where, if there had been sufficient reflection, he would not have allowed himself to be propelled. A sudden fit of anger, unfounded fears, severe depression, anxieties of various kinds, all of these are not the imaginings of psychologists. They are the very real experiences of ourselves and others; and they are well-known to impede, obfuscate, pervert, even preclude judgements.

Thus a burning fever, a dysfunctioning of the electric impulses in the brain, a chemical imbalance, an atrophying of the nerve-endings, and a myriad of other negative physical conditions or an explosion of melancholy without measure or evident cause, a phobia, an obsession, a period of hysteria, and a myriad of other negative emotional conditions can lead to an intellectual judgement, a series, or even a lifetime of intel-

lectual judgements that are defective because, for instance, the instrumental cause of the intellectual apprehension (the phantasm) or the sensitive appetites (the emotions) or both were out-of-order, out-of-cycle, disabled, sick.

How all of this happens, for example, in a burst of mania, in a long-term schizophrenia, or in a recurring hypochondria, no one has thus far been able to explain in detail. In the middle of the last century psychologists discovered a number of clues in their study of general paresis and the link between syphilis and certain manifestations of insanity such as delusions of grandeur. Additional pieces of the puzzle were uncovered when the various symptoms of epilepsy were learned to result from unbalanced neuronal charges in certain areas of the brain and more recently when numerous forms of depression were revealed to be susceptible of cure or at least of control through the administration of lithium and other chemical compounds.

None of this, however, need further occupy us here. It is enough that we understand the basic process whereby we make decisions as explained in sound rational psychology and that we recognize 1. that this process can be disturbed by « sickness » in what is corporal in us, 2. that what is strictly spiritual in us, the intellect and the will, though never truly « sick », can, through a certain « redundance », be affected by the sickness of the body, and finally 3. that, while the intellect can be directly affected by this redundance, the will cannot. If we have all of this clearly in mind, we are in a position to begin more profoundly to comprehend insanity and lack of due discretion of judgement and their relation to marriage consent.

III. - *Various explanations of lack of due discretion of judgement in ecclesiastical jurisprudence.*

One hardly needs to provide a detailed analysis of why a marriage is null if one or both of the parties were truly insane (without sufficient use of reason) at the time the marriage consent seemed to have been given. For insanity ordinarily carries with it inadequate knowledge of what marriage is,

inevitably entails a lack of due discretion of judgement regarding marriage, and therefore always implies an incapacity freely to choose marriage. (The blind will obviously cannot freely choose something whose nature is not fittingly known and whose merits or demerits cannot be fittingly pondered.)

As has already been observed, however, there are persons who have an adequate knowledge of the nature of marriage, are not insane, and who are nevertheless thought to be unable to posit a valid act of marriage consent because they lack the afore-mentioned due discretion of judgement, that is to say, because, despite their knowledge, they cannot consider in an apt fashion whether or not an act as serious as marriage consent is to be posited.

This phenomenon has been discussed in the sentences of the Sacred Roman Rota primarily according to four schemata which, although they may appear at first blush to be quite distinct, seem in the final analysis to come to more or less the same thing. Whatever of this, all four deserve our attention here. For they permit us to examine the issue of lack of due discretion of judgement from four different vantage points and thus open the way to a more complete understanding of it. We shall examine each of the four not necessarily in its original formulation but rather in that which was most obviously an attempt to explain what lack of due discretion of judgement is.

We begin with a sentence *Before Wynen* of February 25, 1941. The section « As regards the law » opens by noting that marriage consent is an act of the will which requires on the part of the intellect at least that basic knowledge of the meaning of marriage which is delineated in Canon 1082, § 1, of the Code of Canon Law : « In order that marriage consent can be had, it is necessary that the parties to the contract at least not fail to know that marriage is a permanent association of a man and a woman for the procreation of children ».

The sentence then goes on to explain that some modern psychologists and psychiatrists do not believe that the mere use of reason and a simple choice by the free will suffice for a valid human act of marriage consent. Rather there must also be, according to these psychologists and psychiatrists, a distinct perception of the value of the act in its esthetic, social, ethical,

and juridic dimensions, a perception which postulates, in addition to the intellect and will, an « appreciative or estimative faculty ».

The sentence rejects the necessity of such a faculty and in the course of justifying the rejection alludes to the classic Scholastic analysis of how free will choices are made, without, however, emphasizing the familiar Scholastic categories of the speculative and practical judgements. Instead, the operation which according to the Scholastics begets the speculative judgement is called in the sentence the « merely representative or conceptual function » of the intellect ; and the operation which according to the Scholastics begets the practical judgement is called in the sentence the « ponderative or evaluative function » of the intellect.

This latter function is alleged to develop later in life than the former. It is also suggested that it is likely to be deficient in persons afflicted by certain psychic anomalies. Hence, it is here that the sentence, at least by implication, locates the reason for lack of « sufficient maturity and discretion of judgement ». The ponderative or evaluative function of the intellect does not operate as it should, indeed, as it must, if a valid act of marriage consent is to be posited.

The second of the four sentences was pronounced *Before Felici* on December 3, 1957. Its section « As regards the law » likewise begins with a discussion of the minimum knowledge necessary for a valid act of marriage consent. It then moves on to a distinction which at first reading can seem to be quite different from that indicated in the sentence *Before Wynen*. For in the first explanation of it, it appears to concern only the speculative sphere. « In man's act of knowing », observes the sentence, « you must properly distinguish the cognoscitive faculty, which is involved in the operation of abstracting the universal from the particular, that is, in the simple apprehension of truth, and the critical faculty, which is the power to judge and to reason, that is, the power to affirm or deny something about something and put judgements together so that other judgements can be legitimately deduced from them ».

In point of fact, however, the sentence promptly turns to the question of judgements regarding actions to be taken

or not taken and in this context defines the critical faculty, which is parenthetically said to develop later than the cognoscitive, as « that which alone forms judgements and gives rise to acts of the free will ». All of which seems to suggest that what we have here is another reformulation of the classic Scholastic analysis of free-will acts, the speculative judgement of the Scholastics being identified with the result of the operation of what the sentence calls the cognoscitive faculty and the practical judgement of the Scholastics being identified with the result of the operation of what the sentence calls the critical faculty.

In any case, the sentence closes its treatment of the two faculties by remarking that the critical faculty, which at this point it calls the « discretive faculty », is ordinarily sufficiently operative after puberty but can be impeded in its operation by mental afflictions ; and when this happens, we are told, what is had is a « lack of necessary discretion ».

The third sentence we wish to discuss was rendered on December 20, 1962, *Before Mattioli*. It opens its treatment of our question by insisting that the mere capacity for a human act is not sufficient for a valid act of marriage consent. Rather, there is needed as well a sufficient understanding of what marriage is, as specified in Canon 1082, § 1, plus the kind of discretion of judgement one as a rule enjoys after puberty.

It can happen, however, the sentence continues, that because of a defect in the phantasm or a disturbance in the nerves, the intellect and will are pulled back and forth between decisions to act or not to act and consequently rendered incapable of a valid choice. Moreover, according to the sentence, it can also happen that a person's organism so lose its balance and coördination that, even though the operation of the intellect remain intact, the will somehow becomes ineffective. Accordingly it is concluded that, when one suffers from mental illnesses or abnormalities, he is liable to be unable to posit a valid act of marriage consent for lack of « harmonic organization and interaction of the superior faculties ».

There are several elements in this analysis which might leave one uneasy, not the least of which being the suggestion that the will can somehow be affected by indispositions of the body and lower faculties while the intellect, unscathed,

operates satisfactorily. Whatever of this, the conclusion regarding the activity of intellect and will in the making of free choices does seem to be nothing more than a rather unusual articulation of what the Scholastics have in mind when they describe the interplay of speculative and practical judgements and the ensuing operation of the free will. For this reason, one does not hesitate to see this third sentence as intimately, even if somewhat obscurely, related to the first two, indeed, as a further elaboration of their basic theme.

The fourth sentence to be considered here was given *Before Egan* on May 29, 1976. It addresses our subject by stating that marriage consent is an act of the will which, supposing the necessary knowledge defined in Canon 1082, § 1, involves two judgements of the intellect, a speculative judgement about the act of consent which, however, is not directly ordered to the positing of the act, and a practical judgement about the same act of consent which indicates whether or not the act ought to be posited. The sentence then proceeds to relate this distinction, first, to the distinction between the merely representative and the ponderative functions of the intellect as proposed in the sentence *Before Wynen* and, second, to the distinction between the cognoscitive and critical faculties of the intellect as proposed in the sentence *Before Felici*.

Next the sentence *Before Egan* reminds the reader that illnesses are properly to be found in the realm of the corporal alone and therefore influence the spiritual faculties of intellect and will only by «redundance». Whereupon it is noted that the redundance on the will must be mediated through the intellect. Finally, the sentence closes by asserting that psychic disorders can stand in the way of the basic, required knowledge of what marriage is and that, when this occurs, there will not even be a sufficient speculative judgement about the positing of an act of marriage consent. However, alleges the sentence, even when the speculative judgement is adequate, there can be a lack of due discretion of judgement because of an incapacity to make a sufficient practical judgement about the same act, a practical judgement which in the final analysis is equivalent to the product of the ponderative function of the intellect about which we read in the sentence *Before Wynen* and

of the critical faculty about which we read in the sentence *Before Felici*.

All of which brings us to the conclusion of this third step in our treatment of insanity and lack of due discretion of judgement. It would seem that the problem of an invalid act of marriage consent despite sufficient knowledge regarding the basic meaning of marriage can be aptly articulated in terms of a deficient ponderative function of the intellect, a deficient operation of the critical faculty, a deficient practical judgement, and — supposing a proper understanding of the expression — even a deficient organization and interaction of the faculties of intellect and will.

In addition, if we wish to link this conclusion with what went before, we might further note that all of these deficiencies are, in their turn, ultimately explained on the basis of disorders in the sensitive faculties of cognition, and especially the phantasm, and in the sensitive appetite or, if you prefer, in the emotions. Consequently, there seems to be no need to attempt to account for lack of due discretion of judgement by appeals to certain effects of illnesses and abnormalities directly upon the will. Indeed, such appeals, unless they are clearly stated to concern only the appearance rather than the reality of things, seem to be nothing more than occasions for useless controversy and confusion.

IV. - *The minimum discretion of judgement required to posit a valid act of marriage consent.*

What is the least amount of pondering or evaluating, of critical analysis, of practical judgement, or — moving from the language of the rational psychologist to that of the jurist — of discretion of judgement, of mature consideration, of deliberated willing, that is needed in order that the positing of an act of marriage consent be valid ? The question has troubled canonists for centuries and seems to trouble not a few even today. Be that as it may, the various answers thus far proposed and the various critiques of the various answers are all quite well-known. For they have been repeated again and again over the past thirty or forty years not only in numerous

books and articles but also in even more numerous decisions of the Sacred Roman Rota. We will therefore treat just the essentials of the matter here. The peripheral issues, which are of little, if any, practical importance, can be explored elsewhere.

Some have tried to solve the problem, « How much discretion of judgement is needed for the positing of a valid act of marriage consent ? », in terms of calendar age and the capacities that regularly accompany progress in calendar age. Thus appeared the familiar and oft-refuted thesis of those who held, or are at least said to have held, that one can be thought to have attained a discretion of judgement sufficient for consenting to marriage when one has completed his or her seventh year, achieved the use of reason, and accordingly become capable of committing serious sin.

The unacceptability of this criterion hardly needs much elucidation. For no thoughtful man or woman in any nation, culture, or climate would be likely to contend that seven-year-olds are as a rule able to posit an act of consent such as would be demanded by a commitment as serious as marriage. Moreover, it is altogether clear that there is no correlation whatever between the use of reason and the capacity for grave sin on the one hand and the capacity to consent to a marriage on the other. A perfectly normal child of seven may know full well that defiance of his parents' commands is seriously wrong but be quite unable to ponder the wisdom of consenting to a marriage, supposing that he has sufficient knowledge of what marriage is. Hence, to try to measure ability to give marriage consent on the basis of the common psychological attainments of a seven-year-old, the use of reason, or the power grievously to offend the Divinity is obviously a pointless endeavor ; and for most people of ordinary intelligence, all of this is evident simply upon hearing it affirmed. Consequently, trusting in common sense, we move on immediately to another proposal.

Some have taught that once a person has reached puberty, that is, once a boy has completed his fourteenth year and a girl her twelfth, ages when both are expected to be physically potent, it is legitimately to be assumed that discretion of judgement sufficient for marriage consent has been attained. This second thesis is not as easily dismissed as the first. For

we do know that in some parts of the world physical and psychological development are at least said to proceed faster than in others, and it may well be that in these areas young people of fourteen or twelve are such as the thesis suggests.

However, if we are thinking in terms of Europe, North America, and the more mild climes of South America, South Africa, and the Middle East, it hardly seems that puberty is a helpful criterion for capacity to posit an act of marriage consent. Certainly, most civil laws would not subscribe to it. Indeed, even Canon Law seems to reject it. For boys who marry before completing their sixteenth year and girls who marry before completing their fourteenth marry invalidly in virtue of the positive-law norm of Canon 1067, § 1, which appears to be an attempt to specify the parallel norm of the natural law ; and Canon 1082, to which we have referred so often above, after defining the basic knowledge needed for marriage in its first paragraph, stipulates in its second, not that one is free to presume such knowledge after puberty, but rather that one is not free to presume ignorance, a formula which clearly betrays a fundamental mistrust of the puberty criterion even for the knowledge aspect of an act of marriage consent.

But whatever positive laws have to say or suggest on the subject, again it would seem safe to assert that common sense at least would not be enthusiastic with the puberty criterion. Certainly there may be boys of fourteen and girls of twelve who are capable of adequately evaluating a decision to marry. However, if there are, most people would insist that they are the exception and by no means the norm.

So much for calendar rules.

A second approach to identifying the minimum discretion of judgement required for a valid act of marriage consent is to compare such consent with other significant acts. Following this method, some have taught, first, that more discretion of judgement is needed to consent to a marriage than to consent to any other contract because marriage is a giving of self which touches upon all facets of one's life and activities and, second, that less discretion of judgement is needed to consent to a marriage than to consent to entering religious life because

marriage is a condition to which all are naturally inclined and for which all are naturally prepared.

As a matter of fact, none of this appears to be very helpful, inasmuch as it simply begs the original question, or better: relocates it in areas not less but rather more difficult to fathom. For if we knew how much discretion of judgement is necessary for all other contracts besides marriage or how much is necessary to enter religious life, we would probably also know how much is necessary for marriage. In short, we have here an almost comical example of explaining the obscure by means of the even more obscure.

But no less significantly, the first part of the comparison does not even seem to be accurate, and that for two reasons. First, there are a number of contracts which appear to demand more discretion of judgement than marriage. For example, if the head of a family were to exchange all of his family's wealth for a tract of land, a business enterprise, or whatever, it might well be that his decision would call for more evaluating, critical analysis, and practical judgement than marriage. And the most obvious explanation of this is to be found in the latter half of the comparison, namely: nature helps us with the second decision, marriage, but gives us very little assistance with the first.

Even beyond this, however, the proposed comparison seems to misstate or at least overstate what is at issue in a marriage. It is acceptable, of course, in a literary or homiletic context to assert that marriage is a giving of oneself which involves the totality of one's being. For the reader or hearer will ordinarily know how to put this kind of rhetoric into focus and distill from it what is valid, that is, the extraordinary importance of marriage. However, let us admit that no one ever gives himself or receives another in any contract, exchange, or covenant. We do not give ourselves because we do not have ourselves to give. We rather give rights which are, at most, intimately bound up with ourselves.

Furthermore, it can be inspiring and on occasion salutary to wax eloquent about the all-embracing character of marriage. Still, when the hyperbole has served its often laudable purpose, it is well to recall that even in the best of married people there remains much that is individual, inalienable,

incommunicable. We certainly grant that sharing between marriage partners is to be encouraged with the utmost of zeal. However, at the same time we do not deny that husbands and wives have every right to keep certain elements of their existence quite personal and — we hope the formula will scandalize no one — quite their own as free, distinct human beings.

What then remains? Where are we to find the norm, the criterion, the measure of the minimum amount of discretion of judgement needed to posit a valid act of marriage consent? There is but one answer: in that which is proportionate with something as serious as marriage.

How much discretion of judgement is required for the head of the family mentioned above to consent validly to his contract? As much, we reply, as a matter of that import demands. And so we answer every other similar query. There is a balance to be struck between the capacity on the one hand and the activity on the other. If the head of the family were a madman unable to care even for himself at the time of the contract, the balance would obviously not be achieved. His capacity would not be proportionate with his activity, that is, with what he was trying to do but clearly could not do for lack at least of due discretion of judgement.

The only norm, therefore, in cases which concern us here is marriage itself. Thus, in simplest terms, the function of the judge in such cases is to compare demonstrated limitations of capacity with true insight into what a marriage is and draw the appropriate conclusion. His work is consequently an exercise in intuition, but not merely subjective intuition. For he is considering two objective or, if you will, two existential realities, namely, proven compromising of intellect and will and an exclusive, life-long relationship between a man and a woman which is ordered by nature itself to the procreation of children.

But does not all of this leave too much to chance? Might we not have judges who attach to every personality disorder an incapacity for marriage or who make of marriage an enterprise so arduous and unusual that virtually no one can measure up to it? Certainly we might, just as we might have judges in civil tribunals who do similar things as regards other contracts and crimes as well. However, there is a safeguard and there

is a margin for error to put our concerns at rest. The safeguard is that decisions about the validity of acts of marriage consent are not to be made by one judge but by at least three, and the decision of the three judges is in turn to be reviewed by three more in appeal. And the margin for error is that every decision in favor of the nullity of marriage must be given on the basis of certitude about that nullity. The wisdom of the ages has in a sense protected us from ourselves as regards declarations of the nullity of marriage by ecclesiastical tribunals and in so doing has allowed us to deal with marriage in those tribunals in a manner worthy of such an institution.

V. - *The principal psychic disorders leading to lack of due discretion of judgement.*

Psychiatry is not a science which operates on the basis of rigid definitions, mathematical certitudes, and definitive analyses. For the object of its concern, the human psyche, does not permit it such luxuries. Indeed, when the definitions of psychiatry become rigid, its certitudes mathematical, and its analyses definitive, one can usually assume that the science is regressing rather than progressing. Man and his processes of thinking, feeling, and willing are to a great extent enshrouded in mystery. It is inevitable, therefore, that the study of such a reality will not be without its obscurities, its hesitancies, its approximations.

Be that as it may, men and women of genius in the fields of clinical psychology and psychiatry have, especially over the past one hundred years, uncovered an extraordinary fund of solid information about the human psyche. Thus it is that most serious psychic disorders have been named, distinguished one from the other, grouped, and with few exceptions rather thoroughly analysed according to the time of their onset, probable causes, principal manifestations, and likely outcome.

It is obviously not required that judges and other tribunal officials who treat cases concerning psychic disorders be experts in the fields of modern clinical psychology or psychiatry. It is necessary, however, that when they read the reports of

such experts, they understand what is being said. For otherwise they will not be in a position to do what is to be done in tribunals with reports of experts, namely, translate them from the realm of the expertise to the realm of law.

It is for this reason that in ecclesiastical tribunals which accept marriage nullity cases based on insanity, lack of due discretion of judgement, or psychic incapacity to fulfill the essential obligations of marriage, judges, defenders of the bond, and advocates should feel duty-bound to acquaint themselves with at least the fundamentals of modern clinical psychology and psychiatry. This they may do by attending a survey course on the subject in a local college or university or even by carefully making their way through a few of the standard treatises used in such courses. With this preparation they should be able to comprehend quite adequately both the language and the argument of reports by experts in psychology and psychiatry, appreciate when these reports are thorough and valuable and when they are cursory and trivial, and — perhaps most importantly — recognize what in the reports is certain and what is merely hypothesis.

In these few pages it is, of course, not possible to present all that a judge, defender, or advocate need to know about psychic disorders which can lead to insanity and lack of due discretion of judgement. It does, however, seem well to touch a number of the high-points, partly as an introduction to the afore-mentioned survey course or private study and partly as a necessary prelude for what is to follow.

The most serious psychic disorder, the one which both psychiatrists and jurists with greatest ease call mental illness, is the *psychosis*. In simplest terms it might be defined as a severe affliction of the psyche which is accompanied by abnormal patterns of thinking, feeling, willing, and acting.

There are two principal kinds of psychosis, *psychotic affective disorders* and *schizophrenia*. The former manifests itself in extreme euphoria (mania) or extreme melancholia (depression) or, in some few cases, now in one extreme and now in the other. Thus it is that it is frequently called *manic-depressive* or *cyclothymic psychosis*.

The « clinical picture » of the malady, as psychiatrists are wont to say, is as follows. In states of psychotic depression the

patient is tormented by feelings of deep sadness, worthlessness, despair, hopelessness, and sometimes also fear, which feelings are often attended by a rapid heartbeat, difficulties in breathing, gastro-intestinal dysfunctions, headaches, and other somatic disturbances. What is more, the patient finds it difficult to focus his thoughts and very frequently has the impression that his thinking is slowing down or breaking down. Indeed, he is at times beset by *delusions*, that is, false interpretations of real events, and especially by those particular delusions which are commonly termed *ideas of reference*, that is, beliefs that certain events which are in fact quite extraneous are somehow related directly to him.

In states of psychotic mania, on the other hand, the patient is euphoric, energetic, full of new enthusiasms, and hyperactive, so much so that he may experience not only delusions and ideas of reference but also *hallucinations*, that is, sense perceptions for which there are no corresponding realities whatever ; *flights of ideas*, that is, rapid and uncoördinated thoughts, judgements, and even reasonings ; and *de-realization* or *de-personalization*, that is, a feeling of ceasing to exist or ceasing to exist as himself.

As has been indicated, some persons afflicted by psychotic affective disorders oscillate back and forth between the two extremes of euphoria and melancholia. Most, however, do not. In fact, most suffer only states of depression and that not continuously but rather with interposed *periods of remission*, that is, weeks or months or even years when manifestations of the psychosis significantly abate. Whatever of this, when a person is in the throes of a genuine and developed psychotic affective disorder, his ability to think and will is at very least greatly compromised ; and as a rule, he is only tenuously, if at all, in contact with reality.

The second of the principal psychoses is *schizophrenia*. There are a number of opinions as to how it might best be identified. Some like to define it as *a splitting of the basic structures of the personality*, that is, a separating and dis-coördinating of the activities of the intellect, emotions, and will. Others prefer to avoid such admittedly fanciful language (Do personalities have « structures » ? And if they do, can they be « split » ?) and simply describe what happens to victims of

the illness, namely : their thought processes become confused and often assailed by delusions and hallucinations ; their emotional reactions to persons and things become for the most part shallow and negative, although at times they may also exhibit extremes of irritability and aggressiveness ; they become ever less desirous of relationships with other human beings and ever less interested not only in work but also in play ; they respond to persons and things in contradictory manners, loving and hating, pursuing and avoiding, the same object at the same time ; they become silly ; they assume and maintain contorted bodily postures ; their talk corrupts into streams of « non sequiturs », invented expressions, « word salads », nonsense ; and when the malady has totally conquered, they generally seem to their fellows to have bade the real world « good-bye », sitting, as they do, alone, ordinarily motionless, their attention riveted on something unknown within.

Concerning psychosis two additional points need to be made. First, schizophrenia is commonly divided by clinical psychologists and psychiatrists into at least four species, each of which is characterized, as it were, by one or another of the manifestations mentioned above. Thus *simple schizophrenia* is that which is peculiarly marked by apathy and isolation from other persons ; *hebephrenic schizophrenia*, that which is peculiarly marked by silliness of thought and action ; *catatonic schizophrenia*, that which is peculiarly marked by strange facial expressions and bodily positions ; and *paranoid schizophrenia*, that which is peculiarly marked by delusions about the harm that others are doing or wish to do to the patient.

Second, there are other kinds of psychoses besides the two we have emphasized here. For example, clinical psychologists and psychiatrists commonly speak of a *paranoid psychosis* which is not schizophrenic. Similarly, certain psychotic conditions have been related to pregnancy and child-birth ; and certain others seem to result from years of epileptic seizures or from long-term abuse of drugs or alcohol. In all of these illnesses, however, when they are truly psychotic and have progressed to a stage of obvious seriousness, there is sure to be present that severe affliction of the psyche by which psychosis is defined plus various combinations of the mani-

festations (symptoms) of which we spoke above in our descriptions of the two principal psychoses.

We move on to the second of the major psychic disorders, the neurosis. However, before we do, a note of transition would seem to be in order. While it does seem that many psychoses are preceded by neuroses and by some of the personality disorders we will later call psychopathic, psychosis is not to be thought of as a psychic disorder only quantitatively distinct from neurosis and psychopathy. For the genuine psychotic whose psychosis is in full bloom is losing or has lost contact with reality, whereas both the neurotic and the psychopath are not, have not, and most probably will not. The importance of this in our study of insanity and lack of due discretion of judgement is perhaps already clear and will certainly emerge ever more clearly anon.

A *neurosis* is a chronic psychic disorder characterized by recurrent attacks of anxiety (*anxiety neurosis* or *neurasthenia*), obsession and/or compulsion (*obsessive* and/or *compulsive neurosis* or *psychasthenia*), unreasonable fears (*phobic neurosis*), or unexplained somatic and neurological symptoms (*hysteria*). Most modern clinical psychiatrists view the neurosis as an attempt to cope with anxiety by repressing it through devices (obessions, compulsions, phobias, and the like) which are unconsciously chosen and manifestly inappropriate. Thus *anxiety*, a painful uneasiness of mind, ordinarily complicated by tension, fear, and apprehension, is often considered the common denominator, as it were, of all neuroses.

Nonetheless, there is a neurosis which is simply termed *anxiety neurosis* and which finds its expression in sudden onslaughts of anxiety frequently enough accompanied by labored breathing, palpitations, feelings of weakness, and in some extraordinary cases even the beginnings of de-personalization. It can be serious but ordinarily is not, largely because the attacks as a rule come and go rather quickly and generally cause no lasting impairment of the victim's mental processes.

Obsessions are persistent ideas or impulses which are unwanted and distressing but cannot be escaped. *Compulsions* are actions occasioned by obsessions. For example, a person may be obsessed with the thought that he is going to catch a certain infectious disease and consequently feel compelled to wash his hands over and over according to a particular ritual from morning to night. Such a one would be said to be afflicted by an *obsessive-compulsive neurosis*. Curiously, he may or may not recognize the senselessness of both the obsession and the compulsion. However, he is always acutely aware that he would like to escape the situation ; and as he struggles with it, he suffers intensely, oftentimes isolates himself from family and friends, if for no other reason, out of embarassment, and may even begin to suspect that he is « losing his mind ». In point of fact, however, while the pain of the condition may be severe on the emotional level, the mind as a rule remains quite clear at least in areas other than those directly touched by the obsession and/or compulsion.

A *phobia* is an unreasonable fear which is both continuous and intense. *Phobic neurosis* is the psychic disorder of one who is troubled by such a fear. Typical examples are those who tighten up or tremble, shout out or become mute, perspire heavily, feel suffocated, and such in the presence of certain animals, in a closed room or an open space, if required to speak or even to eat in public, and so forth. Needless to say, the condition is sporadic and for the most part does not compromise the thinking or willing of the patient except in regard to the object of his fear or things closely related to it. Indeed, there seem to be few adults who suffer from a real phobic neurosis ; and of these, few are disturbed by such serious manifestations as de-realization or de-personalization, although it can happen that the phobic neurosis proves to be a prelude to a more serious disorder, for instance, a severe depression.

Hysteria is a neurosis which is characterized by frequent and dramatic complaints of unexplained somatic manifestations (fainting, vomiting, gastro-intestinal dysfunctions, sexual frigidity, etc.) and unexplained neurological manifestations, that is, the so-called *conversion symptoms* (amnesia, unconsciousness, momentary deafness, momentary blindness, etc.). It attacks women chiefly, making its first appearance as a rule before the age of twenty, and is always attended by much colorful and exaggerated language and posturing. In addition, it is often difficult to distinguish to what extent it is genuine and to what extent it is merely a strategy to avoid work, self-discipline, or just the ordinary tedium of daily life. Whatever

of this, a true hysteria can be complicated by serious disturbances of the consciousness, for example, by *twilight states*, that is, sudden losses of consciousness, and by *fugues*, that is, periods of amnesia, the events of which cannot later be recalled, and in severe cases even by tendencies to de-personalization. These conditions, however, are transitory in nature and need not lastingly damage the ordinary mental processes.

We come therefore to the third and last of the major psychic disorders to be considered here, the *psychopathies* or, as some prefer, *personality disorders*. As is evident, the names assigned these conditions are hardly very helpful in identifying them. For psychopathy, of itself, is the most generic of expressions, indicating nothing more or less than a malady of the psyche ; and psychotics and neurotics, no less than psychopaths, suffer from a disordered personality.

All the same, the expressions do have certain precise meanings. For some they signify an unhealthy psychic condition which is manifested by abnormalities of behavior in persons who are neither psychotic nor neurotic. For others they signify an unhealthy psychic condition which is manifested by criminal or at least anti-social behavior in persons who are neither psychotic nor neurotic. We prefer to follow the first definition here, not only because it is the one most commonly proposed in the sentences of the Sacred Roman Rota but also because it appears to be ever more accepted in the literature of modern clinical psychology and psychiatry across the world.

The central issue in any in-depth discussion of psychopathy or personality disorder is always whether or not it is in fact possible to define that normal behavior away from which the psychopath is thought to deviate. Many would maintain it is not. However, many others are convinced it is ; and whatever the value of the various philosophical arguments that might be mounted against the possibility, it remains a homely fact of life that all of us every day make what we think to be considered judgements about what is normal and what is not or at least about what is radically abnormal and what is not.

Consequently, while the philosophical debate continues, psychiatrists do not scruple to speak of a distinct group of psychically unhealthy persons who are neither psychotic nor neurotic but nonetheless behave in a clearly abnormal manner

and thus do harm to themselves or to others. All are called *psychopaths*, and the ones who do harm mostly to others are called *sociopaths* as well.

In categorizing these persons, especially those who do harm to themselves, we find psychiatrists divided into three major groups, to wit : 1. Those who name the various psychopathies according to their similarity with one or another of the psychoses or neuroses and hence discuss, for instance, *schizoid psychopaths*, *cyclothymic psychopaths*, *obsessive psychopaths*, and *hysteric psychopaths* ; 2. Those who name the various psychopathies according to their victims' prevailing mood or style of life and hence discuss, for instance, *overly active psychopaths*, *weak psychopaths*, *overly sensitive psychopaths*, and *fanatical psychopaths* ; 3. Those who name the various psychopathies according to both criteria.

As for the manifestations of each kind of psychopathy, the matter is obviously beyond the pale of these few pages. We would however note that those psychopaths who are identified according to similarity with psychoses and neuroses often exhibit some of the less severe symptoms of the corresponding psychotic or neurotic condition. In addition, it is widely thought that a genuine psychopathy, like a genuine neurosis, can in certain cases be a forecast of something more serious in the future. Still, psychopaths are not understood to be either losing contact with reality or even necessarily impaired in their thinking and willing. Their behavior is simply not according to the norm, and it is assumed from this that something must be amiss in their mental and especially in their emotional functioning.

Thus we would once again insist that psychopathy, neurosis, and psychosis are not to be seen as three steps on a graduated scale between sanity and insanity. For psychosis is a malady altogether apart. Indeed, psychosis is the only one of the three afflictions which clinical psychologists and psychiatrists commonly style a mental illness, a condition which by its very nature has to do with at least a tendency toward abandoning reality and which, therefore, is radically distinct from anxiety in its various unacceptable expressions and disorders of the personality.

The caution having been repeated, we conclude by observ-

ing that, in addition to psychoses, neuroses, and psychopathies, there are other mentally and emotionally related situations which can beget insanity or lack of due discretion of judgement, the most notable being hereditary or constitutional cerebral insufficiency and damage to the brain or central nervous system because of trauma, infection, intoxication, or a dysfunctioning of the electrical impulses operating therein.

In ecclesiastical tribunals, the best known of these is perhaps the last mentioned, which is generally summed up in the word, « epilepsy ». We would note, however, that, while epilepsy does indeed signify a series of somatic and psychic manifestations caused by faulty neuronal charges in the brain, the manifestations are so varied that not a few modern clinical psychologists and psychiatrists prefer to speak not of epilepsy but rather of the epilepsies.

This approach is by no means uncongenial to the jurist. For epilepsy is usually understood to include, along with convulsions of greater or lesser gravity and duration (*grand mal* and *petit mal*), also twilight states and fugues, epileptic psychopathy, and even epileptic psychosis, all of which obviously affect the victim's thinking and willing in quite different ways. Marriage consent given during an epileptic seizure of any kind or even a twilight state, for example, would clearly be invalid not only for lack of due discretion of judgement but also for lack of sufficient use of reason. The same might be said of marriage consent given by an epileptic psychotic in an advanced stage of his psychosis. However, the consent given by an epileptic psychopath, despite the horrific sound of these words, is presumed to be valid, even though in certain extraordinary circumstances it may be invalid for lack of due discretion of judgement. Of all this, however, we will speak in detail in the final sections of our study.

VI. - *The marriage bond cannot be dissolved at the discretion of one or even both of the partners. Indeed, by divine law, a marriage between baptized persons which has been consummated cannot be dissolved by any merely human power whatever.*

These truths of Catholic doctrine are firmly grounded in Scripture and Tradition and have been repeated over the

centuries in various formulations by Popes and Councils, both local and ecumenical. They have, however, found their clearest and most uncompromising expression in the Church's *Magisterium* of the past two hundred years. We are reminded, for example, of such encyclicals as *Accepimus* of Gregory XVI issued in February of 1836, *Verbis exprimere* of Pius IX issued in August of 1859, *Arcanum divinae Sapientiae* of Leo XIII issued in February of 1880, *Casti connubii* of Pius XI issued in December of 1930, and of the many magnificent statements of Pius XII regarding the perpetuity of the marriage bond from 1939 to 1958, for instance, his Address to the Sacred Roman Rota, *Già per la terza*, delivered in October of 1941.

All of which, of course, climaxed in the declarations of the Second Vatican Council, which are unquestionably the most telling, varied, and unhesitating affirmations of the permanence of marriage in the history of Christianity. Let us recall here just six of the most salient sections of Pastoral Constitution, *Gaudium et spes*, on the subject :

« (T)he excellence of this institution (marriage) is not everywhere reflected with equal brilliance. For polygamy, the plague of divorce, so-called free love, and other disfigurements have an obscuring effect ».

« The intimate partnership of married life and love has been established by the Creator and qualified by His laws. It is rooted in the conjugal covenant of irrevocable personal consent. Hence, by that human act whereby spouses mutually bestow and accept each other, a relationship arises which by divine will and in the eyes of society too is a lasting one. For the good of the spouses and their offspring as well as of society, the existence of this sacred bond no longer depends on human decisions alone ».

« As a mutual gift of two persons, this intimate (marriage) union, as well as the good of the children, imposes total fidelity on the spouses and argues for an unbreakable oneness between them ».

« (A)s God of old made Himself present to His people through a covenant of love and fidelity, so now the Savior of men and the Spouse of the Church comes into the lives of married Christians through the sacrament of matrimony. He abides with them thereafter so that, just as He loved the Church

and handed Himself over on her behalf, the spouses may love each other with perpetual fidelity through mutual self-bestowal ».

« Sealed by mutual faithfulness and hallowed above all by Christ's sacrament, (marital) love remains steadfastly true in body and in mind, in bright days or dark. It will never be profaned by adultery or divorce ».

« Marriage to be sure is not instituted solely for procreation. Rather, its very nature as an unbreakable compact between persons, and the welfare of the children, both demand that the mutual love of the spouses, too, be embodied in a rightly ordered manner, that it grow and ripen. Therefore, marriage persists as a whole manner and communion of life, and maintains its value and indissolubility, even when offspring are lacking – despite, rather often, the very intense desire of the couple ».

One would have to look long and hard through the texts of Ecumenical Councils to find an issue of moral or sacramental theology treated more insistently and forcefully. If before Vatican II there were any room for doubt about the teaching of the Church concerning the indissolubility of marriage, there scarcely can be any now. And this is a reality which officials of ecclesiastical marriage courts may never allow themselves to forget.

VII. - *The vast majority of adults are capable of a valid marriage, and the vast majority of marriages are therefore valid.*

There are a number of ways to attack the doctrine of the indissolubility of marriage. The best and most worthy is to draw up an argument derived from Scripture, Tradition, and reason, and attempt to show that it demonstrates that the teaching of the *Magisterium* has been wrong about the permanence of the marriage bond. The worst and most unworthy is to concede the doctrine in words but deny it in fact by pretending that a valid marriage is beyond the capacities of most mortals.

Marriage is indeed a « great mystery », a partnership of two human beings ordered to the procreation of other human

beings in coöperation with the Creator Himself, a holy state, the magnificent gift of a God Who recognized that « it is not good for man to be alone ». All the same, marriage is also a commonplace in the scheme of Nature, the usual way in which most people are to work out their lives and their salvation. Virtually all men and women are attracted to it. Few children can develop properly except in the environment which it creates. In fact, no state, no community of any kind, can long endure without marriage of some sort. It is part and parcel of the ordinary flow of things this side of eternity. Consequently, unless the Creator and the Nature He has brought into being are to be judged outrageously deficient in things essential, marriage must be something that almost every adult who is not obviously gravely defective in mind or body can do.

All of this should be kepte ver before the attention of officials in ecclesiastical tribunals which accept cases concerning the nullity of marriage because of insanity or lack of due discretion of judgement. For such cases are inviting fields of battle for the second species of attack on indissolubility. And the reason is plain. A judge in a case of this kind is in the final analysis engaged in a work of evaluation in which he compares that magnificent commonplace which is marriage with that often elusive reality which is psychological capacity for marriage, and more often than not compares them years after their one relevant encounter as far as the nullity of marriage is concerned, that is, when the marriage consent seemed to have been given. In such a situation, it is easy to slide across realities, overstate indications, inflate proofs, and thus manufacture certitudes which are certain not at all.

In so doing, one might resolve the personal problems of one or two or even several individuals; and one might have the feeling that all of this is very « pastoral ». However, at the same time, one might also be reducing the religious commitment of the Faithful as a whole to the permanence of the marriage bond and, as a consequence, raising doubts about the solidity of all other elements of the Gospel message as well, an extraordinarily unpastoral enterprise which, for some melancholy reason, has not of late been accorded the attention and censure it would seem to merit.

Most people today who live in areas of the world where ecclesiastical marriage tribunals are active are sophisticated enough to know that most marriages are valid because most men and women, however pleasant or unpleasant, however educated or uneducated, are able to marry. These people can understand an extraordinary case, something unusual having happened in peculiar circumstances, in a word, an exception ; and they can admit that exceptions are at times operative even in the doing of something as ordinary and plain as marrying. However, when the exception becomes the rule, they may remain silent ; but they are not without thoughts. The vast majority of marriages are valid, the vast majority of people know it, and they know we know it too.

VIII. - *The insights of criminal jurisprudence can be of assistance in developing principles « In iure » for cases concerning the nullity of marriage because of insanity or lack of due discretion of judgement. However, we must be careful to distinguish the imputability of a delict, which results from sufficient knowledge and liberty and admits of greater or less, from the valid positing of an act of marriage consent, which likewise results from sufficient knowledge and liberty but does not admit of greater or less.*

In criminal trials, both ecclesiastical and secular, oftentimes the central issue to be decided is whether or not the defendant enjoyed sufficient knowledge and liberty at the time of the crime of which he is accused so that it can be justly imputed to him. Over the centuries in criminal jurisprudence, and especially in secular criminal jurisprudence, many valuable principles have been evolved to help the judge in resolving this question. Hence, it should be no surprise that in ecclesiastical tribunals treating the nullity of marriage for reason of insanity or lack of due discretion of judgement, tracts concerning criminal capacity are frequently consulted and insights drawn from them cited and applied.

None of this need cause concern as long as those handling the marriage nullity cases recognize the fundamental difference which exists between psychological capacity for a crime

and psychological capacity to posit a valid act of marriage consent.

Very often it is suggested that this difference has something to do with the duration of the results of the two acts in question. Thus we frequently read that more discretion of judgement is required to consent to a marriage than to perpetrate a delict because marriage entails commitments stretching into the future while the delict is ordinarily just a single act performed here and now.

Perhaps this explanation has some merit. However, when one commits a crime which is truly a crime, what he is doing is usually something that carries with it at least the possibility of a penalty in the future. Accordingly, the difference in the discretion of judgement the two acts require does not seem to be reducible simply to time and its implications.

Rather, it seems to concern the fact that a delict can be more or less imputable or, if you prefer, the offender can be more or less responsible for it, depending on the amount of knowledge and liberty he had at the time it was perpetrated, whereas an act of marriage consent is either validly posited or not, depending on whether the knowledge and liberty of the one who was endeavoring to marry were sufficient or not. I can be slightly, moderately, or very guilty of a fraud. I cannot be slightly, moderately, or very married. I am either married or I am not. The condition does not admit of greater or less.

If all of this be kept in mind, criminal jurisprudence regarding knowledge and liberty can be studied without fear of misapplying what has been learned. For example, in a case concerning the nullity of marriage because of insanity or lack of due discretion of judgement, a judge who understands the difference (and the reason for the difference) between capacity to commit a crime and capacity to posit a valid act of marriage consent will not dismiss debilitation of the mind or will which was intentionally induced or insufficiently guarded against as irrelevant, will take ignorance into account even if it be altogether culpable, and will refuse to allow himself even to consider the availability of the party in question to mend his ways if his ways are, in fact, in need of mending. All that will concern him will be : « Is it proved that sufficient use of reason or discretion of judgement were not had at the time of the mar-

riage ? ». And whatever the dispositions of mind and heart of the interested party are now, the answer will be « Yes » or « No » exclusively in the light of demonstrated realities then.

A judge in a trial about the valid or invalid positing of an act of marriage consent is, indeed, fundamentally different from a judge in a criminal trial. For his function is not to penalize or even to reward. His function is simply to affirm or deny that something has been shown to be so with moral certitude gleaned from convincing proofs.

IX. - *The insights of psychological or psychiatric experts can be of assistance in developing conclusions « In facto » for cases concerning the nullity of marriage because of insanity or lack of due discretion of judgement. However, we must be careful not to allow the expert to become the judge.*

Canon 1982 of the Code of Canon Law and Article 151 of the Instruction, *Provida Mater Ecclesia*, decree that in marriage nullity cases concerning mental illness or abnormality, the assistance of one or more psychologists or psychiatrists must be sought according to the difficulty of each case. The reason for these norms is obvious. Most judges are not in a position properly to interpret hospital records, therapies followed, medications administered, psychological tests, and many of the more subtle signs and symptoms of psychic disorders. Accordingly, an expert in psychology or psychiatry is called upon, insofar as possible, to inspect the person in question, to study the acts of the case, and finally to answer questions prepared by the lawyer or lawyers and/or defender of the bond about the nature, the origin, the duration, the gravity, and frequently also the prognosis of the alleged illness or abnormality. In addition, the law requires that in making his report the expert explain how he conducted his investigation and what indications led him to his conclusions. Finally, after the report has been submitted to the tribunal, the expert is to be invited to « recognize » it formally and to reply to specific queries about it, if such there be.

All of this is clear and reasonable and evidently the fruit of centuries of experience in ecclesiastical tribunals. Unfortunately, however, in the implementation much can go awry. We will discuss here but three of the most dangerous pitfalls.

The first is epitomized by the all too familiar «memo» from psychologist or psychiatrist to tribunal stating that Titius is, for example, a psychopathic personality and therefore married invalidly. The defect of such a report is not necessarily its conclusion. Titius may indeed be a psychopathic personality, and that condition may have led to an invalid positing of his act of marriage consent. However, the mere affirming of this does not suffice. The judge must know how the expert arrived at his conclusion. For the conclusion is a proof which, like any other, must be evaluated by the judge. A simple statement about a psychic condition and its supposed juridic effect is of virtually no value whatever ; and of course, it is contrary to the clear law of the Church which demands that experts explain whence their expert opinions, that is, on the basis of what inspections, tests, documents, testimonies, symptoms, indications, or presumptions, they came to the conclusion or conclusions they are now commending to the judge.

The second pitfall is epitomized by the expert report which is over and again contradicted by solid documentation or testimony in the acts of the case. The origin of this situation is ordinarily the expert's excessive dependence upon what the patient told him in the course of an interview and his failure thoroughly to consider other available and relevant sources of information. Not rarely such a report will move an experienced judge to seek another expert opinion. For the judge, in fulfilling his function of evaluating proofs, will have discovered that the report of the expert is fundamentally flawed and will therefore obtain a second proof of the same kind to correct or perhaps only to confirm the first.

(We note parenthetically that, if the expert had not revealed in his report how he came to his conclusions, the judge might not have been aware of how unsure the conclusions were. Hence, once again, the importance of knowing the method of investigation and the reasons for the conclusions in expert reports is highlighted.)

The third pitfall is the most fatal and, alas, also the most common. In simplest terms it consists in transforming the expert into a judge. The phenomenon can take many forms. One of

the most prevalent is illustrated by the final questions proposed to psychologists and psychiatrists in marriage cases before certain tribunals, for example, « Was Titius capable at the time of his marriage of positing an act of consent proportionate with the grave obligations of marriage » ? or « Was the marriage of Titius invalid for lack of due discretion of judgement ? ».

Certainly, such questions as these are not prohibited in the law. However, strictly speaking, they are not questions for psychologists and psychiatrists. They are rather questions for judges, questions for those, namely, whose office it often is to translate proofs from fields which are not juridic into conclusions which are.

Thus a psychiatrist, after having indicated the method of his investigation, may state in reply to questions proposed to him that he is persuaded that Titius for such and such reasons was in the grip, for example, of an advanced schizophrenia at the time of his marriage. The judge receives this report, reviews the method followed in preparing it, studies the reasons offered to sustain it, and, with all other proofs in mind as well, either accepts or rejects the psychiatrist's conclusion. If he accepts it, he then draws the appropriate juridic conclusion, for instance, « The marriage of Titius and Titia was invalid because of insanity or lack of due discretion of judgement in Titius ».

If the psychiatrist has also been invited to offer a legal opinion of the case, the judge is, of course, not forbidden to consider it. However, he is not to consider it as though it were an expert opinion. For a psychiatrist is an expert in psychiatry, not law.

It is in this sense that the judge is sometimes styled the « expert of experts ». It is not that he is thought, for example, to know more about psychiatry than a psychiatrist. Obviously he is not. For in certain cases the legislator obliges him to ask a psychiatrist for his opinion. It is rather that in one very limited area of human life, his expertise is decisive ; and that, of course, is the courtroom where rights, duties, and facts are publicly and officially recognized at law.

It is one thing to prove that Titius was gravely afflicted by a mental or emotional disorder when he married Titia.

It is quite another to divine from this fact and others that the marriage of Titius and Titia has been juridically proved to have been invalid. The first task belongs to the psychiatrist, and the second to the judge. When this distinction is forgotten and the psychiatrist becomes the judge or the judge becomes the psychiatrist, the duties of both are compromised, justice is ordinarily not done, and often enough the entire undertaking assumes the aspect first of the ludicrous and then of the scandalous. The law requires that in cases concerning the nullity of marriage for reason of insanity or lack of due discretion of judgement, there be both a judge and a psychological or psychiatric expert involved in the effort. Their roles, however, are not interchangeable. Unicuique suum !

X. - *A psychosis is presumed to render a person incapable of positing a valid act of marriage consent, at least for lack of due discretion of judgement, when it is proved to have been in an advanced stage both before and after the marriage in question ; nor does a « lucid interval » at the time of the marriage necessarily preclude the presumption.*

Psychoses, as a rule, come on unnoticed and develop slowly. Moreover, some, the schizophrenic psychoses, have been historically, though — it would seem — inaccurately, identified as those grave mental afflictions which inexorably push on toward total intellectual, emotional, and volitional ruin. It is not surprising, therefore, that psychoses, among both medical men and jurists, have traditionally been seen and analysed in terms of process, as conditions which have beginnings, middles, and ends.

Actually, all of this is quite approximative. For some psychoses, while they clearly have beginnings and very often middles, do not necessarily have ends. The paranoid psychosis is an obvious example. The victim may spend his entire adult life suspecting his fellows of all manner of dark intentions. He may be tormented grievously. He may even hear an occasional voice that no one else hears. But he may also live in a more or less orderly fashion, keep a job — especially if it be one that requires little contact with others —, and go to his grave

never judged to be in any serious sense insane. The same is frequently the case with certain late-blooming depressive psychotics.

Nonetheless, the process view of psychosis is « in possession », largely — one suspects — because it reflects rather well the situation of those psychotics whose plight is most frequently studied by psychologists, psychiatrists, judges, and lawyers, those, namely, whose psychosis does indeed have an end, a tragic end of utter psychic collapse.

Thus it is that in canon law, just as in civil law, the effects of psychosis are usually discussed in terms of stages (phases) of development. For some these stages are as many as a dozen or more. For others they may be as few as three.

To avoid unnecessary complications and at the same time fall into step with the majority of the decisions of the Sacred Roman Rota, let us adopt the three-stage approach ; and let us, furthermore, treat it here in the context of that most common of psychoses, schizophrenia.

In the first stage, which is regularly called « schizoid », the victim is just beginning to manifest his illness ; and the manifestations are for the most part dismissed by observers as either irrelevant or simply « strange ». Thus the incipient schizophrenic may spend most of his time alone. He may have little interest in social contacts, sports, games, and the like. He may be falling behind in his school work or daydreaming on the job. He may on occasion even refuse to speak or say things that seem, at least in passing, to be mindless.

Still, in this first stage, the schizoid is ordinarily able to « muddle through » life with the help of family and associates at home, school, or work. At a certain point, however, he may enter stage two, a point which, unless there be an obvious « precipitating event », regularly defies precise definition. Indeed, the person in question may for a while drift back and forth from one stage to the other.

Whatever of this, stage two is distinguished, at least in its settled development, by clear signs of intellectual, emotional, and volitional deterioration. The patient is manifestly not « thinking straight ». At times he is silly. At times his discourse is, for a sentence or two, quite unintelligible. He appears to want little or nothing and yet on occasion may become

extraordinarily irritable without evident reason only to lapse back into indifference, again without evident reason. In fact, his family and associates begin to note an unnerving discontinuity between what he seems to be knowing, feeling, and willing. He learns of something which should sadden him but responds with a blank look or even a dull smile. He is now a full-fledged schizophrenic in what is called the « qualified » stage of the malady. The components of his personality are disengaging. He is beginning to depart from the real world and to create — one must assume — another unreal ambience all his own.

The third stage is spoken of as « terminal » and entails total psychic ruin. The classic schizophrenic sits alone, oftentimes staring into space, his body in some cases contorted into rigid and uncomfortable positions, his person ill-kempt, his reactions to the environment empty, shallow, « flat », his awareness of reality at least appearing to be snuffed out.

In the third stage, the schizophrenic, or any other psychotic for that matter, is clearly incapable of an act of consent such as would be required by a commitment as serious as marriage ; and the proper « caput nullitatis » is insanity, « amentia », lack of sufficient use of reason. One might also speak of ignorance of what marriage is, lack of due discretion of judgement, and even incapacity to fulfill the essential obligations of marriage in such a person. However, a discussion of this kind would be patently beside the point. For insanity is the source of so radical a defect of consent that all other defects, whether primarily in the consent or primarily in the consenter, are foregone conclusions.

But does anyone ever marry in the terminal stage of a psychosis ? Perhaps by proxy, perhaps by trickery, but hardly ever in the ordinary circumstances of life. We move on, therefore, to other more likely situations.

And we find ourselves in the second stage which, like the third, also entails the nullity of marriage but, as a rule, not because of insanity but rather because of a lack of due discretion of judgement, that is, because of a lack of capacity to ponder the decision to marry with that measure of deliberation which such a decision demands.

Are we saying then that, when a person marries while in the qualified stage of a psychosis, his marriage is presumed to be invalid ? In general, we are. However, the matter is rarely as clear as all that. What rather happens in the usual course of events is that the marriage takes place at a time when the psychotic at least appears to be more or less in control of himself and his destiny (some would say : « at least appears to be experiencing a 'lucid interval' »), and the court in a subsequent trial must therefore decide if he was indeed incapable of an act of marriage consent on the basis of what his condition is revealed to have been before and after the wedding.

Hence, the rule for judging the capacity of the individual in question is simply this : If before and after his wedding Titius gave signs of being in the qualified stage of psychosis, it is presumed that he was in the same condition at the time of the wedding even if this was not clear to the casual or non-expert observer ; and the presumption is strengthened or weakened, 1. the more or less exotic were the manifestations of the psychosis, 2. the more or less near the time of the wedding the manifestations occurred, and 3. the more or less swiftly the terminal stage was attained, if ever it was in fact attained.

What then of those in the first stage ? The answer may come as a surprise to some, but it should not. Those whose condition is not manifestly disabling, such as persons in the first stage of psychosis, are assumed to be capable of consent to marriage. Accordingly, just as no one this side of heaven is empowered to deny them the right to marry, so no one this side of heaven is empowered to declare their marriages inevitably invalid. They may be the poorest of candidates for married life. Yet, as long as they know what marriage is, have sufficientily considered it, and freely willed it — something which need not exceed the capacities of a schizoid, for example —, theycan be validly married.

Nor does the likelihood of future unhappiness for themselves and their partners necessarily color the issue. The object of marriage consent, as noted above, is a relationship between a male and a female which is exclusive, permanent, and by nature ordered to the procreation of children. In that object there is no guarantee of happiness. Thus it may happen that

Titius, for instance, is married today and found tomorrow to be suffering from a physical disorder which has been building for years and will be the source of continuous stress not only for himself but also for his wife for many more years to come. Still, his marriage is not invalid for that reason. And the same would be true of Titia who is married today and found tomorrow to be suffering from a psychic disorder, perhaps schizophrenia or cyclothymia, which has been building for years and will be the source of continuous stress not only for herself but also for her husband for many more years to come. Happiness is, of course, desired in every marriage. It may, however, not always be achieved whether in the case of persons altogether healthy both physically and mentally or in the case of persons who are slowly becoming paralyzed or even slowly losing their minds. If this seems to be an unduly « hard saying », the difficulty is perhaps not so much canonical as theological.

Whatever of this, we offer the following rules concerning psychosis and the capacity for positing a valid act of marriage consent : 1. There is no presumption against this capacity for those in the first stage of psychosis ; 2. There is such a presumption for those in the second, and this presumption is not necessarily prejudiced by a temporary remission of the more serious symptoms of the condition at the time of the marriage ; 3. In the third stage, the incapacity is usually for reason of insanity ; 4. In the second, if the incapacity be had, it is usually for reason of lack of due discretion of judgement ; 5. In the first, what is to be said below, in Section XI, may be relevant.

XI. - *Neurosis and psychopathy (personality disorder) are never presumed to render a person incapable of positing a valid act of marriage consent. However, they may have that effect when they are serious and exacerbated by circumstances.*

In our discussion of psychic disorders, we observed that psychoses on the one hand and neuroses and psychopathies on the other are to be distinguished not quantitatively but qualitatively. For psychoses, we noted, are understood to entail a grave compromising of the superior faculties, whereas neuroses and psychopathies are not.

Titius may be suffering grievously because of a phobia, but he is not thereby taking leave of the real world. He is rather dealing with something in that world in a blatantly inappropriate manner ; and while such comportment may undermine his thinking, feeling, and willing in one particular area of life, it need not undermine them in general, at least not in the ordinary circumstances of a phobic neurosis.

Caius, on the other hand, who is a depressive psychotic in the so-called « qualified » stage of that affliction, is not just more troubled than Titius. He is mentally ill. Moreover, the illness touches not just one area of his life ; it touches and colors everything.

Consequently, Caius is and Titius is not presumed to be incapable of positing an act of consent of the kind that a decision as important as marriage would demand.

This said, however, we hasten to concede that neurotics and psychopaths (and some psychotics in the first stage of their psychosis) do at times marry invalidly because the psychic disorder from which they suffer has interfered with that minimum discretion of judgement which marriage requires. Ordinarily this happens when, in addition to a serious neurosis or psychopathy, there are other factors at work which heighten confusion and stress and especially when the particular neurosis or psychopathy is intimately connected either with the marriage itself or with certain of its circumstances.

An example will clarify the principle.

Titius suffers from a psychopathy because of which he is constantly seeking to prove to himself and the world that he is an unusually gifted and important personage. Through all manner of deceit, he is convinced by Titia and her family that, if he marries her, his offspring will be a politico-religious leader in whose glory he will bask for the rest of his days. The convincing, moreover, takes place in an outrageously unhealthy atmosphere not only of sexual encounters of various kinds but also of séances in which Titius, a dedicated « spiritualist », is led to hear voices announcing that Titia's wondrous son is yearning to be conceived and born.

Could it be that the marriage of Titius and Titia were invalid because, in view of his serious personality disorder and the extraordinary circumstances in which he found himself, Titius was unable to weigh the decision to marry with that measure of critical judgement which such a decision merits ? Indeed it could. Nor would it be necessary, as some would suggest, to appeal to a dysfunctioning of the will, while the intellect somehow remained « intact », in order to explain the phenomenon. Rather it would be enough to point to an « estimating », a pondering, a practical judgement concerning the wisdom of marrying which was grossly distorted by both misapprehensions of reality and emotional turmoil and which, therefore, begot a manifestly inadequate act of the will.

In a tribunal, the proof would very likely proceed as follows. First, the psychological or psychiatric expert would demonstrate from the acts of the case, and perhaps also from a professional interview, that at the time of his marriage Titius was a gravely disordered personality. Second, the same expert would then examine what is known of the circumstances of the decision to marry and the wedding and, from his knowledge both of the circumstances and of the disordered personality in question, conclude that Titius was seriously disturbed in his decision-making operation when he married Titia. Finally, if the judges were to accept the expert's opinion and convert it into a juridic conclusion, they might state, for example, that Titius consented to his marriage with gravely impaired deliberation and, consequently, without sufficient discretion of judgement. Thus the decision of the tribunal would be in favor of the nullity of the marriage, and the proof would be considered « direct ». For it would not have been surmised from other actions of Titius at the time of his marriage but rather directly derived from knowledge of his mental and emotional situation at that time.

There are cases, however, wherein such direct knowledge is not available and the conclusion must therefore be arrived at indirectly, that is, by means of inference. We offer an illustration.

Caia too at the time of her marriage was a seriously disordered personality. She was incredibly irresponsible, radically self-centered, and oftentimes gratuitously cruel. Yet little can be established about circumstances which may have aggravated her condition when she married Caius. For at the time,

even her whereabouts were unknown to relatives and friends; and no others are willing to come forward now as witnesses.

All the same, from unimpeachable evidence we know of an extraordinary number of truly absurd decisions made by Caia shortly before and after her wedding. They range from pointless abuse of public property, to prostitution for no identifiable reason, to obtaining a dispensation from the form of Catholic marriage under false pretenses in order to marry a man with whom it had been agreed to live in a manner directly contrary to Catholic teaching, to adamant refusal to contact relatives who were known to be sick with worry over her, and even to attempting to have a civil court force her hospitalized father pay the damages resulting from an automobile accident in which he had no part or responsibility whatever.

In such a case, the tribunal, having heard the experts, may well conclude to Caia's incapacity for valid marriage consent with an analysis something like this: If in all other decisions at the time of her marriage, Caia, a proven and seriously disturbed psychopath, is shown to have acted foolishly, mindlessly, irrationally, it may be legitimately assumed that in making her decision to marry she acted in the same way, that is, without the necessary discretion of judgement. The force of such an argument might be enhanced or reduced by an almost unlimited variety of factors. However, the following would appear to be relevant in virtually every case: 1. the seriousness of the psychopathy at the time of the marriage, 2. the number of absurd decisions that later came to light, 3. their gravity, 4. their proximity to the wedding, and 5. the absence of other reasonable decisions during the same period. The first of these is, of course, fundamental; but the remaining four are no less essential; and the fifth can be crucial.

In closing we would observe that both of the cases described here are real and were decided favorably (« The nullity of the marriage has been established ») by the Sacred Roman Rota in sentences *Before Egan*. Still, let us be very clear about them. First, the facts of both are unusual in the extreme. Second, despite this, both were decided at the Rota in third instance. Thus at least one previous college of judges was not convinced of the nullity of the marriage in question. Third and most importantly, the two cases illustrate not the rule

about the capacity of a neurotic or psychopath to posit a valid act of marriage consent, but rather the exception. The rule is that such persons are presumed capable, and it is this which we are obliged to emphasize here. Neurosis and psychopathy may lead to insufficient discretion of judgement. Ordinarily they do not.

XII. - *Some less grave psychic disorders are named on the basis of the similarity of certain of their symptoms with certain of the symptoms of psychosis or on the basis of their origins in other psychic disorders which can be more grave. The judge in cases concerning the nullity of marriage for reason of insanity or lack of due discretion of judgement must therefore be constantly on his guard not to be beguiled by such possibly misleading terminology.*

We have had occasion to allude to this matter in passing above. There we mentioned that some psychopaths are termed epileptic because the disorder of their personality and the abnormality of their activity seem to result from epilepsy. Moreover, we observed that such an expression as « epileptic psychopathy » might easily draw the unitiated to conclude that anyone suffering from such a condition must necessarily be incapable of valid marriage consent.

In point of fact, however, epileptic psychopaths are, as a rule, quite capable of marriage; and it would be the height of injustice (and the depth of pastoral practice) even to suggest that their marriages are « ipso facto » null. For, among other considerations, the correlative of such a suggestion would obviously be that epileptic psychopaths should not be permitted to marry.

The same applies to schizoid, cyclothymic, and paranoid psychopaths and personalities, depressive neurotics, and so forth. In none of these is the presumption of which we spoke in Section X. operative. On the contrary, the presumption to be invoked for all of them is that which was articulated in Section XI.

« Let no man deceive you with vain words », the Psalmist cautions. Let none of us, we add, deceive ourselves or others with vain words either. A psychopathy or a neurosis with an

adjective attached which has been derived from the name of a psychosis, or any other psychic disorder for that matter, is still a psychopathy or a neurosis ; and its consequences in law remain unchanged.

Final Note

In the opening section of this study it was stated that psychic disorders can lead to the nullity of marriage either because of an incapacity to posit an act of consent such as would be required by a commitment as serious as marriage or because of an incapacity to carry out that to which the consent was given, that is, to fulfill the essential obligations of marriage. Our assignment was to explore the first of these two incapacities, and this we have done. Now, however, we presume to attach a brief note about the second as well. For it is closely bound up with the first and has, moreover, recently replaced the first as *the* « caput nullitatis matrimonii » in the ecclesiastical tribunals of many nations.

Marriage, according to the natural and the divine positive law, is a relationship (society, communion, partnership) between a male and female, which is exclusive (all third parties are ruled out), perpetual (it continues in existence as long as both parties are alive), and ordered by nature to the procreation of children. If one grants this definition, all else that we have to say here follows, « as night the day ». If one calls into question any of its essential elements or seeks to add others, all else that we have to say here will probably founder.

But let us push on. The marriage we have just defined is a relationship, an « esse ad », if you will, which is brought into being when Titius and Titia consent to it by giving and accepting the exclusive and perpetual right to perform acts which are intrinsically directed toward the begetting of offspring. It has never been brought into being in any other way and, indeed, cannot be brought into being in any other way. Consequently, if one or both of the partners to a marriage were unable to participate in marital acts or were unable to commit himself or herself to participate in those acts only with the other partner as long as both were among the living, their marriage, their conjugal « esse ad », or more explicitly, that relationship

which should have resulted from the exchange of the above-described right, would be invalid for incapacity to follow through on marriage, which is to say, for incapacity to fulfill the essential obligations of marriage.

Perhaps we may seem to be pointlessly laboring the obvious. Unfortunately we are not. For, while the vast majority of canonists today would accede in theory to what we have just written in the paragraph above, not a few deny it in fact by attaching to the key word, « relationship », a new meaning which, though never spelled out, emerges quite clearly, all the same.

The approach goes something like this : « Of late the Church has discovered that marriage does not have just a corporal but also a personal meaning, nay more, an interpersonal meaning. Hence, if Titius and Titia are unable to constituite an interpersonal relationship, their marriage is manifestly null and can be declared such on the grounds of incapacity to fulfill the essential obligations of marriage ».

Up to this point, no urgent complaint need be lodged. It is, of course, not true that the Church has only recently learned that marriage is an interpersonal relationship, as is evident from the fact that Canon 1082 of the 1918 Code of Canon Law stated that anyone who did not know that marriage was a « permanent association of a man and a woman » could not marry validly and that such ignorance was not to be presumed after puberty. Likewise, it is not true that the Church only recently learned that marriage is something more than a merely corporal matter, as is evident from the fact that Canon 1081 of the same 1918 Code of Canon Law stated that marriage results from an exchange of rights, something that can be done only by persons exercising their highest spiritual faculties. However, setting these two reservations aside as issues of secondary importance, we repeat that no grave damage has been done thus far. Marriage is a relationship (interpersonal, of course) ; and if Titius and Titia are unable to constitute the relationship, they do not marry validly. So far, so good.

But the explanation continues : « The interpersonal relationship which Titius and Titia must constitute is clearly not had if they cannot grow in it, if they cannot be enriched by it, if they cannot be mutually fulfilled as a result of it. Therefore, when either or both parties to a marriage are afflicted by a

psychic disorder (usually an abnormality of the personality) whereby they are unable to grow in their marriage, be enriched by it, and mutually fulfilled as a result of it, again, they do not marry validly ».

Here we have the most serious of complaints. For « relationship » has moved from meaning an « esse ad » to meaning a successful « esse ad ». And worse yet, the criteria for the success (which is, of course, quite beside the point when the validity of a marriage is at issue) is so vague (« growth », « enrichment », « fulfillment ») that it is unlikely that any marriage could survive the test if those judging a case based on such grounds were disposed to sanction a new effort by Titius and/or Titia to achieve a more satisfactory growth, enrichment, and fulfillment in a new, conjugal, interpersonal relationship.

Are we therefore suggesting that the second kind of incapacity for marriage is without meaning ? Certainly not. For there are psychic disorders which can render persons incapable of fulfilling the essential obligations of marriage, namely, those psychic disorders which make it impossible for persons to give and accept the exclusive and perpetual right to conjugal acts whence arises that interpersonal relationship which is marriage. As a matter of fact, three are well-known to have such an effect. They are 1. satyriasis, whereby a male cannot commit himself to an exclusive, interpersonal, conjugal relationship ; 2. nymphomania, whereby a female cannot commit herself to an exclusive, interpersonal, conjugal relationship ; and 3. that homosexual condition whereby a male is permanently impeded from engaging in sexual activity with a female or a female is permanently impeded from engaging in sexual activity with a male.

If there be any others, they have not as yet been identified at least for those for whom the word, « relationship », means « relationship » and not necessarily « happy relationship ». Thus there seems to be little more to be remarked about the second incapacity beyond the simple fact that the jurisprudence of the Sacred Roman Rota concerning satyriasis, nymphomania, and homosexuality is quite well-developed and easily available in the published decisions of the past twenty-five years.

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