NOTES ON CANON LAW

CONFIRMATION

Although the sacrament of confirmation is not required as a means necessary for salvation (canon 787), the Church has always urged her children to receive it, in order to benefit by the gifts of the Holy Ghost which it imparts, and to receive the character of a soldier of Christ.

The Council of Trent has defined that a bishop alone is the ordinary minister of confirmation (canon 782, §1); hence the Holy See has always provided that the administration of this sacrament be reserved as far as possible to the bishop as a right and an office which is proper to him. However, when the need and welfare of the faithful demanded it, the Holy See has not hesitated to substitute a simple priest as the extraordinary minister of confirmation. This faculty to confirm is given by the law itself in certain cases—to cardinals, (canon 239, §1, n. 23) without limitation as to territory, to prelates and abbots *nullius*, to vicars and prefects apostolic, who may use the faculty only within the limits of their territory and for the duration of their office (canon 782, §3). In all other cases a priest needs a special indult of the Holy See to administer the sacrament of confirmation. Such indults have been granted from time to time, for instance, to the bishops of Latin America (April 30, 1929; *AAS*, XXI, 554). However, as late as 1935, the Holy See refused to extend the privilege to European bishops, advising them rather to ask the Holy See for an auxiliary or coadjutor, or to obtain the help of a neighboring bishop for the administration of confirmation (*AAS*, XXVII [1935], 14).

At the time when the Code of Canon Law was being prepared, some of the collaborators suggested that the Holy Father be asked to extend the power to confirm to other extraordinary ministers, so that no child might die without this sacrament. Father F. X. Wernz, S.J., one of the foremost canonists of his day, proposed a canon, inserted into the first schema of the Code, which granted to pastors the faculty to confer confirmation, as extraordinary ministers, to dying persons. And he backed his proposition with the observation that the children of schismatics were more privileged in this matter than those of Catholics. The Pontifical Commission had also determined to ask the Holy Father to make this proposition a law even before the promulgation of the Code. Even though, for reasons unknown, this proposal came to nought, and Father Wernz's canon was omitted from subsequent schemata of the Code, still the idea was kept alive by canonists and moralists by proposing reasons in favor of it in their textbooks and magazine articles.

When the ravages of World War II increased the number of infants who died without confirmation, and caused many children to grow to adult age and run the risk of dying without this sacrament because there was no bishop at hand to administer it, Cardinal Jorio, Prefect of the Sacred Congregation of the Sacraments, became the champion of the cause with Pope Pius XII, proposing all the reasons suggested by prominent consultors of the same Congregation. His Holiness, after considering the importance of the matter, and wishing to provide for the spiritual welfare of a considerable portion of the faithful who in present circumstances would die without confirmation, commissioned the same Congregation to make a thorough and accurate study of the question, and, after discussing it in plenary sessions, to report to him the resolution adopted. Having done so, they handed in a report to His Holiness who, after having studied it, authorized the Congregation to draw up a decree providing for the needs of the times in this matter.

The decree appears in full in the *Acta Apostolicae Sedis*, XXXIII (1946), pp. 349–58 (n. 11), under date of October 3. We quote the most important part of the decree.

Faithfully complying with this apostolic mandate, this Sacred Congregation of the Sacraments by these present letters has decreed as follows:

1) By reason of a general indult of the Apostolic See the faculty to confer the sacrament of confirmation as extraordinary ministers (canon 782, §2) is granted only in the cases and under the conditions laid down below to the following priests, namely:

a) to pastors enjoying a proper territory, excluding personal and family pastors, unless they also enjoy a proper territory, even though it be cumulative;

b) to the vicars mentioned in canon 471, as well as to vicars econome;

c) to priests to whom a certain territory has been committed exclusively and permanently, and with a determined church with the full care of souls, and with all the rights and duties of pastors.

2) The above mentioned ministers may validly and licitly confer confirmation, *per se ipsi, personaliter*, but only on the faithful who are actually present within their territory, including persons staying in places withdrawn from parochial jurisdiction; therefore seminaries, hospices, hospitals, are not excluded, or any other kind of institution even though it be [under the care of] religious no matter how exempt (cf. canon 792); provided the faithful in question are in danger of death by reason of a serious illness from which it is foreseen that they will die.

Should the ministers exceed the limits of their mandate, let them know well that they act wrongly and do not administer the sacrament, and that canon 2365 retains its full force.

3) They may use this faculty both within the episcopal city and outside of it,

whether the see be occupied or vacant, provided the diocesan bishop cannot be had or is legitimately impeded from conferring the sacrament personally, and that there is no other bishop in union with the Holy See at hand, even though he be only titular, who cannot act as a substitute without grave inconvenience.

4) Confirmation should be administered according to the discipline of the Code of Canon Law adapted to the circumstances, and the rite prescribed by the Roman Ritual should be used as given in detail below, and the sacrament is to be conferred *gratis vero quovis titulo.*

The decree then gives details regarding the instruction which should be given the person to be confirmed (if circumstances permit), the registration of the confirmed in the baptismal and confirmation records and in the diocesan chancery. It further informs the local ordinary that he is to instruct the extraordinary ministers in the details of the administration of this sacrament, and that he is to send an annual report to the Holy See regarding the number of persons confirmed by the extraordinary ministers and regarding the manner of carrying out this extraordinary office (nn. 5–9). The first part of the decree concludes as follows:

His Holiness, Pope Pius XII, in an audience granted to the Secretary of this Congregation on August 20, 1946, deigned to approve the above-mentioned decree and to support it with his apostolic authority, all things to the contrary notwithstanding; and he ordered that this same decree should be published in the *Acta Apostolicae Sedis*, official publication of the Holy See, to have the force of law as of January 1, 1947.

The second section of the decree gives a complete list of the canons of the Code regarding the extraordinary minister of confirmation, the matter to be used in the administration of the sacrament, the sponsors, the recording of the sacrament, and finally the penal legislation on this subject. The third section reprints in detail the rite to be used by a priest who, in virtue of an apostolic indult, confers the sacrament of confirmation. It is taken from the typical edition of the *Rituale Romanum*, for 1925.

In a lengthy article which appeared in *L'Osservatore Romano* for October 31, 1946, Monsignore Cesare Zerba, Subsecretary of the Sacred Congregation of the Sacraments, gives what he calls marginal notes for the decree: "In margine al recente Decreto della S. C. dei Sacramenti circa il conferimento della Cresima ai moribondi." Though in no sense an authentic interpretation of the decree, Monsignore Zerba's comments give us the best possible doctrinal interpretation, since by reason of his office he is thoroughly conversant with the historical background and knows the mind of the Sacred Congregation. Hence we deem it helpful to give the substance of his inter-

pretation regarding the positive provisions of the decree which we have quoted above.

The faculty to confirm as extraordinary minister is granted to all parish priests having a proper territory. It is likewise granted to the vicars mentioned in canon 471, that is, to those who have the care of souls in a parish which has been united with a moral person, such as a religious house or a capitular church. Vicars econome or administrators of parishes, as described in canon 472, also enjoy the faculty; but all other vicars, such as those mentioned in canons 474–476 do not; hence substitute vicars, coadjutor vicars, and regular assistants (*vicarii cooperatores*) do not enjoy this faculty; neither does the vicar capitular (administrator of a diocese), nor even the vicar general, unless they be bishops (or pastors), since the enumeration of the decree is absolutely exclusive. The third class of priests mentioned in the decree includes all perpetual curacies, vicariate and succursal churches whose rectors enjoy the full and independent care of souls, but lack the title of pastor. Few such will be found in the United States.

The faculty is personal: hence it cannot be delegated to anyone. Its use is limited to the territory proper to the minister: hence a pastor cannot use it in favor of a parishioner who happens to be outside the parish limits; within the parish limits, he may confer confirmation on any of the faithful who are in danger of death, whether they be adults or infants, whether they have a domicile, quasi-domicile, or residence, or simply happen to be there. Included also are all persons in institutes which have been withdrawn from the parochial jurisdiction, such as a seminary, a hospital, hospice, and the like, as well as those in an exempt religious house, even within papal cloister.

These persons must be in danger of death by reason of a grave illness; hence not from any other cause, such as imminence of battle for a soldier, or an air raid for a civilian. This danger must be such that death is foreseen. However, to avoid vain fears and scruples, a moral estimate of the danger will suffice. Practically, then, a doctor's decision that a person is in danger of death from disease, or a pastor's decision that the time has arrived to administer the last sacraments to a dying person, will allow the priest who has the faculty to administer confirmation. The words, "gravi morbo . . . ex quo decessuri praevideantur," are practically equivalent to those others used in the Code in analogous cases: "urgente mortis periculo."

In conclusion, we may note that while giving the common doctrine regarding the ordinary and the extraordinary minister of the sacrament of confirmation, the decree of the Sacred Congregation of the Sacraments very carefully refrains from any discussion of the nature of the faculty granted

to the extraordinary minister. Is it the power of orders, or the power of jurisdiction, or some third thing? Theologians have still to provide us with a satisfactory answer to this difficult problem.

CHURCH PROPERTY

The "wealth of the Church" has ever been a target of attack on the part of "progressive" intellectuals and popular-front movements. Accustomed to think of real property as realizable in terms of ready money, the world at large confuses control of property with ownership, and, from the analogy of commercial and industrial undertakings, argues that a body which administers such imposing assets must necessarily pay fat dividends to its fortunate shareholders. From the gratuitous assumption that the Church is the clergy, the conclusion is drawn that a well-founded Church means a wealthy clergy; that *curês* and capitalists are miscreants of the same deep-dyed brand. Nothing could be further from the truth, since it is a patent fact that the enjoyment of magnificent cathedrals and other ecclesiastical buildings does not prevent the clergy in many lands from living a hand-to-mouth existence. With these thoughts as an introduction, Father Lawrence L. McReavy gives an excellent exposition of "The Ownership of Church Property" in *The Clergy Review* for February, 1946 (pp. 65–74).

The first part of the article is taken up with an exposition of the development of the doctrine of the ownership of church property. It need not detain us here. In the second half of the article, the author gives a practical exposition of the canons of the Code regarding the ownership of church property. Two points receive special emphasis and may well be pondered by all administrators of church property. The first point is the fact that the ownership of church property remains vested in the moral personality to which it belongs, even though for civil purposes it is found convenient, if not necessary, to vest church property in a diocesan board of trustees. This does not alter the canonical position; it does not make such property diocesan in ownership; but the moral person—say, the parish—retains its right to acquire, possess, and administer property of its own. Hence the members of the board which controls such property in the eyes of the civil law are merely administrators of it so far as the Church is concerned, and must consult and at times obtain the consent of the moral person who owns the property, before they may alienate such property by way of sale, mortgage, and the like.

This is a very practical thought for administrators of parochial and institutional property in the United States. It may be useful to recall here that on July 29, 1911, the Sacred Congregation of the Council issued an instruction to the archbishops and bishops of the United States to the

following effect: (1) Parish corporations (civil) are preferable to all others and should be introduced wherever the state laws allow it; (2) if the state law does not allow parishes to be incorporated, the bishops are to use their influence to have parish corporations made legal as soon as possible; (3) until such recognition can be obtained, the method commonly called "corporation sole" is allowed, but with the understanding that the bishop act with the advice and, in more important matters, with the consent of the interested parties, as well as of the diocesan consultors, this being an obligation in conscience on the bishop in person; (4) the method called "in fee simple" is to be abandoned. The instruction recommends the civil form of incorporation of parishes in use in the State of New York.[1]

The second point of interest in Father McReavy's article is the ownership of particular offerings in which special regard must be paid to the donor's intentions. Even though it be clear that a donation is not made *intuitu personae* but is given to the Church, the canon law is very insistent on the necessity of respecting the will of the donor regarding the purpose for which it is to be used. "Therefore, money contributed for, let us say, a new altar, may not lawfully be devoted to a school-building, nor, for that matter, may it simply be dropped in the till for general parish purposes (including possibly the eventual erection of an altar); it must be devoted to the purpose for which it was solicited or given."

Father McReavy's article is a real contribution to the scanty literature in English on the subject of church property.

REMEDIABLE SENTENCE

Canon 1971, §1, 1°, disqualifies a consort from impugning his marriage if he was the culpable cause of the impediment or of the nullity. The purpose of the law is contained in the classical maxim: "Fraus sua nemini patrocinari debet." Since this canon deprives the consort of a right granted by the law, it is to be interpreted strictly, according to canon 19. Many canonists seem to have forgotten this fundamental principle in their interpretation of canon 1971. Alarmed by the great increase in the number of cases of vitiated consent, which one of them has called a substitute for divorce, they have considered only the scandal which would follow if such a guilty consort were granted a declaration of nullity, and, as a consequence, they have extended the incapacity of the guilty consort laid down in canon 1971, §1, 1°, as widely as possible.

The Commission for the Interpretation of the Code, on the other hand,

[1] The text of the instruction as well as the form of incorporation of Roman Catholic parishes in the State of New York may be found in the *Ecclesiastical Review*, XLV (1911), 585, 696; as well as in Bouscaren, *Canon Law Digest*, II, 443–445.

has steadfastly interpreted canon 1971 in the light of canon 19. The Commission admits: that the canon applies not only to impediments strictly so-called (canons 1067–1080) but also to impediments improperly so-called (1081–1103);[2] and, that the guilty consort is barred from being a petitioner for annulment,[3] and consequently has no right to appeal from a sentence given in favor of the marriage.[4] However, it upholds the right of the guilty consort to notify the Ordinary or the promotor of justice of the nullity of the marriage,[5] so that the latter under certain conditions may introduce the case; and, if he does so, he takes part in the trial by virtue of his office,[6] not as a representative of the Sacred Congregation of the Sacraments.[7]

Furthermore, the Code Commission declared that a consort who entered upon marriage under the influence of force or fear is not debarred under canon 1971, §1, 1°,[8] nor is a consort who placed an honest and licit impediment,[9] but only that consort who was both the direct and malicious (*dolosa*) cause of the impediment; hence a consort who was either the indirect cause or was not the malicious (*doli expers*) cause of the impediment is not barred from petitioning for a decree of nullity.[10]

In its most recent decision, which we wish to discuss here, the Code Commission declares that the deprival of the right to impugn the marriage contained in canon 1971, §1, 1°, does not cause a sentence passed to be irremediably null in conformity with canon 1892, 2°. Here is the official text of the reply: "*D*°. An inhabilitas coniugis ad accusandum matrimonium, a canone 1971, §1, 1° statuta, secumferat incapacitatem standi in iudicio, ita ut sententia vitio insanabilis nullitatis laboret iuxta canonem 1892, 2°? *R*. Negative."[11]

When a sentence is vitiated by irremediable nullity, the court issuing the sentence is powerless to correct or emendate the sentence in any way so as to render it valid. If it is a remediable sentence, complaint of nullity may be proposed according to the methods laid down in canons 1895 and 1896. Canon 1892, 2°, tells us that a sentence is irremediably null when it is pronounced in the cases of parties, one of whom has not the legal right to bring suit in an ecclesiastical court. According to canon 1971, §1, 1°, the consorts have such a legal right in all cases of separation and nullity, unless they themselves were the cause of the impediment. At first sight,

[2] *AAS*, XXI (1929), 171, Bouscaren, *CLD*, I, 807.
[3] *AAS*, XXV (1933), 345 (ad II); *CLD*, I, 808.
[4] *AAS*, XXXVII (1945), 149.
[5] *AAS*, XXII (1930), 195; *CLD*, I, 808.
[6] *AAS*, XXV (1933), 345 (ad IV); *CLD*, I, 808.
[7] *AAS*, XXXII (1940), 317.
[8] *AAS*, XXV (1933), 345 (ad I); *CLD*, I, 808.
[9] *AAS*, XXV (1933), 345 (ad III); *CLD*, I, 808.
[10] *AAS*, XXXIV (1942), 241; *CLD*, II, 548.
[11] *AAS*, XXXVIII (1946), 162.

one would be tempted to conclude that, if a guilty consort did bring an action for nullity, the sentence would be irremediably null. Yet the Code Commission has declared the contrary. How is the seeming discrepancy to be explained?

We have at hand the comments of three prominent canonists on this latest reply of the Code Commission. Let us see how they interpret it. In *Periodica* for June 15, 1946, (pp. 195–198) Father Cappello, after commenting on the canons involved and defining the terms used, sums up the arguments for and against the right of the guilty consort to stand in court. In favor of that right he proposes three arguments: (1) Canon 1971, §1, 1°, by no means clearly and explicitly denies the culpable consort the right to stand in court; hence the prescription of canon 1892, 2°, does not seem to apply. (2) It is not always evident whether the consort was really the culpable cause, whether he acted maliciously, whether his fault was both subjectively and objectively grave; as a consequence the consort cannot be considered debarred from his right to act unless his true and grave culpability be established in the external forum. (3) If the nullity of the sentence be admitted to be irremediable, and if later on doubts were to arise either for or against it, a number of grave inconveniences would arise regarding the validity of the process and of the judicial acts, as well as the court sentence itself, because a complaint of nullity can be proposed either by the method of exception *in perpetuum*, or by way of action within thirty years from the date of publication of the sentence (canon 1893).

Against the right of the consort to stand in judgment two arguments are proposed: (1) canon 1971, §1, 1°, collated with canons 1646 and 1648 ff., seems to deprive the guilty consort of his right to stand in court. For what do the terms "habilis" or "inhabilis," "capax" or "incapax" mean? (2) If the consort, no matter how guilty, could nevertheless stand in court and be a plaintiff, what value has canon 1971, §1, 1°, and what would be the juridical effects of the penalty established, and the privation laid down? Either none whatever or one of only slight moment. And then the learned author calmly concludes: "Hence every one will clearly see the reason for the doubt and for the answer given, as well as its importance, and the problems and questions solved by it."

Father Creusen, in *Nouvelle Revue Théologique* for May–June, 1946 (pp. 344–5), tells us that most commentators think that the legislator in depriving the guilty consort of his right to attack the validity of his marriage intended to deprive him of all capacity to act, once the procedure had been started by the promotor of justice in accord with §2 of canon 1971. Hence the court's decision would be irremediably null because of the very incapacity to be a party to the process. He then cites a minority opinion

held by Jemolo[12] and Bidagor[13] to the effect that the privation of the right of introducing the case in the quality of plaintiff is not the same thing as the absolute incapacity of being a party to a case properly begun by the promotor of justice. Father Creusen thinks that the latest decision of the Code Commission supports this opinion, and "once again interprets the canon in its strictest sense."

Canon Mahoney, in the *Clergy Review* for December 1946 (pp. 660–664), informs us that there are Rota decisions which confirm what appears to have been up to the present the common opinion of canonists, namely, that "inhabilis" means "incapax." "Habilis" and "inhabilis" certainly have this meaning in canons 1080 and 1116, as regards the marriage contract. He then continues: "In this most recent decision favoring the culpable party, this opinion is rejected and the reason may be that the interpretation given to 'impedimenti causa' (May 3, 1945: 'causa directa et dolosa') leaves it open to dispute, until a judicial decision has been obtained, whether the party who is the cause of the impediment is actually the culpable cause of it directly and in bad faith. Accordingly, a judicial sentence, unlawfully obtained in a case of this kind is invalid, but the invalidity can be remedied as in canons 1894 and 1895."

After reading these commentators on this latest decision of the Code Commission, one point at least seems clear: there is a difference between the *inability* of the guilty party to stand in court contained in canon 1971, §2, and the *lack of right* to stand in court on the part of the plaintiff in canon 1892, 2°, which causes the sentence to be irremediably null. It is this difference upon which the Code Commission bases its decision. In what that difference consists is not too evident, in spite of Cappello's assertion to the contrary. The following explanation occurs to the writer, and he proposes it for what it is worth: The guilty consort actually had a right to come into court, but was deprived of it by reason of his being the direct and malicious cause of the impediment which made his marriage invalid; the plaintiff in canon 1892, 2°, never did have a right to stand in court.

Since the sentence of the court is remediable, according to this latest decision of the Code Commission, we may well ask with Canon Mahoney how the remedy is to be applied. It is not so clear from canons 1894 and 1895. He suggests that the promotor of justice is to intervene and perform, in the measure directed or permitted by the law, the essential acts which are lacking.

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[12] A. C. Jemolo, *Il matrimonio nel diritto canonico* (Milano, 1941), n. 195 s., 220.

[13] Bidagor, S.J., "Circa accusationem matrimonii coniugis culpabilis," *Rassegna di Morale e di Diritto*, VI (1940), 154 ff.