

A PRELIMINARY INVESTIGATION
IN
MARRIAGE NULLITY TRIALS

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INTRODUCTION

This dissertation--"A Preliminary Investigation in Marriage Nullity Trials"-- concerns a procedural law topic with pastoral significance: the common practice in the United States and Canada of gathering a considerable amount of information and even testimony before the acceptance of a petition for a formal marriage annulment process, especially in cases based on psychological grounds.

There have been a number of criticisms of this practice as an abuse of the process as regulated in the Code of Canon Law and the Instruction Provida Mater of 1936. This thesis is a positive evaluation of whether any preliminary investigation is justified in law and in good tribunal practice, especially in view of the alleged psychological grounds and the need for more background information to process a case, or even to see if any grounds of nullity are present. These preliminary examinations will also be evaluated in the context of the Church's total pastoral care for broken marriages.

When a petition, which would require a formal judicial process, is presented to a tribunal, a preliminary decision must be made either to accept the petition for adjudication, or to reject it for reasons clearly stated. Any case, then, must have some grounds in law and in fact which, if substantiated, could lead to the moral certitude required for a declaration of nullity. Courts have always required

some indications of nullity and means of proving it, before a case will be accepted for the long judicial procedure. With the newer "psychological grounds," which make up an estimated 80% of all formal grounds in North American tribunals, the importance, and often the necessity of some preliminary investigation seems even more evident. Without it, judges often fail to see any possibility of a case; with it, judges may discover clear indications of nullity, and means of establishing the required moral certitude.

The dangers must also be clearly investigated. By requiring too much before the probative part of the process begins, a court could literally prejudice (pre-judge) a case, before all the testimony and evidence is properly and fully gathered. By requiring too little, a court could make a too facile decision of rejection.

The problem can be reduced to these questions: is there a lacuna legis which is being justifiably supplemented by court procedure? Or is it a practice contrary to the law, prejudicial to the rights of persons, and, therefore, to be corrected? Or, finally, is it a practice extra legem since circumstances not foreseen in the law (especially the greater acceptance of psychic incapacity cases) have arisen, which require such a practice for true justice to be achieved? And if it is justified, should the revised Code of Canon Law mention and sanction such a procedure, or should it be left

to the judge to use it where necessary?

The indefinite article in the title of this thesis is deliberate, since we cannot speak of the preliminary investigation in canon law. The concept is not univocal, but rather connotes different purposes in different types of procedure used at diverse times.

The only "canonical institution" of an officially approved (in forma ordinaria) preliminary investigation for marriage nullity cases was in the Austrian Instruction of 1855. This was approved only for the Empire of Austria, but served as a valuable precedent for other countries, including the United States, as witnessed by the Third Plenary Council of Baltimore.

A preliminary investigation is understood only if it is clear what the process is, and what steps are considered as preliminary. In Church procedures which are more administrative in nature, the investigation had as its purpose to guarantee some basis to various types of cases, before a full-scale investigation was begun with procedures which are very time-consuming. Thus, a bishop, for example, in petitions for dispensation of a non-consummated marriage, was to make sure that the request he signed have a solid basis in law and in fact before he asked permission to open a case officially. Otherwise, it might be summarily rejected by the competent Sacred Congregation, or delayed by

many dilatory responses asking for more information. This would indicate that the bishop or his delegate had not done their homework, and presented a well-founded case for decision.

The central concern of this dissertation is whether any type of preliminary investigation is suitable to the formal judicial process for marriage cases. Other processes will be studied which often share, to some degree, in the same judicial elements as a formal trial. The reader would do well initially to place a question mark after the title.

There are only three authors, it seems, who comment on this precise topic at any length. R. Bassibey of France and S. B. Smith of the United States both wrote at the end of the nineteenth century. Joseph Berger wrote a thesis at the Gregorian University in 1964 on the rejection of the petition. He has a brief treatment of the legal and practical arguments for and against a preliminary investigation, but mostly from the aspect of rejecting unworthy petitions. He bases this upon his survey of United States tribunals.

This thesis will investigate the legality and usefulness of an investigation in accepting more petitions, and also in giving the judge a clearer idea of the direction of a case, economizing on witnesses within the process, etc. The search for present practices in North America was aided

by John V. Dolciamore's survey of selected United States tribunals in 1973, which he graciously made available, and the author's own survey of Canada's regional tribunals in October, 1975.

The hope is that this work might be of benefit not only to tribunals, but also to parish priests and a growing number of sisters, brothers and laypersons in pastoral ministry who often make first contacts toward possible declarations of nullity.

The dissertation is divided into six chapters. The first three deal with the history and interpretation of procedural laws which regulate or influence preliminary investigations. The last three chapters deal with present-day practice, and also an analysis and critique of this practice. Chapter one treats of historical precedents both in Roman law and in canon law before the Code. Chapter two includes the Code of Canon Law and subsequent legislation not only for marriage nullity cases, but also preliminary investigations for other types of procedures. Chapter three examines civil law in the United States and Canada, and also in various continental law systems, to determine their attitudes toward pre-trial investigations.

Chapter four considers various forms of preliminary investigations in the tribunals of North America. Chapter five looks at particular circumstances in the United States

and Canada that affect the acceptance of preliminary investigations. Chapter six provides a critique of some benefits, and also some possible dangers in the practice. A concluding summary gives a brief synopsis of the entire work and some conclusions follow.

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CHAPTER ONE

THE HISTORY OF "PRELIMINARIES" TO TRIAL

The first chapter will study the history of various "preliminaries" to trial, and to the probative period of a judgment. The search will look for any type of preliminary inquiry, first in Roman law, then in Church law before the promulgation of the Code of Canon Law. Roman law, in its various periods, set the precedent for much of the terminology and many of the concepts of Church procedure. In the Church, two procedures grew up side by side: the solemn or formal, which became known as the ordinary; and the summary, which eliminated all but the essential steps. Both sections: on Roman law and on Church law, will attempt to clarify some notions of a "trial" procedure, and thereby help to understand what investigations are "preliminary" to this procedure.

One of the chief objections raised to some modern preliminary investigations is found in canon 1730 of the Code of Canon Law of 1917:

Before the contestation of the issue [litis contestatio] has taken place, the judge shall not proceed to the examination of witnesses or to the reception of other proofs, except in the case of contempt, or unless it is proper to take the deposition of witnesses lest because of the probable death of a witness or his departure, or another just cause, it could not be obtained later, or would be possible only with difficulty.¹

¹Codex Juris Canonici, Pii X Pontificis Maximi jussu digestus, Benedicti Papae XV auctoritate promulgatus, Romae, 1917. [Hereafter quoted only by canons.]

Chapter one will be largely centered upon understanding the import of this canon.

I. Roman Law

The Church was born and grew in the shadow of the Roman Empire. When the Church began to exercise judicial power, however, the distinct nature and purposes of the ecclesial community quickly found expression. Christians were not to go to the civil courts to settle their disputes. Their leaders exercised their authority as judges principally in disciplinary matters, and in a rather summary fashion. But even in apostolic times, they felt the need for judicial safeguards of rights, such as having two or three good witnesses (I Tim. 5:19). The distinction was made very early between criminal cases and contentious ones.

After the conversion of the Emperor Constantine, and the rapid growth of Christianity, the number of disputes also grew, and the former procedures no longer seemed adequate. For this reason, Pope St. Gregory the Great, in the VII century, used the judicial procedures of Roman Imperial law to solve the disputes of Christians. Lucius III, in the XII century, constituted Roman laws in general as a subsidiary font for canon law. In order to understand the canon law of procedure, and specifically the meaning of

a "preliminary investigation," it is necessary to review briefly some principles of Roman law. For, "there is no part of Canon Law which is so conspicuously based on, nay governed by, Roman law as [Book IV of the Code of Canon Law]." ²

A. The "In Jure" Hearing

In classical Roman law, there were two phases to a trial: the legal hearing (in jure), which took place before a magistrate; and the judgment phase (apud judicem), which took place before a judge who heard the factual evidence and made the decision. The purpose of the legal hearing was to clarify the point in dispute, and to determine what law was applicable. The conclusion of this first phase, the legal investigation, was the "contesting of the issue" (litis contestatio). Only when the magistrate had determined what law was applicable, after clarifying the allegations of both parties, could the second, or judgment phase begin. The two important elements to be studied here are the "legal hearing," and the "contestatio." Although both are part of the Roman "trial"--i.e. the first phase, they are preliminary to the formal hearing of the evidence and

²Charles AUGUSTINE [Bachofen], O.S.B., A Commentary on the New Code of Canon Law, St. Louis, Herder, 1930, Vol. 7, p. 1.

a judgment on the merits of the evidence, which took place in the second phase. In this sense, some comparison is possible to a "preliminary investigation" which must make some initial evaluation of the legal grounds applicable, and some determination, not of the merits of the evidence, but at least of the existence of facts or evidence that, on the surface, demand a judicial determination.

B. The Three Periods of Roman Law

Briefly, there were three periods of procedure in Roman law: 1) actions of the law were used under the Twelve Tables, their first written law (c. 450 B.C.); 2) the formulary system, according to the law of Aebutia (149 B.C.); and 3) the extraordinary system, i.e. one "outside the order" or norm of the other two.

Both of the first two procedures can be considered a true judicial order, and were used from the beginning of the Republic until the end of the classical period. The third, the extraordinary, was used from the time of the post classical period.

Actions of the law, and the formulary process both had two stages: one before a magistrate who settled the law which applied, and the second before a judge who heard only the facts, and rendered a decision. The extraordinary procedure combined these two steps into one person, who both

interpreted the law (as a jurist), and then made a judgment based on the facts of a case.

The first procedure (actions of the law) prescribed in a very formalistic way how to proceed, but it was quite limited by the exact words written in the Twelve Tables. The classic example of the weakness of this system was the man who claimed that another man had damaged his vines, but vines were not mentioned in the Twelve Tables, only trees. Therefore, he should have said that his "trees" were damaged. Because of this defect in presentation, his case was thrown out of court. In this procedure, the plaintiff would first appear before a magistrate to determine if he had any rights of action under the law. During this hearing, the magistrate would have to listen to his story of the facts, but only to determine, in law, what rights he had. Facts were also important initially, but only insofar as they bore on the legal "title" or grounds. The actual merits of the case were not decided until the second phase of the "trial," the period apud iudicem.

In the formulary period of classical Roman law, the magistrate would hear the facts, and embody the issue in a "formula." This was still an "in jure" hearing. Yet it did not preclude a thorough hearing of the facts, being of some assistance to the plaintiff, and even making some evaluation of the case. When the magistrate wrote the formula,

. . . it was not his duty to see that it stated the dispute correctly; that was for the parties. What he had ordinarily to see to was that it stated a real issue of fact and law, or, in some cases, of fact, satisfying himself, in this last case, that the facts alleged were such as to justify the issue of the formula in factum.³

There did not seem to be any reason why the magistrate could not also take the part of an inquisitor, and draw out the facts relevant to a possible case, which would lead to a suitable legal foundation: "In dealing with insufficiently advised suitors he might on occasion be much more helpful."⁴ When he did not see any possibility of a case, because of lack of grounds for action on the alleged facts, he apparently had some power of rejection: "it seems that if on the agreed facts the Praetor held that there was no case he could refuse the action."⁵

C. The Litis Contestatio

The litis contestatio is an important, but changing concept in Roman law. C. Augustine states that:

Originally the phrase litis contestatio seems to have meant merely the notice given by both parties to their witnesses to appear before

³W. W. BUCKLAND, A Text-Book of Roman Law, from Augustus to Justinian, Cambridge, University Press, 1963, 3rd ed., p. 632.

⁴Ibid., footnote 2.

⁵Ibid., p. 635.

the judge. Later, however, the term came to comprise the whole of the proceedings before the praetor, i.e., in jure.⁶

At one time, it was seen as a contract.⁷ It could be described as a "novation," i.e. the substitution of a new obligation for an old one. For example, when parties could not agree in private over the existence or terms of a contract, they took the matter to litigation, and each gave their side of the story, pledging themselves to submit to a decision. For example, under the action of "sacramentum," both plaintiff and defendant would place their hand on the disputed object, claiming ownership and putting down a pledge (sacramentum) of money or security which the loser would forfeit to the State. This pledge guaranteed the cost of the action, and also indicated that the parties were serious and would follow through the course of litigation. It was a protection against "frivolous or vexatious" actions that were a waste of the judge's time.

"At some time in the proceedings, there was a joint formal appeal to witnesses, a proclamation to bystanders."⁸ This appeal was said by Festus to be litis

⁶AUGUSTINE, op. cit., p. 173.

⁷BUCKLAND, op. cit., pp. 611, 632, 667.

⁸Ibid., p. 611.

contestatio.⁹ There is debate as to whether this appeal was to witnesses who could testify concerning the matter at issue, or merely testify to the sacramentum, or else to the general credibility of the parties. Festus says that it "may be a summoning of witnesses for the hearing, or, more probably, an appeal to bystanders to bear witness that the ceremonial has been properly performed."¹⁰ This step (testes estote) would be followed by the naming of a judge by the magistrate (judex esto).

The litis contestatio would mark the final formulation of the contested issue, which was incorporated by the magistrate into the formula. It was the end of the in jure preliminary hearing and the beginning of the judgment phase. As Buckland states, it "occured in the formulary system at the moment of the issue of the formula, the end of the proceedings in jure . . . [it] is not merely a date: it is an event."¹¹ It fixed the measure of liability. "The

⁹According to Cassell's Latin Dictionary, N.Y., Funk & Wagnalls, 1955, "contestatio" means an earnest supplication. It comes from "contestor": to call to witness; with "litem": to set an action on foot, inaugurate an action by calling witnesses, "lis, litis" means a contention, strife, controversy. Perhaps, etymologically, "contestatio" developed from "cum" (with) "testibus" (witnesses)

¹⁰BUCKLAND, op. cit., p. 611.

¹¹BUCKLAND, Elementary Principles of Roman Private Law, Cambridge, University Press, 1912, p. 376.

most important effect of the litis contestatio, that of Novation," is explained by the fact that "the parties have made a substituted contract, or have substituted a contract for some previous obligation."¹²

Under the third system of Roman law - the extraordinary - one person both heard the case and made the decision. Under this system, the parties appeared for a "cognitio," a judicial hearing. They stated their cases and the facts on which they relied.

The close of this stage was apparently litis contestatio, but with effects much modified. A time so defined was unsatisfactory and Justinian provided, in effect, that litis contestatio was to occur when the parties had taken the oath against calumnia.¹³

It was the extraordinary procedure of Roman law which was to have a greater influence on the ordinary procedure of canon law. Ecclesiastical judges would both assess the law of a case, as the magistrate of the classical period had done, and then weigh the facts based on the evidence, as a separate judge had once done. In Church law, however, the contestation of the case remained of major importance as the event which settled the issues or grounds of a case. A legal

¹²Ibid.

¹³W. BUCKLAND, Text-Book, etc., op. cit., p. 666. Cfr. Novel 53, §3, in which the litis contestatio occurs at the signature of the libellus.

hearing (in jure) was no longer used as such, although a preliminary determination did have to be made as to whether to accept a petition, and upon what grounds.

II. Church Law

The "preliminaries" and preparation for "trial" differed for various types of procedure that developed in the Church. This section analyzes some of the introductory steps, first in the solemn or formal process, then in the summary process. A certain bipolarity or ambiguity will then be shown to exist between various procedures. The study is brought to the XVIII century with no example of a modern "preliminary investigation," by the examination of a papal Constitution, Dei miseratione, and an Instruction from the S.C. of the Council, Cum moneat Glossa. However, the Austrian Instruction of 1855 provides a surprising and legislated example of such an investigation, which will be exegeted on its own, and then through the contemporary theory and practice in France and in the United States of America. Finally, a pre-Code criminal investigation is presented as it was legislated for the U.S.A., taken almost exactly from a Constitution for the universal Church, providing the only canonical example of a preliminary inquiry for the whole Church which includes both an extrajudicial and a judicial phase.

A. A Solemn Judgment

Roman law produced a procedure in which a judge could make a mature and free evaluation of evidence. The early Church had devised methods which involved less procedure, but at the same time were more dependent on authority - more "administrative." From the Germanic influence came such judicial methods as trial by fire, extensive oaths, and various practices that appealed to the "judgment of God." From these three fonts: the early Christian community, Roman and Germanic law, was formed the solemn judgment of the Church. There were many formal steps: the petition, citation, litis contestatio, proofs, etc. A reliable description of the solemn judgment is contained in the second book of the Decretals of Gregory IX, which could be considered a self-contained law on judicial procedure.¹⁴

But the well-ordered treatise of Gregory IX would not have been possible without the previous contribution of the Camaldolese monk, Gratian.

By the XII century, Church law in general had become a forest of laws, difficult to find and often contradictory. About the year 1140, Gratian set out to make a "Concordance

¹⁴I. GORDON, De Processibus, Annotationes in L. IV Codicis Juris Canonici, Romae, P.U.G. (ms.), 1965-66, p. 7, 8.

of Discordant Canons," better known as his "Decree." In the second part of the Decree, treating of ecclesiastical matters (de negotiis ecclesiasticis), he deals with a number of procedural and marriage questions. Among the thirty-six "Causes" of Part Two, the ones that deal with process or marriage are: Cause 3, on procedural law, concerning preliminary questions of judgment, i.e. the right of accusing, testifying, judging; Cause 4, on plaintiffs and witnesses; Cause 5, on just and unjust calling into judgment; Cause 15, procedural law on various questions; and Causes 27-36, on matrimonial law and all related questions (except for Cause 33 which is his treatise on penance).¹⁵ He includes some fragments from the letters of St. Gregory, in which the use of Roman law is seen to be rather common in that period of the Church.¹⁶ But there are no passages pertinent to a "preliminary investigation."

In the period between Gratian's Decree and the Decretals of Gregory IX, the forest of laws grew thicker, but scholars were there to collect and organize them. The classic organizer of this period was Bernard of Pavia (Bernardus

¹⁵Alphonsus M. STICKLER, S.D.B., Historia Juris Canonici Latini, Institutiones Academicæ, I, Historia Fontium, Torino, Apud custodiam librariam Pontif. Athenaei Salesiani, 1950, p. 201-207.

¹⁶Decretum, P. 2, C. II, q. 1, c.7; C. XI, q. 1, c.38, (FRIEDBERG, I, pp. 442 and 637).

Papiensis). Somewhere between the years 1188 and 1192, he put together the First Ancient Compilation known as the "Breviarium." This collection was a summary of the decretals not found in Gratian's work. His most famous contribution was the division of materials into five parts: judex, judicium, clerus, connubia, crimen. This is the division later adopted by Pope Gregory IX, whose Book Two on judicium--judicial procedure--was to contribute most to Book IV of the Code of Canon Law.

Pope Gregory IX saw a need for the general reordering of legislation in the Church to provide for a more expeditious treatment of cases, both in Rome and in local curias.¹⁷ To carry out the work, he commissioned Raymond of Peñafort, a Spanish Dominican, who was the pope's confessor and chaplain, and had a function similar to an auditor of the Rota, since he heard cases referred to the Pontiff. In the year 1234, Gregory IX promulgated his Decretals, which had no official title, but became known as both the Decretal of Gregory IX and the Liber Extra(vagantium), or "X" for short.

The Decretals are most important for their authority and juridical value. They were authentic, insofar as any

¹⁷Amleto Giovanni CICOGNANI, Canon Law, Westminster, Md., Newman, 1949, 2nd rev. ed., pp. 298-300.

law in them had legal authority, even if taken from another source. The rubrics of the titles are part of this authentic collection and therefore have legal value. They were universal in that they applied to the entire Church, even though in the beginning they may have been only particular law. It was promulgated as a unified work under authority of the Pope, with all its parts of equal importance for interpretation. However, the summaries of the "chapters," which were later added by private editors, have no legal value. Finally, it is an exclusive collection, meant to be the only compilation of the "Extravagantes" used in the Church. But it leaves intact the Decree of Gratian, which Gregory did not wish to touch.

It is Book Two which gives us an accurate, and authentic, law concerning the solemn judicial procedure. The two sections most important to a preliminary investigation are Title three, on the presentation of the petition; and Title six, forbidding the interrogation of witnesses before the contestation (litis contestatio).

1. De libelli oblatione (the presentation of the petition)

Using quotations from Innocent III, Chapter two specifies: "When treating of an object, it is not sufficient to seek the matter in general, but it must be so specified

that obscurity and equivocation are avoided."¹⁸ The petition is to include the definite grounds (terra illa, super qua quaestio vertebatur). The accused is not obliged to answer the petition if it does not state the cause of the action (causa petendi).²⁰ These few quotations seem to be the only references to the introduction of the action, as it pertains to the substantial content of a petition.

2. The Forbidding of Witnesses Before Contestation

In the headnote to Chapter nineteen of Title one, judges treating the principal issues are told not to receive witnesses before the litis contestatio.²¹ This is because the judge is not acting as an inquisitor, but is merely acting as a delegate for the matter to which he is assigned by apostolic commission.²² Title six is entirely on this subject, and gives the same order to judges, but with exceptions. When a case concerns adultery or judicial separation, and the respondent is in contempt, he can be excommunicated,

¹⁸C.2, X, II, 3. Quum agitur reali, non sufficit rem generaliter peti, sed debet ita specificari, ut evitetur obscuritas et equivocatio.

¹⁹C.2, X, II, 3.

²⁰C.3, X, II, 3.

²¹C.19, X, II, 1.

²²Ibid., ". . . non in modum inquisitionis, sed commissionis negotium exstitit delegatum."

but witnesses are not to be received before the contestation.²³ In a famous passage, Innocent III admits that the judicial order is not being observed everywhere in marriage cases. He insists that it be followed for other controversies.²⁴ The case at hand, he says, does not concern the covenant of marriage, but the crime of adultery, and therefore, witnesses should not be received before the contestation.

Chapter four also forbids the receiving of witnesses before the contestation in marriage cases, but only when the respondent is not in contempt. The case described is one of consanguinity, and the acts are declared null and void since witnesses were received even though the respondent was not guilty of contumacy.²⁵

Chapter five, in the headnote, warns that witnesses are not regularly to be received before the contestation, but lists a number of exceptions: §5 refers to the perpetual memorial of the event (i.e. for the purpose of preserving testimony that might otherwise be lost), or when proceeding by way of inquisition (i.e. the judge's need or right to probe for further information or testimony--in

²³C. 1, X, II, 6.

²⁴C. 1, X, II, 6: "licet ordo judicarius in aliis controversiis sit servandis, et in matrimonialibus causis non usquequaque servetur."

²⁵C. 4, X, II, 6.

distinction to the adversary manner, in which the parties took all the initiatives to seek proofs and ask questions through the mediacy of the judge), and, in these cases, allows witnesses to be obtained beforehand.²⁶ The text itself refers to special cases when departing witnesses must be obtained, or the publication of the witnesses must be done quickly.²⁷

The other exceptions include such conditions as a fear concerning the death or long absence of one of the witnesses.²⁸

F. Schmalzgrueber gives an extended commentary on the rule that witnesses are not to be received before the contestation except in certain circumstances. He says that:

The reason for this rule is because witnesses ought to be received only in court, and upon the matter brought into judgment, and heard so that from their testimony a judge might be informed to bring sentence. But before the contestation of the issue, the controversy is not yet considered brought into court; because . . . the contestation of the issue is the beginning of the controversy, and through it the trial begins . . . before the contestation, the plaintiff seeks nothing as yet, but only wishes to sue; therefore, there is nothing

²⁶C. 5, X, II, 6: "Ad perpetuam rei memoriam, vel quum agitur per viam inquisitionis . . ."

²⁷Ibid., "quando excesuum inquisitio vel testium publicatio imminet facienda."

²⁸Ibid.

upon which the witnesses might be received, or sentence brought.²⁹

Schmalzgrueber then groups the exceptions into four general categories: 1) when a judge must proceed ex officio in the inquisition of a delict; 2) when the plaintiff fears that a delay will cause the loss of some testimony; 3) when a defendant wants to produce and preserve some testimony for his future defense (this examination is called "ad perpetuam memoriam" [for a perpetual memorial]); and 4) in marriage cases when the defendant is absent in contempt of court.³⁰

The foregoing gives a brief view of the formal judicial process of the authentic Liber Extra that will form the backdrop of canon 1730, and its attitude toward the type of information to be presented, and not to be presented, before the contestation of the issue.

²⁹F. SCHMALZGRUEBER, Jus Ecclesiasticum Universum, Rome, Ex Typ. Rev. Camerae Apostolicae, 1843-1845, Tome 3, p. 248: "Ratio hujus regulae est, quia testes in judicio tantum, et super re in judicium deducta recipi, et audiri debent, ut ex eorum dictis judex informetur ad ferendam sententiam. Sed ante contestationem litis nondum censetur in judicium deducta lis; quia . . . litis contestatio est exordium litis, perque eam judicium incipit . . . ante contestationem litis nihil adhuc actor petit, sed tantum petere vult; ergo nihil est, super quo testes recipiantur, aut feratur sententia."

³⁰Ibid., pp. 248-254. These exceptions are necessary only in the "ordinary" procedure. The summary process is, as Schmalzgrueber says, another thing, since there is no litis contestatio.

B. A Summary Judicial Procedure

Many of the solemnities which came into Church law from Roman law were not fitting to the nature nor the proper purpose of Church procedure, especially for marriage cases. The length of the solemn judgment, which often worked to the detriment of justice, caused the popes of the XII and XIII centuries to yield to the omission of many of the formalities.³¹ It was for Pope Clement V to introduce a new briefer judicial process, which would be called the "summary" or "Clementine" judgment. Clement was the first of the seven Avignon popes and the inaugurator of the "Babylonian Captivity." He published several constitutions, especially at the Council of Vienne (1311), the Fifteenth Ecumenical Council. He wished to make these into a new collection, but it was not completed before his death. His successor, John XXII promulgated them in 1317 A.D. in his Extravagantes. This collection enjoyed the same qualities of authenticity, unity and universality as the work of Gregory IX, but it was not exclusive, in the sense that it did not abrogate any previous collection.

³¹Cfr. GORDON, op. cit., p. 9 and Charles LEFEBVRE, "Les origines romaines de la procedure sommaire au XII et XIII s.," in Ephemerides Juris Canonici, 12(1956), pp. 149-197. Also R. ab UNIAO DOS PALMARES, O.F.M. Cap., De processu summario, Roma, 1956, pp. 1-3.

Clement had spoken of the burdensome prolongation of Church litigation (Dispendiosam prorogationem litium) and, for a certain taxative list, which included marriage cases, he proposed a procedure that would be accomplished simply and plainly, without the clattering and the formalities of solemn judgments (simpliciter et de plano, ac sine strepitu iudicii et figura).³²

This he accomplished by the Constitution "Saepe" on December 13, 1306. The most important provision it made for our theme was that it did not require a written petition, nor a contestation of the issue.³³ The judge could himself direct the investigation in the case, and use his own discretion as to when to interrogate the parties and their witnesses. He was to be guided by the rule of equity.³⁴ A. Bottoms asserts that "[t]his summary process as set up by Clement V continued almost unchanged until the introduction

³²C. 2, de iudiciis, II, 1 in Clem.

³³C. 2, de verborum significatione, V, II in Clem.: ". . . necessario libellum non exigat, litis contestationem non postulet."

³⁴Ibid., "Interrogabit etiam partes sive ad earum instantiam, sive ex officio, ubicunque hoc aequitas suadebit."

of the Code.³⁵ Even though a number of instructions and a papal constitution were issued in the interim, an American legal expert, S.B. Smith made the statement in 1893:

. . . it would seem that even matrimonial causes of nullity may at present be tried summarily, so far as this summary procedure is compatible with the observance of the peculiar formalities laid down in said constitution [Dei miseratione], as explained and developed by the Sacred Congregation of the Council, in its Instruction, dated August 22, 1840, on trials for matrimonial causes.³⁶

But Smith hastily adds that a judge more prudently proceeds according to the solemn or formal trial.

C. Fundamental Bipolarity of Marriage Processes

The difference between a strictly formal juridical process, and a more summary administrative procedure points up a fundamental bipolarity that will reveal itself in all the laws of marriage procedure. E. Colagiovanni says:

If anyone wishes, at a glance, to relate briefly the history of the marriage process, he cannot do this without bringing out this twofold dimension, not always endowed with a correct balance, so that it may be seen that the procedural order is guided by a rather unstable equilibrium

³⁵Archibald M. BOTTOMS, The Discretionary Authority of the Ecclesiastical Judge in Matrimonial Trials of the First Instance, Washington, D.C., The Catholic University of America, 1955, p. 22.

³⁶Sebastian Bach SMITH, The Marriage Process in the United States, New York, Benziger, [c. 1893], p. 379.

between the exigencies of the juridical order and of the administrative order.³⁷

He speaks of this bipolarity under many aspects. There is an intimate connection between the order of judgment and the order of concessions (grace, dispensations). Marriage procedure is caught in the earthly dilemma between justice and charity; between the letter and the spirit; between authority and freedom or between the Magisterium and free investigation; and between the administrative-juridical order and the charismatic order.³⁸

This bipolarity becomes evident in the gradually recognized difference between a strictly judicial process, which judgment is ordered to whether or not a marriage was validly contracted, and the administrative process which serves for marriages dissoluble by the Roman Pontiff. "If, in the theological and canonical reflection of the XI and XII century, this distinction had already clearly appeared - this distinction brought confusion as regards the process itself."³⁹

Matrimonial "causes" included such diverse cases as adultery and separation, which often involved true

³⁷Aemilius COLAGIOVANNI, De innovatione processus matrimonialis, in jure et in jurisprudentia S.R. Rotae, Neapoli, M. D'Auria, [1973], p. 3.

³⁸Ibid.

³⁹Ibid., p. 4.

litigation, and nullity investigations, not always a "contentious" matter. The Church was still borrowing from Roman law and various other procedural sources which, even if more summary, were not always suited to the status-question of nullity or validity.

It must not be said, therefore, that a process for the nullity of marriage was lacking, but that it followed the ordinary procedural route of the civil law. But it was not without the inquietude brought on by the above-mentioned dilemma that Innocent III (1198) admonished: "The order of judgment (that is, the solemn) is not being observed everywhere in marriage cases."⁴⁰

The definite direction, however, seemed to be toward a more summary procedure, beginning with an oral exposition of the case, rather than a written petition. A number of changes from the "civil" process seemed more appropriate to the nature of marriage and its investigation:

For there are some marriage cases of this kind which require more accommodation, and which demand more rapid handling. For it often became very necessary that for these cases, for example, witnesses be admitted who would rightly be excluded in other cases; often danger of incontinence required that these cases be solved as quickly as possible.⁴¹

After the Constitution "Saepe," of Clement V, the plaintiff could give an oral account, which was then summarized in writing by the notary. The contestation was

⁴⁰Ibid., pp. 4, 5.

⁴¹Franciscus Xaverius WERNZ, S.J., Jus Decretalium, Romae, P.U.G., 1898, Vol. 5, p. 524.

thought to be useless. The judge had a great deal of discretion to reject delaying exceptions, could reduce the number of witnesses, and could freely question the parties. The greatest freedom and discretion on the part of the judge were moderated by the general procedural safeguards of the civil law. This was always done with great concern for, and belief in, the indissolubility of the marriage bond.⁴²

Hence we can understand the transition, which, although common enough, was certainly not universal either in time or in place, from the ordinary process to the summary process, with an administrative character.⁴³

After the time of Clement V, there were few innovations from popes and the Sacred Congregations concerning marriage procedure. The Council of Trent created synodal judges. In the XVII century, the jurisprudence of the Sacred Roman Rota began to have a singular influence,⁴⁴ and it always used a summary form of judgment at that time.⁴⁵ A major document on marriage procedure was not issued until the XVIII century.

⁴²E. COLAGIOVANNI, op. cit., p. 5.

⁴³Ibid.

⁴⁴I. GORDON, op. cit., p. 10.

⁴⁵See Francesco ROBERTI, De processibus, In civitate Vaticana, [1956] 4th ed., Vol. 1, n. 4.

D. Dei Miseratione

Benedict XIV, on November 3, 1741, issued the Constitution, Dei miseratione. As with many laws, it was prodded into being by specific abuses - in this case laxity of some ecclesiastical judges who were granting too many annulments too easily. Benedict describes the serious state of affairs. Marriages, he warns, "are being broken in certain ecclesiastical Curias with an imprudent facility by too many judges, and, with sentences delivered on the nullity of marriages both rashly and inconsiderately, spouses are given the power to enter other marriage vows."⁴⁶ This has gone to the extent where "because of too much precipitousness on the part of judges in declaring nullity,"⁴⁷ a man can go on to successive marriages, even to a fourth wife! This situation, he says, is "not without scandal to the sensitive."⁴⁸ He goes on to give a procedural law for the entire Church specifically for marriage cases, not only for nullity procedures, but also for dispensations of non-consummated marriages. Among the new formalities, he establishes his most remembered office - the "defender of

⁴⁶BENEDICTUS XIV, in Fontes [GASPARRI], Vol. 1, p. 695, §1.

⁴⁷Ibid., §2. "ob nimiam Judicum praecipitantiam in nullitate Matrimoniorum declaranda."

⁴⁸Ibid., "non sine pusillorum scandalo"

marriage," who is to see to the observance of procedural law, and appeal all nullity decisions. However, there is nothing specifically new about the "preliminaries" of a nullity case. The only passage that would reflect indirectly on a "preliminary investigation" concerns rather the more-administrative non-consummation procedure:

. . . we command that the introductory petition be presented to Us, . . . in which a full and accurate description of all the facts are contained, and all the reasons put forward in it.⁴⁹

E. Cum Moneat Glossa

Almost a hundred years after Benedict's Constitution, the Sacred Congregation of the Council issued the Instruction Cum moneat Glossa, on August 22, 1840, which reaffirmed Dei miseratione, and contained additional rules for the conducting of matrimonial cases. It was also a cautionary document, worried about the strict observance of the formalities. A particular worry was deception and collusion on the part of the spouses. The beginning of the Instruction sets the tone:

As the Gloss warns (under the heading de frig. et malef.), every caution must be

⁴⁹Ibid., p. 700, §15. "mandamus, ut supplex libellus Nobis, vel Romano Pontifici pro tempore exhibeatur, in quo plena, et accurata totius facti species contineatur, causaeque omnes in eo exprimentur."

exercised in marriage cases on account of danger to souls . . . Indeed, for eliminating frauds which, by the malice or collusion of spouses often arises, Benedict XIV, in the Constitution Dei miseratione, prescribed that a process be conducted under pain of nullity of all the acts, . . . in which judges might be confident in rendering a safe judgment, concerning the validity or nullity of the Sacrament, and of dissolving the bond of matrimony.⁵⁰

This Instruction also stresses that the procedure is ecclesiastical and not civil, and implies that there is a definite process to be observed: "the acts of the process are not for the courts of other judges, especially civil, but are to be carried out according to the sacred canons."⁵¹

There is no mention of any preliminary investigation. Rather, in the Instruction, the process seems to proceed directly from a written petition to the judicial interrogations, with the defender of marriage always present:

. . . as often as one of the spouses begins in writing the instance for a declaration of nullity of marriage, the Bishop delegates a judge, if he so wishes . . . On the day defined in the citation, the plaintiff will appear on behalf of the nullity, and then the defender of marriage

⁵⁰S.C.C., Instruction, in Fontes, Vol. 6, p. 345.

⁵¹Ibid., p. 346. "processus acta non ad instar aliorum iudiciorum, praesertim civilium, sed juxta ss. canones."

hands over the interrogatory . . .⁵²

One might reasonably argue that the Bishop would have to have a fairly clear opinion about the possibilities of a case before he would set in motion any process so ponderous. One could likewise compare this opinion with a similar judgment he would have to form before sending a petition for dispensation directly to the Holy Father, a process equally serious and weighty. But there does not seem to be any official, or even customary procedure for obtaining this preliminary information, and forming this opinion.

Cum moneat Glossa seems to be the last significant document concerning marriage nullity for the universal Church until the Code of Canon Law. An Instruction in the year 1880 from the Congregation of Bishops and Regulars⁵³ established the office of a "Diocesan Prosecutor for Justice and the Protection of Law" (Promotor fiscalis pro justitiae et legis tutela), known today as the "Promotor of Justice." It was his function to carry out the preliminary inquiry in

⁵²Ibid. "quoties aliquis ex conjugibus instantiam in scriptis porriget super nullitate matrimonii, Episcopus judicem, si velit, delegabit . . . Praefinita die in citatione comparebit instans pro nullitate, et tunc defensor matrimonii tradet interrogatoria."

⁵³Instructio S. C. Episcoporum et Regularium, June 11, 1880, in Fontes, Vol. 4, p. 1023, n. 13.

criminal trials, and also to investigate when it would be in the public interest for a diocese to institute, ex officio, a marriage nullity proceeding.

F. The Austrian Instruction

The only example, it seems, of a canonically-established preliminary investigation for the marriage nullity procedure was in the Austrian Instruction of Cardinal Rauscher, approved in the year 1855.

This Instruction on marriage impediments and nullity procedures was prepared by the Cardinal Archbishop of Vienna, Joseph Rauscher, for use in the entire Austrian Empire. Under his leadership, the Catholic Church was slowly recovering from Josephinism,⁵⁴ under which the State had gradually usurped many of the legitimate rights, and intruded into the jurisdiction of the Church. One of these rights that the Church wished to reaffirm was the right to judge marriage cases. The "Austrian Instruction" for ecclesiastical judges was only a part (of Article 10) of a Concordat between Pope Pius IX and Franz Joseph I, Emperor of Austria.

⁵⁴See New Catholic Encyclopedia (1967) under "Rauscher" and "Josephinism."

The first version of the Austrian Instruction⁵⁵ was sent to Rome in 1853, and was examined both by the Sacred Congregation for Extraordinary Ecclesiastical Affairs, and by two commissions: one of theologians and the other of canonists.⁵⁶

Cardinal Rauscher himself came to Rome in November, 1854 and entered into consultations with both the Sacred Congregation (S.C. pro Negotiis Ecclesiasticis Extraordinariis), and Roman experts in law (cum Romanis Jurisperitis colloquia). The Secretariate of State was very anxious to have this most important Concordat with Austria, and showed the greatest respect for Cardinal Rauscher, who was on close terms with the twenty-four-year-old Emperor, whose professor he had been. The Congregation had even instructed its consultors to leave the text of Cardinal Rauscher in its greatest possible integrity.⁵⁷ Yet there were some

⁵⁵The text of this version and also the version that received final approval are printed in parallel columns by Syrus CIPRIANI in Instructio Matrimonialis Rev. mi Domini Rauscher, Archiepiscopi Vindobonensis (1853-1856), Romae, Officium Libri Catholici, 1952, pp. 101-153. The official title of the Austrian Instruction is: "Instructio pro iudiciis ecclesiasticis imperii Austriaci quoad causas matrimoniales." The Instruction is also contained in the Collectio Lacensis, Vol. 5, cols. 1286-1316; and in the Analecta Juris Pontifici, Vol. 2, cols. 2515-2545.

⁵⁶Ibid., pp. 38-69.

⁵⁷Ibid., p. 182, ". . . viste prudentiale della S. Congregazione, cioè che lasciandosi il testo dell'Autore nella sua più possibile integrità . . ."

points in the Instruction which the consultors judged to be outside the current laws (praeter jus).⁵⁸ It seems clear that Pope Pius IX and the Congregation did not want the Instruction issued by the Holy See, but only that it be indicated that various theologians and canonists had approved it in a private capacity. However, the Pope wanted the Bishops of the Austrian Empire to know that it was a safe guide to follow in practice.⁵⁹ The Secretary of State, Cardinal Antonelli, wrote:

His Holiness, to whom I referred the affair, permits that the indicated words be omitted [that the Holy See has contributed nothing to it], saying only that the Instruction has been examined and approved by various private theologians and canonists at Rome, and that She [the Holy See], based on their declarations, judges that the Bishops can follow this same Instruction with a safe conscience.⁶⁰

When the Pro-Nuncio to Vienna, Cardinal Viale-Prelà, sent the Instruction to all the Bishops of the Empire on February 2, 1856, he included a "common letter" (Communis Epistula).⁶¹ He reminds them that Article ten of the Con-

⁵⁸Ibid., p. 46.

⁵⁹Ibid., pp. 90-91.

⁶⁰Ibid., p. 91: "La Santità di Nostro Signore, cui ho riferito l'affare, permette che si omettano le indicate parole [nihil S. Sedem in eam contulisse], dicendosi soltanto che la detta istruzione è stata esaminata e approvata da diversi privati teologi e canonisti romani, e che, fondata Ella sulla loro dichiarazione, giudica potere i Vescovi seguire tuta conscientia l'istruzione medesima."

⁶¹Ibid., p. 183. This letter is Document IX. The summary which follows is a paraphrase of the letter.

cordat established that marriage cases pertain to the ecclesiastical forum, and in order that a matter of such importance be carried out properly, Cardinal Rauscher wrote his Instruction for judges with the greatest study and care. But not content with this, he went to Rome to have it examined by five of the best canonists in Rome, who are known for their sound teachings and are in great repute before the Holy See. Cardinal Viale-Prelà then points out that at the conclusion of the Instruction, these canonists have signed their names and made the statement:

The present Instruction, we declare as the truth, has nothing in it, to our knowledge, which is not in conformity with either the precepts of the Sacred Canons, or the regulations of Apostolic Constitutions, or the opinions of approved Doctors.⁶²

The Pro-Nuncio closes his letter with the same expression used by the Secretary of State:

With no hesitation, I can declare that in my judgment, the Bishops of the Austrian Empire can follow each and every item contained in the Instruction with a safe conscience.⁶³

⁶²In Collectio Lacensis, Vol 5, col. 1316: "Presentem Instructionem . . . pro rei veritate declaremus, nihil in eo nos invenisse, quod vel Sacrorum Canonum praescripto, vel Apostolicarum Constitutionum ordinationibus, vel probatorum Doctorum sententiis conforme non sit."

⁶³S. CIPRIANI, op. cit., p. 183: "haud ambigo declarare meo quidem iudicio Episcopus Imperii Austriaci omnia et quaecumque in praefata Instructione continentur, tuta conscientia, sequi posse."

All of these official statements made about the Austrian Instruction indicate that the document is not meant to contain any new legislation, or radically different procedures. They imply that Cardinal Rauscher has combined the various ecclesiastical laws in force at that time, with the best extant jurisprudence and procedures of the Vatican offices, and the assistance of recognized canonists.

Ratification of the Concordat took place on September 25, 1855, and the "Austrian Instruction" was officiall sanctioned by Emperor Franz Joseph on October 8, 1856. The original document (Urtext) was in Latin, with a German translation. The Latin and German appeared in parallel columns in the newly-founded periodical, Archiv für Katholisches Kirchenrecht, mit besonderer Rücksicht auf Oesterreich.⁶⁴

The Austrian Instruction is composed of 251 articles. It begins with a description of the nature of marriage and of the impediments. Even when it begins to discuss the nullity of marriages, the Instruction (§139) advises trying to avoid judicial investigations (inquisitio in forma juris) if at all possible. The presumption seems to be that most couples are still living together, but the parties, or a

⁶⁴Vol. 1, Innsbruck, 1857.

third party, discovers the possible existence of an impediment. The recommended course is to see whether, in the parish books, the impediment had been properly dispensed. If not, the bishop is urged to give the dispensation, and arrange for the convalidation of the marriage, with scandal duly avoided. In some cases, radical sanation may be preferable, to be obtained from the Holy See. This description tells us two important things. First, their marriage cases seem to deal with impediments that are rather uncomplicated, judicially speaking, rather than with cases that involve grounds difficult to establish. Second, there seems to be hope in many cases that the marriage can be salvaged, either because the couple has discovered an unknown (and unwanted) impediment, or because there is hope of reconciliation.

However, if there must be a judicial inquiry by a tribunal, the Instruction prescribes that it shall be preceded by a preliminary investigation, which it calls "disquisitio praevia" in §142, and "praevia inquisitio" in §143. This step presumes that the possible nullity concerns a matter or grounds that cannot be easily resolved. Previously, in §126, a petition had been discussed:

A person attacking the validity of a marriage can respectfully submit a petition for annulment either expressed in writing, or delivered viva voce. The facts, upon which the

assertion of nullity is founded, must be brought forward clearly and fully, and the proofs, which he asserts to be available, must be indicated.⁶⁵

The subsequent articles try to preclude any defect in the formalities of presenting a petition, either in written (§127) or oral form (§128). Another source of the suspicion of nullity might be a widespread report or rumor (fama). The tribunal must evaluate whether there is any foundation to a report (or accusation) of nullity, according to §131:

But if a common report is heard that there is an impediment obstructing [the validity of] someone's marriage, which merits attention if all the circumstances are considered, the matrimonial tribunal is to make an investigation concerning the foundation of these descriptions or assertions, and to judge whether that which comes to light, demands an inquiry.⁶⁶

The Instruction seems to allow for an immediate and summary judgment that a petition should not be allowed. This judgment that there is no foundation (fundamentum, cf. §131) to the petition or rumor is presumably made by

⁶⁵§126. Matrimonii valorem impugnans accusationem, respective petitionem, ut nullitas pronuntietur, aut scripto expressam afferre aut in gesta redigendam viva voce exhibere potest. Facta, quibus assertio nullitatis superstruitur, distincte ac plene proponenda et probationes, quas praesto sibi esse autumat, indicandae sunt.

⁶⁶§131. Quodsi de impedimento matrimonio alicui obsistente fama divulgatur, quae omnibus perpensis circumstantiis, attentionem mereatur, tribunal matrimoniale circa fundamentum harum narrationum vel assertionum indagaciones habeat atque dijudicet, an, quae eruantur, inquisitionem decerni postulent.

the tribunal or its representative mentioned in §127. The two reasons for rejection, given in §§137 and 138⁶⁷ are the same criteria that will be repeated in Provida Mater of 1936:

1) the facts, although true, would not render the marriage invalid; 2) the falsity of the allegations is apparent. If there is a foundation, §139 would demand that every effort be made at reconciliation and validation.

Only when all of these steps have failed to bring a resolution, and there seems to be some grounds for nullity, is the preliminary investigation to commence:

§140. Whenever there ought to be an inquiry into the validity of any marriage, the matrimonial tribunal is to name a commissary to bring to light an investigation of the facts.⁶⁸

The "commissarius" (Commissär) is the central figure in this preliminary investigation. The name itself, from its Latin root "committere" means to entrust a mission to someone.⁶⁹ The English word "commissary" means primarily "one to whom is committed some charge or office by a su-

⁶⁷§137: "irritando impar foret"; §138: "falsitas in propatulo sit."

⁶⁸§140. Quoties in valorem matrimonii alicujus inquirendum erit, tribunali matrimoniale commissarium ad quaestionem facti eruendam nominet.

§140. Wenn die Giltigkeit einer Ehe untersucht werden muss, so hat das Ehegericht einen Commissär zur Erhebung des Thatbestandes zu ernennen.

⁶⁹"Committere" is used in the Code of Canon Law, c. 1940 for the deputation of the special investigator for criminal preliminary investigations.

perior power."⁷⁰ The title is used in the Church of England for "an officer who represents a bishop, as in a distant part of the diocese." In German, the Commissär der Instruction is also referred to as one with a mandate (Der Mandatar), and as a deputy (Deputirte).⁷¹ This function, in the Austrian marriage nullity procedure, could be delegated to an office (Ampte) such as a vicar general, vicars forane, rural deans; or to a particular person.⁷²

The classical Latin overtones of the word "quaestio" used in §140 are as follows: "seeking, searching. A. an asking, questioning; B. an inquiring, investigation; C. a public judicial inquiry."⁷³

Because of the key importance of §141, the Latin text follows:

§141. Commissarius ad inquirendum deputatus, antequam ad probationes in forma juris instituendas procedatur, anniti debet, ut omnium circumstantiarum, quae ad matrimonii valorem vel nullitatem extra dubium ponendum facere possint, accuratam acquirat notitiam. Hunc in finem pro conditione casus et personarum necessariae percunctationes faciendae; postea conjuges, personae matrimonium accusantes, vel quae impedimentum denuntiarunt, et in quantum fieri potest, etiam testes, qui pro

⁷⁰WEBSTER'S, op. cit.

⁷¹Cf. Archiv für Katholisches Kirchenrecht, 1(1857), p. 205.

⁷²Ibid.

⁷³CASELL'S, op. cit.

matrimonio aut contra illud producuntur, defensore matrimonii praesente, praevis interrogandi sunt.

§141. The commissary deputed for the inquiry, before the probatory period begins, ought to strive to acquire a very careful knowledge of all the circumstances which might place the validity or nullity of the marriage beyond doubt. For this purpose, according to the condition of the case and of the persons, he must make the necessary inquiries; after this, the spouses, persons accusing the marriage or who allege an impediment, and, in so far as it can be done, even witnesses, who can be produced for the marriage or against it, are to be previously interrogated, with the defender of marriage present.

In article §141 on the preliminary investigation, the final Latin text is identical with the original draft of 1853 (§146), except for one unimportant letter. The commissary is to conduct an investigation which is definitely preliminary to the probative stage. It is to be "antequam ad probationes in forma juris," literally "before the proofs in the form of law." In the German text,⁷⁴ "bevor . . . das Beweisverfahren einleitet" means "before the proof-making is introduced." Yet at the same time it has aspects of a juridical and procedural nature: the

⁷⁴Archiv, 1(1857), p. CI. §141. Bevor der Untersuchungscommissär das Beweisverfahren einleitet, hat er nichts zu unterlassen, um sich von allen Umständen, welche dazu beitragen können, um die Giltigkeit oder Ungiltigkeit der Ehe ausser Zweifel zu stellen, genau zu unterrichten. Zu diesem Ende soll er nach Beschaffenheit des Falles und der Personen die nöthigen Erkundigungen einziehen; dann aber das Hinderniss Anzeigen gemacht haben, und soviel als möglich auch die Zeugen, welche für oder gegen die Ehe aufgeführt werden, im Beisein des Vertheidigers der Ehe vorläufig vernehmen.

defender of marriage (or his representative; cf. §146), and the notary are to be present. The commissary is given a great deal of discretion to make any inquiries necessary to the nature of the case. He questions not only the plaintiff and respondent, but also the witnesses. In contrast to the Decretals of Gregory IX, it is not only allowed, but recommended that witnesses be interrogated. The "Roman canonists" who signed the Austrian Instruction had promised that there would be nothing new or surprising to those familiar with the law and its practice. However, this preliminary investigation, this process before the probatory period, seems to be entirely new to formal marriage procedure. There are no footnotes to these important provisions, forcing the reader to rely upon contemporary interpretations. Could it be that a preliminary process of this sort had been in use for some time in the Church, but more a matter of practical necessity than of formulated laws?

The following article makes it very clear that this investigation precedes the probatory period in the tribunal:

§142. That which shall have been brought to light in the preliminary investigation, should be proposed to the marriage tribunal, which gives suitable directions if it judges that anything is lacking. When this is done, everything must be prepared for the probatory process which is to

be held without any delay.⁷⁵

The thoroughness of the preliminary investigation is revealed in the phrase, "quidpiam deesse," or in the earlier text, "adhuc necessaria." The tribunal must make sure that nothing is lacking that is necessary to know before proceeding to the judicial proofs.

It is important for both parties to give their statements in person to the commissary. Although these statements are obtained "informally" (no oath, it seems, was administered), the parties are to have the advice of an advocate, if they wish, since these statements will be written down and inserted in the acts. All this is provided for in §143:

Both in the preliminary investigation, and in the probatory process, the spouses must personally be present. But it is allowed that advocates be brought with them, and before they have given their statement, to seek their counsel; indeed only those declarations, which they themselves pronounce as representing their own belief, are to be

⁷⁵§142. Quae in disquisitione praevia eruta fuerint, proponantur tribunali matrimoniali, et ipsum, si quidpiam deesse censeat, ordinationes opportunas dabit. Quo facto, omnia disponenda sunt ad processum probatorium absque ulla cunctatione habendum. The 1853 text is slightly variant: "§147. Inquisitionis praeviae resultatum tribunali proponendum est matrimoniali, quod ordinationes dabit de iis, quae forsitan adhuc necessaria ducat." The second half is identical. In S. CIPRIANI, op. cit., pp. 130-131.

inserted in the acts.⁷⁶

Although these statements are received into the acts, the Austrian Instruction treats them with a strict rigor that allows them no probative value.⁷⁷ An exception is a statement made at a non-suspect time, before the party ever thought of impugning the validity of his marriage:

§148. A confession, which the spouses make in this preliminary investigation itself, or indeed which they make previously, but following the celebration of the marriage being accused, lacks all force. But a confession which the spouses deposed before they contracted the marriage which is being accused, can scarcely be excluded in proving nullity.⁷⁸

The remainder of the articles on the nullity of marriage seem to follow the ordinary, or solemn formal procedure which will be accepted in the 1917 Code of Canon Law. The importance of this fact is that the preliminary investigation, as legislated, was not thought to be incompatible

⁷⁶§143. Tam in praevia inquisitione, quam in processu probatorio conjuges personaliter se sistere debent. Conceditur quidem, ut advocatos secum adducant, et antequam declarationem exhibeant, eorum consilio expetant; verum eae tantum declarationes, quas ipsimet pronuntiant, ut ipsorum mentes explicantes actis inserendae sunt.

⁷⁷See Peter A. PIJNAPPELS, "Sufficiency of Evidence in Formal Trials," in Studia Canonica, 8(1974), p. 173.

⁷⁸§148. Confessio, quam conjuges in ipsa disquisitione faciunt, aut prius quidem, post matrimonii tamen, quod accusatur, celebrationem fecerunt in quantum adversus matrimonii valorem pugnat, omni vi caret. Confessio vero, quam conjuges, antequam matrimonium accusatam contraxerant, deposuerunt, in nullitate probanda haud excluditur.

with formal judicial procedure. In fact, it was thought by experts to be essential, and was therefore required.

When the Austrian Instruction had been examined by the Sacred Congregation for Extraordinary Ecclesiastical Affairs and by the two commissions (of theologians and canonists), their main recommendations concerned marriage as a sacrament in the Church-State context. The Church has jurisdiction over the marriages of the baptized, including impediments and nullity proceedings, they asserted. However, the Roman consultors were also critical of some clarifications that needed to be made between an extrajudicial manner of procedure and a strictly judicial one. They point this out as the main problem of the various directives proposed in the Austrian Instruction.⁷⁹ They would have preferred to keep the two procedures in separate chapters. But it is not clear in the sources what the consultors meant by the phrase "economico stragiudiziale" (extrajudicial process?). Perhaps it refers to a summary process, in distinction to a full judicial process. When each process could or should be used for marriage nullity cases was not a settled matter for canonists of that period. For example, M. Bouix says that

⁷⁹S. CIPRIANI, op. cit., p. 182, in Document 8, a letter from the consultors to the secretary of the S.C. for Extraordinary Ecclesiastical Affairs, December 17, 1853: "Distinguere l'economico stragiudiziale dalla pretta procedura forense, ha per noi formato la maggiore delle difficoltà . . ."

"[i]t is certain that before Benedict XIV, all marriage cases could be summarily processed."⁸⁰ Although Dei miseratione definitely added certain elements not present in the summary form, "it is not clear whether this summary form is altogether eliminated."⁸¹ Bouix continues to the conclusion that the context of Dei miseratione "rather evidently seems to suppose the full trial,"⁸² and thus it is better to follow a full trial and be secure against appeal, even though a doubt remains (stante dubio).

Or perhaps the consultors are using the phrase "economico stragiudiziale" to refer to the procedure for judicial separation, in distinction to that for marriage nullity. It is perhaps true that the divisions in the Austrian Instruction are not well made. In fact, the only division of articles is into two broad titles: marriage, and the marriage process. In the second part, both marriage annulments and ecclesiastical separation are described. A commissary is delegated to make a preliminary investigation for both types of cases. When he completes his investigation

⁸⁰Marie-Dominique BOUIX, Tractatus de judiciis ecclesiasticis ubi et de vicario generali episcopi, 2nd ed., Paris, R. Ruffet, 1866, p. 445.

⁸¹Ibid.: "an forma summaria per constitutionem Dei miseratione omnino sublata sit, non adeo liquet."

⁸²Ibid., p. 446: "satis aperte supponere videtur plenario iudicio . . ."

for separation cases (cf. §208), a final decision can be made by the bishop. However, "for the opposite cases [declaration of nullity], a probatory process must be instituted" [after the preliminary investigation is completed].⁸³

Regardless of what the consultors meant by the word "extrajudicial," even if it refers specifically to the preliminary investigation before the marriage nullity procedure, their objection does not seem to have been with the fact of an extrajudicial procedure, but rather with the arrangement of the articles in the Austrian Instruction, which they did not think was clear enough. This interpretation is strengthened by the observation of the consultors that although these mixed prescriptions of an extrajudicial and a judicial character were amalgamated, they see no gross deviation from the law [praeter jus?], nor anything diametrically opposed to the law [contra legem].⁸⁴

There are a number of unanswered questions in the Austrian Instruction taken by itself. Before the preliminary investigation, a petition is mentioned (oral or written) or a rumor (fama) which must be investigated (cf. indagationes of §131) for some foundation. Without that foundation, it

⁸³§221. "Casu opposito processus probatorius instituendus est."

⁸⁴S. CIPRIANI, op. cit., p. 182: ". . . non sara per ostarvi l'amalgama delle disposizioni miste di economico e di giudiziale, nulla ivi contenendosi di esorbitante dal diritto, od a questo diametralmente contrario."

seems that the case could be rejected. Even with such a foundation, an inquiry or preliminary investigation had to be conducted. There seems to be no mention of certain steps which are considered part of the formal process, e.g. acceptance of a petition, citation and summons of the respondent, and the litis contestatio. Does the preliminary investigation replace these, much as in a summary process? Once the preliminary investigation is concluded, the probatory period seems to begin immediately (cf. §151ff.).

How this preliminary investigation actually worked, both in theory and in practice, can best be evaluated from contemporary canonists who wrote about it.

G. Contemporary Views of The Austrian Instruction

1. A View From France

Over the years 1896 to 1919 in Paris, when the Austrian Instruction had been in use about forty years, there was produced a complete course on canon law and canonico-civil jurisprudence. R. Bassibey wrote the volume on general matrimonial procedure in 1899.⁸⁵ The effect and influence of the Austrian Instruction is evident in his work. Whereas writers after the Code of Canon Law will

⁸⁵Cours complet de droit canonique, Tome XII, Procédure matrimoniale générale, par R. BASSIBEY, Paris, H. Oudin, 1899.

write next to nothing on a preliminary investigation, either as a canonical institution as in the Austrian Instruction, or as an undefined help in procedure, Bassibey devotes a whole section to this question. Entitled "De l'enquête préliminaire extrajudiciaire" (Concerning the preliminary extrajudicial investigation), it begins with "Utilité générale de l'enquête. Du commissaire instructeur" (General usefulness of the investigation. The Commissary Hearing-Judge).⁸⁶

Bassibey notes that, for the most part, there are only two types of cases brought to the French ecclesiastical tribunals of those times: petitions for papal dispensations and declarations of nullity by diocesan authority. A case usually begins under the advice of a parish priest or confessor. A formal accusatory libellus is usually not presented until after an extrajudicial investigation is carried

⁸⁶Ibid., p. 101. The title "juge d'instruction" was most commonly used in French law of that period for the examining magistrate in a criminal procedure, who would be the delegated hearing-judge in charge of the preliminary examination (enquête). It would be interesting to do a comparative law study of continental and canonical criminal procedure, to better assess any possible influence of the criminal preliminary inquiry on the matrimonial preliminary investigation in Austria and France. Cf. Adhémar ESMEIN, A History of Continental Criminal Procedure, with Special Reference to France. Trans. by John SIMPSON. Reprint of The Continental Legal History Series, Vol. 5, 1913 ed., in South Hackensack, N.J., Rothman Reprints, 1968, pp. 548, 549.

out by the local administration. Most of the time, the actual writing of the petition is entrusted to one of the members of the tribunal, since the spouses themselves are incapable, and there are few advocates or canonists available to render them service.⁸⁷

Bassibey is most insistent on the value of such a preliminary investigation:

Nevertheless, whatever might be the first step, either that the plaintiff begin by introducing a judicial accusation, drawn up in the proper form under the direction of a competent counsel, or that he wait for an opinion from the Ordinary before accomplishing this formality, it remains no less true from this that the Officialis ought never to undertake a regular procedure without having conscientiously studied the matter in a preliminary hearing, --not only when the accusation is made ex officio by the tribunal, which would be very rare, as explained in the following section, --but also when the accusation is presented by the spouses or by a third person.⁸⁸

The reasons why he believes it is so important to have this investigation before engaging the parties in a

⁸⁷Ibid., pp. 101-102.

⁸⁸Ibid., p. 102. Au reste, quelle que soit la première démarche, que le demandeur commence par introduire une accusation judiciaire, libellée dans les formes sur les indications d'un conseiller compétent, ou qu'il attende pour accomplir cette formalité l'avis de l'Ordinaire, il n'en reste pas moins vrai que l'Officialité ne doit jamais entreprendre une procédure régulière sans avoir consciencieusement étudié l'affaire dans une instruction préalable, --non seulement lorsque l'accusation est faite ex officio par le tribunal, ce qui sera fort rare, comme on l'explique au titre suivant, --mais encore lorsque l'accusation est présentée par les époux ou une tierce personne.

serious contest and opening the instance are the following:

1. To ascertain whether the tribunal is competent;
2. Does the plaintiff have a right to present the case?
3. Does the petition have a juridical basis?
4. Is reconciliation between the spouses still possible?
5. Can the marriage be revalidated?⁸⁹

Therefore, he begins his discussion of the preliminaries of any case with a treatment of the general utility of the extrajudicial hearing (instruction extrajudiciaire). The diocesan bishop will want to use this procedure not only for cases that will come under his competence, such as petitions for a declaration of nullity, but also for those he will submit to the Sovereign Pontiff, such as for the dissolution of a non-consummated marriage. He quotes from the Canoniste contemporain of September-October, 1894:

Benedict XIV, in his Constitution, Dei miseratione, expressly prescribed that petitions to request the dispensation of a non-consummated marriage ought to be addressed to the Holy See, in order that the Sovereign Pontiff might see whether he ought to reject them, or to entrust their examination to a Congregation. But what value will these petitions have without the preliminary evaluation of the bishops, and how can the

⁸⁹Ibid.

bishops make any judgment about them if not by instructing a process?⁹⁰

This "process" is explained later in the article as a bishop gathering this information by an "extrajudicial inquiry."⁹¹

Bassibey asserts that "no law prohibits the Officials from treating these extrajudicially. Moreover, jurisprudence establishes this obligation."⁹²

He points out the many practical advantages he sees to a preliminary investigation:

1. It diminishes the number of formal processes.
2. It avoids embarrassment to tribunals who discover they are not competent.
3. It allows the tribunal to proceed more surely and more rapidly.
4. The judge, through the results of the inquiry, can see the intricacy of the case in a more precise manner.
5. The judge can direct the discussions of the trial with more assurance.
6. The judge has a "directing idea" to conduct the trial.

⁹⁰Ibid., p. 103, footnote 2.

⁹¹Ibid., "une information extrajudiciaire."

⁹²Ibid., pp. 103, 104. "Cependant aucune loi n'empêche l'Officialité de les traiter extrajudiciairement. Bien plus, la jurisprudence établit cette obligation."

7. The defender of the bond knows the grounds more clearly, and can thus direct the formal interrogations exactly to the point.⁹³

Bassibey explains at length how the preliminary investigation can save time-consuming correspondence with the Apostolic See, as the Sacred Congregations may repeatedly ask for more information; and also how it may save on excessive appearances and numbers of witnesses, and expensive experts.

In principle, the Ordinary or his Vicar General is certainly the most competent person to carry out the investigation. Although a serious and capable advocate can provide a good foundation for a case, Bassibey discourages his use as official investigator because "it exposes the sacrament to the judgment of a single person who can be easily deceived or let himself be guided by interest."⁹⁴ Canon law, he says, does not see anything unseemly about the same person being both judge-instructor and also president of the tribunal. But the bishop may wish to delegate a "commissary" or "Hearing-Judge" especially charged with extrajudicial informative processes.⁹⁵

⁹³Ibid., pp. 105, 106.

⁹⁴Ibid., p. 112: "il expose le sacrement au jugement d'un seul personnage qui peut facilement se tromper ou se laisser guider par l'intérêt."

⁹⁵Ibid., pp. 112, 113.

This method "is sanctioned by the Austrian Instruction, which prescribes that a tribunal name a commissary, in cases where the validity of marriage is placed in question."⁹⁶ Bassibey recommends that French tribunals utilize their assessors, who are highly qualified canonists, but whose role around the tribunal has been "purely platonic, decorative and passive - for the pomp of judgment . . ."⁹⁷ This commissary fills a function identical to that of an auditor. "As the law has nothing precisely and clearly defined on this point, it belongs to the bishop to determine his competence and [matters of] cognizance."⁹⁸

Bassibey then quotes and gives a commentary on the important §§140-142 of the Austrian Instruction. The mission given to the commissary in §140 "ad quaestionem facti eruendam" is essentially "to gather information preparatory to the regular procedure."⁹⁹ The institution of this office is left entirely to the discretion of the bishop. To fill the office, a person needs only one quality: the knowledge of law; no dignities, no titles. The principle reason for a preliminary investigation is

⁹⁶Ibid., p. 113.

⁹⁷Ibid.

⁹⁸Ibid.

⁹⁹Ibid.

the increasing number of marriage cases in France because of the civil law of divorce. They cannot afford to spend unnecessary time on the intricacies and subtleties of a case, especially when the tribunals get involved in the full process for cases with a false foundation or without sufficient proofs.¹⁰⁰

Also, the Austrian Instruction gives the power to the commissary not only to study the proposed cases with all their circumstances--a simple jurist [a man learned in law], could do this much--but also to interrogate the spouses or other persons who attack the marriage; still more, to cite and hear at least the principal witnesses (cf. §141). It requires even the presence of the defender of the bond at the interrogatories, and that of the notary. But, Bassibey says, this assistance by the defender, even less that of the notary, is not at all necessary,¹⁰¹ because the results of the hearing, once completed, are submitted to the tribunal. It is there that the defender of the bond takes cognizance of it to aid in formulating his questionnaire, and the judge will accept or reject the instance.¹⁰²

¹⁰⁰Ibid., p. 114.

¹⁰¹The Austrian Instruction itself requires the presence of the defender of the bond (§141), or at least gives him the right to always be present, or send a representative (§146).

¹⁰²Ibid., pp. 114, 115.

The function of the commissary is compared to that of the auditor as described by Schmalzgrueber.¹⁰³ The auditor has a "jurisdiction in cognizance" (jurisdictio in cognoscendo), so that he can cite the parties for a hearing, and is able to admit witnesses and proofs, but does not have jurisdiction in deciding the case.¹⁰⁴ For the Roman Curia or the legates of the Apostolic See, such an auditor is commissioned either for an entire case, or for examining certain articles of a case.¹⁰⁵

The commissary gives his completed investigation to the bishop or officialis, and only they have the right, based on the information provided, to accept or reject the case, or to order new information that they believe useful (cf. §142). The commissary is certainly permitted to add his own personal opinion on the case, which is purely consultative. In fact, they ought to make use of his opinion, which is like a "votum" or motivated report. In it, he can comment on competence, the accusation, the manner of introducing the action, the credibility of the people he has interrogated, probable difficulties concerning the appearance

¹⁰³See SCHMALZGRUEBER, op. cit., Vol. 3-4, lib. II, tit. 1, n. 15 (p. 13).

¹⁰⁴Ibid.

¹⁰⁵Ibid.

of certain witnesses, what permissions are needed for medical inspections, the utilization of the acts of a civil court--in short, any details that may enlighten the judicial path.¹⁰⁶

Once the procedure has begun, the judges can cite the commissary to give a judicial deposition concerning the facts he has learned in the preliminary investigation, unless, of course, he is already one of the tribunal members. Bassibey confirms that the commissary may be one of the panel of judges by pointing out the fact that French civil law allowed this practice. Also, in the Congregation of the Council, this preparatory work is done by the Cardinal Prefect, Secretary and Auditor in a meeting (Congresso).¹⁰⁷

The last recommendation of Bassibey concerns the stipend given to the commissary. He recommends requiring a small payment from the plaintiff from the outset of the inquiry. If the case ends up rejected by the tribunal, he runs the risk of wasting his time and effort, in spite of laborious investigations.¹⁰⁸

¹⁰⁶BASSIBEY, op. cit., pp. 115, 116.

¹⁰⁷Ibid., p. 116.

¹⁰⁸Ibid.

2. A View from the United States

The United States, at the time of the Austrian Instruction, was still under the authority of the Sacred Congregation for the Propagation of the Faith (Propaganda). For matrimonial procedure, the Constitution of Benedict XIV in 1741 would still be in force, but any particular legislation had to come from Propaganda, which did not occur until 1884 when the Sacred Congregation issued "Causae matrimoniales." This was an "Instruction for Ecclesiastical Judges Concerning Marriage Cases."¹⁰⁹ In that same year, 1884, the Third Plenary Council of Baltimore convened, and in Title X, treated of "Ecclesiastical Trials." They ordered the institution of an ecclesiastical court in each diocese of the United States, in accordance with the provisions of the Instruction Causae matrimoniales. In §2 they prescribe:

In treating these cases, because of the gravity of the matter, both the Constitution of Benedict XIV, Dei miseratione, November 3, 1741, and the Instruction from the Sacred Congregation for the Propagation of the Faith communicated to us, which begins with the words "Causae Matrimoniales" are to be exactly observed. The Instruction for Ecclesiastical Judges of the Austrian Empire for Marriage Cases, in 1855, recommended by weighty Roman theologians and canonists, although only by their own

¹⁰⁹"Instructio de judiciis ecclesiasticis circa caussas [sic] matrimoniales. In Fontes, Vol. 7, n. 4901, pp. 479-492.

private judgment, may also be usefully consulted.¹¹⁰

The bishops of the United States saw nothing inconsistent in ordering the strict observance of the Constitution of Benedict and the Instruction of Propaganda, while at the same time looking to the Austrian Instruction as a practical guide for implementing and fulfilling these prescriptions. Further evidence that they did not find the preliminary investigation inconsistent, but rather presumed its use, is found in n. 305, II. It begins with words taken almost exactly from Causae matrimoniales §9:

It is the task of the auditor or moderator to convoke the tribunal, to cite the parties and witnesses, to order investigations, to delegate experts to carry them out, to issue decrees for the correct compilation of the acts; . . .¹¹¹

They have added the important function of "investigations" as can be seen when compared with the Instruction of

¹¹⁰"In agendis hisce causis pro rei gravitate exacte servetur tum Constitutio Benedicti XIV. Dei Miseratione, 3 Nov. 1741, tum Instructio a S. Cong. de Prop. Fide Nobis communicata quae incipit Causae Matrimoniales. Utiliter etiam consuli poterit Instructio pro judiciis ecclesiasticis Imperii Austriaci in causis matrimonialibus, a. 1855 a gravibus theologis et canonistis Romanis, licet solo privato suo iudicio, commendata." Acta et decreta concilii plenarii baltimorensis tertii. A.D. 1884, Baltimorae, J. Murphy, 1886, p. 174. [Hereafter referred to as Acta.]

¹¹¹"Auditoris seu moderatoris est tribunal convocare, partes et testes citare, ordinare investigationes, viros peritos ad eas instituendas deputare, edere decreta pro recta actorum compilatione; in Acta, p. 174.

Propaganda, §9.¹¹² But the most significant part is the final phrase:

. . . in a word, to be responsible for all those things, which, both in the preliminary investigation, as well as in the probatory process, are proper to judges.¹¹³

The favorable attitude toward the Austrian Instruction is again shown in n. 307, in which the bishops agree that it is right to provide counsel for the parties. However, "it is obvious by its very nature that advocates differ greatly from witnesses, and their personal allegations differ greatly from testimony."¹¹⁴ If the advocates interfere with the work of the court, the judge may rightly exclude them. They support this interpretation with the phrase: "as was advised in the above-mentioned memorable Instruction of the Archbishop of Vienna, §143."¹¹⁵

The actual practice in the United States after the Baltimore Council is given by Sebastian Bach Smith, a

¹¹²Instructio, §9. "Moderatoris actorum erit tribunal convocare, partes et testes citare ut in iudicium compareant; terminos dilationis concedere, quoties rationabiliter ab iis qui jus habent petantur; edere decreta et ordinationes pro regulari et recta actorum compilatione. Quae omnia scripto erunt exaranda, et in actis ipsis recensenda. The Instruction is given by the Bishops as an Appendix in the Acta, p. 262.

¹¹³"uno verbo, omnia praestare tam in disquisitione praevia; quam in processu probatorio, quae iudicis propria sunt." Acta, p. 174. [Emphasis added in text.]

¹¹⁴Acta, p. 175.

¹¹⁵Ibid.: "ut in superius memorata Instructione Archiep. Viennensis, §143, monetur."

leading commentator. He was a professor of Sacred Scripture, Canon Law and Ecclesiastical History at Seton Hall Seminary, and became a prolific writer in the field of canon law.¹¹⁶ He is certainly familiar with the formal trial procedure for marriage cases, and in 1893, he describes the marriage process in the United States.

The first step or stage of the trial, Smith says, is the petition for annulment (libellus accusationis matrimonii), which is the corner-stone of the whole process. It should fully describe the diriment impediment. He uses the example of "fear and violence," and says that the threats, etc., should be fully described, and the proofs to be brought in support of the allegation should be indicated. This is to be done so that "the judge may be able to know whether the petition is based upon good grounds."¹¹⁷ Sometimes, when the petitioner does not know how to draw up the writing embodying the petition, and has no advocate, the person may go personally to the tribunal and first describe the whole case orally. The secretary then writes a petition from this data, and reads it back before the person signs it. But

¹¹⁶S.B. SMITH (1845-1895) authored: Notes on the Second Plenary Council of Baltimore; Elements of Ecclesiastical Law (3 vv.); The Marriage Process in the United States; The New Procedure; Compendium Juris Canonici; and others [one of his publishers adds: "etc., etc."].

¹¹⁷S.B. SMITH, The Marriage Process in the United States, New York, Benziger, [c. 1893], p. 277.

whether the person has presented his petition in writing, or made it orally before the tribunal, in either case.¹¹⁸

. . . the petitioner or accuser must always appear in person before the ordinary or his matrimonial tribunal for a preliminary examination, and give a full and detailed oral account of the whole case. On this occasion the bishop or his moderator of the marriage court should endeavor to obtain, by prudent questions, a full knowledge of the asserted impediment, and of all the circumstances connected with it, as also of the witnesses informed on the matter, and of all other available evidence. If he finds on this occasion that the asserted impediment cannot be proved, he should reject the petition, or at least defer further proceedings until a better prima facie case is made out.¹¹⁹

Smith asks whether it is necessary to produce the proofs together with the petition, and he answers:

The petition need not be accompanied by any proofs. It is sufficient for the petitioner to indicate the proofs which he will produce subsequently, that is, after the citation of the defendant and the contestatio matrimonii.¹²⁰

Another question is whether proofs can sometimes be juridically produced with the petition, and prior to the contestatio. He answers "yes" in two cases: 1) documents; and 2) when there is danger that the proofs will be lost by delay (this examination of witnesses is called "ad perpetuam rei memoriam").¹²¹

¹¹⁸Ibid., pp. 276, 277, 280, passim.

¹¹⁹Ibid., p. 280.

¹²⁰Ibid., p. 282.

¹²¹Ibid.

It is clear from these comments that Smith is well aware of the distinction between judicial and extra-judicial, and also between a summary procedure and a trial procedure. As mentioned above, Smith admitted a compatibility between the current Church laws and a more summary manner, but he did not recommend the summary procedure for formal marriage cases. Here, he is definitely speaking about the formal trial procedure:

Whether this trial or mode of procedure can be conducted in a summary manner, so far as this is compatible with the above formalities, we have seen already. We also observe that the trial as above described may and usually is preceded and inaugurated by a preliminary investigation. The object in the latter is to ascertain as far as possible all the facts in the case, and thus to enable the judge to know whether he is justified in going on with the trial or hearing of the case.¹²²

Quoting §141 of the Austrian Instruction in its entirety, he gives his own explanation:

When the juridical petition for the annulment, or the accusatio matrimonii, has been properly made, as already shown, it becomes the duty of the ordinary or the moderator to examine carefully, though extrajudicially, whether the alleged annulling impediment, and consequently the asserted nullity of the marriage, rests upon proofs which appear prima facie full and conclusive. For it would be evidently worse than useless to begin a process where there is no good reason or proof for assuming the invalidity of the marriage, or where the nullity, if it really

¹²²S.B. SMITH, Elements of Ecclesiastical Law, Vol. II, Ecclesiastical Trials, New York, Benziger, [1892], pp. 398, 399.

exists, cannot be juridically proved. Hence, in this preliminary investigation, the judge should seek orally from the plaintiff and others all the available information on the alleged impediments.¹²³

Under the word "extrajudicially," he has a footnote which reads: "Hence in the preliminary inquiry, the oath should not be administered to the accuser, spouses, or witnesses." His reference is to p. 35 of the book, Ehe-process (Marriage Procedure) by Johann Friedrich Schulte, a professor of Catholic Church law, Germanic law and legal history in Prague. Smith uses Schulte as one of his constant sources, and thus reveals his familiarity with one of the leading commentators and contemporaries (and perhaps one of the authors) of the Austrian Instruction.¹²⁴

Smith repeats the opinion of the Third Plenary Council of Baltimore (and the Austrian Instruction §143) that the parties may have the assistance of advocates at

¹²³S.B. SMITH, Marriage Process in the United States, pp. 289, 290. He refers to Causae matrimoniales §§ 5 & 6 which are: §5. In ea, praeter accuratam facti expositionem, enarranda erunt omnia adjuncta necessaria, et omnia indicia concurrentia; indicandi et nominandi testes de re instructi, ut hoc modo fundamenta accusationis cognoscantur, et via tribunali sternatur veritati detegendae. §6. Accusatione sic recepta, munus moderatoris actorum Episcopus vel ipse sibi assumet, vel suum vicarium generalem, aut alium probum et expertum virum e clero ad illud delegabit. Similiter alium virum designabit, qui cancellarii officio fungens quidquid ad causam pertinet in acta referat, ac nominatim interrogationes examinandis faciendas, eorumque responsiones scripto consignet. In Acta, Appendix, p. 263.

¹²⁴Ibid., p. 290, footnote 2.

the preliminary hearing. "It is also well to invite the defensor matrimonii" ¹²⁵ The petition itself must necessarily be communicated to the defender of the bond, which petition may be amended in accordance with the results of the inquiry. ¹²⁶ Smith then proposes the value of a preliminary investigation for the judge, in terms of the pre-Code "mathematical" evidentiary standards or norms:

When it is found, at the end of this preliminary inquiry, that the petition for the annulment . . . has no solid foundation, or that the alleged impediment rests upon no canonical proofs, or that there are but slight and insufficient proofs, the judge should advise the petitioner to withdraw the petition, or he should simply reject it himself.

But when it is found that there are good proofs, e.g. a canonical half-proof, extant on the existence of the alleged impediment and consequent nullity of the marriage, the process or trial, or rather its probatory term, can then be begun. ¹²⁷

The last phrase reveals something of a procedural "ambiguity" which will trouble some commentators of the XX century, but seemed to be no problem for these eminent and competent canonists. This is the question of when does the process actually begin? The preliminary investigation, as understood and practiced in the late XIX

¹²⁵Ibid.

¹²⁶Ibid., pp. 290 and 291, footnote 2.

¹²⁷Ibid., p. 291.

century was clearly an "extrajudicial" procedure, not under oath. Smith clearly distinguishes this testimony of witnesses from the judicial type, which is permitted only exceptionally before the contestation, as was seen in the Decretals of Gregory IX, and will be seen in the Code of Canon Law, canon 1730. Yet this extrajudicial procedure took place before the tribunal or its representative, with the defender and notary often present; and the results were apparently placed in the acts of the case. These results could also be helpfully interpreted by the commissary or auditor. The probatory part of the process has not yet begun. In fact, the petition has not been officially accepted. The preliminary investigation is used not only when the plaintiff has submitted a petition, but also to help a plaintiff to formulate a petition. In this system, the advocate seems to play a clearly subordinate role in preparing a case. All of these considerations, scarcely mentioned to date in the XX century, have reappeared en masse in the tribunals of North America beginning in the late 1960's.

H. Criminal Cases Before the Code of Canon Law

Although the Austrian Instruction seems to be the first canonical preliminary investigation for marriage nullity cases, canon law had long used a preliminary inquiry

for criminal cases. In fact, the word "inquisitio" (investigation) "has always been used in canon law in the restricted sense to designate the investigation of delicts."¹²⁸ It is extremely helpful to examine this preliminary inquiry or inquest since, in the period before the Code of Canon Law, there was a double preliminary investigation: one extra-judicial, the other judicial. Criminal procedure in the Code will prescribe only one preliminary investigation.

Our guide will again be the American, S.B. Smith. The process he describes was issued for the United States in 1883 by the Sacred Congregation for the Propagation of the Faith: the Instruction "Cum magnopere," sent in 1884 to the Third Plenary Council of Baltimore.¹²⁹ This Instruction is almost identical to the one issued for the universal Church on June 11, 1880 by the Sacred Congregation of Bishops and Regulars.¹³⁰

In his Latin text, Smith occasionally includes a parenthesis in which he gives an approximate English

¹²⁸ John Whelan Joseph DOUGHERTY, De inquisitione speciali, Washington, D.C., Catholic University of America, 1945 (Thesis 213), p. vii. He gives the long history of the special inquest. In the Dictionnaire de droit canonique, "enquête" is defined only in terms of the criminal investigation by P. TORQUEBIAU, cols. 344-348.

¹²⁹ Fontes, n. 4900. Vol. 7, pp. 475-479.

¹³⁰ Fontes, n. 2005. Vol. 4, pp. 1022-1025.

equivalent.¹³¹ The procedure he describes is for a judicial process or a trial, as opposed to the summary process which a bishop may use to suspend a priest "ex informata conscientia." The first step in the process is the investigatio seu inquisitio extrajudicialis, which Smith translates as "extrajudicial inquiry." He quotes from Cum magnopere, Art. 12: when an accusation of a priest's misconduct comes to the attention of a bishop, or if he has any reason to suspect misconduct himself, then:

. . . the Bishop, either himself or through another ecclesiastic, should inquire ex officio, in an extrajudicial manner, whether such accusations or information is well founded.¹³²

For this purpose, the Third Plenary Council of Baltimore prescribed¹³³ that witnesses should be examined extrajudicially, or the Bishop should obtain other authentic extrajudicial information. If this investigation produces extrajudicial proofs at least of a partial nature, or

¹³¹S.B. SMITH, Compendium juris canonici ad usum cleri et seminariorum hujus regionis accomodatum, Neoboraci, Benziger, 1890. See also S.B. SMITH, The New Procedure in Criminal and Disciplinary Causes of Ecclesiastics in the United States, New York, Fr. Pustet & Co., 1898.

¹³²Cum magnopere, Art. 12.1: "Episcopus vel per se, vel per alium virum ecclesiasticum inquirat ex officio, modo extrajudiciali, utrum hujusmodi querelae seu informationes sint fundatae. Also see Art. 15.

¹³³Acta, n. 308.

serious indications (probationes extrajudiciales saltem semi-plenas, vel indicia gravia), and so there is some foundation (fundamentum) that a crime has been committed by the priest, the bishop is still not to proceed to a judicial process. First, he must see whether the priest will accept a preventive or medicinal remedy. If this falls on deaf ears (in irritum cedant), he is to proceed to the second step.¹³⁴

Even in this second step, the beginning of a "judicial" process, the accused is not yet to be cited or heard. Smith calls it "De investigatione judiciali seu processu informativo instituendo antequam citetur reus," which he translates: "The Informative Trial to be held before the Accused is Cited to Appear for Trial."¹³⁵

From the information obtained in the extrajudicial inquiry, the bishop's investigator is to prepare an accusatory libellus, which Smith translates as a "preparatory or preliminary charge." Then begins this "trial" before the trial. Smith asks whether this (second) informative process is necessary, and answers "Affirmative," because the bishop is bound to discover whether there are present "legal, therefore juridical proofs, at least partial, concerning the

¹³⁴S.B. SMITH, Compendium, p. 345. Also cf. Acta, n. 309.

¹³⁵Ibid.

crime of the accused."¹³⁶ Smith explains that before a pries should be cited for a criminal trial, it is presupposed that he is prima facie guilty of the crime, since he will be suffering the infamy of the people he serves, not to speak of his own sorrow. This judicial informative process (also called the "process for the information of the curia" and the "preparatory instruction") is to search for sufficient indications of guilt. Smith compares it to the American criminal law concept of an "investigation by the grand jury, prior to the indictment and trial of a criminal."¹³⁷

In this processus informativus, which Smith translates "the preliminary judicial investigation,"¹³⁸ witnesses are juridically examined (per juridicum examen testium) by the judge or his delegate (auditor), with the notary and the diocesan prosecutor present.¹³⁹ The object of this judicial inquiry is to obtain full, complete legal proofs, insofar as this is possible.¹⁴⁰ The Instruction Cum magnopere warns (Art. 21) that the accused is not to

¹³⁶Ibid., p. 346. "probationes legales et proinde juridicae, saltem semi-plenae de delicto accusati." Cf. Cum magnopere, Arts. 16 & 21.

¹³⁷Ibid., p. 347.

¹³⁸Ibid.

¹³⁹Ibid., "adsistente tum secretario tum procuratore fiscali."

¹⁴⁰Ibid., "plenae . . . quantum fieri possit, probationes legales habeantur."

be cited until all these proofs are collected. This admonition is repeated by the Third Plenary Council of Baltimore, n. 312.

In this pre-Code criminal preliminary investigation, it is clear that the Holy See knows the difference between, and insists upon both an extrajudicial and a judicial informative process. As much as this manner of proceeding may violate modern sensitivity to due process, this preliminary investigation was not seen as harming any rights of the accused. Nor was it seen as "prejudicing" a case, even though the judge himself could hear witnesses in a formal judicial manner before the accused was ever heard. Rather, this double informative process is seen in exactly the opposite light--as preventing unnecessary and unjust trials from being held without sufficient reason, and with grave subsequent harm to the name and reputation of the priest. This is why the extrajudicial investigation was also called the "paternal" investigation, since it was directed primarily to preventive measures and medicinal remedies. But the information collected was also used if there was a trial. This was explained in the Instruction, Cum magnopere, §15:

The foundation of the delict can be drawn from this very exposition found in the process, which is confirmed by authentic information,

or extrajudicial confession, or the deposition of witnesses. . .¹⁴¹

In summary, the pre-Code period of Church law had definite knowledge and a limited practice of certain types of preliminary investigations. Although the clearest legislated use for the entire Church was in disciplinary matters, the practice was approved for marriage nullity cases in the Austrian Empire with the full knowledge of the Pope, and with the explicit statement of his apostolic pro-nuncio. While disciplinary cases used both an extrajudicial and a judicial preliminary investigation, marriage cases used only the extrajudicial. However, the investigation of the Austrian Instruction seemed to be "formal" in every way except for the oath. The prescription of the Decretals of Gregory IX that witnesses were not ordinarily to be interrogated before the contestation is not mentioned by commentators as posing any problem against that type of investigation.

The development of a growing practice with regard to a preliminary investigation in marriage nullity cases seems to come to a sudden halt with the Code of Canon Law.

¹⁴¹ Delicti fundamentum erui potest ex ipsa expositione habita in processu, quae authenticis informationibus vel confessione extrajudiciali, vel testium depositionibus confirmetur. . .

CHAPTER TWO

TYPES OF PRELIMINARY INQUIRIES SINCE THE CODE OF CANON LAW

In spite of many details required in the formalities of the presentation and acceptance of petitions, few guidelines are found in the Code of Canon Law regarding the substance (law and facts) and evaluation of a petition. A study will be made of the Code as regards the petition, its rejection, and canon 1730, which forbids the judicial interrogation of witnesses before the litis contestatio, except in certain circumstances. Although no preliminary investigation for formal marriage nullity cases is found in the Code, examples do exist for other types of cases, which will be examined: the preliminary inquiry before criminal cases, and the informative process before beatification causes.

I. The Code of Canon Law

The formation of the Code of Canon Law of 1917, the Church's first complete Code, remains in great part a mystery sealed in the Vatican archives; its origins revealed mainly in its official footnotes. A project was commissioned to publish the preliminary work and its sources, but only one volume appeared, happily on Book IV, by Francis Cardinal Roberti.¹ In this work, there is a

¹Codicis juris canonici schemata. Lib. IV: De processibus. Digessit Franciscus Roberti. I: De judiciis in genere, In Civitate Vaticana, Typis Polyglottis Vaticanis, 1940.

synopsis of seven previous schemata in parallel columns, with the approved Code as the eighth. The most common source seems to be the Corpus Juris Canonici, especially the Decretals of Gregory IX. There is a page of abbreviations (sigla), naming the members of the commission, and providing some frequently used sources, which are surprisingly few. The civil codes for Austria, Germany, Italy and France are listed, as well as the regulations for the Rota, Signatura and other Roman Curial departments. The only marriage documents listed are Cum moneat Glossa (S.C. Council, 1840), and Causae matrimoniales (Prop. Fidei, 1883). In the footnotes themselves, the Austrian Instruction is referred to occasionally, but without reference to a preliminary investigation.

Title VI concerns the introduction of a case (De causae introductione). In schema B,² three canons are proposed which divide contentious judgments into ordinary and summary, relegating the summary process to an appendix. The other schemata have nothing corresponding, and a footnote questions whether the two processes should still be distinguished, and how they are actually different. This question was not answered in the Code.³ Scholars are divided as to whether the single judicial process given in the Code

²Ibid., p. 198.

³See I. GORDON, De processibus, op. cit., pp. 12, 13.

corresponds to the old solemn, or rather to the summary process.⁴ The importance of the discussion here is that the fundamental bipolarity of the process, discussed above, was a tension in the formation of the Code. They were aware of the difference between using a solemn, highly judicial trial, or else a more summary and abbreviated procedure. Procedurally, this bipolarity occurs from the desire, on the one hand, to protect the Church and the parties from abuses such as fraud, laxity, etc., by the safeguards of a legal process, while at the same time, to eliminate any outdated formalities or delays not required for the adequate protection of the law and of rights. It is well to keep this bipolarity as a constant backdrop to a study of the formal process, especially when it is later compared to the more administrative procedures.

In the discussion of the introduction of a case, one of the consultors to the Code of Canon Law, Otto Fischer,

⁴Ibid. There are two opinions, according to GORDON. The first, which is rather common, asserts that there is a single form of judicial procedure in the Code. Nevertheless, these authors are not in agreement in determining the nature of the single process existing; some (e.g. Noval, Roberti) think that it corresponds more to the ancient summary process; others (e.g. C. Lefebvre) assert rather that it is equivalent to the solemn. GORDON favors the opinion more recently proposed by R. ab UNIAO DOS PALMARES, O.F.M., Cap., who thinks that the distinction is no longer contained in the Code in express words, but is nevertheless retained insofar as a certain summary judicial procedure is conserved as if by way of exception, whose most prominent example is the process of cc. 1990-1992.

professor at the University of Breslau, reminded the commission to what extent the canon law of procedure is derived from Roman law: some laws of the Church "tacitly suppose that many institutes of Roman law are still existing."⁵ He asks that the obsolete provisions be removed, and that a simplification be made in the spirit of Clement V, although it does not seem to him that Clement's summary judgment can any longer be admitted.⁶

The opinions of the other consultors, especially as regards the introduction of a case (by a petition), and a preliminary examination of witnesses (before the litis contestatio), must be implied, for the most part, from the schemata they proposed.

A. The Petition

A number of authors have written on the subject of the petition in the Code of Canon Law.⁷ A great part of it concerns formalities that will not be of interest here. This

⁵F. ROBERTI, CIC Schemata, op. cit., p. 198.

⁶Ibid., p. 199.

⁷See John J. KEALY, The Introductory Libellus in Church Court Procedure, Washington, D.C., The Catholic University of America Press, 1937 (Study 253); Raoul NAZ (Charvet), "Libelle," in Dictionnaire de Droit Canonique, Vol. 6, cols. 419-424.

study will center on the substantial content of the petition--the law and the facts--that relate to the extent of a "preliminary investigation."

The first two schemata for the Code insist that the petition be brief: the first asks that it clearly and succinctly contain the facts (species facti); the second that it give a brief narrative (brevis narratio). The other schemata require only that the object of the controversy (objectum controversiae) be presented--and it was this last proposal that was accepted in canon 1706:

To open a suit, the plaintiff must present to the competent judge a bill of complaint in which the object of the controversy is shown. . .⁸

Each of the schemata asks for some indication of the proofs that will be offered in support of the action: "the positions or assertions bearing on the fact, or facts, or circumstances, which the plaintiff claims as a support of his right (Schema A);⁹ "a summary indication of the proofs" (B);¹⁰ "a narration of the facts with an exhibition of the proofs" (facti narrationem cum exhibitione probationum)" (C);¹¹

⁸C. 1706. Qui aliquem convenire vult, debet libellum competenti iudici exhibere, in quo controversiae objectum proponatur . . .

⁹ROBERTI, CIC Schemata, p. 200.

¹⁰Ibid., "Summaria indicatio probationum."

¹¹Ibid.

"to 'give a nod to' the arguments of the evidence, by which the plaintiff intends to prove the asserted fact" (Innuere probationis argumenta, quibus uti intendit actor ad comprobanda factorum asserta) (D and E);¹² "to indicate in a general way at least, on what law the plaintiff relies. . ." (F and G).¹³ It was the formulation of schemata F and G that became c. 1708.2:

It must indicate, at least in a general way, the law on which the plaintiff relies to prove his allegations and assertions.¹⁴

The first part of c. 1708 indicates that the petition should state "what is sought" (quid petatur), which merely repeats the idea of the "object of the controversy" in c. 1706.

Provision is made in the schemata and in the Code (c. 1707) for plaintiffs who cannot write, to present their case orally to the tribunal, which will then be written by the notary. The bishops of England, commenting on this proposal, stated that they:

¹²Ibid., pp. 200, 201.

¹³Ibid., p. 201.

¹⁴C. 1708.2: "Indicare, generatim saltem, quo jure initatur actor ad comprobanda ea quae allegantur et asseruntur." The proposed revision of this canon substitutes "quibus argumentis" for "quo jure," [unpublished], 1976.

. . . hope that in English-language areas, in which the formalities of trials are much different from those to which latin peoples have become accustomed, that it will be permitted to them, observing substantially the manner of proceeding described in the Code, to observe the customs of procedure of their homeland, in matters of less importance.¹⁵

To summarize the substantial contents of a petition: the document must have a foundation both in law and in fact. It must be remembered that these canons were written for canonical trials in general, and it is often difficult to apply them precisely to marriage. That is what Provida Mater did in 1936. Until then, the Code had to stand on its own, and former laws and practice on marriage procedure must help to interpret it. This is in strict accord with canon six as a principle of interpretation: the old laws are still of value when they are in conformity with the Code.¹⁶ Authors debate at length as to exactly how much of a foundation is required for a petition, and it seems impossible to make a certain judgment from the Code alone.¹⁷

¹⁵ROBERTI, CIC Schemata, p. 201.

¹⁶C. 6.3: Canones qui ex parte tantum cum veteri jure congruunt, qua congruunt, ex jure antiquo aestimandi sunt; qua discrepant, sunt ex sua ipsorum sententia dijudicandi;. . .

¹⁷See Joseph BERGER, Rejection of the Introductory Libellus in Matrimonial Causes, Rome, P.U.G., 1964, pp. 24-27.

B. Rejection of the Petition

Canons 1709 and 1710 discuss the rejection of a petition, but give no criteria for rejecting it on substantial grounds. For this too, we must turn to other documents, and to jurisprudence concerning the "fumus boni juris," which will be discussed later.

C. Canon 1730

So far, nothing at all has been mentioned about a preliminary investigation, either in the Code, the schemata, or the footnotes. Canon 1730 insists, in terms taken almost entirely from the Decretals of Gregory IX, that no judicial interrogation of witnesses is to take place before the litis contestatio, with certain exceptions:

Before the contestation of the issue has taken place, the judge shall not proceed to the examination of witnesses or to the reception of other proofs, except in the case of contempt, or unless it is proper to take the depositions of witnesses, lest because of the probable death of a witness or his departure or another just cause, it could not be later obtained, or would be possible only with difficulty.¹⁸

¹⁸C. 1730: "Antequam litis contestatio locum habuerit, iudex ad testium aliarumve probationum receptionem ne procedat, nisi in casu contumaciae, aut nisi testium depositionem recipere oporteat, ne ipsa ob probabilem testis mortem, ob discessum eiusdem vel ob aliam justam causam recipi postea nequeat, aut difficulter possit."

"Deposition" refers to the formal type of judicial testimony under oath, usually taken during the probative period.¹⁹ This interpretation is verified by the Instruction Provida Mater, Art. 68, §2, which allows a judge to "admit proofs before the contestation of the issue in the cases mentioned in canon 1730."²⁰ Proofs (probationes) are defined by Mascardus as "the exposition of a doubtful or controverted matter made to a judge by legitimate arguments."²¹ However, proofs can be considered extrajudicial if they are not obtained in an ecclesiastical trial according to the laws of procedure.²² In this sense, the information and statements gathered under the preliminary investigation of the Austrian Instruction were extrajudicial, and so outside the strict scope of canon 1730. Thus, this type of preliminary investigation does not seem to be forbidden by canon 1730,

¹⁹The Code always uses "depositio" in this sense: cc. 1778 and 1791 refer to the judicial deposition of witnesses, and c. 1975, §2 to the deposition of spouses. The only other use is in c. 2121.2 for the deposition of witnesses in beatification causes, in the context of the judgment of specific miracles (therefore, not in the informative (preliminary) stage).

²⁰P.M., Art. 28 §2: "probationes admittere ante litis contestationem in casibus de quibus in canone 1730."

²¹In GORDON, De Processibus, op. cit., II, p. 35: "Rei dubiae seu controversae per legitima argumenta Judici facta ostensio."

²²Ibid., p. 36.

or in the Code. All the canons regarding the introductory process in the Code would seem to discourage any judicial action before the formal steps of the process. The Code is not unfamiliar with preliminary inquiries, as is seen next in the criminal and canonization procedures.

D. Preliminary Inquiries in the Code

1. Criminal Cases in the Code of Canon Law

In the Code of Canon Law, the preliminary inquiry for criminal cases is simplified to a single "special inquisition" (inquisitio specialis), in canons 1939 to 1954. Before the Code, there had been both an extrajudicial and a judicial preliminary investigation. The purpose in the Code is the same--to determine whether there is any basis (fundamentum)²³ to a suspicion. The Ordinary will usually delegate a synodal judge or another person for a particular case (cc. 1940, 1941). This investigator is disqualified from later acting as the judge, even if it be the bishop himself (c. 1941,§3). The Ordinary has the power of discretion as to whether there are enough arguments to open an investigation (c. 1942,§1). The investigator (inquisitor), when interviewing witnesses, is to observe the prescriptions of canons 1770 to 1781 as closely as he can (c. 1944), which

²³Canon 1939,§1: "inquisitio specialis est praemit-tenda ut constet an et quo fundamento innitatur imputatio."

are the canons regulating the judicial interrogation of witnesses.²⁴ The investigator is able to seek the counsel of the promoter of justice (c. 1945). When he has completed his investigation, he turns everything over to the Ordinary, adding his own opinion (suffragio suo) (c. 1946). The bishop then has three choices: 1) if the accusations lack a solid foundation (destitutam solido fundamento) (c. 1946 §2.1), he will take no action; 2) if there are indications, but not yet sufficient for the accusatory charge (indicia, sed nondum sufficientia ad accusatoriam) (§2.2), he will file it in the archives; 3) if there are certain, or at least probable and sufficient reasons for the charge (certain vel saltem probabilia et sufficientia ad accusationem) (§2.3), he will turn over the acts of the investigation to the promoter of justice (c. 1954), who will draw up the accusation (c. 1955), and thereafter follow the usual canonical trial procedure in the first part of Book IV (c. 1959).

In this criminal procedure of the Code, then, there is a clear example of a strict formal canonical process,

²⁴ Thus this single "special" investigation seems similar to the judicial preliminary investigation required before the Code, although it would seem technically extra-judicial, since the accusatory charge has not yet been brought against the defendant.

which is preceded by a preliminary investigation.²⁵ Its decision is a matter of strict justice. In the following section, the decision will concern the beatification and canonization of the saints.

2. The Informative Process for Beatification

The second part of Book IV of the Code concerns Cases of Beatification of the Servants of God and of the Canonization of the Blessed. Before the actual "process" (processus) begins, it is preceded by a "small process" (processiculus, c. 2061) which is called the "informative process" (processus informativus, cc. 2049-2056).

The local bishop (Ordinary) is to gather sufficient information through this process so that the competent Congregation in Rome can decide whether to permit the official opening of a canonical process (cc. 2073 ff.). Its more specific purpose is negatively stated in c. 2049, i.e. to prove that there was no fraud, deceit, or culpable negli-

²⁵In the draft for the new Code, it appears that the preliminary investigation would always be necessary: "Quoties Ordinarius notitiam; saltem veri similem, habeat de delicto, caute inquirat, per se vel per iudicem aliumve idoneum hominem, circa facta et circumstantias et circa imputabilitatem," can. 1, §1 of the schema de iudicio criminali. Taken from class notes of Albert Gauthier, O.P. on Procedure, St. Paul University, Ottawa (ms.), for 1974-75 school year, p. 59.

gence, before allowing a case to proceed any further.²⁶
 It is positively given in c. 2050 §2: it is sufficient to prove the person's good reputation in general from good sources; it is not necessary to establish specific virtues, martyrdom, miracles.²⁷ The rest of the procedure is not relevant to our thesis.

While discussing this procedure, it would be well to bring the process up to date. The procedure was radically simplified by Pope Paul VI in his Motu Proprio, Sanctitas clarior of March 19, 1969.²⁸ The former law had provided for two kinds of process for the beatification of the Servants of God: the ordinary and the apostolic. In Sanctitas clarior, causes which are following the ordinary route of non-cult will use only one cognitional process to gather proofs, and will be based on a twofold authority. The first is derived from ordinary power, and the second is based on power delegated by the Apostolic See, which confirms and raises the first to a higher level. However, the basic rationale is still the same in applying for the necessary

²⁶C. 2049. ". . . ut ad ulteriora procedi possit, probari debet nullam in casu fraudem vel dolum aut culpabilem negligentiam adfuisse."

²⁷C. 2050 §2. "Non est necesse ut constet in specie de virtutibus, martyrio, miraculis, sed sufficit ut probetur fama in genere . . ."

²⁸PAUL VI, Sanctitas clarior, in A.A.S., 61(1969), p. 149ff.; transl. from Canon Law Digest, 7, p. 1015ff.

permission from Rome. The Congregation must make a judgment, based on sufficient preliminary information, that there is a good basis for opening a case:

However, before a bishop or hierarch opens or introduces a cause, whether ex officio or by request (n. 2 above), he must consult the Holy See and supply valid and appropriate evidence to show that the cause itself is based on a legitimate and solid foundation. (n. 3)

This is another type of case where "evidence" of a general nature is gathered prior to the opening of a formal process (or at least its "probative" stage), for the purpose of establishing a fundamentum, a basis in fact.

II. After the Code of Canon Law

The Instruction Provida Mater, in 1936, finally provided guidelines specifically for marriage cases. It clarified the criteria for rejecting a petition on substantial grounds, but still leaves unclear the type of evaluation that judges must make of the foundation of a petition. Necessary and desirable qualities of a petition, and its evaluation, will be analyzed with the help of two canonists, and some helpful insights from the petition of a plaintiff in poverty.

Then, parallels in preliminary investigations will be examined in cases of nullity or dispensation petitions for sacred orders and non-consummated marriage.

A. Declarations of Marriage Nullity

As was mentioned, the trial procedure of the Code was not written specifically for marriage cases. Tribunals who applied it had to rely greatly on previous laws and jurisprudence. The official explanation and specification did not come until nineteen years after the Code appeared. On August 15, 1936, the Sacred Congregation for the Discipline of the Sacraments issued their Instruction to be Observed by Diocesan Tribunals in Handling Cases of Nullity of Marriages, which begins with the words, "Provida Mater."²⁹ In a footnote to the official text, certain sources are mentioned: 1) Dei miseratione (Benedict XIV); 2) Cum moneat Glossa (S.C. Council); 3) undated Instruction of the Holy Office;³⁰ 4) Instruction of the Holy Office, June 25, 1883;³¹ and 5) the Austrian Instruction.

Provida Mater was not meant to replace nor, even less, to change the prescriptions of the Code. Rather, it was intended to confirm the Code, to explain it in greater detail, to apply it more specifically to marriage cases--all of this according to the best established rules and prin-

²⁹Provida Mater, [henceforth "P.M."], A.A.S., 28(1936), pp. 313-372; Canon Law Digest, 2, pp. 471-530.

³⁰Fontes, Vol. 4, No. 946.

³¹Fontes, Vol. 4, No. 1076.

ciples of law in use in the Sacred Roman Rota and in other Roman departments such as the Supreme Apostolic Signatura. When articles appear to contradict the Code, or be otherwise irreconcilable, the Code itself is to prevail and is to be the overriding norm.³² One can find support for this interpretation from the Decree which introduces the Instruction itself:

In these rules, the judges themselves and the officers of the courts will find the principal canons which deal with procedure accurately and conveniently arranged, together with a brief and easy explanation of the same, taken for the most part from the jurisprudence and Norms of the Sacred Roman Rota, so that they thus have a fuller knowledge of those same canons of the Code--for these rules make no change in them--and may be able more readily to apply them to particular matrimonial cases.³³

It is a common procedure for legislation to rely on established principles, procedures, and opinions of expert canonists to interpret and supplement it in practice.

³²Was the Instruction approved in forma specifica? If yes, then in case of a contradiction, it would derogate from the Code. The better opinion seems to be that it was approved in forma communis, and therefore the Code would prevail. Pinna gives this latter opinion in his first edition (p. 113), which I. Gordon supports (De judiciis, op. cit., II, p. 113). In his second edition, Pinna suggests that there are no real contradictions. See E. EGAN, The Introduction of a New "Chapter of Nullity" in Matrimonial Court of Appeal, Romae, P.U.G., 1967, on the apparent contradiction between c. 1891 and P.M. 219 §2.

³³P.M., Decree, translation from C.L.D., Vol. 2, p. 472. Also cf. Elio MAZZACANE, La delibazione preventiva del libello nel processo canonico, Napoli, Libreria Scientifica Editrice, 1956, p. 62.

Former laws, the history of law, and the interpretation by the "doctors" will always be an indispensable part of the "jus vigens" (cfr. canon 20).

1. The Petition

Provida Mater shows that it is not enough for the plaintiff to ask only for a declaration of nullity. Some specific grounds must be named according to Art. 57.2:

. . . it must state the object of the petition; namely to have the marriage declared null, and on this or that ground; for example because of impotence, fear, etc., or on several grounds. . .

The "law" must also be included, which must mean an explanation of how the grounds are verified in a particular case, since an old axiom of law presumes that the "court knows the law" (jura novit curia). Brevity is recommended in Art. 57.3:

It must set forth, at least in general, the law upon which the plaintiff relies to sustain his alleged and asserted claim. It is not necessary nor advisable to present an exact and extended exposition of the evidence, for this belongs rather to the stages of the case in which proof and defense are to be made; for the present it is enough that the petition be shown not to have been presented without cause.³⁴

³⁴P.M. 57.3. Exponatur, generatim saltem, quo jure innititur actor ad comprobanda ea quae allegantur et asseruntur. Non est necesse, nec expedit, ut conficiatur accurata et longa argumentorum enucleatio, nam haec pertinet ad probationis et defensionis periodos; sufficit ut appareat haud temere fuisse petitionem exhibitam;. . ."

Although several of the schemata for the Code had recommended that the plaintiff offer some indications of the proofs or evidence that would be brought forward in the trial to support his claim, no mention of this was made in the Code (cf. c. 1708). Provida Mater recommends this general listing of proofs in three areas: 1) documents; 2) witnesses; and 3) presumptions, in Art. 59:

If proof is offered in the form of instruments or documents, these must, as far as possible, accompany the petition; if in the form of witnesses, their names and address must be indicated (cf. c. 1761 §1), giving the city, street and number; if in the form of presumptions, the facts or circumstances from which they are derived must be indicated at least in a general way. However, nothing prevents the plaintiff from adducing further proofs in the course of the trial.

All of these provisions, supposedly, are already somehow implicit in the Code. Their implementation presumes at least a basic information-gathering process by the plaintiff, his advocate, or the tribunal. The quantity of information is guided by the principle of Art. 57.3: "It is not necessary nor advisable to present an exact and extended exposition of the evidence." The minimum is indicated in the last phrase of Art. 57.3, that it is sufficient to show that the petition was not presented "temerariosly"³⁵

³⁵Cf. Shorter Oxford Dictionary (1965), "temerarious" - (now only literary), 1. characterized by temerity, reckless, heedless, rash. . .

i.e., without cause. But Provida Mater gives further guidelines for rejection of a petition, which the Code does not give.

2. Rejection of a Petition

Whereas the Code allows for a temporary rejection of a petition because of defects in the mere formalities, which can be corrected, and also for jurisdictional reasons such as lack of competence on the part of plaintiff or court, Provida Mater gives criteria for definite rejection (with appeal) based on substantial defects. There are two reasons given: 1) grounds which are inadequate in law; 2) facts which are evidently false; in Art. 64:

If the fact upon which the accusation of the marriage rests, even though it be entirely true, would nevertheless be quite insufficient to render the marriage null, or if, although the fact would make the marriage subject to a declaration of nullity, the assertion of the fact is evidently false, the bill should be rejected by decree of the collegiate tribunal.³⁶

Two authors have written very specifically on the tribunal practice regarding the rejection of a marriage petition. Joseph Berger wrote his doctoral dissertation on the Rejection of the Introductory Libellus in Matrimonial

³⁶This article gives the same two reasons as the Austrian Instruction, §137.

Causes in 1964.³⁷ Elio Mazzacane, a recognized canonist in the area of procedure, wrote La Delibazione Preventiva del Libello nel Processo Canonico in 1956.³⁸ Both authors demonstrate that a great deal of jurisprudence lies behind the provisions of the Code and of Provida Mater.

3. A "Positive Doubt" of Validity

A key point in Berger is that the plaintiff, in his petition, must cast a "positive doubt"³⁹ upon the validity of his marriage. Marriage enjoys the favor of the law (c. 1014), and is presumed valid until proven otherwise with moral certitude. Until a doubt (a suspension of judgment) is created, based upon reasons (positive doubt), a judge has to reject a petition.⁴⁰ This doubt does not imply the absence of all hesitation or uncertainty,⁴¹ nor does this examination intend to solve that doubt at this time.⁴²

³⁷J. BERGER, op. cit., Gregorian University.

³⁸E. MAZZACANE, Napoli, Libreria Scientifica Editrice. Title trans. "The Preliminary Examination of the Petition in the Canonical Process."

³⁹BERGER, op. cit., p. 100. Cf. also P.M., Art. 172.

⁴⁰Ibid., p. 98.

⁴¹Ibid.

⁴²I. GORDON, De Judiciis, II, p. 7: "et ut finem intelligere an exsistat dubium positivum circa valorem matrimonii, quin intendatur illud dubium jam solve."

4. "Fumus Boni Juris"

E. Mazzacane describes the evaluation that the judges ought to make upon the reception of a petition. This summary inquiry is, in the Code, mainly to ascertain the competence of the judge, and the right of the plaintiff to present an action (jus standi in judicio). "Other than these two ascertainties. . . the Code does not speak of other investigations pertaining to a judge at the time a petition is presented."⁴³ The emphasis is on whether the plaintiff has the right of judicial protection and of a hearing, rather than on the merits of the case.

It seems to Mazzacane, however, that a preliminary examination of a petition should also proceed to a "summary inquiry concerning the fumus boni juris of a request."⁴⁴ His justifying reason is to avoid expenses for a trial which is useless or manifestly unfounded. Therefore, the judge should examine the contents (consistenza) and the foundation (fondamento) of the petition.⁴⁵

He shows the inconsistency of the position of some canonists who deny, on one hand, the correctness of any

⁴³E. MAZZACANE, op. cit., p. 60.

⁴⁴Ibid., "sommatoria indagine sul fumus boni juris della domanda." "Fumus boni juris" is literally the "smoke of good law."

⁴⁵Ibid.

examination on the merits, but who also point out that the Code itself requires such an examination when a plaintiff is seeking free service or reduced expenses. The Code, in c. 1915 §1 prescribes:

He who wishes to be granted an exemption from expenses, or their reduction, ought to seek it from the judge when he presents his petition, to which he should attach documents attesting to the fact that he is needy, and the extent of his family possessions; furthermore, he ought to prove that he is bringing the action neither futilely nor temerarily.⁴⁶

The plaintiff who is poor, then, must establish not only his condition of poverty, he must also prove that he is not acting rashly. Is this second condition more than is required for any other plaintiff? As was seen above, the same type of expression was used by the Instruction, Provida Mater, Art. 57.3 for all cases (haud temere). However, when Provida Mater considers the question of free advocacy, it does not repeat that phrase, but for the first time either in the Code or in the Instruction, uses the phrase "fumus boni juris." In Art. 237, it states:

Free advocacy may be granted to a plaintiff by the college [of judges] if both his true

⁴⁶CIC, c. 1915 §1. "Qui exemptionem ab expensis vel earum deminutionem assequi vult, eam a iudice postulare debet, dato supplici libello, allatisque documentis quibus quae conditio sit postulantis quaeve eius rei familiaris copia demonstret; praeterea probare debet se non futilem neque temerariam causam agere."

poverty, and the existence of a fum[us] boni juris are certain.⁴⁷

V. Bartocetti explains this article: "For the concession of free advocacy two things are required, solidity of a case and poverty."⁴⁸ Yet in his following sentence, he seems to require more than "consistentia causae." He says: "Regarding the first [condition], it is not required that it be so complete that, almost certainly, a sentence will be favorable to the plaintiff; but that it be, nevertheless, notably probable."⁴⁹ "Notably probable" is much stronger than "consistency." It also seems much stronger than the concept of "positive doubt" that Berger describes. It is certainly a more rigid requirement than the "haud temere" for plaintiffs who can pay expenses.

Translating and defining "fumus boni juris" is not an easy task,⁵⁰ but commentators and tribunals are in general

⁴⁷P.M., Art. 237. "Actori, si constet de ejus vera paupertate necnon de boni juris fumo, gratuitum patrocinium a collegio concedendum est."

⁴⁸Michaelae LEGA, Commentarius in judicia ecclesiastica juxta codicem juris canonici. Curante Victorio BARTOCETTI, Romae, A.I.C.I., 1938-1951, Vol. 4, p. 237. "Pro concessione gratuiti patrocinii duo requiruntur, consistentia causae et paupertas."

⁴⁹Ibid. "Prima non requiritur adeo plena ut pene certa sit sententia actori favorabilis sed ut sit tamen notabiliter probabilis."

⁵⁰Canon Law Digest, 2, p. 528, translates the phrase "some color of right," but "color" in American law can have a pejorative sense, i.e. only the appearance of a foundation, which is a false appearance; cf. Black's Law Dictionary under "color."

agreement that a judge does have the right, for any case, to examine a petition for some real foundation. Rotal law and practice confirm this.⁵¹ Even before the Code, in 1910, when the Rota published its own rules, this criterion was provided for cases which requested gratuitous advocacy:

§208. The petition is presented to the presiding judge accompanied by the appropriate documents, not only concerning the condition of poverty, but also upon the merits of the case. . .⁵²

Therefore, either the petition or the attached statements must give some foundation in law and in fact so that the judges can make their preliminary decision as to whether to accept or reject the petition.

How is such information to be obtained? Our attention will now be turned to two other types of procedure that may help clarify this question: 1) annulment or dispensation from the obligations of priesthood, which was formerly a canonical trial; and 2) petition for dispensation of a non-consummated marriage.

⁵¹Cf. Giovanni TORRE, Processus matrimonialis, Neapoli, M. D'Auria, 1956, 3rd ed. Rotal appeals of rejected petitions are not ordinarily published, but Torre includes a number of them in his commentary on P.M., Art. 57 (pp. 177-180), and on Art. 64 (pp. 202-207). Also see the case coram Filipiak on June 12, 1950, P.N. 4513, in which the final rejection is based on information obtained in a preliminary investigation.

⁵²A.A.S., 2(1910), p. 843: §208. "Petitio exhibetur Ponenti opportunis instructa documentis, non modo circa conditionem paupertatis, sed etiam super meritum causae . . ." [Emphasis added in text.]

B. Nullity or Dispensation from Obligations of Priesthood

It is in the area of dispensations that the bipolarity of the procedure becomes most evident. A dispensation is called a "grace" (gratia) or favor, whereas a trial is ordinarily a matter of justice. Yet the line is not strictly drawn. The dispensation is said to follow a more summary or administrative route, but the actual testimony is taken in a judicial manner. There are examples of "mixed" petitions, where a priest will accuse his ordination of nullity, or seek a dispensation from its burdens if it cannot be declared invalid. Another "aut/aut" (either/or) example is the marriage petition for annulment based on impotency, or dispensation of a non-consummated union. The transition from one process to the other is being continually simplified by new legislation. The dispensation process is referred to as a "truth-seeking" procedure (pro rei veritate), which seems a strange way to distinguish it from a canonical trial, whose whole purpose, according to Pius XII in his allocution to the Rota in 1944, is pro rei veritate.⁵³ Perhaps it is meant to distinguish it from the contentious trial, but marriage annulments are seldom contentious in the juridical sense, and have always been recognized as falling into

⁵³PIUS XII, Allocution to the S.R. Rota, October 2, 1944. A.A.S., 36(1944), pp. 281-290.

a "special" category--a status question, rather than a battling over property or damages.

Therefore, in considering a preliminary investigation in any of these dispensation proceedings, there is more than a comparison or analogy with the annulment process. They are two closely related, and often indistinguishable procedures.

Strictly speaking, a priest who wished to be laicized had to submit an annulment petition as recently as the 1964 legislation, which was in force until 1971. An informative process had been required, even under this formal trial process for annulment (cfr. c. 1993 §3). Before the sacred bond of ordination might either be attacked as to validity, or a request made for dispensation from obligations, the Ordinary needed a certain amount of information, and clear evidence, at least prima facie, of a number of facts. This is necessary for the "votum" (opinion) he will submit to the Apostolic See, requesting to open the official "trial" or investigation. Some preliminary questions are: 1. Is there any chance that the priest will reconsider his decision? 2. Has he been offered every opportunity for a change in ministry, a period of reflection? 3. Are there reasons present to question seriously the validity of the ordination, or reasons which are usually adequate for the Holy Father to dispense from the obligations?

Just as the office of the defender of marriage was instituted to safeguard the sanctity of the marriage bond from facile and hasty annulment, so the same defender is to protect the sanctity of sacred orders. The importance of the comparison is not only that the informative process prevented temerarious attack of marriage or priesthood, but also that it protected the petitioner in not making a hasty judgment and, where there were valid grounds, aided the formal procedure to be more accurately and carefully presented.

The Sacred Congregation for the Discipline of the Sacraments, on June 9, 1931, issued Rules to be Observed in Processes Concerning the Nullity of Sacred Ordination or of the Obligations Inherent in Sacred Orders.⁵⁴ The origin of this procedure is enlightening: Ordinaries wish to proceed "more securely and expeditiously following the path of the common law (ad tramitem juris communis)."⁵⁵ The introduction explains that these rules have been adapted, as far as applicable, from the 1923 rules for the non-consummation process.⁵⁶ Those rules, in turn, were taken largely from the Constitution, Si datam, of Benedict XIV, on March 4, 1748.

⁵⁴S.C.D. Sacr., "Regulae Servandae in Processibus super nullitate sacrae ordinationibus aut onerum eidem adnexorum declarationem nullitatis," in A.A.S., 23(1931), pp. 457-492 [with appendices]; Canon Law Digest, 1, pp. 812-833.

⁵⁵Ibid., p. 457.

⁵⁶To be covered in the next section.

Some of these cases were to deal with nullity as a "defect of form," i.e. a formal defect in the sacred rite of ordination. This could be compared to the summary "defect of canonical form" procedure for marriage nullity, which is excused from a strict and full judicial trial. More importantly, it includes substantial defects, e.g. withholding of proper intention, which must be decided in formal trial. The necessity for obtaining the permission of the Holy See for the Ordinary to conduct such a trial is parallel to the permission that was required to "instruct" a non-consummation case.

Chapter 2 indicates the substance of the petition:

4 §1 . . . [it] must give a full and exact account of the facts and state all the reasons which may support the petition;⁵⁷

4 §2 Care must be taken that the petition contain a correct statement of the facts, drawn up by the petitioner himself and signed by him.⁵⁸

Because of its importance here, Chapter 3 is reproduced in full below, with key Latin phrases inserted in the text or footnotes. It concerns the "Preliminary Investigation" (De praevia inquisitione):⁵⁹

6 §1. Upon receiving the petition, the Sacred Congregation writes to the Ordinary to

⁵⁷A.A.S., 23(1931), p. 458: "plenam et accuratam totius facti speciem et causas omnes."

⁵⁸Ibid., "genuinam factorum narrationem," literally, a "genuine narration of the facts."

⁵⁹Ibid., p. 459.

conduct an extrajudicial inquiry upon the statements made by the petitioner, to determine whether the petition has any probable foundation.⁶⁰ The Ordinary is to send the results of this inquiry, with the document and his own decision, to the Sacred Congregation.

6 §2. This preliminary investigation should be directed to discover the circumstances before, during, and after the compulsion alleged by the plaintiff, or whatever other cause he claims affected his consent, with a view to determine whether the petition rest on any probable foundation.

6 §3. With the exception of a case where the Ordinary knows that the petition is really well founded, the preliminary information must be drawn from questions put to the petitioner himself and to witnesses, but extrajudicially; that is, without the formality of an official summons and without placing them under oath.⁶¹

6 §4. The results of this extrajudicial inquiry are to be noted in the record (in actis), and are to be sent to the Sacred Congregation together with the Bishop's decision.

6 §5. If on the strength of this extrajudicial investigation, the Sacred Congregation finds that the petition has some considerable foundation (preces non spernendis niti rationibus),⁶² the practice is to send a letter to the Ordinary himself, delegating him to draw up the case accord-

⁶⁰Ibid., "inquisitionem extrajudicialem peragat, quateat utrum preces probabili fundamento innitantur."

⁶¹Ibid. "Excepto casu quo Ordinario constet revera preces haud spernendo fundamento inniti, praevia rei cognitio erit haurienda ex interrogationibus faciendis ipsi actori et testibus, modo tamen extrajudiciali, seu non praemissa formali citatione et non delato jurejurando."

⁶²Literally, "the pleas are supported by reasons not to be spurned."

ing to the following rules, with additional instructions, if needed, in individual cases.

When the permission is received, the judicial inquiry (n. 12), i.e., the trial (n. 25 §1) begins before the judge (or the Bishop himself), who is the moderator of the acts (moderator actorum) (n. 13). Before this trial begins, a considerable amount of information has already been gathered from the petitioner and the key witnesses. Yet this information is not adjudged prejudicial to the rights of the plaintiff, nor to the seeking of truth in the formal part of the process. The Ordinary and the Sacred Congregation have already made a preliminary evaluation of the case, at least on the fact that there is "some considerable foundation" (n. 6 §5) for a trial. The comparisons with the marriage process are obvious. Priesthood, as marriage, is a sacred bond, a serious responsibility consisting of rights and duties not only for the individual concerned, but also in relation to the ecclesial and civil society. For a nullity process to be initiated impugning its validity, affecting the status of persons and having serious consequences, there must be good reason, a "serious doubt," a "fumus boni juris," a decision of some weight that a process may be justifiably begun.

To say that the Apostolic See makes a preliminary "decision," based on the preliminary investigation and the Bishop's votum (evaluation), is similar to matrimonial

judges accepting or rejecting a petition ad limina (at the threshold of the formal process).

The judge is given wide discretion in moderating the search for truth, and receiving as evidence various types of proofs, including "authentic documents, even extrajudicial ones, of any kind, such as letters, or others that may be pertinent" (n. 12). The most valuable, of course, are statements, documents, etc., prepared or made "tempore non suspecto:"

54. Testimony or documents are understood to be viewed as given at a non-suspect time if they were made at a time when there was no thought of bringing up the question, and when there were no other reasons for concealing the truth or falsifying.⁶³

Chapter seven concerns the oaths and manner of questioning. It is clear that the judicial interrogations are for taking depositions under oath, whereas the preliminary investigation could not, ordinarily⁶⁴ be under oath. Chapter eight describes the examination of the petitioner. The judge will always ask him about the "reality and circumstances of the facts" (n. 44 §1). The questions are basically determined by the defender of sacred orders, and he would rely not only on the petition, but what he knew from the

⁶³A.A.S., 23(1931), p. 469.

⁶⁴Canon 1730 would seem to allow the same exceptions.

preliminary investigation.⁶⁵ The inquiry becomes part of the case since at the conclusion of the process on the local level: "All the judicial proceedings, both the acta causae and the acta processus (cf. c. 1642) should be sent to this Sacred Congregation . . ." (n. 73 §1).

After the Norms, and an Appendix of 26 forms, there is a warning to Ordinaries:

. . . not to delay too long either the preliminary inquiry . . . or the drawing up of the canonical process . . . [lest] witnesses die and important evidence is lost, with great detriment to the case: for the petitioner himself has a natural right to adduce such evidence. . .⁶⁶

This is a fine criterion for the use of canon 1730, in situations when judicial testimony should be obtained at the discretion of the judge, since justice delayed is often justice denied.

The S.C. for the Doctrine of the Faith (then the "Holy Office"), on February 2, 1964, issued new Norms for "Reduction to the Lay State."⁶⁷ While retaining a judicial annulment process, it opened the door to a more speedy and

⁶⁵In an actual case from the Holy Office, P.N. 140/47, the letter authorizing the Ordinary to begin the formal process advises: "Adnexum his litteris inveniet . . . supplicem libellum, ex quo Defensor . . . opportunas hauriet interrogationes actori proponendas . . ."

⁶⁶A.A.S., 23(1931), p. 492.

⁶⁷Unpublished. Printed in translation in Canon Law Digest, 7, pp. 1002-1015.

generous grant of freedom from the obligations of priesthood. The Ordinary was to carry out a single investigation process which was strictly judicial, i.e. under oath before a judge. Its results, along with a "prudent judgment" by the bishop, formed the basis of the decision in Rome. That it was still considered a declaration of nullity rather than a dispensation is shown from the interrogation, where the priest is called "plaintiff," not "petitioner,"⁶⁸ and from the warning given him that if he deceived the court, the "declaration of nullity which has perchance been pronounced, inasmuch as it is destitute of its foundation, is of no validity."⁶⁹

When the Sacred Congregation for the Doctrine of the Faith issued new regulations on January 13, 1971,⁷⁰ the procedure officially changed from an annulment process to a dispensation, a simple administrative decision of "grace." A "Circular Letter to Ordinaries,"⁷¹ issued at the same time as the Instruction, reiterates and clarifies some of the procedural Norms. The Letter states:

In place of the "judicial process" instructed in a tribunal, there now is a simple investigation

⁶⁸Ibid., p. 1005.

⁶⁹Ibid., p. 1014.

⁷⁰A.A.S., 63(1971), p. 303ff.; C.L.D., 7, p. 110ff.

⁷¹A.A.S., 63(1971), p. 309; C.L.D., 7, p. 117.

whose purpose it is to discover whether the reasons alleged in the petition for a dispensation . . . are valid and whether the allegations made by the petitioner are based on truth. This kind of investigation, therefore, has less of juridical rigor and is governed more by pastoral considerations and proceeds in a simpler way: on the other hand, always to be kept holy is that the investigation lead to a knowledge of the objective truth.⁷²

Although the process may have "less of juridical rigor," it still retains many of the judicial safeguards and protections. For example, the testimony of the petitioner alone, even under oath, is not sufficient proof of the truth of his allegations and reasons:

. . . the request of the petitioner is not sufficient but it is absolutely necessary that this petition be supported by information . . . This investigation is set up for this purpose: . . . in order that by interrogations, documents, depositions of witnesses, judgment of medical experts, and like means, it may be discovered whether the request of the petitioner is based on truth.⁷³

The topics of this investigation have many analogies with a present-day marriage questionnaire:

a) General matters regarding the petitioner. . . what is called his "history" (anamnesis), the circumstances of the family . . . his moral conduct, his studies. . .

b) The causes and circumstances of the difficulties. . . before ordination: such as diseases, immaturity, both physical and psychological, lapses . . . pressures . . . after ordination: failures to adjust . . . distress or crises . . . errors . . . dissolute conduct. . .

⁷²Ibid., C.L.D., p. 119.

⁷³Procedural Norms, C.L.D., 7, p. 111.

- c) Trustworthiness of the petitioner . . .
- d) Insofar as it is expedient, interrogation of witnesses contributing to the case . . .
- e) According to the nature of the cases and insofar as they can be helpful, examinations by professional experts in medicine, psychology, psychiatry.⁷⁴

This information is obtained from the petitioner in a "judicial" manner, i.e. under oath, yet this investigation is only preliminary to sending the results to Rome (with the bishop's recommendation), where the real decision is made. As will be seen later, it has many characteristics of the types of preliminary questionnaires used in North America.

C. Dispensation from a Non-Consummated Marriage

Papal dispensation procedures for a non-consummated marriage do not provide as apt a parallel for a preliminary investigation as did priesthood dispensation, since the latter had used it as a preparation for a formal judicial trial, previous to the legislation of 1971. But since the "priesthood model" was copied very closely from the "ratum model," it is helpful to compare briefly the two.

On May 7, 1923, the Sacred Congregation for the Discipline of the Sacraments issued the Decree and Rules of Procedure for Cases on Non-Consummation of Marriage, known as "Catholica doctrina."⁷⁵ The introduction specifies

⁷⁴Ibid., p. 112.

⁷⁵A.A.S., 15(1923), pp. 389-436; C.L.D., 1, pp. 764-792.

that this process is "not strictly judicial, but rather 'of grace' or administrative."⁷⁶ Nevertheless, it is necessary to have "full knowledge of the facts," and consequently "the truth is to be investigated in these proceedings with no less solicitude and care than in strictly judicial proceedings."⁷⁷ Under these Rules, just as in priesthood dispensation, the diocesan bishop and judge needed permission of the Apostolic See to begin the formal process.⁷⁸ Therefore, some preliminary investigation was necessary to determine whether there was any foundation in fact (of non-consummation), and a just cause for the favor to be granted. This preliminary step sometimes was a formal trial, for example, on grounds of impotence, where the impediment could not be established with moral certainty, but there emerged from the evidence a "very probable doubt"⁷⁹ that the marriage was ever consummated. With no procedural difficulty, the case could "shift gears" and go to the Holy See for the administrative procedure. Although not mentioned in the Decree, the switch has sometimes taken the other direction.

⁷⁶Ibid., p. 390: "non sunt vere judiciales, sed magis gratiosae seu administrative."

⁷⁷Ibid.

⁷⁸Ibid., p. 392.

⁷⁹Ibid.: "matrimonii nullitas evinci non possit, sed incidenter dubium valde probabile emergerit de non secuta matrimonii consummatione."

Namely, when the Congregation sees from the investigation that a marriage is probably null, it may remand the case to a diocese for judicial nullity proceedings. Thus, the investigation reveals probable grounds, and leads into a formal trial.⁸⁰

Preliminary investigations, with the help of medical experts, can be essential in cases of possible impotency, or, ad cautelam, where the doubt cannot be settled, the request for a pontifical dispensation of a non-consummated marriage.⁸¹

Chapter two, The Petition for the Dispensation, reveals the administrative flavor: the party is not to be called "plaintiff" (actor), but "petitioner" (orator).⁸² The petition "should contain a full and accurate statement of the facts and all the reasons which may lead to the

⁸⁰This "transfer factor" is also possible, though little known, from a tribunal to the Sacred Penitentiary.

⁸¹The necessity of adequate preparation in making a decision as to whether a case is to be processed as a nullity case, or the transition to a dispensation procedure is described in I. GORDON, De processu super rato, Romae, P.U.G., 1974, esp. I, p. 59 (De initio et evolutione processus "per transitum"), and II, pp. 100, 101 (Istruzione per la applicazione del rescritto pontificio 30 giugno, 1957). Also see Gerard SHEEHY, "Male Psychological Impotence in Judicial Proceedings," in The Jurist, 20(1960), pp. 288-293, in which he gives some "Points of Procedure" in assisting the petitioner in drawing up the petition and other preliminary submissions.

⁸²A.A.S., 15(1923), p. 393, Art. 5 §2.

granting of the dispensation . . ."⁸³ The second part of this article seems to request a rather thorough narration of all relevant facts, and that it be done by the petitioner, with no mention of help from the tribunal or an advocate:

6 §2. Care should be taken that the petition give a genuine narration of the facts, written, if possible, and signed by the party himself . . .⁸⁴

Article nine permits a bishop to carry out a preliminary investigation, but cautions him that it is not to be a real "trial:"

9 §1. In order that the Ordinary may add to his information a sufficient knowledge of the facts, he may conduct investigations regarding things and persons, but not the specific inquiry in the form of a judicial process for questioning parties and witnesses . . .⁸⁵

The Norms also speak of an effort to reconcile the spouses, on the part of the bishop, pastor, or another. If no reconciliation is possible, the Ordinary sends the results

⁸³Ibid., Art. 6 §1 (cf. Dei miseratione, n. 15).

⁸⁴Ibid., "genuinam factorum narrationem."

⁸⁵Ibid. "Ordinarius, ut informationem addat cum factorum sufficienti cognitione, potest investigationibus facere in res et personas, sed non propriam inquisitionem cum partium aut testium interrogationibus in forma processus judicialis (cf. in Appendice, n. II)." This second appendix (p. 415) is called "Letter of Ordinary to pastor, or to another more suitable in the case, concerning information and reconciliation of the spouses." The bishop may ask him to "send to the chancery information concerning the facts before, during and after the wedding;" also the reasons for seeking dispensation; and their trustworthiness (de probitate et credibilitate).

of the investigations to the competent Congregation. The Sacred Congregation may then delegate him to appoint a court and draw up the case. The delegation is obviously based on the information and recommendation resulting from the informative process. The subsequent process, although called "administrative," is a genuine "judicial inquiry,"⁸⁶ and is almost identical to the probative part of the formal judicial process.

In these two processes for dispensation that have been examined, the legitimacy and the pastoral utility of some kind of preliminary investigation, extrajudicially conducted, is clearly seen. Because of the bipolarity of marriage annulment and dispensation procedures, and the ambiguity of the priesthood investigation towards annulment or dispensation, it is not difficult to make the transition from one to the other. The purpose of the process, the criterion of moral certitude, even the very nature of the Church must enter into the considerations of what sort of process is fitting for cases, be they criminal, contentious, marriage or orders. A practical application of these insights will be made in the second half of this thesis. But to add to our knowledge about the uses and dangers of various models of preliminary investigations, an overview of their presence in various secular law systems will be seen next.

⁸⁶Ibid., p. 397, Art. 20: "inquisitionem judicialem instituere."

CHAPTER THREE

SECULAR PRE-TRIAL INVESTIGATIONS

Just as Church procedural laws adopted many concepts from Roman law, so modern civil procedures, especially the European, have in turn learned much from canon law. Anglo-Saxon law, although a different tradition, is perhaps closer than the continental law, in some procedural aspects, to the classical Roman law. In this chapter, both the common law and the civil law tradition (continental) will be studied for their attitudes toward pre-trial investigations and testimony. The common law will be represented by the United States and Canada, since there are more pre-trial procedures than in England; and the civil law tradition will be seen in Italy, France and Germany. Although some interesting comparisons could have been made with secular criminal procedure, or administrative tribunals, this thesis limits itself to the "civil law of procedure," i.e. private contentious matters in trial procedure. This procedure most closely corresponds to the "ordinary process" of canon law.

I. General Notions

After the Second Vatican Council, some Catholics went through a period of ambivalence toward Church laws, perhaps as an overreaction to past legalism and juridicism. One of the strongest influences on the resurgence of canon

law in North America, and a fresh sense of need for renewed laws and structures might well be the indigenous reverence for civil law as a protector of rights. F. McManus proposes that we learn some valuable lessons in the Church from civil laws:

I think we have also outgrown the postconciliar notion that law as well as legalism is abhorrent to the freedom of God's children. If anything, there has been a search for new structures and new affirmations of rights and responsibilities, and this comes down to canon law in one way or another . . .

Much as we fear a resurgence of legalism or of law for the sake of law, we should take a page from the very different systems of civil law.¹

Pope Paul has spoken a number of times on the great influence that secular, especially Roman law has had on Church law.² Many of these have been beneficial lessons, but he constantly warns of the difference between Church and State. Because of the Church's own nature, goals and pastoral mode of operation, its laws cannot be strictly imitative of civil laws. Pope Paul stated this most strongly in a discourse on September 17, 1973 to those who had come to Milan for the Second Congress of the International Canon-

¹Frederick R. McMANUS, "Role of the Canonist: Interpreter and Advocate," in Proceedings of the Canon Law Society of America, The Thirty-Sixth Annual Convention, St. Paul. Minn., October 7-11, 1974, pp. 104-105.

²PAUL VI, Allocation to the S.R. Rota: January 28, 1971, in A.A.S., 63(1971), pp. 135-142, e.g. n. 14: "the codifiers of the first Code [were] in some way inspired . . . by the wisdom of the ancient and secular law."

ical Association:

To limit ecclesial law to a rigid order of injunctions would be to do violence to the Spirit who guides us toward perfect charity in the unity of the Church. Your first preoccupation, then, will not be that of establishing a juridical order modeled solely on civil law, but to plumb the depths of the work of the Spirit, which must be expressed even in the Law of the Church.³

We may learn from the civil codes, but we are not to imitate their manner of exercising judicial power in every respect. Pope Paul mentioned that the authors of the Code of Canon Law were inspired by the wisdom of the ancient and secular law particularly in those parts of the Code dealing with judicial process. Cardinal Roberti's schemata of the formation of the Code reveal that the authors of Book IV had before them the civil codes of Italy, France, Austria and Germany.

When the secular law on preliminary investigations or pre-trial procedures is studied, the differences of purpose are more striking than the similarities. But even here,

³PAUL VI, "Iis qui interfuerunt II Congressui Associationis Internationalis Canonistarum Mediolani habito," in L'Osservatore Romano, September 17-18, 1973, pp 1, 2; also in Allocutiones De Jure Canonico, SS. DD. PAULI VI, Romae, P.U.G., 1974 (Ad usum privatum), p. 113, n. 21. "Limitare il Diritto ecclesiale ad un ordine rigido di ingiunzioni sarebbe far violenza allo Spirito che ci guida verso la carità perfetta nell'unità della Chiesa. La vostra prima preoccupazione non sarà dunque quella di stabilire un ordine giuridico puramente esemplato sul diritto civile, ma di approfondire l'opera dello Spirito che deve esprimersi anche nel Diritto della Chiesa.

there is perhaps a lesson to be learned. If the contentious procedure of civil law seems so far removed from the reality of marriage cases in the Church, perhaps the Church needs to rework its own ordinary, i.e. contentious process, for the special nature of marriage nullity decisions. Sometimes, certain ecclesiastical procedures may have adopted some mistakes of civil systems, as Paul VI says:

It is unfortunately true that the Church, in the exercise of her power, whether judicial (procedural) or coercive (penal), has derived from the civil legislations of past ages even grave imperfections, therefore truly and properly unjust methods, at least "objectively."⁴

Different ages and types of trials have used a confusing variety of pre-trial procedures in various secular law traditions. At one time, its main use in the criminal procedure was to reveal a stronger case for the prosecution by inquisitorial methods. At another, it is beneficial to the accused, in that it gives him more knowledge of the charges and evidence, and more information with which to prepare a defense. In non-criminal cases, it can be useful in helping parties discover the proofs against them, or to find points of agreement so that their time and money in

⁴PAUL VI, in A.A.S., 63(1971), p. 139. "E' vero, purtroppo, che la Chiesa ha derivato dalle legislazioni civili nei secoli passati anche gravi imperfezioni, anzi veri e propri metodi ingiusti, almeno 'objective,' nell'esercizio del potere sia giudiziario (processuale) sia coattivo (penale)."

court may be spent only on points of disagreement. Or it may help bring a settlement when the defendant (or plaintiff) sees the overwhelming evidence against him, and is ready to settle out of court, etc. The contrasts with canon law can also be helpful because they show, again, where an "adversary" or "contentious" procedure may not be the most appropriate procedural approach for marriage cases. Civil law can also illustrate the flexibility of law which can be adapted for various circumstances, depending on the purpose of the process. It likewise reveals certain basic safeguards necessary to any process, to preserve the rights of persons in the search for truth.

Since the word "civil" has so many denotations in law, it is necessary to define its usage in this thesis. Here, it will be used consistently to designate any secular law system of any country, and so will be used very generically, in contradistinction to ecclesiastical law. Using the word in a different sense, S. Woywod translates "judicium contentiosum" in canon law as a "civil trial," and so opposes it to a criminal trial.⁵

This thesis will study the common law systems in the United States and Canada, and also the civil law systems

⁵Stanislaus WOYWOD, O.F.M., A Practical Commentary on the Code of Canon Law, revised by Callistus SMITH, O.F.M., New York, Joseph F. Wagner, 1957, 2 Vols. in one, Vol. 2, p. 223. (Cf. canon 1552, §2)

in continental Europe. The "common law tradition" developed in England, whereas the "civil law tradition" originated on the continent. In the United States at present, "civil law" can refer to any law either on the State or Federal level.⁶ A "civil suit" can mean a non-criminal suit. Without going into the long history of the development of the common law, it should be mentioned that in England, there had been two basic systems of law: the Courts of Law and the Courts of Equity (Chancery). Law reform in the Judicature Act brought about the merger of these two systems into one. Likewise in the United States, the "Field Code" in New York State (1848) brought about, for the first time, the unified and unitary civil action, which other States and the Federal government subsequently adopted:

§69. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.⁷

The term "civil" is further complicated by the use of "civil law tradition" in contradistinction to the "common

⁶"Civil" is from "civis" (citizen). Black's Law Dictionary defines "civil law" as "That rule of action which every particular nation, commonwealth or city has established peculiarly for itself . . . [distinguished] from the 'law of nature,' and from international law," p. 312.

⁷John W. McCORMAC, Ohio Civil Rules Practice, Cincinnati, W. H. Anderson Co., 1970, p. 315.

law tradition." In this sense, "civil" is used to denominate the civil law system that developed in Europe and Latin America from the Napoleonic Code; as distinguished from the common law" system developed in England, and later in the United States and Canada. Here, we are not speaking of the "jus commune" which was the medieval origin of European law, and which is sometimes translated as "common law" even further confusing the distinctions. Paul VI speaks of the "jus commune" in this passage:

Nor should we forget that the same norms of Roman law and civil law have undergone, in the course of time, profound modifications not only through the influence of other cultures and laws, but also, and perhaps above all, through the animation which Christian doctrine effected in it, by means of that most interesting phenomenon of the jus commune, which has had such an influence on legislations, canonical and civil, up to the Codes of modern times . . .⁸

In the United States, the statute law of Louisiana draws heavily from the European Codes, and is the only State

⁸PAUL VI, in A.A.S., 63(1971), p. 139. "Né è da dimenticare che le stesse norme del diritto romano e civile subirono nel corso del tempo profonde modificazioni non solo per l'influsso di altre culture e legislazioni, ma anche e, forse, soprattutto per l'animazione che ne fece la dottrina cristiana, mediante quel fenomeno interessantissimo del diritto comune, che tanto influsso ha poi avuto nelle successive legislazioni canoniche e civili, fino ai codici dei tempi moderni . . ."

to be classified as a civil law jurisdiction.⁹ Canadian law follows this same nomenclature: Quebec law, derived from the French Napoleonic Code, is called "civil law." In the rest of Canada, federal and provincial law is designated as "common law."¹⁰ In this thesis, "common law" will be consistently used to refer to the early English origins of British, Canadian and American law, and when Canadian law is meant, it will be clearly stated.

II. Common Law Tradition (U.S.A. and Canada)

In the United States and Canada, the trial procedure follows the common law tradition. To understand what preliminary steps are considered as pre-trial, one must first consider the early stages of a trial and the preparation for trial, including the pleadings. A rather recent development will then be examined, called a "pre-trial hearing." "Discovery," which includes devices unique to Anglo-American law, reveals that one of these practices--"perpetuation of

⁹See Cases and Materials on Judicial Decision-Making, ed. by Frederica Koller LOMBARD and Arthur J. LOMBARD, Prepared for the exclusive use of students at the Wayne State University Law School. Not published. [ms], September, 1969, p. 5. Also, for a further treatment of the civil law tradition, see John Henry MERRYMAN, The Civil Law Tradition; and Introduction to the Legal Systems of Western Europe and Latin America, Stanford, Ca., Stanford University Press, 1969. These two works cited henceforth as "LOMBARD" and "MERRYMAN."

¹⁰Thus, for example, in the bi-lingual School of Law at the University of Ottawa, the school is divided into the Faculty of Civil Law (law of the Province of Quebec) and the Faculty of Common Law (for Ontario).

testimony"--is very similar to the canonical testimony "ad perpetuam rei memoriam." The Canadian equivalent of this concept is an examination de bene esse. This whole section demonstrates the type of information and testimony which may be gathered before a trial in the common law tradition.

A. The Trial

Before one can discuss pre-trial, an elementary study must be done on the concept and progress of a trial in the Anglo-American system. A trial is an event in which a judge, and sometimes a jury, gather for a definite time to hear a case: statements of parties and their counsel, supported by evidence such as documents or other things, and testimony given by witnesses; and a decision is made. Only the non-criminal trial will be considered here.

The course of any case begins with the "complaint" ("declaration") which is a "document enumerating the factual and, under some systems, the legal basis of his claim . . ."¹¹ The defendant has the opportunity to give an "answer" ("plea"). If his answer leaves nothing to be adjudicated, the plaintiff may move for summary judgment. The defendant may also assert a counter-claim. The plaintiff may make further motions, to which the defendant may or may not reply. "At common law there were many subsequent sounds of pleading until only a

¹¹LOMBARD, p. 7.

single issue of fact remained for trial."¹² The parties may than be required to decide whether they wish a trial by jury. Since the system is basically "adversary," it is up to the parties themselves and their lawyers to prepare the evidence for the trial (as opposed to a more inquisitorial system where the Court looks for information):

Unless a motion has been made in connection with the pleadings or with discovery, there will be no judicial intervention until trial. The pleadings are not scrutinized by a judge as they are filed - think of what an enormously time-consuming and largely fruitless task this would be.¹³

The courts operate on an advisory system in which it is up to the parties, through their counsel, to present the arguments applying the law to the facts necessary to give the court a basis for decision. The court does not ex officio do any investigating in the adversary system, and so the crucial importance of good lawyers.¹⁴

At common law, the course of pleadings had at one time become very involved. Confusing and formalistic pleadings were drawn up by lawyers with "mysteries and formalities unintelligible to the public at large."¹⁵ These pleadings

¹²Ibid., p. 8.

¹³Ibid., pp. 8, 9.

¹⁴Ibid., p. 9.

¹⁵George Templeton STRONG, quoted in McCORMAC, op. cit., p. 316, footnote d.

often obscured or bent the truth. Reforms brought a simplification of the process, as is shown in the New York Code of 1848:

- §142. The complaint shall contain:
1. The title of the cause . . .
 2. A plain and concise statement of the facts constituting a cause of action without unnecessary repetition;¹⁶

The unamended statute read: "A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."¹⁷

These pleadings and the responding motions of the defendant were meant to acquaint both parties with the scope and exact nature of the controversy, but they were not detailed enough: There is a

. . . need for information other than that in pleadings. Both at common law and under code pleading the evidentiary basis of the pleader's case is usually not revealed by the pleadings. Therefore, the pleadings cannot be a sufficient basis upon which to rely in the process of preparing for trial . . .¹⁸

¹⁶McCORMAC, p. 316.

¹⁷Ibid., footnote d.

¹⁸Claude H. BROWN, Allan D. VESTAL, Mason LADD, Cases and Materials on Pleading and Procedure, Buffalo, N.Y., Dennis & Co., 1953, p. 402. [henceforth "BROWN"]

There are two reasons why the pleadings do not reveal the factual basis for the trial:

1. The pleadings are general summaries of the parties' contentions;
2. The pleader may allege many matters which he cannot or will not attempt to prove, or may deny generally all matters pleaded by the opposite party without serious intent to dispute many of them but with the hope that there may be insufficient proof of them.¹⁹

This is the reason that:

After the filing of all the pleadings, most procedural systems provide means for ascertaining more facts prior to trial, in the form of interrogatories to parties, depositions of parties and witnesses, physical examinations. These, collectively, are usually denominated "discovery devices."²⁰

The court itself does not initiate any of these discovery devices, but through laws and judicial orders can force either party to reveal the evidence that he will present in court. Certain confidential and self-incriminating information is excepted from discovery. "The final step prior to trial may involve a pre-trial conference with the judge to determine what issues of fact and law are still in disagreement between the parties."²¹ If the case cannot be settled out of court, their case will come to trial.

In the trial the plaintiff, who normally has the burden of proof, will have his lawyer address the jury

¹⁹Ibid.

²⁰LOMBARD, p. 8.

²¹Ibid., p. 9.

outlining his case, which is sometimes followed by the defendant's opening statement.

These statements are not evidence, but are merely designed to acquaint the jury with the general outline of the case. The evidence will come in the form of witness testimony, physical evidence, or the end products of the discovery devices employed before trial.²²

This brief outline of the first part of a civil case gives a general picture of trial preparation, how certain pre-trial procedures fit in, and how the results of this pre-trial are admissible as evidence within the trial.

B. The Pre-Trial Conference

After the pleadings, but before the appearance in court, modern Anglo-American procedure has introduced a period known as pre-trial. The almost universal element of this are various discovery devices; a more recent development is the pre-trial conference.

Written pleadings and objections are of ancient lineage and there was a time when they constituted nearly the only ways in which a party was entitled to find out about his adversary's claim or defense until the actual trial. In recent times, however, there has been a new development of pre-trial depositions and discovery procedures (which also have an ancient lineage, in equity) with a view to full mutual pre-trial disclosure of the facts relevant to the dispute. A pre-trial conference of the court and counsel also enjoys wide use.²³

²²Ibid.

²³Fleming JAMES, Jr., Civil Procedure, Boston, Toronto, Little, Brown & Co., 1965, p. 62.

The "discovery" stage of the procedure has less value here in our search for comparisons with canonical preliminary procedures for marriage trials. The first reason is that, at least in North America, an annulment is a status question rather than a contentious process where one would need to prepare a "defense." And secondly, the Apostolic Signatura has decreed that a defendant has no right to see the petition of the plaintiff before the litis contestatio.²⁴ Our main interest will be in the pre-trial conference.

A work often quoted on the subject of the pre-trial conference is Pre Trial, by Harry Nims.²⁵ He gives a brief history of its development in the United States, beginning in 1929. He also describes its use, various problems encountered, and a commentary on various reported decisions. The pre-trial conference has had great success in the U.S., but has found a limited and hesitant acceptance in Canada. There is "no counterpart contained in the English rules."²⁶

²⁴"Jurisprudencia Supremi Tribunalis Signaturae Apostolicae: De jure partis conventae cognoscendi libellum," in Ephemerides Juris Canonici, 29(1973), pp. 277-279. The defendant has the right to know only that the plaintiff presented a petition, and the grounds of nullity being alleged.

²⁵Harry D. NIMS, Pre Trial, N.Y., Baker, Voorhis & Co., 1950.

²⁶J.G. RUTTAN, "The Pre-Trial Conference in British Columbia," in University of British Columbia Law Review, 1(1961), p. 434.

H. Nims sees the background of the pre-trial conference in the common law viva voce pleading, when the plaintiff and defendant could appear before the judges and, through their counsel, argue out the nature of the complaint, the grounds of defense, and the points in controversy. This preliminary statement by the plaintiff or his lawyer was called the count, from the French conte (tale, story), to which the defendant rejoined with a similar statement. This alternated until they had come to a contradiction either in law or in fact. However, when judges no longer had the time for this, and lawyers had to write down all the pleadings, this led to fine distinctions, variances, and the other defects that made pleadings so complicated and mysterious. The oral discussions had afforded the opportunity of a full discussion of both the facts and the law, but the written pleadings were not enough to replace them, nor to give an adequate clear-cut picture of the conflict.²⁷

In the United States, long before 1929, conferences were held between judges and counsel for the purpose of simplifying the trial. Lawyers would sometimes consult with each other to eliminate non-essential matters for trial. Judges would beg lawyers to write out in simple language just what the real issue is and, when counsel would or

²⁷H. NIMS, op. cit., pp. 6-8.

could not agree, the judge sometimes formulated the issue himself.²⁸

The first systematic use of a pre-trial conference was in Detroit, Michigan in 1929. In these conferences, the judge did not act as he would in trial, but rather as a friend of the litigants, his purpose being to help them simplify the coming trial, and so reduce the time and expense. This was done without legislation. The experiment was a definite success, and had a bonus by-product that many cases were ended in the pre-trial conference. Its success was such that it attracted the attention of the advisory committee to the United States Supreme Court which was drafting the Federal Rules of Civil Procedure. This committee also listened to a group of eminent judges, lawyers and law professors in the Section of Judicial Administration of the American Bar Association who, in 1937, agreed that public unrest with the administration of justice in America was due primarily to defects in procedural law. They made a number of recommendations, one of which was for the use of a pre-trial conference. The American Bar Association appointed a committee to study pre-trial procedure, and its report in 1938 stated: "Perhaps none of the new

²⁸Ibid., pp. 8, 9.

developments has greater potentialities for serving the public good than has the plan of a pre-trial hearing of each case by the court. . . . [it will provide] a speedier and less costly justice."²⁹

In that same year of 1938, the Federal Rules of Civil Procedure appeared, with Rule 16:

Pre-trial Procedure; Formulating Issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.³⁰

The second part of the rule provides that the Court shall make an order by which the action taken at the conference is recorded, for possible use at trial.

Although discretionary and not mandatory, this Rule quickly became the general practice in the Federal Courts of the United States. It was soon adopted by State legisla-

²⁹See H. NIMS, pp. 3 and iii. Quotation from Rep. A.B.A. Vol. 63, pp. 534 and 550.

³⁰As quoted in NIMS, p. 5.

tures so that by 1963 it could be written that "every State in the Union has a Rule of some kind dealing with it, and some make a Pre-Trial compulsory in all civil cases."³¹

Nims makes an important observation that "neither statute nor state wide court rule is essential to the use of Pre-Trial."³² He bases this on a statement from a decision of L. Brandeis, that the courts possess an "inherent power to provide themselves with appropriate instruments required for the performance of their duties."³³ Judges needed no legislation or authorization to call the lawyers (and parties) into his chambers for an informal discussion of the case before proceeding with the formal trial. But without legislation, the practice would not have its present position of importance, mainly because: 1) lawyers are slow to accept change; 2) the courts were powerless to compel attendance; and 3) the courts could not bind the parties to the results of any conference.³⁴

Prior to the adoption of the Federal Rules, pre-trial conference rules were in force in Boston, Cleveland,

³¹B.F.W. McLOUGHLIN, "Pre-Trial Conference," in Canadian Bar Association, Papers presented at the Annual Meeting, Banff, 1963, p. 16.

³²H. Nims, p. 4.

³³Ibid., from Brandeis, J., Ex Parte Peterson, 253 U.S. 300 (1919).

³⁴Ibid., pp. 4, 5.

Detroit and Los Angeles.³⁵ In 1937, Professor E. Sunderland of the University of Michigan Law School gave an address on the "Theory and Practice of Pre-Trial Procedure."³⁶ He grounds and justifies the procedure as correcting some of the inherent weaknesses of the adversary system. When common law procedure required that each party state his own case, and the judges were in no way concerned with what the parties brought forward, a case might have no substantial basis whatever, and the defense might be purely fictitious. Judges never sought to protect themselves or the parties from the useless trial of issues based upon "allegations or denials which had no colorable existence in fact. It was their business to try the cases as the parties presented them, and if a case lacked substance, the trial would disclose it."³⁷ Sunderland accuses this theory with economic extravagance, since a trial is an elaborate and expensive proceeding. It is heavy-duty machinery designed to sift and weigh substantial and conflicting evidence. The weakness of pleadings is the lack of means for testing the factual basis for a case, which

³⁵BROWN, op. cit., p. 464.

³⁶Published in 21 Journal of the American Judicature Society, 125; summarized in NIMS, pp. 10-12.

³⁷Ibid., in NIMS, p. 10. This comparison might be carried over to the canonical trial, where perhaps the paying were practically assured of a trial, but the poor needed a "fumus boni juris" (colorable existence) to their case.

may be filled with false issues resulting from ignorance, bad judgment, desire to profit from the turns of fortune, or worse - bad faith. The fundamental problem is to ascertain before trial what needs to be tried, and to determine whether or not there is a prima facie foundation for various claims. There is "no direct solution except to make a preliminary examination of the evidence which the parties have at their disposal."³⁸ The tool of discovery devices allows the party himself to test the substantial basis of his adversary:

But there is no reason why the court should not itself take a hand in the investigation, supplementing the pleadings and the discovery which the parties have obtained, by direct interrogation of counsel or parties in the presence of each other, with a view to eliminating issues through admissions or through the withdrawal of allegations or denials; or by obtaining the consent of the parties to the limitation or simplification of proof.³⁹

The adversary system is thus supplemented by an inquisitorial--but friendly--investigation by the court in the interest of the parties. Legislation seems to have provided the structures and the teeth, but not the justification for the practice, which was already "inherent."

In Canada, however, some suggested that within the existing rules of procedure, all the necessary machinery is

³⁸Ibid., pp. 10, 11.

³⁹Ibid., p. 11.

already present for solving the very problems for which pre-trial was devised.⁴⁰ These powers, they say, are already in the existing inherent jurisdiction of the courts. An example of this is the ability "to stay all proceedings which are obviously frivolous or vexatious or in abuse of its process."⁴¹ In Canada, "at the moment, both Bench and Bar seem somewhat skeptical and slow to act."⁴² The Supreme Court of British Columbia added a pre-trial conference Order in 1961⁴³ which is very similar to the United States Federal Rules. It has been introduced in Ontario and Saskatchewan "but with indifferent success."⁴⁴ The Honorable Mr. Justice J. G. Ruttan offers several reasons for the difficulties. Sometimes the attitudes of lawyers are less than perfect, when they view a law suit as a contest of skill rather than a means to achieve justice under the law; or who seek the greatest possible remuneration. When judges are not sympathetic to the practice, it becomes a mere formality; and when they are too enthusiastic, it can force disclosures that may be harmful to one of the parties. Pre-trial, he

⁴⁰J.G. RUTTAN, loc. cit., p. 435.

⁴¹Ibid., p. 436.

⁴²B.W.F. McLOUGHLIN, loc. cit., p. 23.

⁴³Order 34A Pre-Trial Conference (New), 401.

⁴⁴RUTTAN, loc. cit., p. 434.

says, is not the place for insisting on settlements.⁴⁵ No procedure is laid down, but he judges that "perhaps the form and content of the conferences should well be left to the discretion of the presiding judge."⁴⁶

Another Canadian makes the submission that the Supreme Court Rules should be amended to require the opposing parties and their counsel to appear before a proper official, for example the "Master."⁴⁷ He blames the pre-trial conference for two basic faults: 1) the natural reluctance to divulge any weakness to the person who will eventually sit in judgment; and that it is 2) so closely tied in time to the trial that it is too late to permit the parties to resolve their own problems.⁴⁸ The first problem is more relevant to our theme: is it better, or is it worse--and prejudicial--to have the same judge sit both on the preliminary hearing and at the trial? The British Columbia Order⁴⁹ has solved this by providing that the pre-trial judge need not be the trial judge. Canadian practice in pre-divorce conferences, according to some lawyers, tends to have someone

⁴⁵Some U.S. authors, in contrast, point to (out-of-court) settlement as a primary goal.

⁴⁶Ibid., p. 441.

⁴⁷Douglas T. WETMORE, "Pre-Trial Hearings," in The Advocate, 30(1972), pp. 48-49.

⁴⁸Ibid., p. 48.

⁴⁹Order 34A, §403.

other than the trial judge preside at pre-trial. But this is not always true.⁵⁰

C. The Purposes and Advantages of
A Pre-Trial Conference

The purposes of a pre-trial conference can be listed under three headings: 1) the parties; 2) the judge; 3) the court system. It prevents "trial by ambush" by two parties who enter the trial with little knowledge of the evidence possessed by each other, or perhaps little understanding of the grounds. It prevents a "trial in the dark" by a judge whose first knowledge of the case comes with the opening statement at the trial. It offers the services of a friendly, official, impartial intermediary (judge, master, etc.) whose suggestions may not only save time and money in court, but which may lead to an out-of-court settlement.

(1) The parties. Unless a party is using obscurity or delay as a tactic, it is to the advantage of both litigants to clarify and reduce the issues as much as possible. Free discussion helps to "smoke out the real issues."⁵¹ In Canada, there has been various opinions as to whether the pre-trial conference should be an informal meeting, or else a more formal hearing (in Court with a reporter). In U.S.

⁵⁰See The Citizen, Ottawa, March 2, 1976, p. 17: "Judge's pre-trial talk helps; Ontario contested divorce rate halved."

⁵¹McLOUGHLIN, loc. cit., p. 16.

practice, the proceedings are reported and can be used at the trial. An Alberta decision in Canada would indicate the same approach: "it is my opinion that at a preliminary inquiry the same principles govern the admissibility of a confession or statement as would apply at trial."⁵² Another benefit for the parties would be to settle out of court. Although theorists disagree as to whether this is a true purpose, or only a most-desirable by-product, they agree in hoping for it. Also, by agreeing on as much as possible beforehand, parties save themselves time and trial expenses.

(2) The judge. Since, in the Anglo-Saxon tradition, the trial is an event, within a certain time, a judge benefits from having a previous knowledge of a case so that he can prepare for trial. He wants a clear idea of whether a prima facie case exists. He wants to have a clear chart for the ordering of a case with its witnesses. He must advise the jury on the relevant law. Thus, it is to his advantage to confer before the trial with both counsel, and also with the parties, who may seek his expertise in a more informal and "fatherly" setting.

(3) The court system. Pre-trial was introduced primarily to reduce crowded dockets, and it succeeded admirably. This was primarily through out-of-court settlements.

⁵²R.V. PEARSON (1957), 117 C.C.C. 249, 25 C.R. 342 (Alta C.A.), per Boyd McBride, J.A., at p. 352.

However, it also achieved its trial purposes of simplifying issues, obtaining consents to the admissibility of evidence, limiting the number of expert witnesses and, in general, expediting the disposition of a case.⁵³ The heavy machinery of the court (with jury) was used only when necessary, with economy of time and money, and a better application of justice in a shorter time.

The similarities to a preliminary investigation in canon law are primarily these: 1) in a private conversation with a judge or his representative, both plaintiff and respondent (separately) can clarify the facts about their marriage; and the judge or other investigator can ask the additional specific questions needed to clarify the situation; 2) the judge or other person could make a more enlightened assessment as to whether, prima facie, any grounds for annulment exist based on these facts; 3) if there is a case, its course might be simplified and shortened considerably by receiving only the witnesses and information necessary; 4) if this informal statement is recorded with the knowledge and approval of the party (or witness), it could be received into the acts with a value to be ascribed by the judge, and save much unnecessary repetition and wasted

⁵³NIMS, op. cit., p. 12.

time within the probatory period; 5) the dockets of the marriage courts will be filled only with possible cases; and the steps will be expedited (e.g. unnecessary or unavailable witnesses can be more easily eliminated from rogatory commissions).

D. Pre-Trial Discovery

Along with pre-trial conferences, "discovery" marks one of the major differences and, perhaps, contributions of modern American law in contrast to European continental law. Whereas, for example, a French or Italian lawyer will generally consider any previous interviewing of witnesses as unethical, and much searching for facts as unnecessary before "trial," the "common law lawyer" considers these steps as essential. In the common law tradition there is the "trial-event," and witnesses will, if possible, appear in court to give oral testimony and then be cross-examined by counsel. However, previous to the trial, a lawyer, and very possibly both lawyers have not only spoken to a witness to discover what he knows, they may have taken a written deposition from him. This deposition may possibly be used later at trial, if the witness cannot appear, or to prod the memory of a witness on the stand. Pre-trial depositions are sometimes used to "freeze" testimony; i.e., the opposing lawyer will try to obtain a statement as soon as possible, before a

witness can be influenced to change, embellish, etc., his story. If the witness does change his story in court, the lawyer can confront him with the previous deposition. A canonical parallel is not so much the function of impeaching the credibility of a witness. Rather, an advantage for canon law might be: the earlier that testimony is properly taken, the more honest and unembellished it is likely to be (in general). The earlier testimony is also more apt to be "non suspect." Of course, if the statement was taken by an interested party (e.g. the lawyer) the court will give it less weight, especially if the opposing party had not been able to obtain his own deposition or cross-examine. Some depositions may not be admitted in trial. A main purpose of discovery is for each party to learn as much as possible about the exhibits and list of witnesses that the adversary will use at trial. There is some danger to these revelations before trial, as pointed out by the Ohio Supreme Court:

Any discovery proceeding--and it must be conceded that pre-trial depositions are in many instances fishing expeditions--has inherent in it the possibility of revealing information or data helpful to one side or another even though such information would be inadmissible in a subsequent trial.

Any disadvantage to one party from another's gaining such information is offset, however, by the possible advantage therefrom of arriving at the truth of a situation which is and must remain the

ultimate goal in determining the rights of parties and litigation.⁵⁴

"Discovery" is most interesting procedurally, but only those aspects can be considered in this thesis which have some parallel, or cast some light on a canonical preliminary investigation.

Under American rules of discovery, the pleadings have become mainly "notice serving," and information is learned primarily by means of the discovery devices. Under Federal Rules 26-37, during a pending action, the deposition of any person may be taken by oral or written questioning without any permission from the court. In a landmark decision of the United States Supreme Court, the judges explained the importance, purpose and use of discovery along with the pre-trial conference discussed above:

The pre-trial deposition-discovery mechanism established by Rules 26-37 is one of the most significant innovations of the Federal Rules of Civil Procedure. . . . The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain

⁵⁴Ex parte Oliver, 173 Ohio St. 125 (129-130), 18 Ohio Op. 2d 388, 180 N.E. 2d 599 (1962). This might be applied a fortiori to a canonical marriage trial where such concepts as an "advantage" are not relevant, and seeking the truth is all important.

the fullest possible knowledge of the issues and facts before trial.⁵⁵

Among the discovery devices, there is wide scope for the parties and their lawyers to make a thorough preliminary investigation. A brief examination of some discovery procedures will now be made from the statutes of the author's home state of Ohio, since these Civil Rules keep the same numbers and essence as the Federal Rules, and also incorporate many of the amendments approved by the U.S. Supreme Court, effective July 1, 1970. Seven methods of discovery are set forth in the Ohio Rules; all of them had been previously recognized by statute or judicial decision:⁵⁶

1. oral depositions; 2. depositions upon written questions; 3. written interrogatories; 4. production of documents or things; 5. physical and mental examinations; 6. requests for admissions; 7. perpetuation of testimony.

Either lawyer is free to obtain testimony from witnesses, or even from his own party, and one of the discovery methods (#7) allows testimony to be taken which can be

⁵⁵Hickman v. Taylor, Supreme Court of the United States, 329 U.S. 495, (1947).

⁵⁶John W. McCORMAC, Ohio Civil Rules Practice, Cincinnati, W.H. Anderson Co., 1970, pp. 216, 217. Thus, even previous to the new law, the practice was justified in the sources of common law tradition: statute law and "stare decisis" (judicial precedent; court decisions).

both: 1) obtained before any court action begins, and
 2) admissible at the trial with greater weight as evidence.
 It corresponds in some respects with canon 1730⁵⁷ and is
 called "perpetuation of testimony." Rule 27 of the Ohio
 (and Federal) Rules provide for it:

Rule 27. Perpetuation of testimony--depositions before action or pending appeal.

(A) Before action.

(1) Petition. A person who desires to perpetuate his own testimony or the testimony of another person regarding any matter that may be cognizable in any court may file a petition in the court of common pleas in the county of the residence of any expected adverse party. . . . The petitioner . . . shall show

(a) [that he or others] may be parties to an action or proceeding cognizable in a court but is presently unable to bring or defend it; . . .

(c) The facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; . . .

The attorney must also give the names of expected adverse parties, so that they may have equal opportunities to question the witness. This Rule allows the deposition to be later used: "subject to the same limitations and objections as though the deponent were testifying at the trial in person . . ."⁵⁸

⁵⁷Canon 1730 forbids the judicial reception of proofs before the contestation of the issue, except for cases (e.g. a witness is dying) where the testimony might be unobtainable later.

⁵⁸J. McCORMACK, op. cit., pp. 400, 401.

Rule 28 provides that the deposition shall be taken before a person who is not an interested party, and who is authorized to administer an oath by the laws of Ohio, or a person appointed by the court if the action is pending, or by a person agreed upon by all the parties.

Rule 30 concerns depositions upon oral examination:

(A) When depositions may be taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination.

Rule 31 is a parallel provision for deposition upon written questions. Rule 32 allows the use of these depositions at trial in certain circumstances with the same admissibility (under the rules of evidence) as though the witness were then present and testifying. There are, of course, standard objections and equal rights of questioning by the other party. Rule 32 contains reasons very similar to canon 1730:⁵⁹

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead: or
(b) that the witness is beyond the subpoena power

⁵⁹Canon 1730: "Before the contestation of the issue has taken place, the judge shall not proceed to the examination of witnesses or to the reception of other proofs, except in the case of contempt, or unless it is proper to take the depositions of witnesses, lest because of the probable death of a witness or his departure or another just cause, it could not be later obtained, or would be possible with difficulty."

of the court . . .; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) that the witness is an attending physician or medical expert, although residing within the county in which the action is heard; or (f) that the oral examination of a witness is not required; or (g) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.⁶⁰

In all these Rules, the greatest discretion is given to the court, in the interest of justice, to permit the testimony of witnesses, and even of the parties to be taken before trial, under oath, and given full value as evidence if certain conditions are met. The practice of the "perpetuation of testimony" and other depositions to be used in court is clearly intended and stated to be "in exceptional circumstances." But the reason why it is the exception is not any prejudice caused by pre-trial, but rather the common law preference for oral testimony in open court, in the presence of all those who will make the decision, and in the presence of both counsel who may cross-examine. The additional weight of testimony taken under Rule 27 (perpetuation of testimony) is that it is done under court order, with special safeguards as to the impartiality of the person receiving it, and the

⁶⁰Ibid., p. 406.

notification of adversary parties who may wish to do their own questioning. But a party must give reasons for the court to make such an order.⁶¹

E. Canada: De Bene Esse

Canadian procedure also makes a provision similar to canon 1730 in their "examination de bene esse." In the Province of Ontario, Rule 270 allows that:

The court may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination upon oath before an officer of the court or any other person and at any place, of any person, and may permit such deposition to be given in evidence. . .⁶²

Historically, the common law courts of England would entertain a bill de bene esse when witnesses were too old or infirm to attend, and would allow depositions to be taken immediately for use at trial. This was different from the equitable jurisdiction in respect of perpetuation of testimony which allowed the practice even when there was no pending litigation.⁶³ In the present Ontario Rule, the reasons

⁶¹Courts also wish to prevent unnecessary harassment of witnesses where no case is yet presented, and a plaintiff may be only "on a fishing expedition" looking for grounds to sue in court. Rule 27 can be used to require a deposition before a plaintiff has even presented an action in court.

⁶²W.B. WILLISTON and R.J. ROLLS, The Law of Civil Procedure, Toronto, Butterworths, 1970, Vol. 2, p. 973.

⁶³Ibid.

which allow an examination de bene esse are that the testimony of a witness:

. . . may be lost by reason of illness, age or other infirmity, or the death of the witness before the trial, or the absence of the witness at the trial.

There must be some good reason why the witness cannot be examined at trial, that the evidence is material to the case, and that the application is bona fide. This examination may be made even of the parties themselves, but Rule 270 is applied more strictly. Also the court will hesitate to give an order where the credibility of a witness is in question, or if cross-examination ought to take place viva voce before the trial judge. Before this evidence taken de bene esse can be used at trial, it must be shown that the witness is dead or unable to attend the trial.⁶⁴

This practice is considerably more strict than the wide discovery procedures used in the United States.

Common law systems, therefore, prefer testimony in court, given directly to a judge (and jury), but recognize the need for pre-trial investigations to prepare for trial, and supply information that may not be possible in court. We turn now to the civil law tradition in which pre-trial in the "discovery" sense is almost unknown.

⁶⁴Ibid., p. 975.

III. Civil Law Tradition (Continental)

Comparative law studies between the civil law tradition on the European continent, and the common law tradition, reveal a significantly different concept of a "trial." This difference has a profound effect on the attitudes and activities of the advocate and judge, for example, in the civil law tradition, who perform practically no "pre-trial" investigations. It can even be said that the continental tradition does not even have a "trial" in the common law sense. These differing concepts will be illustrated from the civil law of procedure in Italy, France and Germany.

A. Civil vs. Common Law Tradition

A comparison between pre-trial in the common law tradition and the civil law tradition is most enlightening, but most difficult. Basic concepts of procedure, a "trial," and the role of the judge are different. Brief oversimplifications can easily be misunderstood, but must be here attempted. A partial grasp of the two mentalities is essential if one is to comprehend the second half of this dissertation.

A generalization might be attempted to the effect that Europeans are usually opposed to any pre-trial investigation, whereas American and Canadian jurists consider it

essential. Why is this? Is it part of the mentality or legal tradition?

J. H. Merryman⁶⁵ shows the basic difference of procedure in the two traditions (civil law and common law) which he summarizes in three words: immediacy, orality, and concentration.

Immediacy refers to the common law tradition of a trial judge himself (and a jury) both hearing the testimony (immediately, directly) and also making the decision in the case. Mediacy in the civil law tradition refers to the characteristic of having the evidence received and a summary record prepared by someone other than the judge who will decide the case. This practice was strongly influenced by medieval canonical procedure where evidence was taken by a clerk, and it was his written record that the judge used in making his decision. This is modified today where a judge will receive the evidence, but other judges will make the final decision, or where the evidence-hearing judge will later be part of the panel which makes the decision. Formerly, it was considered an advantage for a judge not to hear any testimony himself, supposedly making him more impartial (not tending to either party) and more unprejudiced (not

⁶⁵John Henry MERRYMAN, The Civil Law Tradition, An Introduction to the Legal Systems of Western Europe and Latin America, Stanford, Ca., Stanford University Press, 1969.

having already judged beforehand).⁶⁶

Orality is the common law tradition of having witnesses (and parties) testify and be cross-examined in court in the presence of a judge and jury. It follows naturally from immediacy if a court wishes to hear and evaluate immediately the parties and their witnesses. Not only is testimony given orally, but there are oral discussions, motions, objections, etc. The civil law tradition, in contrast, tends to favor written testimony. A written record is necessary where a clerk or judge other than the deciding judges are taking the testimony. It is also logical since there is no real "trial-event" in the civil law tradition, in the sense of gathering parties, witnesses, judge and an empaneled (or sequestered) jury for a period of time called the "trial." This is because there is no jury. Additional proofs and information can be gathered over a period of months or years.

Concentration is the word for this trial-event in common law. If information, proofs, defenses, etc., are not made at the proper time at trial, the chance may be lost forever. It is essential to prepare for this event by various pre-trial procedures such as discovery and a pre-trial conference. In the civil law tradition, these have no importance or even meaning. You cannot have "pre-trial" when there is no real "trial." A typical civil law proceeding

⁶⁶Ibid., pp. 122, 123.

has three stages: 1) preliminary (pleadings are submitted); 2) evidence-taking (hearing judge receives evidence and makes summary record); 3) decisional (panel of judges considers the summary record, hears counsel's briefs and oral arguments and renders a decision).⁶⁷

Merryman points out some secondary consequences to this lack of concentration:

For one thing, pleading is very general, and the issues are defined as the proceeding goes on; this practice differs considerably from that found in common law jurisdictions, where precise formulations of the issues in pleadings and pre-trial proceedings is seen as a necessary preparation for the concentrated event of the trial.⁶⁸

The three concepts are related to one another. "A trend toward immediacy carries with it a trend toward orality, and orality is promoted by the trend toward concentration."⁶⁹ Merryman points out that scholars of comparative law see the common law system as preferable as to these aspects, and some civil-law theorists are in favor of reforming the law in that direction. Austria and Germany are moving most rapidly in the direction of greater concentration.⁷⁰ Merryman also explains the steady evolution in civil law jurisdictions

⁶⁷Ibid., pp. 120-123.

⁶⁸Ibid., p. 122.

⁶⁹Ibid., p. 123. Also, see E. MAZZACANE, op. cit., p. 14.

⁷⁰Ibid., p. 122.

toward greater immediacy:

The "documentary curtain" that separated the judge from the parties during the medieval period and that was then thought to produce a greater likelihood of fair proceedings, unaffected by influence brought to bear on the judges by interested persons, no longer seems necessary. On the contrary, preparation of the record by someone other than the judge who is to decide the case is now seen to be a defect because it deprives the judge of the opportunity to see and hear the parties, and observe their demeanor, and to evaluate their statements directly.⁷¹

Any American psychiatrist who receives only the written acta from an ecclesiastical tribunal, and is told to make a clinical diagnosis of one or both parties in a marriage case, will expound in no uncertain terms the benefits of the doctrine of immediacy.⁷² A psychiatrist will want to see the parties personally, if possible, or at minimum to see or hear them on video or audio tape, to add a significantly new dimension to merely written acts.

Judges also, in ecclesiastical marriage cases involving some type of psychological problem, have a most difficult time evaluating credibility or content if they have never spoken to a person directly. The axiom "quod

⁷¹Ibid., p. 123.

⁷²E.g. Leon SALZMAN, M.D., "Commitment To and In Marriage," in The Catholic Lawyer, 21(1975), p. 175: "It is the direct contact with the individuals involved rather than transcripts of the proceedings that lends conviction to the proceedings and comfort and support to the participants."

non est in actis, non est in mundo" (interpreted "that which is not written down in the acts of a case does not exist, and cannot be used by the judge in making a decision") is totally misleading when you are interviewing, for example, a timid young lady describing how she felt when, under parental pressure, she married at age sixteen. There is no way an auditor can capture in written "observations" her voice, facial expressions and, in short, her "body language."

The differences between the two legal traditions explain to a large extent the popularity of a preliminary investigation in North America, and the corresponding cloud of suspicion that falls over it from the continental legal mind. It explains, in secular procedures in North America, the importance of pre-trial. This is perhaps the key to understanding its use in Church tribunals, especially those who are making the transition from the mostly written, drawn-out procedure for marriage cases to a "trial-event" where the testimony is "live" and in person. This event requires preparation and information somewhere within the canonical process before the "trial."⁷³

To illustrate and concretize some of the generalities of this section on the civil law tradition, a brief summary

⁷³The civil law tradition, however, (and the canon law process) has the advantage that it need not prepare for a "one-chance" trial-event, and its judges can take all the time they need to gather more information.

follows of the Italian and French civil procedures, which are in many ways representative and typical of continental civil law, and also, in many respects, similar to canon law.

B. Italy

Why examine Italian civil procedure? As M. Cappelletti points out, it is a refined version of the medieval jus commune and has inherited many of its finest points as well as some defects in procedure.

Nevertheless, if the Italian system may still be considered the most interesting and the most representative of all the civil law systems, this is not only because Italy is the place where the civil law originated, but also because Italian civil procedure has not made a break with its great past.⁷⁴

For our purposes it is also most useful since it is so close to canon law, in origin, development and operation. The Sacred Roman Rota functions in downtown Rome not only geographically, but often procedurally. Most of its advocates being Italian laymen, often trained in Italian law as well as canon law, it is not surprising that they incorporate into their briefs and mentality, authors who write on civil procedure. Just as some modern Spanish canonists use civil law frequently to illustrate canonical theory, the integration

⁷⁴Mauro CAPPELLETTI, John Henry MERRYMAN, and Joseph M. PERILLO, The Italian Legal System: An Introduction, Stanford University Press, 1967, p. 146. [henceforth "ITALIAN LEGAL SYSTEM"]

produces some helpful and some harmful results.

Italian law and canon law are more the children of the late Roman period after Justinian (with its extraordinary procedure) rather than of the classical Roman law:

Long before the common law existed, the characteristics of immediacy, orality, and concentration were fundamental features of classical Roman procedure (2d century B.C. to 3d century A.D.). These features were attenuated in the post-classical era and in Justinian's codification (6th century A.D.), and were all but absent from the italo-canonical and jus commune procedures that developed in Italy between the twelfth and fourteenth centuries. The jus commune was adopted by all of continental Europe and formed the basis of modern European codes.⁷⁵

The sharp division in classical Roman law and in modern common law between an issue-making stage (in jure) and a trial stage (in judicio) is also absent in Italian procedure.⁷⁶ Roman pre-trial used oral interrogatories (interrogatio in jure) for discovery in a similar way to the American pre-trial discovery deposition.⁷⁷ But the modern Italian interrogatory is rather, in contrast, a formal instrument for the examination of the parties.⁷⁸ The answers have

⁷⁵Ibid., p. 138.

⁷⁶Mauro CAPPELLETTI, Joseph M. PERILLO, Civil Procedure in Italy, The Hague/The Netherlands, Martinus Nijhoff, 1965, pp. 26, 27. [henceforth "CIVIL PROCEDURE IN ITALY"]

⁷⁷Ibid., p. 27.

⁷⁸Ibid., cfr. Codice di procedura civile §§228-32.

primarily an evidentiary function, whereas the American practice retains an alternative evidentiary function only in limited cases.⁷⁹

The Italian Code of Civil Procedure⁸⁰ divides a civil action into three phases: an introductory stage (fase introduttiva); a proof-taking stage (fase istruttoria); and a decision stage (fase decisoria). The introductory stage⁸¹ begins "with the drafting, filing, and service of the citation that initiates the case, states the legal and factual grounds upon which the prayer for relief is based, and describes the evidence. . ."⁸² An answer is filed by the defendant with various responses possible. Then the president of the court appoints a hearing judge who will direct the proof-taking. "There is no sharp line dividing the introductory from the proof-taking stage."⁸³

It is within this framework that we examine pre-commencement activity--what may be done before an action is

⁷⁹Ibid., cfr. U.S. Federal Rules of Civil Procedure §26.

⁸⁰One of four Codes; the other three are the Civil Code, Penal Code, and Code of Penal Procedure. References in this thesis are from I quattro codici, per le udienze civili e penali, Milano, Ulrico Hoepli, 1966.

⁸¹Codice di procedura civile, §§163-174.

⁸²ITALIAN LEGAL SYSTEM, p. 129.

⁸³Ibid.

instituted. A party may decide, through his lawyer, to apply for a provisional remedy--some immediate relief--since the case itself may take months or years.⁸⁴ For a provisional remedy, two conditions must be established: 1) there would be danger or prejudice to the plaintiff without this remedial help (periculum in mora); 2) the plaintiff probably has a right to a favorable final judgment (fumus boni juris).⁸⁵ However, this is not a judgment on the merits of the case, and the remedy may be stopped or reversed based on the outcome of the action.⁸⁶

One of these provisional remedies is preservation of evidence (istruzione preventiva).⁸⁷ It is also called a hearing "for future memory" (a futura memoria).⁸⁸ "If there is reason to fear that a witness will not be available during the course of an action, his testimony may be taken even before the action is begun. The fear may be based on the advanced age or poor health of the witness, his plans for departure, or similar criteria."⁸⁹

⁸⁴See Ibid., p. 125: the 1959 average for a case was two years.

⁸⁵See ITALIAN LEGAL SYSTEM, p. 125 and CIVIL PROCEDURE in ITALY, p. 131.

⁸⁶Codice §96.

⁸⁷Ibid., §§692-699.

⁸⁸Ibid., §692.

⁸⁹CIVIL PROCEDURE IN ITALY, p. 138. Compare with canon 1730 and common law procedures for preservation of evidence and examinations de bene esse.

Before a court will order such testimony, it needs to hear why the case is urgent, and will first hear all other potential litigants.⁹⁰ This preliminary receiving of proofs does not prejudice the question relative to their admissibility or relevance, nor does it prevent their renewal in the judgment on the merits.⁹¹

Thus the court will later decide whether to admit these testimonies as proof during the action on the merits, and if the judges rule it inadmissible, they may not take it into account in reaching their decision.⁹² German law and others have similar remedies.⁹³

1. The Lawyer

When the plaintiff wishes to prepare for the action itself, what may he do before the introductory period? The answer is provided mainly by the function of the lawyer. Cappelletti gives a good summary:

⁹⁰Ibid., p. 139.

⁹¹Codice §698.

⁹²CIVIL PROCEDURE IN ITALY, p. 139. note 63.

⁹³In Canada, a petition for interim alimony is "in the nature of a preliminary hearing" in which "the merits of the petition are not to be examined," but a master may grant a woman this temporary support "as long as the petition is neither frivolous nor vexatious." The action on the merits will decide if she keeps receiving it. Supreme Court, Master's Chambers [1971] 3 Ont. 222, 5 R.F.L. 214, 20 D.L.R. 3d 62.

An Italian lawyer seldom undertakes an extensive investigation of the facts. He interviews witnesses only in unusual matters . . . He neither asks for, nor accepts, a written statement from a witness. Indeed, any out of court contact with a witness is viewed with the suspicion of possible unprofessional conduct and is generally avoided.⁹⁴

"Italian lawyers tend to overrate issues of law, and to underrate issues of fact."⁹⁵ This is perhaps because the civil law tradition stresses a priori principles of law more than a "free evaluation" of letting facts speak for themselves.

A further explanation for the relative indifference of Italian lawyers to field investigation may be that the courts tend to attach greater importance to documentary evidence and evidence given by court appointed experts than to the testimony of lay witnesses.⁹⁶

The parties have practically no discovery devices. "The burden of interviewing possible witnesses is on the client who will report his findings to his lawyer."⁹⁷ This sharp contrast with the Anglo-American system is even clearer in the role of the judge.

2. The Judge

The role of judges and especially their limits of judicial discretion, is a fascinating study, but too lengthy

⁹⁴CIVIL PROCEDURE IN ITALY, p. 181

⁹⁵Ibid., p. 182.

⁹⁶Ibid., p. 182.

⁹⁷Ibid., p. 130.

to do anything more here, than allude to influences which affect a judge's attitude to various preliminary investigations. The judge who receives the proofs (giudice istruttore) is best called the examining or hearing judge. Investigating judge is a misnomer since he does no investigating and very little inquiring.⁹⁸ His questions are only those of the opposing parties, and the only information he is permitted to accept is presented to him by the parties and their witnesses. Although the civil law tradition is commonly called "inquisitorial," this also is a misnomer at least in Italy, since the adversary process relies entirely on the parties and counsel:

As a consequence, although important exceptions exist, Italian judges, unlike their counterparts in the Austrian, German, French, and Swiss Federal Systems, do not have broad powers to take evidence on their own motion.⁹⁹

In the Italian, as in most law systems, the word of the parties themselves is looked upon with suspicion. The court is constantly being "protected" from undue influence, unbalanced or inadmissible evidence, collusion, connivance, etc. "In Italy, parties may not be examined as witnesses either before or during the proof-taking stage."¹⁰⁰ However, there is a procedure--informal interrogatories--where "at

⁹⁸Ibid., p. 173, notes 1 and 2.

⁹⁹Ibid., p. 183.

¹⁰⁰Ibid., p. 184.

any stage or level of the proceeding, the examining judge or the adjudicating panel may order, sua sponte, the personal appearance of the parties . . ."¹⁰¹ Historically, these were known as "interrogations to clarify the merits of the case" (interrogatio ad clarificandum merita causae). Italy, as opposed to France, has kept this procedure for the purpose of clarifying the issues, rather than for evidence. An additional purpose, which seems to be a nod towards immediacy, is that the judges may observe the behavior of the parties at these informal interrogations, and to "deduce from it arguments of proof" (desumere argomenti di prova). This is a hotly debated phrase¹⁰² because some deny any evidentiary value to party answers, while others consider them a means for obtaining the equivalent of unsworn party testimony. Cappelletti interprets that the phrase "indicates that statements and the behavior of parties may be treated as circumstantial evidence from which the court may deduce or induce the truth of the allegations of the parties."¹⁰³

The Italian judge seems to have less freedom in evaluating evidence, less judicial discretion, and less freedom in creating jurisprudence than his common law counter-

¹⁰¹Ibid., p. 227. See Codice §256.

¹⁰²Ibid., p. 228.

¹⁰³Ibid., footnote 360.

part. There are still many reminders of medieval times when the judge was carefully protected and guided. Although the judge is no longer bound by the arithmetical guidelines of the "system of legal proof," in which, in medieval times for example, testimony of women was either excluded or given only one-half or one-third credit,¹⁰⁴ neither does he follow the modern system of "free proof." Although the panel of judges may rule on admissibility, "judges may neither receive information about a case privately nor accept memoranda not submitted through the clerk's office."¹⁰⁵ Although jurisprudence¹⁰⁶ certainly enters into the judge's decision, the emphasis is on merely applying, not making nor interpreting the law, which belongs to the legislative branch. Folklore images of the judge, which often caricature some truth, compare the process to a cabinet, in which each compartment contains the provision for a certain fact situation, with no lacunae; or a syllogism, where the major premise is the statute, the minor are the facts, and the conclusion follows by itself.¹⁰⁷

¹⁰⁴ITALIAN LEGAL SYSTEM, p. 139.

¹⁰⁵CIVIL PROCEDURE IN ITALY, p. 184, n. 75.

¹⁰⁶"Jurisprudence" is used here in the civil or canon law tradition to mean recognized and consistent judicial decisions, much as "stare decisis" is used in common law. In common law, "jurisprudence" refers more to philosophy of law.

¹⁰⁷ITALIAN LEGAL SYSTEM, pp. 248, 249.

These various points from theory or practice help to illustrate the aversion that would be ordinarily present in the Italian legal mind for most concepts of a "preliminary investigation," whether on the part of the litigants, counsel, or the judge. The court, in general, has neither the right, the means, nor the inclination to conduct any investigation before or during the introductory period.

C. France

Only a short synopsis will be attempted of French civil procedure before the commencement of litigation, since the origins and operation are very similar to the Italian. The basic reason for the fundamental contrast to the common law tradition is also the same: the absence of a jury. The jury (or absence thereof) is the key to a whole mentality of the role of the judge, and the structure of a "trial."

In France, as in Italy, lawyers¹⁰⁸ generally gather little factual information preparatory to and during litigation in the civil courts.¹⁰⁹ They may ask their clients to

¹⁰⁸"Lawyer" is used here to include both "avocat" (legal expert) and "avoué" (lawyer who practices in a single court); the distinction is similar to England's "solicitor" (general practitioner) and "barrister" (court specialist) or in canon law, "advocate" (legal consultant) and "procurator" (representative ad litem).

¹⁰⁹Peter HERZOG, Civil Procedure in France, The Hague, The Netherlands, Martinus Nijhoff, 1967, p. 232.

obtain statements from witnesses or experts,¹¹⁰ but there are few discovery devices. French attorneys and courts have a preference for documentary evidence.¹¹¹ This might be explained by the emphasis in the French codes on documentary evidence for litigation such as contract, property and decedent estate, where proofs could be "prepared in advance" (preuve préconstituée).¹¹² P. Herzog gives another reason:

As a rule, the view that rhetorical skill at the time of the hearing before the court (audience) is more important than a thorough factual preparation is still quite prevalent in France.¹¹³

Receiving the testimony of witnesses seems to be less esteemed, and a complicated procedure in France. In medieval French procedure:

Witnesses were examined neither by the parties nor by the court, but by a judge appointed for the purpose. He heard the witness, reduced the testimony to writing, and returned it to the court (enquête).¹¹⁴

In the classic work on French procedure, E. Garsonnet speaks of the judge-commissary (le juge-commissaire) receiving the testimony (l'enquête) privately, and then writing the summary (procès-verbal) which the panel of judges will

¹¹⁰Ibid., p. 233.

¹¹¹Ibid., p. 232.

¹¹²Ibid., p. 305.

¹¹³Ibid., p. 234.

¹¹⁴Ibid., p. 43.

later read.¹¹⁵ Garsonnet realizes the value of immediacy and adds:

. . . to know the witness's testimony only by means of this written summary, cold and colorless, you lose impressions which are very useful and a precious element of evaluation.¹¹⁶

For this reason, the commissary usually becomes one of the members of the tribunal. The procedure for the preservation of testimony was forbidden by this time.¹¹⁷

Even in more recent times "fear of perjury led the drafters of the Code de Procédure Civile to look with disfavor upon testimony . . . and to provide a rather cumbersome procedure, the enquête, for hearing witnesses."¹¹⁸ Although the procedure was simplified in 1958, it still requires court authorization to conduct an enquête. The party requesting it must "state in detail and item by item (articuler) the facts it seeks to prove."¹¹⁹ Any adverse party may argue against the court order, or demand his own enquête. The court can grant it only for those facts which are "pertinent, material and admissible" (pertinents, concluants, et admis-

¹¹⁵E. GARSONNET, Précis de Procédure Civile, 3ème éd., Paris, L. Larose, 1897, p. 241.

¹¹⁶Ibid., p. 242.

¹¹⁷Ibid., p. 253. "Ces enquêtes à futur (in futurum) avaient été formellement prosrites . . ."

¹¹⁸HERZOG, pp. 334, 335.

¹¹⁹Ibid., p. 335.

sibles).¹²⁰ However, the French court has considerable power of free judicial evaluation in determining the weight of the testimony of witnesses, extra-judicial admissions, and reports of experts.¹²¹ "Neither parties nor experts may be heard as witnesses in an enquête."¹²²

Comparable to the Italian informal interrogatory, French tribunals, too, may examine the parties in person (comparution personnelle), but only before the full court.¹²³ However, the designation of the French judges as "inquisitorial" is misleading, just as in the Italian system. The role of the judge follows the basic principle of neutrality.¹²⁴ It is up to the parties through their lawyers to establish their case. The same legal philosophy obtains in the French system as described in the Italian. The judge is not expected to create new jurisprudence. He applies the law as it is legislated and interpreted. If his opinions do not apply the law correctly, they will be quashed by the highest court in France, the Cour de Cassation¹²⁵ which is not a

¹²⁰Ibid., p. 336.

¹²¹Ibid., p. 307.

¹²²Ibid., p. 337.

¹²³Ibid., pp. 344, 345.

¹²⁴Ibid., p. 306.

¹²⁵Literally, Court of Quashing (annulling, canceling).

court that reviews the merits of a case. Rather it is a court that examines the legal principle to preserve orthodoxy in interpreting statutes. The closest comparison for a canon lawyer would be the Church's highest court: the Apostolic Signatura, when it reviews a point of law. Once again, the civil law tradition's "supremacy" of law over facts is shown, and the "superiority" of the legal theoretician over the judicial profession.

These two procedural systems, the French and the Italian, have been presented because they represent a civil law tradition that most closely resembles canon law, one of their main sources. The warning should be repeated that other continental systems are not identical; Germany and Austria are considerably different. Also, there is the danger in generalizations and oversimplifications. This is best illustrated by an example from the memoirs of a leader of the French bar, who was himself influenced in law school by the supposed tendency to deemphasize facts and extol the law. He writes that in his first cases, he briefly and dryly stated the facts, then copiously quoted citations from Roman law. the authors, decisions, etc.:

The judges did not appear to be very impressed by all this. The old avocats, quite to the contrary, studied their facts with great care . . . combating the law (droit) with equity . . .¹²⁶

¹²⁶ Arthur Taylor VON MEHREN, The Civil Law System, Cases and Materials for the Comparative Study of Law, Boston & Toronto, Little, Brown & Co., 1957, p. 851.

The beauty of comparative law is in coming to appreciate the advantages of other perspectives and systems; to be able to see the purpose of procedural laws, and the number of ways these purposes can be accomplished in practice. In comparing the civil and common law traditions, one must avoid the two extremes: of denying the differences, which are very real; or of missing the similarities, which are present from common origins in history, and also from recent reformations by enlightened jurists. Finally, one must be proud of one's own legal tradition, but careful of becoming intolerant regarding other systems.¹²⁷ To round out the picture, the final consideration will be the German system.

D. Germany

The great period of reform in European legal doctrine in the XIX and early XX centuries centered around the ideas of concentration, immediacy and orality, as well as the corollary idea of the free evaluation of evidence.¹²⁸ These ideas were discussed, but never really implemented in Italy. In Germany and Austria, however, they

¹²⁷A wonderful example of objectivity was the comparative law scholar who was commenting on the relative merits of criminal procedure in the two traditions. He said if he was innocent, he would prefer to be tried by the civil law, but if guilty, by the common law.

¹²⁸ITALIAN LEGAL SYSTEM, p. 143.

became the foundation for the Zivilprozessordnung of 1877 (German) and 1895 (Austria).

The judge was given great power of discretion, to decide for himself case-by-case what evidence he would admit, and not be bound by a priori legal rules set down by the legislator. This was in the tradition of the classic Roman judge, who could admit even hearsay. In the German Code, these are some of the basic principles:

. . . oral presentation; of immediacy, which means that the court has to deal directly with the parties and the witness; and the principle of free admissibility of evidence, which means--unlike in the United States--that any evidence is admissible and it depends on the court what weight it will give to the evidence.¹²⁹

Whereas in the American system, it is counsel who questions witnesses, and in the French and Italian, it is really the parties who pose their questions through the person of the judge (who is not really "inquisitive"); in the German law of evidence:

. . . the actual interrogation of the witnesses is in the hands of the judge and it is he who asks the witness questions to elicit his testimony and if necessary puts any further questions. On request, the judge may then allow the parties to the action to ask supplementary questions.¹³⁰

¹²⁹Ian S. FORRESTER and Hans-Michael ILGEN, The German Legal System, S. Hackensack, N.J., Fred B. Rothman & Co., 1972, p. 16.

¹³⁰Ibid.

In a German court, a witness does not always testify under oath, but the judge may ask for the oath, at his discretion. The party is considered a secondary means of evidence, under the principle that a party is likely to be an unreliable witness, but the Code of Civil Procedure does provide rules (§§445-455) by which a party may be questioned in court, even as a witness.¹³¹

In American law the courts benefit from a more adequate preparation of the facts by the lawyers through various discovery devices. However, during the trial:

An American court is at times insulated to a considerable extent from the facts of a case before it, and the presentation of background material rendered difficult, by exclusionary rules of evidence (especially the hearsay rule) and by a tradition of forensic procedure relying on direct and cross-examination. . . .

French and German law know few exclusionary rules of evidence. In particular, there is no hearsay rule, and witnesses are allowed to testify in narrative form; consequently, relatively few difficulties of this nature are encountered in bringing the factual background of a case to the court's attention.¹³²

Thus, the American system of law is also cautious of extrajudicial statements of witnesses, by means of the

¹³¹Ibid.

¹³²VON MEHREN, op. cit., pp. 850-851.

Hearsay Rule.¹³³ This Rule would govern their admissibility as evidence during the trial. T. Martin defines "hearsay:"

Hearsay is an extra-judicial testimonial assertion. As such it is not made at the time and in the place where the lawyer can subject it to his favorite weapon, "cross-examination."¹³⁴

Martin transfers this notion to canon law by referring to F. Roberti who:

. . . observes that proof by witnesses is full of dangers, whether because of bad faith, or because of the fallible memory of man. Legislators, he says, have, therefore, tried to surround it with manifold precautions. Many authors, however, he observes, think that the greatest precaution is to be found in leaving the judge entirely free in interrogating the witnesses and in weighing the evidence, and in having him examine them directly so that he can penetrate their minds and critically distinguish the false from the true.¹³⁵

In summary, then, comparative law reveals that both systems seek essentially the same objectives and safeguards. The Anglo-American system permits a wider informative process

¹³³Cf. John Henry WIGMORE, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, 3rd ed., Boston, Little Brown, 1940, p. 651, §884: "Impeachment of Hearsay Testimony. General Principle. When the statement of a person not in court is offered as evidence of the fact stated, the real ground of objection is that it has not been subjected to the test of trustworthiness which the law regards as desirable before listening to any testimonial evidence, namely, the test of cross-examination. This is the hearsay rule. Yet under certain conditions such statements may exceptionally be received."

¹³⁴Thomas Owen MARTIN, "Hearsay at Common Law and at Canon Law," in The Jurist, 11(1951), pp. 61-62.

¹³⁵Ibid., p. 63.

to take place before trial, yet it prefers and gives much more evidentiary value to testimony given in court, with the advantages of a direct and immediate evaluation by the judge (and jury). The civil law tradition permits no discovery procedures, has fewer exceptions for obtaining testimony before the probative period, and emphasizes the proper judicial interrogations, which offer greater precautions. The result may be a greater adequacy, and more accurate testimony, since the time of the probatory period is theoretically unlimited. Canon law follows in this tradition.

Chapter three has attempted to present to the canonist some procedural principles and practices of secular law systems, in both the common and civil law tradition. Those aspects were chosen which seem to illumine various reasons and presuppositions which underlie any evaluation, and even definition of "a preliminary investigation." The concept of an investigation and when it is "preliminary" to a "trial" is certainly not univocal.

The second half of this dissertation will analyse and critique the actual practice of preliminary investigations in the ecclesiastical tribunals of North America.

CHAPTER FOUR

METHODS OF CONDUCTING A PRELIMINARY INVESTIGATION

In the second half of this dissertation, various methods of preliminary investigations and certain opinions on the use of them in North America (Canada and the U.S.A.) will be examined. Chapter four will study some of the methods used in these investigations under four headings: 1) personnel; 2) format; 3) case history; and 4) use of an expert before acceptance of a petition. Chapter five will then discuss some particular circumstances in North America which affect these investigations. Finally, chapter six will explain some purposes, and attempt a critique of the practices.

Although practices will be mentioned that come to light in several surveys taken, this chapter is not intended to be a statistical survey. Rather, it is an attempt to classify, dissect and critique present practices and possible uses. The disadvantages as well as the advantages will be pointed out from a practical point of view. But they will also be analyzed from a legal point of view, using as guidelines: a) Church law now in effect; b) the history of canon law; c) relevant principles of secular law; and d) the animation and application of the law with pastoral care.

I. Personnel

A. The Tribunal Staff and a Search for Truth

"Pro rei veritate" (on behalf of the truth of the matter) is a phrase often used in dispensation procedures, e.g. for non-consummated marriages, to describe the bishop's votum (summary opinion and recommendation). The phrase implies that the bishop has read the arguments in favor, prepared by the advocate, and studied the objections against the case, raised by the defender of the bond, and is now presenting the objective truth as he sees and judges it. Some would carry this argument to an unwarranted conclusion: namely, that the "partisan" briefs of the advocate and defender are not "pro rei veritate" since they put forward only those arguments that favor their "side." Pope Pius XII, in a memorable allocution to the Rota on October 2, 1944, said that "such an assertion is based on a theoretical and practical error."¹ The juridical process cannot be compared to a contest or tournament where one will carry off the victory. Rather, there is a unity of purpose in the matrimonial process which all serve, whether advocate, defender or judge:

¹PIUS XII, Allocution to the S.R. Rota, October 2, 1944, in A.A.S., 36(1944), pp. 281-290, p. 286.

. . . the sole and common final purpose: the discovery, the ascertainment, the legal affirmation of the truth of the objective fact.²

Piux XII was addressing advocates in particular when he reminded them of the difference of this judicial "contest:"

. . . it is not a question of creating a fact with eloquence and dialectics but of rendering evident and giving juridical cognizance to an already existing fact. . . .

. . . it is the petitioner's natural right to avail himself . . . of the advice and assistance of a jurist in the drafting and presentation of the petition, in the choice and presentation of the witnesses, and in meeting the unexpectedly arising difficulties. The legal consultant or advocate can here also employ in favor of his client all his knowledge and skill, but even in this extrajudicial activity he must be mindful of the obligation binding him to the service of the truth. . .³

What have been the various roles in the search for truth in preliminary investigations?

B. The Judge

In canon law, the role of the judge is one of moderator of the process, whether this role is filled by the bishop himself, his appointed officialis, or delegated judges. In order to understand terminology and function, it is necessary to make a review of the various titles and functions in the Code. In his dissertation on the Synodal and Pro-Synodal

²Ibid.

³Ibid., p. 287.

Judge,⁴ J. Hickey argues that a synodal judge has ordinary (vicarious) power insofar as he exercises the judicial function of the cognizance and decision of a case.⁵ For this reason, he divides the functions of a judge into two categories:

1) those who act by reason of their office; 2) those who act by delegation or commission.

In the first category a judge may carry out three functions: (1) he is a member of the college (panel) who makes the decision, either as the presiding judge or as an associate judge. He also makes the initial decision of acceptance or rejection of a petition (cc. 1709, 1710).

(2) he may be a "relator" or "ponens" (recording judge) (c. 1584), when he gives a description of the case both in fact and in law, to the rest of the college, along with his own conclusions and reasons for them. (3) he is an auditor (cc. 1580-1583) who may exercise both the role of hearing evidence and making the decision, as a Rotal auditor.⁶

⁴James Aloysius HICKEY, De Judice synodali ac pro-synodali, Romae, Apud custodiam librariam pont. instituti utriusque juris (P.U.L.), 1951. Chapter 3, pp. 63-66 concerns the functions of the judge.

⁵Ibid., p. 63, "munus judiciale cognoscendi et definiendi causam."

⁶See HICKEY, pp. 65-69. The word "auditor" is ambiguous. It referred originally to the Pope's chaplains who heard cases (in an "auditorium") in his name, but only the Pope judged the cases. Today, although still called "auditors" of the Rota, they also make the final decision.

The second category (those who act by commission) includes six functions: (1) the assessor (c. 1575), an expert in the law who acts as a counsellor to a judge (much as a jurisconsult in Roman law); (2) a judge delegated by the Apostolic See (cc. 1606-1607); (3) a conciliator (c. 1925 §3), who tries to avert judicial action; (4) an inquisitor (c. 1940) who is in charge of the "special investigation" for criminal cases; (5) a judge in beatification cases (c. 2040 §1), who draws up the informative process; and (6) the auditor, when he only hears a case (by mandate of the Ordinary or tribunal), but does not take part in the decision.⁷

When a judge in the United States carries out a preliminary investigation himself, he is often one who will later make the final decision, and very often as a single judge.⁸ The same situation would prevail in Canada, with the exception that a single judge is used much less.⁹ Thus, most judges would fulfill the role of moderator (praeses), re-

⁷Ibid., pp. 69-75.

⁸Single judges became possible in the U.S. on July 1, 1970, when Norm 3 of the U.S. Procedural Norms allowed the Episcopal Conference to grant this derogation to a bishop, by faculty of the Holy See. Norm 23 allowed for dispensation from appeal. Cf. The Jurist, 31(1971), pp. 406-422.

⁹Use of a single judge is rarer in Canada since their special Norms were not granted until November 1, 1974, and the faculty to dispense from appeal could be granted only for a collegiate tribunal. Cf. Canadian Canon Law Society Newsletter, December, 1974, Appendix "C" §8, "Decisions of the Canadian Catholic Conference. . ."

cording judge (ponens), or auditor of the first category (by office). A less frequent example would be the role of assessor, where for example a judge would be given new cases to review or investigate, and asked to give an oral or written opinion to other judges who will make the decisions. Most commonly, an officialis or judge of the "first category" will delegate the work of preliminary investigation to a member of the tribunal staff, or to another competent person.

The work of preliminary investigations is most often done by non-judges, but it may be helpful to compare their work to various functions of judges in the "second category" or delegated offices. The work is similar to that of an assessor, since these are persons with some expertise in canon law, sometimes with formal training, but very often with a seminary knowledge plus experience in working for a tribunal. This person exercises a role similar to that of a jurist or an advocate as legal consultant. The interviewer also does work similar to that of the investigator for beatification or criminal cases--drawing up an informative type of process for a judge who will make the preliminary evaluation. However the role will not usually be that of advocate in the strict sense of working for one of the parties. Rather, this person usually represents the tribunal itself, and so is more impartial and objective in receiving information. This is evidenced by the fact in North America that an

advocate often represents both parties. Speaking more practically, he is usually employed and paid a standard salary by the tribunal or the parish, and is not "employed" by any "client," neither benefiting from a favorable case, nor suffering from an unfavorable one--nor even a complete lack of clients. Another function is that of conciliator. Although a tribunal will not--at least should not--accept any marriage case where there is a chance for reconciliation, it happens that those doing preliminary investigations sometimes discover that there is hope. This may happen because the interviewer is the first person with whom they have spoken about their marriage problem:

A party, who requests an interview for the first time, may simply have a marriage problem and not necessarily be seeking a dissolution or a declaration of nullity of marriage. Consequently, the first reaction or attitude of the interviewer should be to determine whether the parties are still living together, or, if they have already separated, whether any reconciliation is possible.¹⁰

It may also happen that the first person they consulted, although on a pastoral level, either did not see, or neglected this primary responsibility of reconciliation. Although the ex professo work of a tribunal is legal, the Vatican documents and even secular tribunals recognize that

¹⁰Edward HUDSON, et al., Handbook for Marriage Nullity Cases, Ottawa, St. Paul University, 1976 (For private distribution only), 2nd ed., p. 30.

this ministry of reconciliation is part of the duty of the legal office.¹¹

When a case comes to the attention of a North American tribunal, there is seldom this chance for reconciliation. Ordinarily, a case will not be accepted until a civil divorce is granted, or the provisional ("nisi") decree given, or definite indications present, that a marriage is irremediably broken. Since, by Church law, the permission of the Ordinary is required for this ecclesiastical separation and civil action, the plaintiff sometimes has already been interviewed by the Bishop's Office. Family Counselling Services of a diocese are doing preliminary investigations, in retrospect, for the tribunal, but their ex professo work is reconciliation.

The final function coming under the canonical roles of delegated judges is that of the auditor, but taken only in the sense of hearing a case by mandate. This function is

¹¹E. g. in Catholica doctrina, A.A.S., 15(1923), p. 389 ff, in Appendix, n. II, where part of the preliminary investigation for non-consummation petitions is the ascertainment by the bishop, pastor, etc., whether there is any chance of reconciliation; also n. 10 §1, where the bishop "should try to reconcile the parties . . . unless the circumstances and persons be such as to render such an attempt utterly useless." In §2 pastors are warned to be tactful in their advice, lest they break up a viable marriage. In Canadian common law, see the Divorce Act, 1967-68, where it is the duty of every lawyer (s. 7) and of every court (s. 8) to direct their clients to counsellors and ascertain whether reconciliation is a possibility, before they proceed to their legal task of preparing a divorce action. The section is entitled "Special Duties" (Devoirs Spéciaux).

clearly filled when a tribunal delegates a priest to receive evidence within the probatory period, e.g. by rogatorial commission, but most preliminary investigations are extrajudicial. This means they are previous to the probatory period and not carried out under oath (as a rule), so that no special mandate is required, just as the advocate does not need a mandate to act until the formal process begins.

C. The Advocate

In North America, there are an insufficient number of full-time advocates. Whereas the majority of Rotal advocates are laymen, few laymen in the United States or Canada would have the background, the interest, or the employment opportunity to study canon law and make a profession of the advocacy of marriage cases. Since dioceses are already heavily subsidizing marriage tribunals, salaries sufficient to support a layman (and his family) would have to be borne by the clients themselves, and would be extremely meagre compared to what their counterparts in civil law receive.

Advocacy is most often the part-time responsibility of a parish priest or of a member of the tribunal staff. These are the persons who have initial contact with parties inquiring about the possibilities of a marriage case. It is this person, usually a priest, who absorbs two functions: that of advocacy or seeking for any reasons which may allow

the person to receive the desired annulment or dissolution; but also that of a more impartial representative of the Church, who tries to give an honest evaluation of the "possibilities." It is precisely in this double function that many difficulties and criticisms arise. This investigator can be criticized for giving favorable, or unfavorable judgments.

In giving "favorable" opinions, the priest (or other) may be destroying the will to reconcile, or giving a plaintiff unwarranted hope for remarriage in the Church. There is no assurance of freedom to remarry until a second affirmative decision of nullity (or a dispensation from appeal) has been given, or a dissolution has been freely granted by the Holy Father.

In giving "unfavorable" opinions, the priest may also seem to be "judging a case before it is judged." Although any person has a right to a formal acceptance or rejection of his petition by a collegiate tribunal, this right is not always explained to the plaintiff. Many cases end with an "informal rejection" or "screening process," whether on the parish or tribunal level. The investigator may be giving the best advice when he offers the opinion that he does not see any type of case possible. Advocates do have the right to refuse clients, especially when they appear to have no legal grounds upon which to present a case. However, the "investigator" may have other roles, such as representative

of the tribunal, and an ecclesial role of pastoral ministry. In summary, then, this person dissuades parties with no grounds evident after a thorough interview; informs them of their right to a formal decision; and avoids giving them false hopes or encouraging divorce if it has not already been granted. This, perhaps, clarifies the questions raised by some European canonists such as I. Gordon:

Some Tribunals, especially if a great number of the faithful come to them for the sake of accusing their marriages, are accustomed to offer them a Priest-Advocate who, after having a preliminary interview with them, suggests or dissuades them from presenting a case. This practice, if it only dissuades the introduction of a case when there are evident reasons . . . , is good; otherwise it is a grave abuse and indirectly fosters divorce.¹²

Whether this role is filled by tribunal advocates or other personnel: parish priests, religious brothers and

¹²I. GORDON, De judiciis in genere, op. cit., p. 4 (Part II): "Nonnulla Tribunalia, praesertim si magnus christifidelium numerus ad ea veniat proprii matrimonii accusandi gratia, solent eisdem offerre Sacerdotem-Advocatum, qui, praevio habito colloquio, suadeat vel dissuadeat causae introductionem. Haec praxis, si solum dissuadeat introductionem quando sunt rationes evidentes, juxta inferius dicenda, est bona; secus est graviter abusiva ac divortia fovet indirecte." Gordon refers ("inferius") to reasons for definitive rejection: the golden rule is found in c. 1709 §1, completed by Provida Mater, 64; and Pope Paul encouraged this rule in his allocution to the Rota on January 11, 1965, A.A.S., 57(1965), p. 235: "Nell'acettare o respingere un libello, vi occorrerà dunque un vigile senso di giustizia, affinché cause destitute di ogni fondamento, o manifestamente basate sul falso, o anche su fatti veri, ma giuridicamente inetti a ottenere l'effetto desiderato, siano respinto con coraggiosa fermezza."

sisters; or laypersons, men and women (sometimes as a function subsidiary to counselling, etc.), it includes not only strict advocacy, but also advice or an opinion offered by a representative of the ecclesial community.

II. Format

The term "preliminary investigation" is used to encompass many items, and so it is necessary to delimit the use of the term in this paper. In the Handbook for Marriage Nullity Cases, Chapter three is entitled "Guideline for Preliminary Investigation."¹³ It lists twelve elements for a complete preliminary file: 1) a "preliminary investigation form" completed by the plaintiff; 2) a "case history" prepared by the interviewer; 3) a list of witnesses with essential data including "knowledgeable contribution to case;" 4 & 5) baptismal certificate of plaintiff and respondent; 6) marriage certificate; 7) pre-nuptial investigation forms; 8) other marriage certificates; 9) separation and divorce decree (absolute or final); 10) releases from secrecy for professionals and clergy; 11) libellus (formal petition); 12) medical and/or psychiatric records.¹⁴

For purposes of this dissertation, only numbers 1, 2, 3 and 11 will be discussed. Documents are also essential,

¹³E. HUDSON, op. cit., pp. 29-43.

¹⁴Ibid., p. 34.

but there does not seem to be any problem about the law permitting these to be submitted with a petition. Rather, the problem that this thesis considers, is precisely how much information, "testimony," etc., can be obtained from the plaintiff, respondent and witnesses before the probatory period of a formal case. A preliminary investigation is also helpful, even essential at times, to determine whether an informal case or a dissolution is possible. And many of the same problems and questions arise in these cases with regard to pre-judicial interviewing of witnesses. For example, when a parish priest is preparing a favor of the faith case, he may unwisely ask a witness to the alleged non-baptism to sign a simple statement to that effect. But the Sacred Congregation for the Doctrine of the Faith demands more information, e.g. from the parents, than a simple assertion that their child was never baptized. However, when the tribunal returns to that same witness with a full, properly-prepared questionnaire, it may encounter non-cooperation, or a prejudiced witness who knows how to help (or hurt) the petitioner.

The general context of this chapter, however, refers to a more substantive preliminary investigation for formal cases.

A. The Plaintiff

The heart of a preliminary investigation is a comprehensive statement from a plaintiff and, if necessary, a thorough interview. This is often made necessary in North America by petitions that do not contain sufficient information to make a fair judgment. This, in turn, is often the result of a lack of competent advocates. Also, for certain grounds, such as "lack of due discretion," an adequate description of the case often demands a considerable amount of information. This is usually accomplished in two ways: 1) A plaintiff is asked to write or make a tape recording of the story of his or her marriage. He may be given a standard questionnaire to follow as a guideline. 2) After this preliminary statement is received (or if the plaintiff is incapable or unwilling to write such a statement), an interviewer will have a conversation in which he elicits information from the plaintiff.

It is clear that a plaintiff himself ought to provide, if possible, certain basic facts, dates, etc., on a "preliminary investigation form," including a list of witnesses, either to his credibility (de fama) or who know something about the grounds (de scientia). In addition, he or she may be asked to write or tape the "story" or "case history" of his/her life and marriage(s). This can be done either in a "free form" or according to a questionnaire

prepared by the tribunal. The content will be discussed under "case history." The rationale is to have as much background material as possible, as told by the plaintiff himself in his own words. This first telling of the story can be the most truthful, since later repetitions can tend to become more "embellished" and more "slanted" as the party gains more information about grounds of nullity. The legal principle holds true that truthfulness increases proportionately to the level of non-suspect time (tempore non suspecto).

When an interviewer elicits information, it seems that he always influences the answers, at least to some degree. Although he tries to follow the same principles as for a formal interrogation (basically, that he should not ask "leading" questions), nevertheless, his very questions and manner of asking them will draw a certain response. This questioning and probing is often necessary, but at the same time, legally hazardous. E. Hudson remarks that:

The taking of a case history depends very much on the personality/temperament of the Interviewer and the client. However, the interview should be DIRECTED, i.e., while taking notes, the Interviewer should ask pertinent questions and direct the conversation to matters relevant to the case.¹⁵

Most often, these two methods will be combined: the plaintiff is asked to write something himself, usually according to a standard questionnaire; and this is followed by an

¹⁵Ibid., p. 31.

interview in which the questions are narrowed to cover precise possibilities of nullity seen by the interviewer. It is this same interviewer who may help the plaintiff prepare a formal petition.¹⁶

B. Respondent

By normal canonical process, a respondent is contacted at least twice: the first time at the summons, when he is asked whether he agrees or disagrees with the allegation(s) of the plaintiff; and the second time, during the probatory period, when he is interrogated with a questionnaire prepared by the defender of the bond. In North America, two situations are quite common: a respondent is not at all cooperative; or he is most cooperative, since he is just as anxious for an annulment. In the first case, an interviewer or priest formally delegated for the summons, will be fortunate to hold a brief informal conversation on the telephone or through a screen door. He therefore attempts to obtain as much information as possible, as formally as possible, since it may be the only chance. In the other case of an eager respondent, it is also often the practice to obtain as much information as possible before the probatory period. This may be done by a personal preliminary questionnaire

¹⁶Ibid., p. 35.

similar to the plaintiff's, or by a more prepared and directed interview, most often not taken under oath. The reason for this practice is to make the grounds and method of proof as clear as possible by the time of litis contestatio. This respondent will usually be ready to cooperate again during the probatory period, but tribunals will often find further information unnecessary, or minimally necessary to fill in some details, explain certain contradictions, and confirm under oath the previous statement. The format of a preliminary questionnaire or interview with a respondent is often derived from the information given by the plaintiff.

C. Witnesses

Although canon 1730 forbids (with some exceptions) a tribunal to obtain the judicial deposition of witnesses before the contestation of the case, most legislation presumes or even prescribes that a list of witnesses should be given by the plaintiff, and some indication of the facts (or credibility, etc.) to which they can attest. In practice, North American tribunals sometimes obtain informal statements from witnesses before the acceptance or rejection of a petition. This is often a "last chance" effort to see whether any case is possible, in an otherwise hopeless case. It may be done to see whether a case is provable according to canonical standards of proof, since a petition may be rejected if

there is no way envisaged to establish the necessary moral certitude. The format of such a contact with a witness varies widely. It may involve a telephone call, mailed questionnaire, or personal contact with an interviewer. Regardless of its form, the central concern seems to include: 1) avoiding depositions under oath (there are exceptions); 2) not revealing information that would endanger secrecy or prejudice future testimony; 3) ascertaining whether a witness will cooperate in a formal process (if not, getting all possible information, even under oath). The basic premise seems to be the priority of the search for truth over the possible dangers to the integrity of the judicial process.

D. Preliminary to Acceptance or Rejection of a Petition

"Preliminary" investigation can be an ambiguous term with regard to the time when it is carried out: a) before a petition is formally made; b) before a petition is formally accepted or rejected; c) before the contestation; d) before the probatory period; or e) before the day of "trial" in some few tribunals where the testimony is live and "concentrated." In order to understand what this term meant to actual tribunals, the author conducted an informal survey of the regional tribunals of Canada in the fall of

1975.¹⁷ The results were meant to aid in this analytical study, rather than as a "proof" by statistics for any particular position.

Almost all tribunals agreed with the definition of "preliminary investigation" as "pre-trial statements before formal acceptance or rejection of a petition." Some added the element of using an investigation after acceptance to narrow and clarify the issues, and to guide and speed up the judicial proof-seeking process.

The central reason for a preliminary investigation seems to be for giving the most just evaluation possible to a petition, which means that it takes place primarily before the official acceptance or rejection.

E. Subject and Object of Interview

In the Canadian survey, all answers indicated that a preliminary investigation always involves interviewing a plaintiff to see whether any case is possible. It sometimes involved an interview of the respondent, and sometimes meant speaking to some of the witnesses.

In all tribunals but one, there is a questionnaire to be filled out by the plaintiff himself concerning the substance of the marriage ("case history," etc.). The

¹⁷A total of nine responses were received, representing five of Canada's regional tribunals.

tribunal that did not proceed in this manner had done so previously. Only one court indicated that this questionnaire was answered under oath.

When asked whether it could include "an interview with the parish priest which is later submitted in writing to the tribunal," only one answered "yes," and indicated that "normally all preliminaries are conducted by a member of the tribunal; but some are done by the parish priest using a questionnaire provided by the tribunal." One indicated sad experience using parish priests for this function.¹⁸

All included as the central element a "probing interview of the plaintiff with a full or part-time member of the tribunal." Two responses said that a preliminary investigation could also include "a 'statement' (not under oath) from an expert, parish priest, advocate, Diocesan Family Counseling, separation petition, civil lawyer."

When offered a negative choice of answers: "Our tribunal does not use any type of preliminary investigation because:" none of the responses checked the first two choices, namely: a) we have not found it necessary; and

¹⁸"Before entering an operating room for a delicate surgery, you do not just accept a simple doctor, but you ask for a top specialist. The same applies here . . ." He also says: "I came to the conclusion that in general, priests, instead of helping to seek the truth, are lending their own opinion in the matter of nullity (always superficial and anti-canonical) to the 'honestly thinking' petitioner."

b) I do not believe it is justified in law. Only one response checked the other three choices; c) it prejudices a case before it is properly judged; d) it prejudices the later statements of the plaintiff; e) once you talk to the respondent or a witness, they will often not cooperate again within the judicial process. One added the note: "I avoid, if possible, interviewing the respondent or witnesses more than once."

III. Case History

A "case history" is the heart of a preliminary investigation, as shown by the Canadian survey, and as described in the Handbook for Marriage Nullity Cases.¹⁹ Just as the 1971 Norms for Priests' Dispensations require the "history" (anamnesis) of the priest, giving the whole story of his family background, his moral conduct, his studies, circumstances of his ordination, course of his priestly ministry, beginning of problems, final decision to leave, present state of mind, etc., so, this same type of development has become more necessary for marriage cases. This is true especially for the "newer" grounds of psychic incapacity, etc., where more information is often needed even to see the possibility of a case. In a Rotal decision before L. Anné,

¹⁹E. HUDSON, op. cit., cf. pp. 31-33 and 39-43.

which declared a marriage null on grounds of "defective consent on the ethical plane," the judges stated that cases based on such grounds:

. . . require a far more penetrating investigation, not only into the lifestyle of the person at the time of the engagement and the wedding, but also into his character, way of thinking, and psychic make-up in adolescence and youth, and into his way of acting in other life situations besides those of marriage. The enucleation of a so-called abnormal "personality" in a spouse--which is considered to make him incapable of assuming marital responsibilities--cannot be correctly determined without this kind of very accurate and complete anamnesis (case history) which is then to be submitted to the judgment of experts--not only psychiatrists but also psychologists--who are skilled in this area.²⁰

Although a more standard jurisprudence and manner of questioning has been developed for "traditional" grounds such as force and fear, or intention against children (contra bonum prolis), it has become much more difficult to establish grounds such as "lack of due discretion," or lack of due competence (inability to accept and fulfill the essential responsibilities of marriage). The scope of the investigation was often extended to the life history of the parties, as we have written elsewhere:

The most difficult aspect of evidence, from a practical standpoint, is the extent or scope often required for consensual incapacity. Defective intentions could often be pinned down to statements

²⁰S.R.R. Dec., c. L. ANNÉ, P.N. 10,629, March 11, 1975, n. 6. Transl. by William B. COGAN, S.J. and Joseph A. PERSICH, S.J. [ms.].

like "I never wanted any children and always took the means to prevent them." Although rarely so explicit, there are rather clear-cut and developed criteria for the grounds of nullity listed in canon law. However, the "new grounds" often require a "general overview" of a person's life, before, during and after marriage. The "total picture" . . . "especially the background . . . reaching to his childhood and his parents" . . . , or the "general life" . . . becomes necessary for the psychiatrist to give his evaluation, and the Judge to make his decision.²¹

Even though estimates vary to some extent, these psychological cases form the bulk of the work-load of formal marriage cases in most North American tribunals--about 80% seems to be a safe estimate.²² Such cases almost demand a lengthy case history, especially when a peritus--a psychiatrist or psychologist appointed by the tribunal--must review the acts of the case.

The preliminary investigation to obtain this case history is carried out, as was said, by a questionnaire that the plaintiff himself fills out, or by a systematic

²¹Robert J. SANSON, Consensual Incapacity. A Review of Sentences of Nullity in the Cleveland Diocesan Tribunal on Grounds of Consensual Incapacity from its Beginning (1966) until June 1973, and a Justification of their Jurisprudence in a Vatican II Theology of Marriage, Cleveland, St. Mary Seminary (ms.), 1974, pp. 166, 167. Quotations are taken from cases in the Cleveland archives and from other (anonymous) dioceses in the U.S.

²²John V. DOLCIAMORE estimated 80% for Chicago in 1973, in "Interpersonal Relationships and their Effect on the Validity of Marriages," Canon Law Society of America, Proceedings of the Thirty-Fifth Annual Convention, Washington, D.C., October 15-18, 1973, p. 86.

interview, or, most often by a combination of both. This questionnaire or interview generally follows the same pattern: 1) family background of plaintiff and respondent; 2) the courtship; 3) the marriage; 4) common life and its problems; 5) final separation and breakup.

A survey of United States tribunals by John V. Dolciamore shows a preliminary investigation and case history approach very similar to that used in Canada:

The general procedure is to obtain a full history from the Petitioner. To the extent possible, this includes a detailed background about the party in question, going back even to childhood, and pointing out unusual behavioral patterns. The history also includes a narration of the time of courtship, and even of the time of the married life. . . . At the same time, the Respondent is generally contacted if the address is known, and he or she is invited to participate in the case. Generally, however, this has not proved too successful or helpful, except that the Respondent is aware that the case is in progress. Even when the Respondent cooperates, most tribunals find it difficult to determine how to conduct the interview. For the most part, the questions used with the Respondent are general in nature, and they attempt to elicit a sociological picture going back at least to adolescence. The Respondent is also asked to discuss his or her understanding and evaluation of the marriage problems.²³

Especially when there are psychological problems involved, a case history attempts to demonstrate the development of disorders or anomalies in each party individually, and then in the interaction and interpersonal relationship

²³Ibid., p. 88.

of marriage. Although questions run the gamut from the impediments whose existence is simple to establish, to complicated intentions and incapacities, one may distinguish two general lines of questioning: the canonical model and the medical model. The first is based mainly on the Code and jurisprudence, and is directed toward those facts, intentions, terminology, etc., that would be most helpful to a judge. The medical model is framed in the terms and approach of a psychiatrist or psychologist, and is directed more to helping the expert form a diagnostic or prognostic opinion. Another model might be conceived, and that is a "pastoral counselling" one. Although nowhere explicitly used, to the knowledge of the author, it would frame the legal and medical questions in a pastoral mind-set, being also concerned about healing and reconciliation of a past marriage, and a future decision of whether or not to remarry.

In writing and reworking typical questionnaires, tribunals are well aware that standardized forms are always inadequate and imprecise. The interviewer is advised to rewrite and tailor the format to the individual person, to supplement it with his own questions (ex officio), and to use his own prudence and legal ability in asking the questions. Certain psychological techniques are employed, such as asking a party about the problems or faults of the other spouse, before he or she is asked to reflect upon his own. The

preliminary questionnaires of North America are remarkably similar, at least those collected by the author. Most are examples of a "canonical model," and only a few follow the "medical or psychological model," although most would incorporate many psychological questions in the area of incapacity and lack of due discretion.

IV. Use of Experts Before Acceptance of a Petition

The medical-model questionnaire is an appropriate introduction to this section on the use of an expert before a marriage case is formally accepted. In the Canadian survey, the responses indicated that these tribunals seldom or never "ask for medical or psychological expertise (excluding existing medical records) before a case is accepted (e.g. psychological testing, etc.)." It would seem that the practice is more frequent in the United States, as indicated in the survey by J. Dolciamore:

Although most tribunals admit that a history of psychological or psychiatric treatment is helpful to the case, only one tribunal stated that it would not accept a case "without history in the past." Although this history is not required by the other tribunals, several admitted that it has been present in all or a good number of the cases presented. Psychological testing is frequently helpful, particularly when there is no past history of mental, emotional, or behavioral difficulty. It is used if one or both parties can be persuaded to undergo it, although several tribunals never request testing of either party under any condition.²⁴

²⁴J. DOLCIAMORE, loc. cit., p. 88.

An expert is usually asked to help in one of two ways (or both): 1) as an advisor, if the file is sent to him (e.g. containing preliminary questionnaire, interview, memo's, etc.), asking him for some preliminary opinion or indications; or 2) as a referent, if one or both of the parties arrange an interview with the expert for a medical examination, psychological testing, counselling, etc. The second, of course, requires a release from professional secrecy for the tribunal to receive any information.

A psychiatric consultant to the tribunal of the Diocese of Brooklyn, New York, presented a paper to the experts of the Sacred Roman Rota in which he showed the importance of an investigation, not only of the parties, but also of other witnesses, before an expert can make some assessment in the area of psychic capacity. This evaluation is greatly aided by the expert's own investigation:

When we have certain psychic states, like compulsions, or a severity of problems, as in the psychosis of the borderline state, the decision is easy. But in the borderlands of certain character structures or neuroses, we still need a clear and competent investigation to judge the individual's capacity to make a free and mature choice.

The ability to comprehend an individual's personality structure in order to come to some judgment about his capacity for mature decision-making does not require prolonged or extensive interviewing. In fact, a good psychiatric interview lasting one or two hours, accompanied by supporting materials from other members of the family, relatives, or friends, can often give one a firm grasp about the individual's capacity to make mature judgments . . .

How do we know that the personality that is now being presented to us operated at the time of the decision to marry? It is extraordinary how personality does reveal itself if the interview techniques are effective.²⁵

Experts have traditionally been distinguished into judicial, i.e. court-appointed; and extra-judicial or private. The judicial expert has been viewed as having an advantage not only because he sees all the acts of a case, but also because he is supposedly more objective, since he is removed from any interest in either of the parties. It is perhaps for this reason that private doctors of either party are forbidden to be the court-appointed expert in Provida Mater, Art. 143:

In cases of impotence or insanity, persons who have examined the party privately are also excluded from serving as experts; they may however in cases of impotence (cf. can. 1978), and in cases of insanity they must (cf. can. 1982) be introduced as witnesses.²⁶

However, these private doctors who have actually talked and worked with one or both of the parties may actually give more significant testimony than an official expert who is dealing only with the written evidence.²⁷ C. Lefebvre,

²⁵Leon SALZMAN, M.D., "Commitment To and In Marriage," in The Catholic Lawyer, 21(1975), p. 167.

²⁶P.M., Art. 143, transl. from Canon Law Digest, Vol. 2, p. 506.

²⁷Cf. Heber McMAHON, "The Role of Psychiatric and Psychological Experts in Nullity Cases," in Studia Canonica, 9(1975), pp. 68-69.

writing on the use of experts in marriage cases on grounds of insanity, calls the private physician "peritus a parte seu extrajudicialis" (expert from one of the parties or extrajudicial), and says that it is important to obtain their confirmation so that the truth may be better obtained; this depends on the discretionary power of the judge.²⁸

Some tribunals have the policy, in certain difficult cases (e.g. lack of due discretion), of requesting psychological testing of one or both parties before a petition for nullity will be accepted. Others prefer a psychiatric interview, or whatever professional evaluation is appropriate to the case. Even though the parties may often choose among several experts for convenience and preference, this expert could still be considered "court-appointed" since he is professionally removed from the service of either party, and can certainly be considered objective. Yet he is technically "extrajudicial" because he is not appointed within the process. However, it seems that this type of expert would be eminently qualified to be appointed the official expert later in the case because of his personal contact with the parties. He may also be the doctor best prepared to speak to the parties later, in case a "vetitum" (restriction) is

²⁸Charles LEFEBVRE, "De peritorum judicumque habitudine in causis matrimonialibus ex capite amentiae," in Periodica, 65(1976), p. 119.

placed on either party preventing him from remarrying.²⁹

North American tribunals have profited greatly by their consultations with psychiatrists and psychologists. Since the late 1960's, when nullity grounds of incapacity based on psychological causes first gained wide acceptance, priests in tribunal work have become much more familiar with the concepts and methods of psychology and psychiatry. If there is a trend to use experts less, it may be a result of the fact that tribunal personnel are more experienced and are competent, not as psychologists, or psychiatrists, but as canonists who have learned to relate the behavioral sciences to canonical standards. A consulting psychologist to the Chicago Archdiocesan Tribunal comments on the various preliminary investigation forms, especially the psychological model, and shows how the interviewers (advocates) have used them and learned from them:

Over the years I have been at the Chicago Tribunal, I have given the priests various forms of interview outlines, one at least from the Catholic Family Consultation Service . . .

I see no reason why a reasonably intelligent priest could not use such a form as his guide in

²⁹Jean-Marc BORDELEAU, M.D., however, would disagree with this, reasoning that an expert involved in the nullity case would be biased from having emphasized incapacity to marry; therefore a different physician would be better in the therapeutic process. Cfr. "Le (re)mariage des malades psychiques," in Studia Canonica, 9(1975), p. 245.

doing a preliminary interview in a psychic incapacity case. I would even think it possible for a reasonably educated lay person to send in an advance "autobiography" in such a case using this sort of outline as a guide--perhaps with some preliminary words of instruction.

Using instruments like this, and learning from the kind of preliminary evaluations I make, as well as from the kind of formal or final analysis I make of a case, the priests have come to a pretty concrete knowledge of what kinds of things to ask and to look for when interviewing our clientele.³⁰

Yet, an interview is not a simple matter, and may take skill beyond the ordinary competence of a priest, as Doctor Wauck illustrates:

With regard to the use of the "Outline," I might say that one uses it only as such, i.e. an outline. It obviously has to be filled in and elaborated on with much skillful and sensitive questioning of a rather "non-directive" sort . . .

I believe that what usually emerges is a pattern or a theme, rather than a series of isolated or discrete events. Mostly what one is looking for is not so much a diagnosis in the medical model sense of pathology, but an estimate of level of responsibility or of moral-social development and maturity. This, in practice, is what most of our psychic incapacity cases are all about.³¹

It is not difficult to see, then, that in many cases, especially in borderline ones, some sort of professional testing or interview is invaluable, or even essential to recognize certain problems. It may be necessary not only for judges to perceive some grounds for a nullity trial, but also

³⁰Le Roy A. WAUCK, Ph.D., in personal correspondence with the author.

³¹Ibid.

to have a more objective judgment than may be possible from testimony alone. Doctor Wauck writes:

I know that it has been the practice at the Chicago Tribunal to have expert opinion prior to the acceptance of psychic incapacity cases. In fact that is all I did initially a few years ago. Then, after the priests became more sophisticated, they were able to make these decisions on their own--at least in what I would consider the more obvious cases. However, even at this stage, we often require psychological testing to further clarify the status of either the Respondent, Petitioner, or both. We currently are running a two-month backlog of people for psychological testing--most of them relative to their initial petition.

It is my opinion that in some cases, the psychological testing, especially if we have an evaluation of both parties, can stand for the host of doubtful testimony which one often gets solely from one side or the other.

Given the biases and vagaries of Petitioners and Respondents, and of their friends, relatives, and benefactors, I see no way to settle the issue of mutual (or relative) stability and credibility without some sort of more objective assessment which testing can provide. The interviewing process alone is too fraught with possibilities for distortion and deception to be taken at its face value--without other kinds of corroborating evidence. Of course, if there is a very clear track (jail sentences, hospitalizations, etc.) of a high degree of instability, the need for testing diminishes.³²

In summary, this chapter has considered various methods used by the tribunals of North America in making preliminary investigations. The interviewer is usually a member of the tribunal staff. The format for formal cases is primarily a questionnaire or interview with the plaintiff, and sometimes

³²Ibid.

with the respondent. A list of witnesses is obtained, and some may even be contacted informally, if this is judged necessary for the acceptance of a case. Preferably, a case history is obtained from both parties, giving necessary background for the judge to make an initial evaluation. Sometimes an expert is consulted before the acceptance of a case, especially in instances involving psychological grounds.

If a case is eventually accepted for adjudication, the questions naturally follow: How do we evaluate the results of this preliminary investigation? What weight do we give these statements? Do we even consider them in the probative phase, and with what credence? All of this depends to a great extent on the discretion of the judge, taking into account not only the particular circumstances of one case, but also the more general conditions of his society, his culture, etc. The following chapter will examine this context of the judge in North America, and some of the circumstances that affect these value judgments.

CHAPTER FIVE

PARTICULAR CONDITIONS IN NORTH AMERICA

The principles and practices of procedural law contain many insights of a perennial wisdom, an accumulated jurisprudence based on the way humans behave. Yet this same wisdom recognizes also that the guidelines and practices must be constantly changing, of necessity, since the situations and motivations of human behavior also change. The "Rules of Law" (Regulae Juris) that Boniface VIII collected, and other such axioms represent a distilled judicial wisdom which reveals the fact that the foundations of procedural law have not changed that much over the centuries. Yet procedural law is only valuable when it is a current and viable means to achieve its end: the search for truth, and the administration of justice. If its procedures or practices (or presuppositions) hinder or thwart this purpose, then it must be re-evaluated and updated. If procedure is only a means, then its universally valid principles must be tempered, adjusted, applied and supplied in each individual age and mentality. This chapter proposes to show how the "universal" laws of the Church have particular application in North America today, just as they might have particular (and different) presuppositions in Europe, Africa, Asia, etc. Perhaps we have not sufficiently recognized and respected these differences.

I. No Civil Effects to Church Annulment

In the author's survey of Canadian tribunals, four responses of nine agreed with the statement that a preliminary investigation, carefully conducted, "is more justified in our country because the motive for annulment is usually different from countries with no (or difficult) civil divorce." In North America, where there are no prescribed civil effects to a Church annulment, the process is usually an inquiry for truth rather than a conflict of rights.

In countries such as Italy or Spain with a close connection or, in these cases, a concordat between Church and State, annulment can have entirely different effects. An ecclesiastical annulment will often be automatically approved or recognized by a civil tribunal. Conversely, civil governments may not allow divorce and remarriage unless a Church annulment is decreed. This obviously creates a situation of some who might not hesitate to use any means (e.g. bribery, falsehood) to obtain a Church decree, since their only purpose in coming before a Church court may be to remarry legally in the State. It will also have the effect on procedure that marriage cases must be technically perfect, since the formal validity of the process must be protected, and its truthfulness safeguarded from lying, collusion, connivance, etc. Not only remarriage is affected, but many

important civil effects arising from the former marriage, such as status-rights, property, and the most important consequence of all: the custody and well-being of any children of the marriage. A somewhat similar process is used, for example, in Spain, for judicial separation. In Spanish treatises on procedure, annulment and separation processes will often be treated together. Although the canonical procedure (Book IV of the Code of Canon Law) is basically one, it does differ considerably according to the specific purpose for which it is being used. Criminal cases, disputes over money, and marriage cases are clearly distinct in presuppositions and even in the mode or procedure of arriving at truth (or justice). Judicial separation often involves charges of adultery, where strict evidentiary procedures are necessary, with safeguarding of rights and one's good name. It might also involve civil effects such as custody of children and ownership of property.

This same admixture of spiritual motives, inquiry into the truth of married or non-married status and its societal consequence (civil effects) has caused problems ever since the Church became involved in the total regulation of marriage. It was perhaps necessary at a time when the Roman Empire collapsed and defaulted its care of marriage to the only viable institution able to supplant it: the Church. Yet it has complicated and encumbered the process of the Church ever since.

Many of the examples from the Decretals of Gregory IX illustrate how the process was often directed primarily at what one might describe as "civil effects." In the cases Gregory IX uses to establish the principle that no witnesses should be interrogated on the principal issue before the litis contestatio, he is referring to such types of issues as, for example: a) "spiritual marriages," where a cleric argues that he is "wed" to a particular benefice, and so deserves the accruing revenue; b) "carnal marriage," where a husband wishes to disavow (and probably disinherit) his allegedly adulterous wife. Examples could be multiplied, but the point seems clearly made that the purpose and circumstances of a procedure can definitely affect the type and severity of evidentiary proof and judgment. No wonder that a Clement V could decree a more summary procedure for certain types of cases (including marriage).¹

In North America, the separation of Church and State divides the care of marriage into two separate domains. Civil separation and divorce are possible for any person, under certain conditions, in Canada and the United States.

¹This dissertation must work with the reality of the present process, while suggesting at times that certain procedures could and perhaps should change (e.g. in the direction of the Clementine "Saepe").

Having a Church decree will not ordinarily² help in the least to obtain a civil decree. In fact, Church tribunals will usually demand that a final (absolute) divorce be granted by the civil authority before a case is processed or at least before a Church decree is released.³ This means in effect that all "non-spiritual" matters will already be settled ("civil effects" such as custody of the children, property settlement, maintenance, etc.). Although the North American Church has a process for obtaining the Bishop's permission to initiate civil action, and for ecclesiastical separation, it does not involve any of these civil effects. The motive, then, of a Church plaintiff is usually spiritual: to be declared free to remarry in the Church and receive the sacraments. Exceptions, such as financial advantage, social standing and other such "mixed motives" certainly exist, but would not often lead to deliberate attempts at deception, which a court can often recognize.

²In Canadian tribunals, where the Church process is sometimes completed before the civil divorce or annulment, civil tribunals have, in rare instances, taken notice of evidence obtained in the ecclesial process or have even subpoenaed such information. But secular courts usually recognize the confidentiality of a Church procedure.

³Some purposes of this are: to safeguard the secrecy of the process; to protect the Church from getting embroiled in the legal contest; to protect the Church from various charges and actions such as alienation of affection, subpoena of records, etc.

This presupposition of mainly spiritual motives on the part of the plaintiff has tremendous repercussions on the process itself. Rather than a defensive or negative approach, which can add an undertone of "Why are you trying to deceive us?" tribunals can concentrate on the search for truth, rather than a conflict of rights. They can operate on a general presumption of the truthfulness of persons, as will be discussed in the next part. One writer speaks of various elements from the common law tradition that might be beneficially adopted by canon law procedure, and says:

That which would be the most important would be the changing of the philosophy underlying our cases of marriage nullity. The investigation ought to rest upon the truth of the facts, and not upon a conflict of rights. Also, it would not be necessary to incorporate so many safeguards in the procedure, nor to adopt a priori a pessimistic perspective.⁴

The fact that civil effects are settled by the time of the canonical procedure means that a Church annulment is rarely contested.⁵ A respondent may disagree as to some facts, or he may protest or "contest" an annulment in order

⁴Francis G. MORRISEY, "Les éléments du droit anglo-saxon qui pourraient être incorporés au nouveau droit de procédure," a paper presented at the international study session of the Associatio Canonistica, Rome, September 27 to October 2, 1975, (ms.), p. 20.

⁵Cfr. Charles P. KOSTER, "Reaching Certitude in Marriage Cases," in The Jurist, 29(1969), p. 309: "Rare indeed it is that a defendant actually opposes the declaration of nullity as such."

to hurt, or at least not to help this person with whom he or she may have just completed a bitter court battle. But the marriage is usually irretrievable by this time, with no hope of reconciliation. Some people will often not care whether or not the other party obtains Church permission to remarry. The respondent who is a practicing Catholic, in contrast, is usually anxious for annulment to be granted so that he too might remarry in the Church.

There is a tremendous difference of approach in proofs and procedure resulting from whether or not a case is contested. A number of North American authors have written about the unsuitability of much of the canonical (formal) process for non-contested marriage cases. These comments have equal application to a preliminary investigation, and whether it "prejudices" the parties, the judge, the witnesses or the very process. Ladislav Orsy, S.J., describes some effects on the process:

The courts of the Church gradually armed themselves against the threat of being transformed into an instrument of deception. The rules on admissibility of evidence were tightened, the testimony of the parties became suspect. Safeguards were multiplied even if the proceedings had to be time-consuming beyond reason. Civil needs determined the working of the tribunals.⁶

⁶Ladislav ORSY, S.J., "The Function of Ecclesial Decisions: A Theological Evaluation of Marriage Tribunals," in Concilium, 9(1973) [September], p. 42.

Germain Lesage, O.M.I., in his article suggesting a renewal of matrimonial procedure,⁷ points out the psychological effects on the persons involved, even from the terminology used: defender of the bond, contestation of the litigation, etc. He says:

In such an atmosphere of juridical combat, it follows almost connaturally that the people involved in the proof feel that they are psychologically conquering an adversary. It is not rare, then, that the parties propose witnesses, relatives or friends with whom they are sympathetic. Thus it happens that the file presents two contradictory series of affirmations: clan against clan. This confrontation scarcely favors the truth.⁸

G. Lesage proposes, in its place, an "enquiry upon the truth of the facts." This would require a better psychological approach, a viewpoint that would look to a research into the objective truth of the facts, with the safeguards reduced to a minimum according to circumstances and local needs:

It would certainly be indispensable to retain the majority of the successive acta which are really required; but it would be necessary to limit the formalities which have become useless in numerous countries where the canonical decision has no civil effects. . . .

The methodical study of the facts supposes a concentration of energies upon the proof rather than

⁷Germain LESAGE, O.M.I., "Pour une rénovation de la procédure matrimoniale," in Studia Canonica, 7(1973), pp. 253-279.

⁸Ibid., pp. 263, 264.

on the procedure, in a way that an investigation more "historical" than juridical could profitably replace the process.⁹

In this perspective, the whole inquiry, including any preliminary investigation, becomes a search "pro rei veritate" on the part of all concerned. The purpose of this process is to define the ecclesial status of two persons regarding the marriage bond--nothing more.

It is most difficult for a person who lives in a country where there are no civil effects to Church court decisions, to understand really the mentality of a country where there are civil effects. And, of course, vice versa. This truth cannot be repeated often enough to procedural experts in both situations. For example, a North American may read Rotal decisions¹⁰ which are appeals from the Spanish Rota concerning separation. He may find it incomprehensible how a Church court in Spain may have the competence to grant custody of children, and even more incredible that a tribunal in Rome may have the power to reverse that decision, after having the parents and children examined by medical experts. This person, whose only experience has been of civil courts ruling on all matters such as custody, will begin to under-

⁹Ibid., pp. 272, 273.

¹⁰See S.R.R. Dec., c. Parisella, February 2, 1970 and January 9, 1973, reported in Ephemerides Juris Canonici, 29(1973), pp. 123-135.

stand why more judicial safeguards are necessary in Spain. But will he really comprehend the full meaning and civil effects of annulment, separation, etc., in these countries? It is just as difficult from the other side. A Spaniard may wonder whether the experimental procedural norms granted to the United States and Canada can work strict justice, when they have changed a system of judicial safeguards developed over the centuries.

II. Credibility of Plaintiff and Others

Flowing from the general presupposition of no civil effects in North America is the consequence that the plaintiff and other persons are to be believed, in general, unless there is some motive or profit to be gained from bad faith.

L. Orsy states it this way:

To keep the religious character of the tribunal its procedures should be conceived and intended for the honest believer, not for the dishonest one who is ready to perjure himself.¹¹

In the survey of Canadian tribunals, all responses agreed with the statement:

I believe we operate on the following presumptions in Canada (praesumptiones hominis--subject to evidence to the contrary):

The plaintiff is generally truthful (allowing for exaggerations).

Most responses agreed with the statement: "The respondent is generally truthful," with some qualifications

¹¹L. ORSY, loc. cit., p. 43.

such as "when he cooperates."

The axiom of good procedure is that no person is a good judge (or witness) in his own case. This is easy to see for most types of contested cases, since a party has a "vested interest" in the outcome and is usually emotionally involved. In marriage cases, both civil and ecclesial law recognize that questions of marital status are a public matter, affecting the common good, and that the testimony of plaintiff and defendant are not sufficient, but must be "objectified" and supported by witnesses.¹² For this reason, principles of evidence are drawn up so as to avoid not only lying or connivance by one party, but also collusion between both parties.¹³

In ecclesial annulments, dispensations in marriage cases and priesthood cases, plaintiffs are warned that if they are lying in a substantial matter, it may invalidate the result. As was seen above, in North America there is ordinarily no reason to lie when the motives are spiritual,

¹²Cfr. Charles P. KOSTER, "Reaching Certitude in Marriage Cases," in The Jurist, 29(1969), p. 311, in which he lists the "disvalues" in basing a decision on the mere word of the parties, almost making them a judge of their own cause.

¹³See the Divorce Act (Canada), 1967-1968, s. 2: "'Collusion' means an agreement or conspiracy to which a petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court . . ."

namely peace of conscience. Also, there are many situations where the plaintiff and/or respondent may be the only witnesses to the ultimate truth of the matter. For example, in non-consummation petitions where physical virginity cannot be established, the "moral" argument may have to suffice, and often does, with increased attestation of the credibility of the parties. In countries where the respondent is often a non-Catholic, and often non-cooperative in a Church procedure, allowances and adjustments have been made which give more credence to the plaintiff, and require less witnesses. This is often accomplished by more credibility witnesses for those who testify, and use of suppletory oaths. An example is the Instruction of the Holy Office for the Apostolic Vicariate of Sweden:

From the sole point of view of the natural law, true and full moral certitude concerning the nullity of marriage can be obtained from only a declaration made by the parties or by either of them, if their credibility and veracity can be evaluated as beyond question, such, namely, that excludes every prudent doubt to the contrary: for the proof of which, confirming witnesses, sworn and worthy of trust, can be rightly used.¹⁴

¹⁴Regulae Servandae a Vicariatu Apostolico Sueciae in pertractandis causis super nullitate matrimoniorum acatholicorum, S.C. Santi Officii, June 21, 1951, in L'Année Canonique, 8(1963), p. 332, n. 11: "Inspecto enim uno naturae jure vera atque plena moralis certitudo de nullitate matrimonii haberi potest a sola partium aut earum alterutrius emissa declaratione, dummodo earum credibilitas ac veracitas aestimari possit omni exceptione major, talis nempe quae omne prudens contrarii dubium excludat: cui comparandae probe inservire possunt testes jurati ac fidedigni."

These confirming, or character witnesses do not testify to the substance of the case, but rather to the credibility of one or both of the parties.¹⁵

Two authors, one an American and the other a Canadian, have written articles pleading for greater credence to be given to petitioners in the North American context. Peter Pijnappels writes on the "Sufficiency of Evidence in Formal Trials."¹⁶ He begins with a discussion of the object of all evidence: moral certitude on the part of the judge. Pijnappels speaks of many situations in which the testimony of the plaintiff and respondent ought to be given greater credence by a judge as he tries to attain moral certitude. Depositions of the parties need not be only a "recital," but can also be a proof. When the National Conference of Catholic Bishops (U.S.A.) asked for special procedural norms for their tribunals, one of the original proposals was specifically directed to establishing the credibility of the principals (plaintiff and respondent):

In exceptional cases the concordant statements of the principals or even in some instances the

¹⁵In the proposed revision of De processibus [unpublished], it is suggested that if full proofs cannot otherwise be obtained, the depositions of the parties can be evaluated both with witnesses to their credibility (even received ex officio), and also by other indications and adminicular evidence. Cf. Communicationes, 2(1970), pp. 183 and 186.

¹⁶Peter A. PIJNAPPELS, "Sufficiency of Evidence in Formal Trials," in Studia Canonica, 8(1974), pp. 167-182.

statement of one principal, given due consideration to the circumstances of the case, may constitute preponderance of evidence.¹⁷

This proposal was not granted as requested, indeed, the approved Norm twenty-one was quite different:

The judge will render his decision according to moral certitude generated by the prevailing weight of that evidence having a recognized value in law and jurisprudence.¹⁸

In the official commentary on this Norm, the following reason was given for not including the notion of the credibility of the parties:

It was pointed out with merit by Vatican experts that what was said in the proposed norm was already a recognized principle of law and jurisprudence, namely that over and above the obvious value of the testimony of the parties and the direct corroboratory testimony of witnesses, an important and often conclusive field of proof was to be found in the use of experts, documents, presumptions and oaths as outlined in Title X of Book IV.¹⁹

It is perhaps true that many North American judges have been too hesitant to use "recognized principles of law and jurisprudence" in evaluating depositions of the parties, especially where witnesses are few or weak. Vatican experts pointed out the "obvious value of the testimony of the parties." By existing Church law, the judge can already

¹⁷In "Commentary on the Procedural Norms," in The Jurist, 31(1971), p. 417.

¹⁸Ibid.

¹⁹Ibid.

legitimately use presumptions such as those mentioned in this chapter, e.g. a plaintiff can be given greater credence in situations where there is less reason to lie because the civil effects of divorce are already settled. The judge can also give more weight to the deposition of a party by means of a suppletory oath, when corroboration from witnesses is not sufficient for moral certitude. Also, in the matter of experts, courts today have many new means of establishing the truthfulness and competence of parties to testify. Forensic psychiatry, for example, in civil courts, has brought similar advantages to Church courts. In a nullity case in the tribunal of Ottawa involving psychological problems, the expert said:

Great credibility is to be given to the plaintiff's deposition. Her testimony is simple, spontaneous and precise: such a clear description of the recognized symptoms cannot be invented by someone who has no expertise in the matter.²⁰

That example is quoted by André Brossard, who proposes the thesis that:

In cases of mental illness or of psychic incapacity, the sole testimony of the petitioner should be sufficient:

- 1) if this testimony presented an evident internal logic.
- 2) if this testimony was basically identical to the one given tempore non suspecto at the pre-judicial level to:

²⁰ André BROSSARD, "Notes on the Gathering of Evidence in Church Tribunals," in Studia Canonica, 8(1974), p. 164. At the time, he was an advocate in the Ottawa Regional Tribunal, and is now a judge.

-the priest who referred the case to the Tribunal, or

- to a civil lawyer, or
- to a counsellor, etc.

This pre-judicial testimony already on file could be judicially confirmed if needed in case some discrepancies should be probed.

3) if the expert can verify the psychiatric coherence of the symptoms described by the petitioner and the moral impossibility for the petitioner to invent such a description.²¹

A. Brossard thus shows how a judge has the ability (and power) to give more credence to a plaintiff, and he also establishes some criteria for the evaluation of pre-judicial information. Such information, gathered in a preliminary investigation, can be critical in arriving at moral certitude of nullity. As Pius XII reminded the judge: moral certainty is not only his goal; it is sufficient to render a decision.²² Brossard adds:

The basic principle should be applied in those cases where only one good witness is available: any relevant pre-judicial information already collected should be considered as sufficient indication to acquire complete moral certitude and full legal proof . . .²³

²¹Ibid., pp. 163, 164.

²²When a judge has moral certainty from the record of a case, he cannot let the letter of procedural law stand in the way of declaring this truth. Cfr. Allocutions of PIUS XII to the Rota in 1942, A.A.S., 34(1942), pp. 328ff., esp. §4; and in 1944, A.A.S., 36(1944), pp. 281ff., esp.: ". . . in cases where the letter of the law becomes an obstacle to the attainment of the truth and justice, there must always be open an avenue of recourse to the legislator." (Transl. from Dennis J. BURNS, "Moral Certitude," in Canon Law Society of America, Proceedings of The Thirty-Seventh Annual Convention, San Diego, California, October 6-9, 1975, CLSA, 1976, p. 40.

²³Ibid., p. 165.

Another element included by the Code as a source of proof is the use of oaths. In the Canadian survey, the tribunals were asked whether, and how their judges receive pre-trial testimony into the acta et probata. Seven responses of nine said that the judges have at least the plaintiff confirm under oath their preliminary statements, and then this information is given the weight of judicial proof. Another response allowed that some elements from a preliminary investigation are deemed worthy and accepted into the formal procedure. One response stated that in their tribunal, the preliminary investigation becomes the formal testimony by decree or incorporation. Three responses also affirmed that they leave the preliminary investigation to their judges to weigh. One added the comment that conversations of witnesses with the advocate are used as adminicula.

These responses are interesting examples of how the North American tribunals are applying to jurisprudence the presupposition of the credibility of the plaintiff and other persons, especially in the practice of various forms of a preliminary investigation. General credence is given to people, but is also confirmed by experts, or oaths, or prudent judicial discretion.

III. "Declaration" More Often Than "Confession" of the Parties

Not all statements of a plaintiff have been rejected as evidence by Church tribunals over the centuries. It depends greatly on the type of statement, and when it is made--preferably at a non-suspect time, when the person does not make the statement in order to obtain an annulment. If such a statement is "non-suspect" then, in fact, it is better that it be made before the judicial process. The prime example in Title X of the Code is the "confession." Canon 1750 describes the judicial confession:

The assertion of some fact, in writing or orally before a judge, by one party against himself and in favor of the adversary, whether made spontaneously or to the questioning of the judge, is called a judicial confession.²⁴

Canon 1753 defines the extrajudicial confession:

A confession, whether written or oral, which is made to one's adversary or to others extrajudicially, is called extrajudicial: and if brought into the judicial process, it is for the judge, considering all the circumstances, to evaluate what weight he shall give to it.²⁵

²⁴Can. 1750. Assertio de aliquo facto, in scriptis aut oretenus ab una parte contra se et pro adversario coram iudice, sive sponte, sive iudice interrogante peracta, dicitur confessio judicialis.

²⁵Can. 1753. Confessio sive scriptis, sive oretenus, ipsimet adversario aut aliis extra iudicium facta, dicitur extrajudicialis: eaque in iudicium deducta, iudicis est, perpensis omnibus rerum adjunctis, aestimare quanti facienda sit.

The notion of "confession" presumes that the "confessor" is the willful and culpable cause of the nullity of a marriage (e.g. an intention against the essence or "goods" of marriage). It does not really envision the newer psychological types of grounds where perhaps neither is "at fault" or both parties are. Since these grounds often include lack of capacity to fulfill marriage obligations rather than wrong intention, the concept of "confession" is inadequate to cover all statements of the parties in and out of court.

The proposed revision of the Code on procedure recognized this problem, and:

In the new order of treating the heading "Confession of the Parties," the [new] title begins "The Declarations of the Parties," so that it can include also those statements which do not constitute confessions, for the purpose that some evaluation might be made of them, even with juridical force.²⁶

The importance of that phrase "with juridical force" (vi juridica) can only be appreciated by reviewing the evidentiary attitude toward statements of the parties over the centuries. In his article, P. Pijnappels briefly relates

²⁶In Communicationes, 2(1970), p. 186: "In novo ordine tractationis Caput 'De confessione partium' titulum coepit 'De declarationibus partium,' ut comprehendere posset etiam declarationes illas quae non constituunt confessiones, ad finem ut de earum quoque vi juridica aliqua taxatio poneretur."

this history.²⁷ While the early Church accepted the word of the parties as the basis for a decision, suspicion and distrust began to predominate from the twelfth century. In the Austrian Instruction, the deposition of a party, even if a confession and even if made under oath, had no probative value. The Rules issued for the Rota in 1910 retained judicial confession as a means of proof.²⁸ The Code gave some approval to this notion in canon 1975 §2 in the argument of credence given to a party by the character witness ("septimae manus"). Catholica doctrina (1923) was commonly interpreted as considering the moral argument as the fundamental and principal means of proof. In §70 it states:

Extrajudicial confessions of the parties are of great value in the case, if made at a time not suspect, that is, at a time when there was no thought of raising the question, and there were no other reasons for concealing the truth or telling a lie.²⁹

I. Gordon confirms that the confession of the spouses "is the first proof or the foundation of the whole argu-

²⁷P. PIJNAPPELS, loc. cit., pp. 171-178.

²⁸Regulae servandae in judiciis apud S.R. Rotae Tribunal, §137: "Utrique parti integer est haurire ex confessione judiciali partis adversae probationem factorum, quae ad causam spectant," in A.A.S., 2(1910), p. 826.

²⁹A.A.S., 15(1923), p. 406.

mentation."³⁰

However Provida Mater (1936), as Pijnappels says, turned the clock back to the Austrian Instruction with regard to statements of the principals. In Art. 116, an extrajudicial confession, even if made at a non-suspect time, is only "an adminicular proof, to be correctly weighed by the judge."³¹ And a judicial confession, in Art. 117, is said to be "not suitable for constituting a proof against the validity of marriage."³²

The new proposal referred to in Communicationes would seem to leave the evaluation of all statements of the parties, not only confessions, to the discretion of the judge. This is more in the direction of modern civil evidentiary rules: a free evaluation of all that is offered in evidence to the judge.

Since "confession" is most often, in psychological incapacity cases, a relating of the story, perhaps with fault on both sides, the evaluation becomes more complex. Yet, as A. Brossard points out, a judge already has from law and

³⁰I. GORDON, S.J., De processu super rato, Romae, P.U.G., 1974, I, p. 68: "Est prima probatio seu fundamentum totius argumentationis." Also cfr. S.R.R. Dec. c. Mori, April 27, 1915; c. Massimi, December 30, 1921; c. Sabbatani, January 23, 1959; and c. Doheny, February 23, 1961

³¹P.M., Art. 116: ". . . probationis adminiculum constituit a iudice recte aestimandum."

³²P.M., Art. 117: "Depositio judicialis conjugum non est apta ad probationem contra valorem matrimonii constituendam."

jurisprudence the necessary means and right to use them as proofs. As I. Gordon reminded judges in their refresher course at the Gregorian University, in the expression "actis et probatis," "proofs" has a much wider meaning than just the hearing of witnesses. We often forget other means of legal proof such as presumptions (c. 1828); supplementary oaths (cc.1829-1831); close investigation of the petitioner's credibility (c. 1975 §2) and authentic documents, either public or private (c. 1812).³³

This ties together a number of strands by which a judge might evaluate information gathered in a preliminary investigation. As was seen in the Canadian survey, and as is true also in United States tribunals, statements of the parties and of witnesses made before the probatory stage, are often given judicial force in varying degrees. Whether this is done by later having a person confirm a fact under oath, or using various circumstances, presumptions, adminiculars, etc., this information is considered valuable, not only in a preliminary evaluation of whether to accept or reject a petition, but also in the final decision.

IV. Greater Extension of "Non-Suspect Time"

In jurisprudence, a statement made at a non-suspect time can be more valuable if it is originally said outside

³³A. BROSSARD, loc. cit., p. 163.

of court, and before a process begins. Therefore, a final "presupposition" of North American tribunals to be examined in this dissertation will be this concept of "non-suspect time," especially in marriage cases based on psychological grounds. The expert in the Ottawa case quoted previously said that the plaintiff should be believed since "such a clear description of the recognized symptoms cannot be invented by someone who has no expertise in the matter." P. Pijnappels also gives several means to ascertain credibility:

- - the nearest means consists in the ascertainment of the coherence of the plaintiff's story, and its internal corroboration through the facts brought to light at the interview; . . .
- a check into the consistence of the plaintiff's story will often be possible through contact with the priest, lawyer, counsellor or doctor to whom the plaintiff explained his problem; . . .³⁴

In the Canadian survey, six out of nine responses declared that statements of parties in psychological cases are usually considered as having been made "tempore non suspecto" since it is difficult to fabricate these grounds.

On the other hand, North Americans are very much aware of psychological problems, and the incapacities they create. In the civil legal forum, the field of forensic psychiatry has grown enormously, and the public at large often reads of criminal cases where a medical expert is called upon by the court to help determine whether a person is

³⁴P. PIJNAPPELS, loc. cit., p. 179.

capable of standing trial, or in what degree capable of a certain crime at a certain moment. There has been a phenomenal growth in the science of psychiatry and psychology, which has been accompanied not only by a popular awareness of terms and symptoms, but a widespread incidence of mental disorders. Yet the average person does not seem easily to excuse the criminal, or others, but affirms that humans are largely responsible for their actions, and accountable for their decisions.³⁵

In this context, "non-suspect time" can be examined in a gradation of time and knowledge. Before a marriage, statements of contrary intentions, or evidence of insanity constitute the best proof later in court. The exception, of course, is where the person already attempts to provide an escape for himself by giving a notarized statement of his contrary intention to his lawyer before the wedding, in case it proves unhappy later!³⁶ Such chicanery is not necessary in the North American Church context.

Another excellent non-suspect time is after the wedding, either before the troubles begin, or before there

³⁵See Thomas S. SZASZ, M.D., The Myth of Mental Illness, Foundations of a Theory of Personal Conduct, New York, Dell Book, 1967, pp. 296, 297.

³⁶To see where this is not just a hypothetical, but a real problem in Italy, cf. Sebastianus VILLEGIANTE, "De Chartulis et declarationibus contra valorem matrimonii prae-paratis," in Monitor Ecclesiasticus, 87(1962), pp. 556-571, esp. p. 556: "Pessimus jam invaluit mos, praesertim a civilistis quodammodo cerebrose excogitatus, machinandi contra vinculum per probationem, ut dicitur, prae-constitutam."

is any thought of separating. Sometimes a couple is still "in love," and yet the marriage does not seem to be working or happy, in spite of the efforts of one or both to make it a success. From this point on, the "suspicion" grows proportionately to the problems, and the knowledge that anything said or done may later be used for a divorce or annulment proceeding. During the problems, a couple may perhaps be seeing a priest or other counsellor to heal the marriage. When hope begins to be lost, thoughts of possible divorce and remarriage begin to enter. However, even after a final separation, a Catholic or other person with a strong belief in indissolubility, may still be ignorant that annulment is possible, or else unaware of what constitutes valid grounds. A person who knows something of the grounds begins to be the most "suspect" when he states, for example, that he or his spouse "lacked due discretion." Even in these cases, though, an expert can often distinguish truth from fiction.

"Non-suspect" must be evaluated by a judge in relation to these various times and levels of information. Psychological types of cases can often extend this "non-suspect time" because of the difficulty of fabricating such grounds. Traditional jurisprudence still holds, that the earlier and the less "directed" a statement is, the more likely it will be unbiased, unprejudiced and, in a word, true. This is precisely why different forms of preliminary

investigation have proved so valuable. They receive a story or case history from a person before it is known for sure whether there is a case, or what the grounds are. They often tap sources of information such as the parish priest or doctor who can give the most objective evaluation.

In synthesis, then, this chapter has described four circumstances, four "presuppositions" often accepted in North America, which are closely related. Because the majority of cases involve psychological grounds, because the plaintiff and respondent often give a "statement" of their marriage rather than a "confession," and because this story is not usually a priori suspicious, considering that there are no civil effects to Church annulment--judges tend to believe them, even when they are told things extrajudicially, not under oath.

This "background" of the North American context must be a part of the evaluation of chapter six which will critique preliminary investigations.

CHAPTER SIX

A CANONICAL APPRAISAL AND CRITIQUE

This chapter is a synthetic appraisal and critique of the various types and purposes of preliminary investigations. The first purpose deals with the rejection of groundless or false petitions, and how judges are to weigh the petition and accompanying documentation before acceptance or rejection. The second will discuss the discovery of difficult grounds, especially since the psychological grounds demand more information, in order to give every person a fair hearing. The third reason will involve the probative value of a preliminary investigation in the actual judicial process. Finally, the fourth will pose the related purpose of some other pastoral benefits, parallel to a legal process, and no less essential to the role of the Church.

I. Rejection of Groundless or False Petitions

Regarding the rejection of a petition, Provida Mater, Art. 64, gives two reasons for this rejection: 1) the facts alleged are quite insufficient to render the marriage null; 2) the assertion of the fact is evidently false. The Code of Canon Law, as was seen, did not adequately provide for this preliminary evaluation in canons 1706 to 1709. Although c. 1709 allowed for the rejection of a petition, no guideline were given for reasons based on its substance, but only for reasons such as lack of competence, etc. Provida Mater,

Art. 57.3 states that it is sufficient to show that a petition is not presented "temerariosly" (uselessly, rashly). Civil law uses what seems to be a parallel phrase: that a petition be "neither frivolous nor vexatious." Recognized authors and commentators use other terms which indicate the depth of this evaluation. J. Berger proposes that the judges must have a "positive doubt of validity" in order to accept a petition.¹ E. Mazzacane gives the most complete explanation of "fumus boni juris" as a summary inquiry into the consistency and foundation of a petition. The Code requires (c. 1915 §1) the plaintiff seeking gratuitous advocacy to prove that he is acting neither uselessly nor temerariosly; and this same plaintiff, under Provida Mater, Art. 237, has to establish a "fumus boni juris."

Sebastian Bach Smith, using a civil law term, said that a judge should make a preliminary investigation to see whether there is a "prima facie" case. This term is useful in its etymological sense; at face value; "at first sight; on the first appearance; so far as can be judged from the first disclosure."² But the modern term "prima facie case" seems to be too strong, implying facts "presumed to be true unless

¹C. KOSTER, loc. cit., p. 316, suggests that the norm "should be simple probability of nullity, nothing more."

²In Henry Campbell BLACK, Black's Law Dictionary, St. Paul, Minn., West Publishing Co., 1968, rev. 4th ed., p. 1353.

disproved by some evidence to the contrary."³ However, in marriage cases, the validity of marriage enjoys the presumption of the law until rebutted with evidence leading to moral certitude of nullity. A more complete discussion and resolution of this problem is found in other authors.⁴ It is necessary here only to establish that some evaluation of a petition must be made, and that some type of preliminary investigation is required for a just evaluation. Even though a petition itself ought to be concise (cf. Art. 57), it seems that a complete presentation by a plaintiff should include more than just a libellus (e.g. Art. 59--a general listing of proofs). Even though the initial evaluation of a petition does not go into the merits of the proofs, it seems that it does go into the merits of the petition, in a substantial way, and not just its formalities, competence of the court, right of the plaintiff to accuse the marriage, etc. In order best to illustrate the implications of these arguments in practice, and also some of the objections and dangers, several actual cases that came before the Sacred Roman Rota will be examined.

³Ibid. A prima facie case is, "A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to the contrary is disregarded."

⁴See Joseph BERGER, Rejection of The Introductory Libellus in Marriage Causes, op. cit.

A. Coram Adam Pucci

The first case to be analyzed is an appeal, "In the matter of the rejection of the petition," from a diocese in the United States to the Rota, before A. Pucci, May 30, 1968.⁵ The grounds alleged were force and fear; also total simulation. The Rotal advocate, Sebastiano Villegiante, argues that the judges in first instance had no basis in law on which to reject the petition, and he also severely criticizes the rejecting tribunal--its officialis in particular--for the manner of preliminary investigation conducted. In his "Law" section, he mentions canons 1706 to 1709 and also Provida Mater, Arts. 57 and 64. He says that the judge must see whether "the grounds are supported by good law," that a petition be not "rash," and that "it is sufficient, as it appears that the petition was not uselessly introduced." There must be a judgment on the admitting of the brief:

The law states precisely the items the judge is to consider in this pre-trial phase about accepting or rejecting the brief, without going into the merits of the case or touching on the weight of evidence.

⁵Coram Adam Pucci, ponens, May 30, 1968, Prot. No. 9135, [unpublished]. The English is presumably the advocate's own translation. The decision reversed the rejection, remanded the case to the diocese of origin, which, in subsequent trial decreed the nullity of the marriage.

S. Villegiante wishes to clarify further that it is the formal decision of the trial that looks directly to the merits of the case, and not the preliminary inquiry:

The words of Articles 57 and 64, which on their face seem to give the judge the faculty of making an inquiry beforehand about the merits of the petition, are not in contradiction here.

The judge will immediately reject a petition that has been uselessly offered (cfr. Art. 57) for: "if the fact upon which the charge rests be 100% true, but of no value in upsetting the validity of the marriage, or if the fact would indeed upset the validity of the marriage, but is evidently false" (Art. 64), still the admonitions above stated will not confuse the issues. The reason is, we are here concerned with a mere formal judgment about the basis of the plea to be treated judicially.

Thus, he says, this preliminary judicial examination is only on the "form content,"⁶ or the formal aspect:

However, this preliminary investigation by no means may enter into the precise merits of the case, because we are treating about the presuppositions of the process or about the question touching the form of the petition only.

He warns that the judge is not required to examine the proofs offered, nor should he make inquiry about them. Such an inquiry is to be avoided, according to Bartoccetti, "lest the case be tried before the trial itself."⁷ Further, he says:

⁶Villegiante refers to REDENTII, Civil Procedural Law, Milan, 1954, Vol. 1, p. 203.

⁷LEGA-BARTOCCETTI, Commentary on Ecclesiastical Trials, op. cit., 1950 ed., p. 135.

Proofs are expressly and precisely not required in the petition: "for Canon 1708, No. 2, does not demand them, and Canon 1730 bars the taking up of proof before the contesting of the case."⁸

Villegiante claims that the practice of the Rota has been uniform: "we always reversed decrees of inferior tribunals which rejected petitions on the merits of the case alone." He cites a case before Mattioli (July 27, 1949), where the tribunal of first instance had issued a decree of rejection since the petition:

. . . lacks a legal base; because the reasons given in writing by the Petitioner in no way describe an impediment of force and fear with respect to the circumstances. . .

The decree of rejection was overturned, Villegiante says, because:

. . . it is in no way permitted for the judge, sitting on the acceptance of the petition (that is, before the hearing of the testimony has begun and the matter about which there will be a presentation by the parties) to offer any opinion whatever about the merits of the question.

For if the judge would presume to enter on the merits of the case in the examination of the petition, the structure of the entire process and its purpose would be put in jeopardy together with a peril to substantial justice itself, as this would be some sort of summary administrative justice.

Villegiante has, in this statement, struck upon the principal objection and primary danger in a preliminary investigation: summary rejection of a petition without a

⁸He quotes from Servus GOYENECHÉ, On Trials, (ms.), 1947, p. 189.

proper hearing by a thwarting of the process, with possible harm to the rights of persons. This "sort of summary administrative justice" is his main worry:

This is especially the case for the practice of Tribunals of North America, where they interrogate the parties before there is any proceeding and before a petition has been handed up to the Tribunal (i.e. pre-trial statements).

They won't admit a case for hearing if, in a preliminary questioning of the parties, a proof of the claim is not discovered. But these pseudo proofs are of no account either when viewed by procedural law or under the view of substantial justice (cfr. Della Rocca: 'Church Law,' 1950, p. 140ff. and Graziani, p. 429ff).

From this aspect, Villegiante expresses a legitimate concern about the protection of the rights of persons, since the safeguards of the formal judicial process are directed toward this purpose. If a preliminary investigation thwarts the substantive process so that rights are harmed, then it is justifiably criticized. In order to see more precisely what practices he is criticizing, it is necessary to examine, at some length, his section "In Fact."

In this same tribunal of first instance, Villegiante relates:

. . . a practice prevailed which was to be severely criticized. The same President would presume to hear evidence in a case and make a decision before there was any formal presentation of a petition, and sometimes even without any petition properly introduced at all. This happened, for example, in one . . . case (Prot. No. 7762) . . . in which there was no petition, but a decree of rejection was issued in which were featured some memoranda written by the President during a conversation he had with the

parties beforehand. These memoranda were not offered to the parties for signature nor correction. Thus, the judgment or opinion of the President alone prevailed, as in this case.

Even the Austrian Instruction, where a preliminary investigation was legislated, complete with judge, notary and defender of the bond, also allowed an advocate to be present with the parties. Villegiante gives a good description of the plaintiff trying to present his case adequately in this informal hearing, and the possible prejudicial effect of this informal rejection on the turnus (panel) which formally rejected the petition:

The fact is the Petitioner opened his heart to the President, largely as a human being . . . revealing facts that referred rather to the future hearing. He also showed the feelings he had, without being able to bring out a clear concept of the legal aspect, and without the President giving any aid to him

As we have stated, the memos of the official of the . . . Tribunal were in writing, and with the case thus made up (!) he communicated his negative opinion to the Petitioner, discouraging him from beginning a legal process. This judgment of the official is present in the text of the case and the judges of the Appellate Tribunal had it before their eyes, which is not strictly according to rule, because it is easy to be suspicious about the effect of the official's opinion on the panel of judges.

Therefore, Villegiante concludes, the Rota should accept the petition because the judges of the first instance "exceeded the limits of their commission . . . giving attention to the merits of the case and taking up the possibility or, better still, according to their view, the impossibility of proof."

This case coram Pucci, which did reverse the rejection, has been presented at length because it represents a well-reasoned and concrete application of the main objections that are leveled against the practice of certain preliminary investigations, especially in North America. Perhaps objections or clarifications might be raised against some of the argumentation. For example, he warns that "proofs" are not yet to be received at this stage.⁹ Perhaps he fails to make an adequate distinction between strict judicial proofs, of the sort taken under oath within the probatory period (and only exceptionally, under c. 1730, before this time), and a list or an indication of the proofs (documents, witnesses and presumptions) which is recommended in Provida Mater (Art. 59). Also, courts have always expected a plaintiff to give some indications of how he intends to establish his case. This is clear in pre-Code formal processes, in some of the schemata proposed for the Code, in Provida Mater, and in parallel administrative procedures. It seems that only the Code itself fails to mention this fact explicitly enough.

⁹A good contrast with the solemn process is provided by the summary process in the proposed revision of the Code: "The petition ought to anticipate many things which in the ordinary judgment will be exhibited afterwards: not only the facts upon which the petition of the plaintiff is founded, but the proofs by which the plaintiff wishes to demonstrate the facts . . ." in Communicationes, 4(1972), p. 62.

Even if these objections and clarifications are true, Villegiante's main point is well-taken: the process was established to protect rights, and if these rights are denied or prejudiced by a summary and informal judgment of one man, then not only has the law been subverted, but justice has been denied. This is why, in any preliminary investigation, a tribunal must be very careful to give an adequate hearing, with counsel available; to guarantee an unbiased judgment of the petition; and, in cases of rejection, to inform the parties of every right, especially that of appeal.

At a seminar given during the national convention of the Canadian Canon Law Society in Montreal, Quebec in October of 1975, Raymond Lowing discussed "The Pastoral Dimension of the Study of Marriage Nullity Cases." He emphasized that if a petition is to be rejected, it must be done with the proper thought and process, and not the decision of one person. As an illustration of a preliminary investigation where justice seems to be well served, he described the five point program of the tribunal of Westminster, England. The officialis himself tries to do most of the preliminary investigations. This initial interview with the party is recorded. If the officialis sees no grounds for nullity, he tells the plaintiff before he leaves. But even then, he discusses the case with the tribunal staff. The group can decide to support the negative answer, or else decide to try the case in full process. If the group's response is negative, the plaintiff

is informed, and given a chance for a new preliminary interview with someone else, and the results go to a formal session for official acceptance or rejection. If there is a rejection, they recommend an appeal which, if negative, marks the final tribunal decision. Thus, the plaintiff is offered two interviewers, two acceptance sessions, and one appeal. This is certainly a far cry from an arbitrary, summary rejection by one parish priest or tribunal member saying that "nothing can be done."

B. The "Little Rock" Cases

A briefer review will be made of two cases from the Diocese of Little Rock (Petriculana), also in the United States. Both these cases concern the preliminary evaluation of a petition (delibazione del libello), and rejection in first instance. They were reported in the periodical Il Diritto Ecclesiastico, and commented on by another Rotal advocate and recognized canonical author: Fernando della Rocca.

The first case, May 31, 1949,¹⁰ involved the rejection of the petition for reasons of "useless arguments" (argomenti futili), in which certain elements acquired in an extra-

¹⁰Little Rock, in Il Diritto Ecclesiastico, 61(1951), pp. 140-143.

judicial way led the judges to doubt the veracity of the exposition, and ruled it inadmissible. Della Rocca argues that the rejection is not acceptable for either of the reasons affirmed, namely, 1) the futile arguments, and 2) the extrajudicial way of establishing their futility. For him, this obviously clashes with the clear law, unanimous teaching, and a firm tradition. Arguing in the same line as Villegiante, he emphasizes that a judge must not yet base his decision on reasons pertaining to the merits; otherwise it is a form of "denied justice in evident scorn for the spirit which animates the directive principles of the canonical process."¹¹ The law, he claims, is clear (in c. 1709 §1) allowing a judge to reject a petition only if he lacks competence, or the plaintiff has no standing in the court. Della Rocca admits that canonical teaching does enlarge this to include other procedural presuppositions allowed by post-Code writers, even to a substantial examination of the petition.¹² But he claims that all the authors, and Lega in particular, are unanimous in excluding the judge from rejecting a petition only because the law is not founded in

¹¹Ibid., p. 141.

¹²Cfr. F. ROBERTI, De processibus, I, Romae, 1926, p. 428. ". . . quoad substantiam et quoad formam examinari."

the facts presented.¹³ In a footnote, he does mention the concepts of "fumus boni juris" and the "neither futile nor temerarious" of c. 1915 §1, but only in connection with requests for gratuitous advocacy.

He rejects the second principle of the Little Rock decision, namely, doubting the truth of the plaintiff because of what the respondent had said in a preliminary (extra-judicial) statement. To use this type of information to make a judgment of rejection is overwhelmingly improper to him.¹⁴ He says that a respondent will often deny the facts of the plaintiff, and that this should form the basis for the litis contestatio, not for the rejection of the petition.

The second case from the Diocese of Little Rock upon which Della Rocca comments, went to the Rota on appeal coram Filipiak.¹⁵ The Rota upheld the rejection for reasons of a "rash request" (domanda temeraria), but the Apostolic Signatura later reversed this decision on November 7, 1950.

¹³F. DELLA ROCCA, in Il Diritto Ecclesiastico, loc. cit., p. 142: ". . . unanimi nell'escludere che il giudice possa rigettare il libello, sol perchè nella specie non sia fondato il diritto che nel libello viene dall'attore vantato."

¹⁴Ibid., p. 143: ". . . che il giudice possa fare uso di elementi di cognizione stragiudiziali per decidere dell'ammissione o meno di un libello . . . ne corre di distanza non colmabile!"

¹⁵S.R.R. (Petriculana), c. Filipiak, May 27, 1950, Incidentis, in Il Diritto Ecclesiastico, 62(1951), pp. 261-264, with commentary by Fernando DELLA ROCCA.

In Latin excerpts from the appeal decision, coram Filipiak, it is clear that the Sacred Roman Rota was aware of a preliminary investigation by the New York tribunal of the Respondent and his mother.¹⁶ It is called "previous investigation" (praeviam indagationem), and "informative little process" (in processiculo informativo), and at least the respondent deposed under oath (sub fide jurisjurandi). Both parties had spoken to a certain priest before their marriage, and the future husband had confided to the priest concerning the way he had provided for their future children in his will--this respondent who was now being accused of an intention contrary to having children. The Rota now gave great weight to that priest's statement, received in the preliminary investigation, especially since the priest had heard the remark in tempore non suspecto. The Rota, therefore, upheld the rejection, considering the opinion contrary to the plaintiff's as sufficiently proven.¹⁷

F. Della Rocca does not agree at all with this Rotal decree and, as in the previous commentary, argues against

¹⁶Ibid., p. 262: "Tribunal Petriculanum post informationes a curia Neo-Eboracensi exquisitas, atque post partis conventae eiusque matris praeviam indagationem, decreto 31 maii 1949, libellum actoris rejecit."

¹⁷Ibid., p. 264: "Cum vero assertio conventae, sub fide jurisjurandi praestita, et quidem votis actoris contraria, sufficienter probata appareat . . . censuerunt Patres actorem temere petitionem exhibuisse."

any examination on the merits, and against any "so-called informative process." In his view, there need be only an abstract foundation for the law, and not a concrete grounding in the facts (and their merits), to such an extent that these must be "sufficiently proven, even if only for the purpose of the admission of a petition?!?"¹⁸ He links this criticism to their use of a preliminary investigation:

Not for nothing, then, does the Rotal decree examine, in the section on the facts, the results of certain proofs improperly gathered, in the so-called informative process, and conclude to the thesis of a petition which is rash on the merits.¹⁹

Della Rocca's criteria seem to be excessively restrictive for a tribunal--they would seem to exclude the rejection of any well-written petition with a solid, even if purely theoretical, legal basis. Of course, his interpretation would seem to be more favorable for a plaintiff whose rights are, it must be remembered, the main purpose of the process. However, as Paul VI points out, a "vigilant sense of justice" can require a tribunal to reject a petition which is "destitute of any foundation," and to do it with a

¹⁸Ibid.: ". . . sono sufficientemente provate, sia pure ai fine dell'ammissione del libello?!?" [his punctuation]

¹⁹Ibid.: "Non per nulla poi nella parte in facto il decreto rotale esamina le risultanze di certe prove irrualmente raccolte, nel cosiddetto processicolo informativo, e conclude per la tesi della domanda temeraria nel merito."

"courageous firmness."²⁰ For, it would be rather an injustice to give a plaintiff unwarranted hope if a case has no juridical substance. Another possible criticism of Della Rocca is where he speaks of the difference of requirements between a person requesting gratuitous advocacy, and the ordinary examination of a libellus. In the first case, he says, it is certainly necessary to concretize, as a first contact with the merits of a case, the examination of the fumus boni juris, whereas this is not used in the examination of the [usual] petition.²¹ If this analysis is true, then it seems that criticism should fall, not on Della Rocca, but on the process itself which has created a "double standard:" one for the client in poverty whose case must be examined on its merits before initially accepted, and one for the rest, whose requests are not subjected to any substantive

²⁰PAUL VI, January 11, 1965, in A.A.S., 57(1965), p. 235.

²¹Ibid., p. 263. "Non si dimentichi che il codex ha usato il termine di 'temerarietà nel caso del gratuito patrocinio (can. 1915, §1), in cui ben doveva necessariamente concretarsi, come un primo contatto col merito, l'esame del fumus boni juris, mentre non l'ha usato nei riguardi dell'esame del libello."

scrutiny.²²

C. Criticisms of Some U.S.A. Procedures

One more Rotal advocate, Luigi Avallone, will be presented. In his book²³ on the taking of evidence before the marriage process, he examines the Church laws and also Italian law. He devotes two chapters to criticisms of some preliminary investigations in United States tribunals. Although his information is, as he admits, often incomplete, and his criticisms at times a caricature of what really

²²E. MAZZACANE, op. cit., p. 66, asserts the right of a tribunal to conduct a preliminary investigation in view to establishing a fumus boni juris for any case. However, he objects when it goes beyond this: "Therefore, I must also agree [with Della Rocca] in pointing out the error of the practice of some tribunals, in the procedure for the summary evaluation of a petition, before accepting it, by which they are accustomed to also carry on a hearing procedure: interrogation of the parties (when the respondent has still not been constituted [as such]); of witnesses, with a corresponding request for information concerning their credibility, at the same time making use of elements which have come to their knowledge in this extrajudicial manner. Whatever hearing procedure is done in this manner seems to me to be irregular, and at least such as to alter the nature of the scope and essence of the institution."

²³Luigi AVALLONE, L'istruzione "praeventiva" nelle cause matrimoniale secondo il Codice di Diritto Canonico e la "Provida Mater" anche in un esame comparato col Codice di Procedura Civile Italiano, Roma, Pontificia Università di S. Tommaso, 1971. The title translates: "Preservation of Evidence in Marriage Cases according to the Code of Canon Law and Provida Mater also in a Comparative Examination with the Italian Code of Civil Procedure."

happens, his basic arguments must be answered and his valid warnings heeded.

He begins with a commentary on canon 1730, warning that some ecclesiastical judges are taking too much liberty with the phrase "any just cause" (alia justa causa) to justify too many exceptions, so that tribunals are gathering evidence not only before the contestation, but even before the petition. He blames the American bureaucracy (civil and ecclesiastical) for the introduction of printed forms, by which an interviewer can quickly check off possible grounds, and write up a brief memo, upon which the initial judgment is made, which is then filed in the archives, and will influence all future inquiries.²⁴

Instead [of the approved canonical procedure], in this preliminary investigation, the interrogation of the parties, taken previously even to the presentation of a petition, without oath, together with an opinion of the interviewing priest, whether it be favorable or not to the introduction of a case of marriage nullity, is deposited in the archives.²⁵

Avallone has basically the same criticism as did Villegiante: that a negative opinion will unfavorably prejudice any future consideration of the case; and that the written memo is only the interpretation of the interviewer, without approval, correction or oath from the party. There-

²⁴Ibid., cf. pp. 91, 92.

²⁵Ibid., p. 94.

fore, the so-called previous investigation is to be rejected, and no value attached to such a procedure.²⁶

Yet in another sense, Avallone is not condemning this previous interview with the plaintiff, but rather its brevity and inaccuracy. Quoting from an actual memo in a U.S. case in which the interviewer had been rather superficial and unprobing, especially in the area of a possible psychological problem, Avallone comments:

It appears from a simple reading that the exposition of the case is too schematic; it lacks particulars; the term "communication" is too vague; it is not sufficiently described, because it has not explored the details and the reasons [for the alleged contrary intentions]; the psychiatric care which is mentioned is also rather vague. A simple report for a traffic accident is perhaps more extensive and more detailed! And yet a report of this type can constitute the basis for a solution in a difficult marriage case!²⁷

It is therefore in reaction to this overly-brief, overly-schematized preliminary investigation that Avallone gives a negative judgment on this practice. It is negative from a procedural point of view because: 1) the legislator did not contemplate it; 2) it is not a judicial act; 3) the interviewer lacks jurisdiction to carry out such a previous examination on which must depend the decision as to whether or not a process of nullity can be introduced; 4) it does

²⁶Ibid., p. 95.

²⁷Ibid., p. 96.

not facilitate the period of evidence-taking but complicates it, as in the case where the formal proofs are completely in contrast with the information gathered without oath, creating doubts, distrust, suspicion; 5) it does not fit under one of the recognized exceptions of canon 1730.²⁸

Also, the presence of a notary, he warns, was introduced by Innocent III for the reason of preventing possible collusion between the party and the judge. Beside these objections in the order of procedural principle, he also points out some unbecoming aspects in its practice, giving the "sad impression that one can depart from legality, not only as to form, but also as to content, and decide administratively that which is judicial."²⁹ Recapitulating his objections, he states that there is no "preliminary investigation" recognized in the canonical process, and the type he has described cannot be considered (under c. 1730) as "proofs for future memory," which are justified "lest proofs perish." The reasons of both parties are not sufficiently explored; all is abbreviated; and a multiple variety of cases becomes reduced to a "standardized" model. Economy of time has its exigencies, but not at the expense of justice and irreparable damage to truth and to the good of souls.³⁰

²⁸Ibid., p. 97.

²⁹Ibid., p. 98.

³⁰Ibid., p. 100.

If a preliminary investigation were carried out in the manner described by L. Avallone, then there should indeed be concern for abuse of the process, injustice and prejudice. However, in the general practice of North America, this does not, ordinarily, seem to be the case. Rather, the practice seems to be within the law and its spirit, provides a greater opportunity for hearing all parties concerned, and is aimed at helping the parties receive justice by its freer and more extensive search for truth.

D. German Conference

In 1966, the personnel of the German tribunals met to discuss their then current practices, and possible revisions of marriage procedure. Their recommendations are printed as part of a subsequent article by Audomar Scheuermann³¹ in which he comments upon them, presumably reflecting some of the opinions of the entire group. Charles Lefebvre, vice dean of the Rota, also published a commentary and Latin translation of these recommendations.³²

The general tone of the section dealing with the "so-called pre-trial hearing" is negative, stating a number of

³¹Audomar SCHEUERMANN, "Vorschläge zum kirchlichen Eheprozessrecht," in Archiv für Katholisches Kirchenrecht, 136(1967), cf. pp. 19, 20, 41.

³²Carolus LEFEBVRE, "De iis quae in novo jure processuali proponuntur mutanda," in Periodica, 59(1970), pp. 251-275.

problems and criticism of certain practices. What seems to be rejected is an officially sanctioned (and required?) procedure, under oath, perhaps similar to that of the 1855 Austrian Instruction. They compare the situation to having two evidence procedures, or the "trial before the trial" criticism of other commentators. Contradictory testimony is said to cloud the issue for a judge and defender of the bond.

On the other hand, a strong case is made--stronger than the Code or Provida Mater--for assurance of a good foundation in law and fact before a case begins. This would seem to presuppose some questioning of the parties, although informally, and gathering an adequate amount of background information and evidentiary prospects.

Among the recommendations of the "German Conference of Officials (1966) for the Reform of Marriage Procedure," number nine concerns the "opening of the process:"

9. A petition is sufficient only,
 - a) when a canonical ground of nullity has been established,
 - b) when the assertion can be presumed that in the particular case in question this ground of nullity is true,
 - c) when sufficient proof is given (see Art. 64,

Provida Mater).³³

Commenting on this proposed norm, Scheuermann says that it is the task of the judge to make a preliminary examination of a petition to see whether it satisfies the norms of canon 1706. In doing so, the criteria of Provida Mater, Art. 64, prove to be insufficient, and a better formulation is needed.³⁴ Their recommended norm number nine, in positive translation, says that the petition must contain:

1. the assertion of a canonical ground of nullity,
2. the presumed assertion that in this particular case the ground of nullity is true,
3. the first presentation of proofs gives some perspective of success, without which the complaint has no chance.³⁵

³³In Archiv, loc. cit., p. 40: Eine Klageschrift ist nur dann ausreichend, a) wenn ein kanonischer Nichtigkeitsgrund geltend gemacht wird, b) wenn die als wahr zu vermutende Behauptung aufgestellt wird, dass dieser Nichtigkeitsgrund im vorliegenden Fall besteht, c) wenn ausreichende Beweise angeboten werden (zu Art. 64 EPO)." C. LEFEBVRE translates these: "Ad libellum quod attinet, petitur 'libellum tunc tantummodo sufficere a) cum canonicum fundamentum nullitatis adsit; b) cum praesumptio veritatis adsit hoc fundamentum verificari in casu; c) cum probationes sufficientes praebeantur.'" loc. cit., p. 264.

³⁴A. SCHEUERMANN, loc. cit., p. 19: ". . . Art. 64 als nicht ausreichend und in ihrer Formulierung verbesserungsbedürftig."

³⁵Ibid.: "1. die Angabe eines kanonischen Nichtigkeitsgrundes, 2. die als wahr zu vermutende Behauptung, dass in einem bestimmten Fall dieser Nichtigkeitsgrund vorliegt, 3. das Angebot von Beweisen, ohne die die Klage keine Aussicht auf Erfolg hat."

If any of these essential points are missing, the Officialis or Hearing Judge should supply them "through further written inquiry or verbal discussions."³⁶

In no case, however, should the so-called preliminary interrogations follow, or declarations under oath, unknown to ecclesiastical law, or written corroboration be received. In such a case not only will time be lost, but also this manner of approach is wrong since these preliminary interrogations are already much troubled to prove that which is the object of the proceedings to prove. Here also it results in a burden on the proceeding, because already, insignificant disagreement between the pre-trial and trial declarations weakens the situation of the parties and leads to unnecessary conflicts above all with the Defender of the Bond. One should thus consider the abuse of pre-trial hearings and written declarations as also legally counter-productive.³⁷

The criticism seems to be leveled at a type of preliminary investigation that takes depositions under oath, and attempts to prove judicially what only the trial should be proving. But Scheuermann's recommendation of a "further written inquiry or oral consultation" seems to refer clearly to a further investigation which is informal, and is directed to obtaining information on the essential points that should be clear before a petition is accepted or rejected.

³⁶Ibid.: "Fehlt hier etwas, dann lässt sich das in aller Regel durch schriftliche Rückfrage oder mündliche Besprechung ergänzen." Literally: ". . . let it be supplied, as a rule, through further written inquiry or oral consultation."

³⁷Ibid., pp. 19, 20.

C. Lefebvre comments: "Indeed we should not institute a preliminary process of a type which could, in some way, prejudice the solution."³⁸ Lefebvre thinks that it is better not to restrict the freedom of the one accusing the marriage, while elements sufficient to lead into the [formal] process are being investigated.³⁹

E. Permissibility and Utility

Perhaps the most balanced and perceptive opinion on the preliminary investigation is given by V. Bartoccetti, who continued the work undertaken by Cardinal Lega.⁴⁰ In his commentary on Art. 64 of Provida Mater, Bartoccetti says that this article is of great importance, at least as the first attempt to discern between matrimonial petitions, and those for purely civil and contentious cases. Bartoccetti mentions two of the considerations that have motivated procedural law over the centuries: 1) the public welfare, along with private rights, and 2) financial considerations. Neither State nor Church wanted their judges unnecessarily disturbed by

³⁸Ibid.: "Non est revera instituendus processiculus quidam praeliminaris, ex quo possit quodammodo praejudicari solutionem."

³⁹Ibid., "Exinde melius est non coarctare libertatem accusandi, dummodo eruantur elementa sufficientia ad inducendum processum."

⁴⁰Michaele Card. LEGA, Commentarius in judicia ecclesiastica juxta codicem juris canonici, Curante Victorio Bartoccetti, Romae, A.L.C.I., 1938-1951. Vol. 4: De causis matrimonialibus.

unfounded or ridiculous cases, especially if this would disrupt the public order. For merely civil cases, or private disputes between citizens, there was generally no fear for any "public evil" (mala publica) from such cases, nor fear of public expenses, since the rash plaintiff would incur the court costs on himself.⁴¹

The Roman law "litis contestatio" often required that both parties deposit a pledge of money or security which would be forfeited to the State by the loser. So as not to incur unnecessary expenses, both the Code and Provida Mater have explicit rules for the evaluation of a petition in cases where gratuitous advocacy is requested. The Apostolic Signatura still uses the contestation as the moment when the parties are to make a deposit toward judicial expenses.⁴²

Bartoccetti emphasizes that marriage cases by their nature are public, since the sanctity and protection of the marriage bond is involved. If too many (unfounded) cases were accepted, it could give a vain hope to many to be freed from the bond. And so, no petition should be accepted unless there is "some appearance of a solid case, proportionate to the seriousness of the matter."⁴³ Art. 64 of Provida Mater,

⁴¹Ibid., p. 135*.

⁴²Regulae Sig. Apost., in A.A.S., 4(1912), p. 199: Art. 37. In actu contestationis litis constituetur etiam quae pecuniae summa a partibus solvenda sit tamquam depositum ad expensarum judicialium cautionem."

⁴³M. LEGA, op. cit., p. 135*: "nisi aliquam soliditatem prae se ferat, gravitati rei proportionatam."

he says, designates two reasons to reject a petition: on the part of law (ex parte juris), or of fact (ex parte facti). The first is when the alleged grounds are absolutely useless: when pseudo-conditions are brought that are not really grounds, but rather causes or manner of troubles. The other reason is the evident falsity of the plaintiff's claims. This coincides with the lack of solid arguments which the plaintiff ought at least to delineate and give some indications (delineare saltem et innuere debet) before a case is accepted.⁴⁴

Commenting specifically on various preliminary investigations, Bartoccetti indicates how this evaluation is best done:

Tribunals are accustomed to carry out a moderate investigation of a case before the acceptance of a petition, by questioning the plaintiff and respondent, very often extrajudicially, and also, sometimes, more important witnesses; by evaluating documents received, requiring information about their credibility, etc.⁴⁵

He also warns what should not be done:

The opposite vice is certainly to be avoided, namely lest a case be processed before the beginning of the case, and a process be completed before the process; but a tribunal never omits a not too long, and moderate investigation, also for the practical

⁴⁴Ibid.

⁴⁵Ibid.: "Assolent enim Tribunalia modicam causae delibationem peragere ante libelli acceptationem, actorem et conventum ut plurimum interrogando extrajudicialiter necnon quandoque testes majoris momenti; perpendendo eventualia documenta, exquirendo informationes circa eorum credibilitatem, etc."

reason of freeing itself from useless work with resulting harm to the diligence that needs to be applied to worthwhile cases, and also that a plaintiff not have to bear absolutely useless expenses.⁴⁶

It is, therefore, on solid canonical authority that a tribunal never omits a "modicam et moderatam" investigation. Bartoccetti again mentions the danger of scandal if tribunals were to accept cases indiscriminately, especially those with too little foundation. Then, answering the previous query about a possible "double standard" for rich and poor, he says:

This, indeed, has application not only for cases to be processed with free advocacy (for which, as we have seen, a fumus boni juris is expressly required), but also for those which are carried out at the expense of the parties.⁴⁷

A well-conducted preliminary investigation, kept within proper bounds, is not only permissible but recommended for a court. William Doheny, former Rotal auditor, and one of the main authors on marriage procedure in English, points out the advantages for judges and also for the defender of the bond of such an inquiry:

⁴⁶Ibid.: "Vitandum certe est oppositum vitium ne causa nempe agatur ante causae initium et processus fiat ante processum; at modicam et moderatam investigationem tribunal numquam omittet etiam ob practicum scopum se liberandi ab inutili labore, cum damno pro causis bonis forte agendis, et etiam ut actor inutiles prorsus expensas non peragat."

⁴⁷Ibid., pp. 135*, 136*.

Neither the Code nor the Instruction refers to any preliminary hearing on the libellus. It appears that this is permitted and that this is left entirely to the discretion of the judges or the special regulations or custom of the tribunal. In some cases such a preliminary hearing may be highly advisable; in others it might be necessary. The court should seek to secure the amount of information sufficient for its own enlightenment and necessary for the Defensor Vinculi to prepare his questions intelligently.⁴⁸

II. Discovery of Difficult Grounds

Of even greater need and importance than for the purpose of "screening" or rejecting petitions, is for the discovery of difficult grounds. This is true especially with the advent of psychological grounds, where much more information and background is often necessary even to see any possibility of a case. Also, if experts are to be consulted either before acceptance or during the process, they are going to require more information of the type obtained in a case history.

A. The Tribunal as Advocate

The basic approach of tribunals to difficult grounds seems to be twofold. First, some would use a preliminary investigation when they do not see, at first glance, any

⁴⁸William J. DOHENY, Canonical Procedure in Matrimonial Cases, Vol. 1, Formal Judicial Procedure, Milwaukee, Bruce, 1948, 2nd ed., p. 187.

grounds, any possibility of an annulment. Rather than issue an immediate rejection, either formal or informal, they will give the parties every chance to explain themselves further, and may contact the suggested witnesses, etc. In brief, the court acts as investigator, and even in the role of advocacy when a person has not been able to receive adequate counsel. Some of these tribunals, as soon as they see a sufficient foundation, will immediately accept and docket a case, beginning the formal process and probatory period.

A second approach, which seems somewhat similar to the American civil law practice of "discovery," is to conduct a preliminary investigation even when there appears to be a case. It helps clarify exactly what grounds should be considered (although others can be added later); what evidence, in general, is available, such as documents; and a list of the best witnesses and what each is expected to know, etc. For the parties, it provides a forum much like the original litis contestatio of classical Roman law, and like the pre-trial conference of American law (except that the Church does not confront the parties, in person, with each other). Since it is seldom truly "contentious," both parties can tell "their side of the story," and the court can learn where they agree and disagree. It becomes a chart or guideline for the formal process, often abbreviating it considerably, for example, by interrogating only those witnesses who are essential and

available. This clarification of the grounds and of the case in general is a valuable "substitute" for the present litis contestatio, which is largely a formality performed by the judge and defender alone, and serves only to make sure that the respondent is contacted, and given an opportunity to make a statement. As was mentioned, the summons may be the only opportunity to speak, even informally, with a reluctant respondent, and a judge or parish priest or whoever makes contact, should avoid no opportunity to obtain all information possible.

There might seem to be a third approach possible in those tribunals which conduct a "trial" more in the common law sense of immediacy, orality and concentration. On a certain day they hear, in person or by telephone, the parties and their witnesses, with all the court officials present, along with an advocate and often an expert. This "day in court" takes a considerable amount of preparation and preliminary investigation. At this "trial" there is no time to waste on preliminaries--basic data and case histories. But, on the other hand, the investigation is often not "preliminary," since the case may already be formally accepted; perhaps the contestation has even taken place, and some witnesses who will not be available for the "trial" have been questioned under oath. Even though before the "trial" in the common law sense, it may be within the trial, e.g. the pro-

batory period, of canon law.

B. Advocates and Procurators

In Roman law procedure, there was a gradual change from a plaintiff who did everything for himself and by himself, to a stage where he did practically nothing except sit at the trial and listen to a highly skilled lawyer plead his case with great oratory (and matching fee). There was a distinction between a jurist who gave legal advice, and the lawyer or orator who pleaded the case in court. Canon law has retained this distinction with its advocates whose role is to give a party legal advice, and its procurators who represent the party before the judges. These two roles are usually exercised, at present, by one person in North America (and elsewhere). This "advocate" may perhaps be considered of three distinct types: 1) the professional "partisan", degreed and trained in canon law, whose full-time work is to promote a favorable decision for his client; 2) the appointed parish priest, often with no degree in canon law, who takes this part-time role so that there will be someone as advocate; and 3) an advocate who is a member of the tribunal staff, who prepares cases professionally, but discriminatingly, since he represents not only the interests of the party but also those of the tribunal.

It is the professional "partisan" advocate who is so rare in North America. The Code of Canon Law asks that every advocate be at least a doctor in canon law (can. 1657 §2).

Provida Mater confirms this and goes even further in Art.

48 §2:

An advocate must, moreover, be at least a doctor in canon law, and have creditably served an apprenticeship for three years, most preferably under the direction of the Sacred Roman Rota.⁴⁹

Such requirements are clearly impossible in North America where there are less and less doctorates even among the officiales of tribunals. A full-time advocate should also perform all the functions suggested by Pius XII in his allocution of 1944:

The Advocate assists his client in drafting the preliminary "libellus" of the case, in determining rightly the object and basis of the controversy, in expounding the salient points of the matter to be adjudicated. The advocate points out to his client the proofs to be adduced and the documents to be produced. He suggests to his client the witnesses to be called in the case and the peremptory points to be emphasized in the deposition of the witnesses.⁵⁰

All this preparatory work would certainly require a full-time professional. Such a description makes it more

⁴⁹Provida Mater, Art. 47 §2: "Advocatus sit oportet praeterea doctor saltem in jure canonico et per triennium tirocinium laudabiliter exercuerit; quod valde optandum est ut fecerit apud Tribunal S.R. Rotae."

⁵⁰PIUS XII, Allocution to S.R. Rota, October 2, 1944, loc. cit., from transl. of W. DOHENY, op. cit., p. 1102.

obvious to the North American that preliminary investigations have, in general, replaced the function of advocacy. The professional advocate would certainly want to speak to the plaintiff at some length, and in considerable detail; likewise, he would want to conduct an informative "investigation" before the petition is submitted, sufficient to fulfill responsibly the functions outlined by Pius XII. However, the typical Rotal or European advocate, trained in the "civil law tradition," and who is often a civil lawyer as well, would ordinarily have little direct contact with the witnesses. He would consider it prejudicial to his client's case to give the witnesses any information on the grounds, or to take any manner of preliminary deposition.

An American canonist, obviously writing from a "common law tradition" background, suggests that an ecclesiastical advocate should have a lengthy and detailed consultation with the petitioner, investigate every particular aspect of the case, and:

Furthermore, if at all possible, he should contact and interview in person every witness, so that he might determine beforehand the full extent and type of information, which the witness possesses. In the event that an individual cannot be contacted personally, either because of distance or some other valid reason, a preliminary deposition might be received.⁵¹

⁵¹Paul V. HARRINGTON, "Analytic Comparison of Trials Under Canon Law and Civil Law with Specific Reference to the Examination of Witnesses," in The Jurist, 14(1954), p. 292.

This may seem logical and proper for an American familiar with pre-trial discovery procedures, but it is totally foreign to the civil and canon law tradition. On the other hand, another canonist, also an American, reacts strongly to this suggestion that an advocate ought to hear all the witnesses before the formal interrogations:

Such an opinion can not at all be reconciled with the canons, especially with canon 1776 §1 [The interrogatories must not be communicated to witnesses beforehand]; furthermore, the danger is present that an advocate, even motivated by the best intentions, would instruct a witness on that which he desires for the successful outcome of the case.

Certainly the matter is full of dangers, not only for the truth, but also for the case of the advocate himself; for even if he scrupulously abstains from any leading question in such an extrajudicial examination, nevertheless, suspicion can easily arise in the mind of the judge.⁵²

The reality of the matter is that there are few advocates to perform even the basic functions prescribed by Pius XII, much less a full-time investigative lawyer. This brings us to the second category of advocate, the part-time non-professional, who is the most common "advocate" in North America. He is often a parish priest, given one more responsibility, and often has little time or trained expertise to offer a plaintiff. This may account for the fact that

⁵²Jordanus BISHOP, O.P., De interrogatoriis pro examine partium ac testium in processu canonico conficiendis, Romae, Officium Libri Catholici, 1958, pp 24, 25 with footnote 15.

petitions, and the preparation of a case in general, are too brief, in contrast to the warning of Art. 57.3 of Provida Mater that it is not necessary or fitting to present a detailed and extensive development of the proofs (accurata et longa argumentorum enucleatio). Perhaps, under this aspect, it is the advocate in the civil law tradition who does a more extensive "preliminary investigation." As W. Doheny states:

In some countries, there appears to be a tendency to make the bills of complaint tediously long. In English-speaking and non-Catholic countries, however, the opposite tendency seems to prevail. It is frequently well-nigh impossible for a judge to form an adequate idea of the case from the paucity of the facts stated. This is due generally to the fact that the average lay person has not a proficient knowledge of matrimonial impediments and that the lawyers and attorneys of ecclesiastical courts are unduly timid about assisting the parties in drawing up the bills of complaint.⁵³

All of this helps to explain why, in North America, the burden of helping the plaintiff, as well as judging him falls more and more on the tribunal itself. Whenever the role of advocacy in its best sense is weak or lacking, a preliminary investigation by the tribunal must often supply.

This leads into the third category of advocate, who is often an expert canonist, but is employed by a tribunal rather than by an individual. He is usually on a parish or

⁵³W. DOHENY, op. cit., p. 190.

diocesan payroll, and is often forbidden to accept additional gratuities for marriage cases. In this sense he is removed from undue influence and "immoderate fees" about which Provida Mater, Art. 54 is concerned.⁵⁴ He would seem to be more impartial, perhaps in the tradition of the "commissary" of the Austrian Instruction. He works for the tribunal, and is genuinely interested in arriving at the truth, as well as helping the parties. He exercises some investigative powers since he asks pertinent, but careful questions. Yet he often prefers that parties spontaneously state or write their case history, and the circumstances important to them. In his brief contacts with witnesses, he tries to avoid the dangers stated by J. Bishop: leading questions, prejudicial information, and premature depositions. This use of an advocate trained by and working for a tribunal seems not only preferable, but is perhaps the only viable method in North America, considering the present state of canonists. It is sometimes indispensable geographically, because parties may be unable to come to diocesan or regional tribunals, and cases must be prepared by some sort of "field representative" whether he or she is called "advocate," "commissary," "auditor," etc.

⁵⁴Art. 54.1 speaks of "immodico emolumento," and 54.2 warns of betraying their trust because of "dona, pollicitationes aliamve causam."

The role of the plaintiff has also taken on increasing importance. An advocate or parish priest often does not have the time to listen to a plaintiff's life story, with circumstances before, during and after the unhappy marriage. He may have to ask the plaintiff to prepare a statement in writing or on recording tape, and in a later interview, he can build on this foundation. Even though this statement may follow the general outline of a prepared questionnaire, it is still much more spontaneous, unprejudiced, non-directive and, in canonical terms: in tempore non suspecto for the most part. Especially for the psychological grounds it is more difficult, as discussed above, to fabricate or to tell the court "what it wants to hear." After all, the object of the procedure itself is to obtain statements from parties and witnesses which are unslanted, and unembellished. A preliminary investigation carried out with tribunal expertise and experience, catching parties and witnesses at their most honest and unsuspecting moments, may be highly preferable to the "hired" professionals or the inexperienced.

Sometimes, when an advocate "helps" a plaintiff prepare a petition and a further presentation, it becomes weighted down with legal precisions and terms, making it hopelessly muddled for the judges who must discern the plain facts. In like manner, no plaintiff is more difficult for a tribunal

than one who has just read a canon law book to help him present a more favorable case.

The hazards of a "partisan" advocate are brought out well by the first Dean of the reestablished Rota, Michael Cardinal Lega. He himself was the presiding judge on the famous Castellane-Gould case.⁵⁵ He observed discrepancies which existed between the written petition, and oral testimony which had been submitted: "observing these discrepancies, Lega touched upon the fashion in which the petition for annulment had been coordinated with the accounts which would be orally given."⁵⁶ The sentence states:

The very petition itself--which is not always accustomed to signify the genuine truth, indeed is written by the advocate to prove irrefutably his proposed case, rather than by the plaintiff. . .⁵⁷

Lega adds that it was precisely for this reason that it was ordered in the Decretals of Gregory IX: "We decree furthermore, that the principals propose the facts not through their

⁵⁵For an interesting account of this case, see John Thomas NOONAN, Power to Dissolve, Lawyers and Marriages in the Courts of the Roman Curia, Cambridge, Mass., The Belknap Press of Harvard University Press, 1972, Chapter 5, pp. 239-301.

⁵⁶Ibid., p. 255.

⁵⁷S.R.R. Dec., 3(1911), c. M. LEGA, December 9, 1911 p. 516, n. 5: "Ipse libellus supplex--qui non semper genuinam veritatem significare solet, quippe ab Advocato, ad evincendum propositam actionem, magis quam ab Actore conscriptus. . .

advocates, but personally by themselves."⁵⁸

This is not to condemn the role of advocacy, which is basically an essential role--fulfilled by a person separate from the "interests" of the court and the judge, who can help the plaintiff discover the most favorable arguments (always in the service of truth, as Pius XII admonishes), and to present them in a language most helpful to the court. But the hazards of advocacy, learned through bitter experience over the centuries,⁵⁹ must not be forgotten in modern forms of ecclesiastical advocacy, including preliminary investigations. The modern American system of pre-trial discovery, for example, has laudable aspects in search of truth. But the civil law tradition and its close relative, canon law, provide cautions which also have their validity. When an advocate in North America today carries out a preliminary investigation, he should not be unfamiliar with the history and problems of such practices. James A. Brundage provides an example from the ecclesiastical advocates of the mid-XII to the mid-XIV century:

During the preparatory stage, the advocate was well advised to study the documents carefully and to test the proofs of his client's position.

⁵⁸C. 14, De judic., X, II, 1. [FRIEDBERG, II, col. 245].

⁵⁹For a fascinating study, see James A. BRUNDAGE, "The Ethics of the Legal Profession: Medieval Canonists and Their Clients," in The Jurist, 33(1973), pp. 237-248.

He was not, however, expected to interview witnesses before the trial and was, in fact, cautioned against so doing, lest he be suspected of coaching them or tampering with their evidence.⁶⁰

In this light, and in the light of all that has been seen in canon, "civil," and "common" law, we are better able to evaluate various functions of advocacy in relation to a preliminary investigation. This section closes with a description of one example of ecclesiastical advocacy. His function would fall in the third category described above, i.e. employed full-time by a regional tribunal for the service of the parties. It is also a selective or discriminating advocacy, i.e. if he sees no foundation to a case, he will not present it, but a party is free to go to another advocate, or to present the case directly for formal acceptance or rejection.

The role he delineates⁶¹ is well suited to this section--"Discovery of Difficult Grounds"--since his experience in Ottawa, Canada, is that eighty to ninety percent of recent cases involve a psychological defect.⁶² The inter-

⁶⁰Ibid., pp. 243, 244. His source is Bonaguida de AREZZO, Summa introductoria super officio avocationis in foro ecclesiastico, partic. 1, tit. 3, in A. Wunderlich, ed., Anecdota quae processum civilem spectant, Gottingen, 1841, pp. 154-155, 157-159.

⁶¹André BROSSARD, "De avvocato ecclesiastico," in Annotationes Professorum, (Cursus renovationis canonicae pro iudiciis), Romae, P.U.G., 1974. A Latin skeletal outline is given, which was expanded in his lectures at the Gregorian University in Rome.

⁶²Ibid., p. 9.

view with the plaintiff, and the rest of the preliminary investigation are almost entirely directed to this type of case.

He recommends that the first interview be done in a relaxed atmosphere; be a search for truth; with discretion and simple words. It is not a criminal investigation, but a personal "drama," about which the advocate inquires with pertinent questions. The object of the interview is the manner of acting of the respondent: before the courtship (with his family; socially, any medical care); during the courtship (psychological and moral behavior; beliefs; capacity for dialogue); celebration of the wedding and honeymoon; first months of conjugal life; critical episodes (signs, manifestations, consequences). Another object is to inquire about specific signs of mental disturbance in the respondent.⁶³

The purpose of such an interview is to obtain the opinion of the plaintiff about the personality of the respondent, the causes of separation, and the means of proof. Also the advocate must form a prudent opinion about the outcome of the case, and have "moral certitude about the credibility of the plaintiff."⁶⁴

⁶³Ibid., p. 5.

⁶⁴Ibid., p. 6: "certitudo moralis de credibilitate actoris."

The documents which must be prepared are: a list of questions or the written narrative; permission to look into all sources of information; and a list of witnesses.

What Brossard entitles "preliminary investigation" (investigatio praevia) includes: 1) contact with the respondent; 2) medical documents from hospitals; 3) contact with civil lawyers (especially at a non-suspect time); 4) official records from marriage counselling centers and from civil courts; 5) telephone conversations with witnesses concerning: a) knowledge of the parties; b) knowledge of the heading of nullity; c) credibility of the parties; d) an opinion concerning the causes of separation.⁶⁵ He added that such short telephone conversations are often most helpful for initially determining whether a case can be submitted to a tribunal, and what information can be expected from the witnesses.

This is one example of a preliminary investigation, which illustrates its helpfulness for the plaintiff and the formal process itself to discover and establish grounds of nullity, especially of a psychological nature. Once more it must be repeated that this study does not intend to be a "statistical proof" of any position, nor to describe all possible types and combinations of preliminary investigations.

⁶⁵Ibid.

Some practices obviously fall within the justification and best traditions of law, jurisprudence and professional ethics. Other practices may be seen as unwise and possibly prejudicial or unethical. This analytic study of the principles involved is meant to guide tribunals and their advocates to a discerning practice of only those types of preliminary investigations consonant with these best traditions.

III. Probative Value as Judicial Proofs

Various types of preliminary investigations exist, with great variety as to: a) who conducts them; b) when they are conducted; c) why they are conducted; d) what kind of information is collected; e) with what solemnity (e.g. under oath or not). How does a judge evaluate this variety of information? What is he free to admit as "evidence?" What is evidence? These are some of the questions that must be considered in this section on the probative value of the results of preliminary investigations and whether they may be used as judicial proofs.

A. Admissibility

In canon law, a "proof" can be defined as the presentation of legitimate arguments to an ecclesial judge for the purpose of leading him to moral certitude concerning some

doubtful matter.⁶⁶ In civil law, "evidence" is:

Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.⁶⁷

The divisions of "proof" are made according to a number of aspects in both canon and civil law. For purposes of this thesis, the most important is to distinguish "judicial" from "extrajudicial." F. Wanenmacher gives the canonical division:

By reason of their formality, proofs are either judicial . . . or extrajudicial . . . Judicial proof is that which is formally brought to the judge acting in his capacity as judge, i.e. during trial. Extrajudicial proof is that which is argued outside of trial. Only judicial proofs are valid for the purpose of judicial decision, but extrajudicial proofs may be reduced to judicial form by presenting them during trial according to the approved norms. Thus when a witness has given testimony before a notary, for future memorial of a thing, the record of such testimony becomes judicial proof through being received, examined, and approved by the judge.⁶⁸

The common law tradition uses "extrajudicial" in a number of senses, often quite different. The word, by itself, means: "that which is done, given, or effected outside the

⁶⁶See I. GORDON, De judiciis in genere, op. cit., II, p. 35.

⁶⁷Black's Law Dictionary, p. 656.

⁶⁸Francis WANENMACHER, Canonical Evidence in Marriage Cases, Philadelphia, Dolphin Press, 1935, p. 78.

course of regular judicial proceedings."⁶⁹ But "extrajudicial evidence" is merely "that which is used to satisfy private persons as to facts requiring proof."⁷⁰ In this tradition where "trial" means a concentrated event, "judicial" may sometimes extend beyond the actual trial event. A judicial confession, for example, is "made before a magistrate or court in the due course of legal proceedings," but these "include confessions made in preliminary examinations before magistrates."⁷¹

Canon law makes a further distinction in terms of time into a) pre-constituted (pre-established) proofs which exist before the trial, and b) proofs which must be established during the trial, specifically in the probatory period. However, Provida Mater, Art. 68 §2 allows the presiding judge to "admit proofs before the contestatio litis in the cases mentioned in canon 1730." The pre-constituted proofs had usually been limited to documents, and to the exceptional cases of c. 1730 in the past. The practice of North American tribunals seems to have widened this category to include many of the elements from preliminary investigations, reducing them to judicial form by receiving, examining and approving them.

⁶⁹Black's Law Dictionary, p. 698.

⁷⁰Ibid.

⁷¹Ibid., p. 369.

B. Evaluation

The most important distinction of proofs is that which scales them according to certain values. Principles of evaluating and weighing evidence may be offered to help a judge, with norms derived from long experience and jurisprudence. This judicial discretion also permits the judge to use his own wisdom and common sense, for example, in personal presumptions (hominis), which he may see as vehement, strong or slight depending on circumstances that he must evaluate. Or, a juridical system may require a judge to give certain facts, persons or presumptions a certain weight in a system of legal proofs. An example would be an irrebuttable or conclusive presumption (juris et de jure). Canon law eliminated many of the arithmetical and required norms of proof at the time of the Code, but still retains a descending scale from full (plena) proofs which certainly establish the truth of the matter, to partial (semiplena), and down to indications (indicia), which help persuade or point to the truth, and adminicles (adminicula) which support or corroborate. Within the spectrum, there are variations and explanations that are far beyond the scope of this section. In civil law, Black's Law Dictionary alone lists fifty-five concepts relating to "evidence." What is most essential to this section is to understand the reasons for helping or requiring

a judge (or jury) to admit or refuse to admit certain evidence, and how to evaluate it.

In secular law of the common law tradition at least, the rules of admissibility are most strict for criminal cases, since the most basic presumption is for innocence and protection of human rights. "Civil" or private contentious suits are less strict, with the burden of proof on the plaintiff, and a decision made on the balance of probabilities rather than on the criminal standard of proof beyond the shadow of a doubt. The least strict is for administrative cases, where almost anything can be presented, and the judges will decide what is admissible in this more summary search for truth, using principles of justice and equity.

The modern tendency is toward the principle of free evaluation of evidence by the judge, in the common and civil law tradition and in canon law,⁷² but necessary rules of admissibility still remain for good reasons. Where, for example, a panel of judges only are hearing a case, there should be less danger that they will be prejudiced or deceived, with their long training and experience. But a jury picked from the citizenry may need a judge to keep hearsay

⁷²The general norm for the Code is in c. 1869.3: "Probationes autem aestimare iudex debet ex sua conscientia, nisi lex aliquid expresse statuatur de efficacia alicujus probationis." Cf. John R. KEATING, "The Province of Law and the Province of Forensic Psychiatry in Marriage Nullity Trials," in Studia Canonica, 4(1970), pp. 20-22.

evidence from their ears, or to strike inadmissible testimony from the record. There are also other factors, such as reasons for lying, and possibility of bribery or prejudice, in certain cultures or circumstances. As already seen, many of these unfortunate circumstances and conditions are not ordinarily present in North American ecclesiastical tribunals. The conclusion is that there is in North America, at least, less reason for restriction of evidence in marriage cases. The process is seldom "contentious," but rather a request of persons for a definition of their marital status. The inquiry for truth is unencumbered by any civil consequences. Therefore, there are less reasons for deception, and the motives are predominantly spiritual. Because the judges and advocates are usually in the pastoral service--and employment--of the diocese, there is less chance of bribery, undue influence, or prejudicial interests.

The North American context for Church courts not only argues for a freer evaluation of evidence by judges, it also affects the quality of the evidence itself. A number of rules of law meant to be conclusive, determinative and peremptory can often lead to the wrong conclusions.

The double oath, for example, is required for judicial testimony. Even stronger oaths, such as the decisory, can be used to supplement or strengthen testimony when witnesses are few, or credibility is more in doubt. This is in

the tradition of the old Germanic appeals to God to witness the truth. The oath is equally sacred in North America, as witnessed by its use in civil courts, and in the serious sanctions for perjury. Yet the fact of an oath is not, in itself, conclusive. Some fundamentalist Christian sects interpret James 5:13 literally: "Above all else, my brothers, you must not swear an oath . . ." And they quote the words of Jesus himself in Matthew 5:33: "You have heard the commandment imposed on your forefathers, 'Do not take a false oath' . . . What I tell you is: do not swear at all." For these people, their word is their pledge, and many of them are strong believers in God and very conscious that God will judge the truth of their words whether testifying in court or out of court. They will refuse to take a court oath, and may refuse to sign anything for a Catholic Church tribunal, but they are no less trustworthy for this. If, on the other hand, a person has no use for the Catholic Church, or for God, the threat of perjury is really no deterrent. What is often more critical to a judge's evaluation is the personal assessment of the auditor: e.g. was the party cooperative and apparently sincere? Was there any motive to lie or "embellish the truth" to hurt the plaintiff or to defend their relative (e.g. when they see the process as a "court" action to prove that the respondent had serious psychological or emotional problems)? Sometimes

the best "interrogation" that can be hoped for is not in a courtroom surrounded by priests, but rather engaging the respondent or witness in informal conversation as he weeds his vegetable garden! These are just a few instances where the presence or absence of an oath is not the decisive factor as to whether testimony is truthful or not--whether it is "judicial" or "extrajudicial."

C. "Judicial"

"Judicial" testimony must be given before the competent judge or his delegate. A tribunal may ask a parish priest, before a case is accepted, to interview a particular person in a preliminary investigation, much in the tradition of the "commissary" of the Austrian Instruction. But since the testimony is, perhaps, not given within the judicial "process," it is not strictly "judicial." However, "extrajudicial" evidence can be brought into the judicial sphere by confirmation in court under oath, or by other such types of discretionary acceptance by the judges. In fact, the extrajudicial statement can have more value in jurisprudence than the judicial, when it is given at a non-suspect time. When it is later mentioned or confirmed in court, it is valued more highly for having been said outside the judicial process, before there were any motives of seeking annulment, before there was clear knowledge of what constituted grounds,

and before the "distorting" context of an interrogation with pointed questions. A judge or psychiatrist will often give more value to an interview of the parties by Catholic Family Counselling, the family doctor or the parish priest while there was still sincere efforts at reconciliation, than a deposition given with full judicial formality after a bitterly contested civil divorce (e.g. asking each to describe the other party's character and personality). Again, these are only a few examples to demonstrate that the demarkation and weighing of "judicial" and "extrajudicial" is not always clear in practice, and needs the wise and equitable judge to decide what he will accept, and what value he will attribute to it.

A final consideration of concepts which are not as peremptory in the North American context concerns the litis contestatio. The contestation was a turning-point in classical Roman law, ending the determination of the law and the clarification of the issues, and beginning the factual evaluation before the judge. In canon law, it marks the end of the introductory stage, and the beginning of the probative stage. This "joinder of the issues" is seen as important because it defines the question, the grounds which must be answered in the final sentence as either established ("constat") with moral certitude, or not ("non constat"). Without these precise grounds, the defender of the bond is unable to draw

up his specific questionnaires. But where is the defender to obtain sufficient information to formulate his questions? The Rota has acknowledged that the petition is to serve as the basis for his questions:

For it is evident that the interrogatories to be drawn up for the trial ought to be made according to that which is presented in the introductory petition for the case.⁷³

However, the defender is not limited to the petition, but may use other materials prepared by an advocate, and can even seek further information:

The defender of the bond in marriage cases knows many things from the petition and from the points brought up by the advocate; but he is not prevented from seeking further information before he composes his questionnaires.⁷⁴

Doheny emphasizes that the defender "must be thoroughly conversant with all the details of the specific case under consideration before he can formulate pertinent questions."⁷⁵ The initiative for providing this information, in North America, often rests with the tribunal rather than with an advocate.

⁷³S.R.R. Dec., c. SEBASTIANELLI, May 10, 1916, 8(1916), p. 146, n. 10. "Etenim neminem latet interrogationes in iudicio instruendo fieri debere juxta ea quae exposita sunt in libello causae introductorio."

⁷⁴J. BISHOP, *op. cit.*, p. 44: "Vinculi defensor, in causis matrimonialibus, ex libello et ex articulis patronorum multa cognoscet; at non prohibetur ei ulteriores notitias quaerere antequam interrogatoria sua conficiat."

⁷⁵W. DOHENY, *op. cit.*, I, p. 312.

The important moment for the introductory period in North America has become not the contestation, but the acceptance of a petition. The new American norms and other practical procedures have rendered the contestation a mere formality and largely useless and irrelevant. Judges using the U.S. procedural Norms can now add new grounds after the contestation. The judge and the defender of the bond can formulate the issues by themselves, making sure that every respondent is contacted and given a fair hearing. Once a petition is accepted, every piece of evidence collected is, in a very real sense, judicial and probatory. This concept is not really foreign to accepted canonical definitions. J. Berger argues that the presentation of the petition in canon law is already a "judicial act."⁷⁶ In his view, "a judicial process in the strict sense begins only with the acceptance of the introductory bill of complaint."⁷⁷ Wernz-Vidal defines "judicial acts" as: "all acts by the parties and judgments which take place in the tribunal, ordered to the cognizance and definition of the controversy."⁷⁸ In these terms, it seems that a preliminary investigation would be "judicial" only

⁷⁶J. BERGER, op. cit., p. 44.

⁷⁷Ibid.

⁷⁸WERNZ-VIDAL, op. cit., Vol. 6, p. 173, n. 198.
 "Actus judiciales sunt omnes actus a partibus et judicia positi in tribunali in ordine ad controversiam cognoscendam et definiendam."

if it was carried out (or accepted into the process) after the formal acceptance of a petition, since it is only at this point that a court accepts jurisdiction, and is constituted as a tribunal.

An essential step in the introductory stage is the citation and answer of the respondent. The Code clearly intends that this is not to anticipate nor be the official judicial interrogatory, which is to be carried out by the judge, under oath, during the probative stage. Tribunal experience confirms that often, if a full questionnaire is filled out with the respondent (or any other witness) in a preliminary investigation, they will not cooperate a second time. This is precisely the reason given by Wanenmacher as to why the authors of the Code of Canon Law did not accept the preliminary investigation of the Austrian Instruction (§§140-142) into the canons. Speaking of the examination of the petition, Wanenmacher says that "especially and principally the judge must examine whether there is a prima facie foundation for the plaint or petition, and if the bill is found to be destitute of all foundation, he will reject it."⁷⁹ Then, speaking of this preliminary evaluation, and comparing it to the Austrian Instruction, Wanenmacher comments:

⁷⁹F. WANENMACHER, op. cit., p. 18.

This and the attempt to reconcile the parties and validate their marriage are the only preliminary inquests now directed for the judge. Under the pre-Code instructions there was an official preliminary inquest somewhat similar to that now prescribed for criminal cases (cc. 1939-1946), in which witnesses were summoned and parties sometimes underwent an extrajudicial physical inspection. Sometimes this was found to defeat its own purpose, for it led to the refusal of parties or witnesses to submit to re-examination when the trial proper was instituted. Hence no inquest, properly speaking, with questioning of parties or witnesses in judicial procedural form, is to be instituted. Any necessary investigation must be entirely informal and usually will have been already undertaken by the pastor or other prudent priest before the plaint or petition was sent to the curia.⁸⁰

This confirms the position that a formal judicial investigation, under oath, is to be avoided before the official process begins, since it would be a "trial before the trial," and would endanger or prejudice cooperation within the probative stage. The exceptions of canon 1730 have long been recognized. The explanation of Wanenmacher also supports the justification and benefits of the informal preliminary investigation as needed. Paradoxically, one of the needs of North America for a preliminary investigation involves the same reason that, in the opinion of Wanenmacher, the Code rejected it: namely, non-cooperation. In an environment where many respondents and witnesses are non-Catholic, or are hostile to the Church conducting a contentious-sounding process, there will often be no cooperation, or very limited cooperation. A respondent, for example, may not be "contu-

⁸⁰Ibid., p. 19.

macious" in the canonical sense of contempt of court, but he will be very often disinterested, if not actually hostile or bitter toward whatever the plaintiff may desire of him or her. Therefore the first contact with the respondent, required by the introductory process, may be the last and only contact. If a judge or auditor thinks this may be his only chance with a respondent or witness, surely this falls under the exception to obtain whatever information he can, even under oath.

The conclusions can be stated briefly. Ecclesial judges already have the power, and sometimes the responsibility to make an informal preliminary investigation. No new legislation is necessary, or seems to be desirable for the present practice. The exceptional power to order a judicial interrogation of a particular person is provided for by canon 1730 and Art. 68 §2 of Provida Mater, and is broad enough (ob aliam justam causam). Judges also possess a wide discretionary power as to what information they will admit into the judicial acts, and what weight they will give it. It has been demonstrated how many factors enter this evaluation, including those of a specifically North American context. The value of oaths, what non-suspect testimony means, and the non-importance of the litis contestatio can alter this evaluation. Also, many judges have unduly limited the concept of "proofs" (probata) to judicial testimony only,

unnecessary restricting the wide range of factors that the Code already asks the judge to take into consideration as proofs.

Another concrete conclusion is that most of the practices of North American tribunals described in this thesis are not only allowable in law, but commendable according to good jurisprudence. A possible exception is the practice of conducting a complete judicial investigation, under oath, before a petition is ever accepted. In the tradition of canon, civil and common law, this is not acceptable in a formal judicial procedure. It is no longer the "canonical process" in force in the Code. Perhaps it would be more summary or administrative, and perhaps it would be better.⁸¹ But it would seem to change the procedure beyond what is allowed by present procedural laws.⁸²

⁸¹Many experienced canonists have recommended a drastic and fundamental change in the Church's procedure for marriage annulments. These pleas for reform often urge that the judicial trial be replaced with a process more in the line of the Clementine Saepe and equitable procedures, keeping the essential protections of rights and the Church community's concern for the stability of marriage, but eliminating unnecessary formalities. Although beyond the scope of this study, the author sees the need for a thesis on the possibilities of a more administrative and equitable process for marriage cases, for which the civil "administrative tribunals" may provide some models.

⁸²Procedural laws are not within the dispensing power of bishops. Cf. Normae Episcopis impertiuntur ad facultatem dispensandi spectantes [De Episcoporum muneribus], PAUL VI, June 15, 1966, in A.A.S., 58(1966), p. 469: "Leges ad processus spectantes . . . non sunt objectum facultatis, de qua agitur in Decreto Christus Dominus, n. 8, b."

Other practices must be judged in the light of the existing laws, prudent and time-tested canonical interpretation, and pastoral necessity. Correct and creative procedure will make every use, within the law, of insights gained from the secular law of a particular culture. Discovery and pre-trial conferences, for example, have been seen as important innovative procedures in the search for truth. When such practices and rationale can be legitimately incorporated into Church procedures, this should be done, always keeping in mind Pope Paul's admonitions about the difference in the nature and purposes of the Church.⁸³ For, "diocesan or national custom is not barred as a director in proceeding, so long as it remains within the purview of the Canons."⁸⁴

Another consideration is the spirit of the law, as well as the letter. I. Gordon admits this principle when he comments:

There are, nevertheless, tribunals which, for the sake of saving time, examine some witnesses before the contesting of the case, which is certainly against the letter of the canon [1730],

⁸³PAUL VI, Address to the S.R. Rota, February 8, 1973, in *A.A.S.*, 65(1973), pp. 95-103. Cf. p. 96: "natura stessa del diritto della Chiesa;" and "Così il diritto canonico è per la sua natura pastorale . . ."

⁸⁴F. WANENMACHER, *op. cit.*, p. 7.

but perhaps not against its spirit if the mistakes of this type of examination are avoided.⁸⁵

Custom is also recognized as an interpreter of laws, but customs outside (extra legem), and especially against the law need more time and strength in order to prevail. It seems that an extrajudicial, informal preliminary investigation for marriage cases is neither forbidden nor covered by present laws, and so falls within the category of customs outside the law (in no way implying contradiction). It is interesting, in this light, to look at the Spanish tribunals, in a context of serious civil consequences to any petition for ecclesiastical separation or divorce. In 1917 Spain faced a Code that may have seemed to demand the admission of almost any petition. T. Muniz reports their jurisprudence:

Our tribunals considered the practice of having an investigation before admitting the written petition in marriage cases as very valuable . . .

Without doubt, neither by the provisions of the Code, nor for any other right of the common law, is the judge obliged to practice the preliminary investigation before the admission of the petitions for divorce; but neither is it prohibited that he inform himself and verify things by investigation; always that it be not burdensome for the plaintiff, nor exceed the boundaries within which he has to admit or reject the petition.

The argument invoked in favor of the preliminary investigation, taken from the constant practice of

⁸⁵I. GORDON, De judiciis in genere, op. cit., II, pp. 17, 18: "Sunt tamen Tribunalia quae, temporis lucrandi gratia, excutiunt aliquot testes ante litis contestationem, quod certe est contra litteram canonis, sed fortasse non est contra ejus spiritum si ejusmodi excutionis frustraneitas vitetur."

the Spanish tribunals since the promulgation of the Code seems very weak to us, but apart from the fact that this custom has not become immemorial nor of a hundred years duration, it necessitates the declaration of the Ordinary to obey it, according to the prescriptions of canon five. One cannot deny, nevertheless, that the ecclesiastical judges in Spain have pondered seriously before admitting a petition for divorce, because the admission creates in the civil forum a right of status, generally onerous for the defendant, and at times lasts for many years and causes him to carry irreparable prejudices. It is to be recommended to all that they be prudent and cautious in admitting such petitions.⁸⁶

Muniz approaches the problem from the notion of custom, and has no problem justifying a preliminary investigation by a good pastoral sensitivity in an area not covered by the law.

North American tribunals should also use legitimate types of preliminary investigations according to pastoral necessity, and evaluate them according to conditions in their own countries. Correspondingly, there seems no good reason why they cannot, within their legitimate judges' discretion, receive this information into the acts, and endow much of it with a probative value as a judicial proof.

IV. Other Pastoral Benefits

The word "pastoral" is a very popular word since the Second Vatican Council, but its exact meaning is not always

⁸⁶Tomás MUNIZ, Procedimientos eclesiásticos, Sevilla, Sobrino de Izquierdo, [1925-1926] 2nd, ed., Vol. 3, pp. 93, 94.

clear. Pius XII set the proper tone when he placed the matrimonial process within its proper context of the special nature and purpose of the Church, whose goal is the pastoral well-being of persons--the "salus animarum:"

But the jurist who, as such, is concerned solely with the bare law and inflexible justice is wont to appear almost instinctively alien to the ideas and the intents of the care of souls, and tends toward a definite cleavage between the two tribunals: the forum of conscience and the forum of the external juridical-social entity. This tendency toward a definite separation of the two fields is legitimate up to a certain point, in so far as the pastoral charge is not properly and directly inherent in the office of the judge and his collaborators in the judicial process.

It would be a tragic error, however, to affirm that they are not, in the last and definite instance, in the service of souls, for this would place them in ecclesiastical judgment outside of the divinely instituted purpose and unity of action of the Church.⁸⁷

The ministry of the ecclesiastical judge, says Pope Paul, is pastoral.⁸⁸ The pastoral role that can also be part of a preliminary investigation needs to be clarified.

On September 23, 1938, the Apostolic Delegate in Washington, D.C., addressed a letter to the Bishops of the

⁸⁷PIUS XII, Allocution to the Rota, October 2, 1944, loc. cit., as transl. in DOHENY, op. cit., I, p. 1105.

⁸⁸PAUL VI, Allocution to S.R. Rota, February 8, 1973, in A.A.S., 65(1973), p. 101: "Questo ministero del giudice ecclesiastico è pastorale . . ." Also see the M.P., Causae Matrimoniales, March 28, 1971, "The ministry of ecclesiastical judges shows forth clearly--though in its own special way--the pastoral charity of the Church. . .," transl. from English edition of L'Osservatore Romano, June 24, 1971.

United States. The then Archbishop Amleto G. Cicognani said in part:

It is only right that the tribunals examine with benevolent kindness the cases presented by the laity and assist them in their difficulties of married life. But it would be a mistake to consider the ecclesiastical tribunal as a kind of clinic for unhappy marriages where the judges are bound to adjust unfortunate situations at all costs, or at least with exaggerated leniency. Such an erroneous attitude would wound the sacred bond of marriage, indissoluble by divine origin, and harm the very solidity of the family and society.⁸⁹

The tribunal personnel must be genuinely concerned about the total person in his "difficulties of married life," but also realize the limits of their time and competency. However, there is a unique opportunity for an interviewer to bring in this pastoral dimension, especially when it is one's own parish priest or other pastoral minister. This role will be considered under several aspects.

A. Reconciliation

Reconciliation is a rare possibility when a case has reached a tribunal in North America. Civil divorce has usually been obtained, and civil remarriage is common. Yet in a very small percentage of cases, which must not be neglected, reconciliation may be possible and advisable. This is all the more true when an apparent interview for an annulment proves rather to be a recently separated party who is merely asking

⁸⁹Reported in the Canon Law Digest, Vol. 2, p. 532.

about his status in the Church. The 1923 Instruction for non-consummation petitions included, in Appendix II, a sample letter from a bishop to the local pastor, or to another person more suitable (even a layman), encouraging them to make every effort to reconcile a couple before submitting a petition for dispensation. The bishop or judge himself might make this effort.⁹⁰

Similarly, in civil law, e.g., in the federal Canadian divorce statutes (1968), the attorney's first response to a person requesting divorce is to make a judgment about the possibility of reconciliation, and make the proper referral. On the other hand, an American legal expert makes the point that a lawyer himself is not always the best counsellor:

When an individual comes to them initially, the attorney may have a glimmer of a thought, as unsophisticated as he may be with interpersonal relationships in the marriage, that maybe they ought to have counseling. But he may make a horrendous mistake by starting to process the papers for a divorce before the counseling. Or he may make an even worse mistake by trying to counsel the couple himself. Divorce lawyers and lawyers by and large are not competent counselors.⁹¹

⁹⁰See A.A.S., 15(1923), p. 393.

⁹¹Harvey L. ZUCKMAN, member of a "Panel Discussion" at Catholic University of America, in The Jurist, 35 (1975), p. 109. A positive approach to the lawyer's reconciliation role is taken by Nester C. KOHUT, Therapeutic Family Law, A Complete Guide to Marital Reconciliation, 2nd ed., Chicago, Ill., Family Law Publication, 1968, 436p.

He adds that a lawyer ought to be very familiar with the local counselling services. A tribunal must also learn to work closely with other diocesan and social agencies. When an interviewer is the parish priest or a diocesan family counselor, a reconciliation interview often becomes a key document in a preliminary investigation, especially to the degree that it was done at a non-suspect time.

B. Conjugal Counselling After Divorce

Pastoral counselling is helpful, and sometimes essential to help separated spouses through the severe trauma of a marriage that has failed. When a marriage is irretrievably broken, and separation and civil divorce have taken place, a tribunal must understand this condition. The tribunal representative is not the judge of guilt, but of validity. A party often needs help in becoming reconciled with himself, at a time which a study has described as more traumatic than the period of grief surrounding the death of a close family member.⁹² Any interviewer needs to be sensitive to this

⁹²See Paul NOWACK, "Till Divorce Do Us Part," in Maclean's, Canada's Newsmagazine, 89(1976), [April 19], p. 26: "According to a Social Readjustment Rating Scale published by the Journal of Psychosomatic Research, spouses involved in divorce proceedings endure the second highest stress rate in modern society, even greater than being sentenced to a jail term, and far greater than the shock of the death of a close family member." Also see James T. McHUGH, "No-Fault Divorce," in The Jurist, 35(1975), pp 20, 21, where he discusses Paul Bohannon's Six Stations of Divorce.

grief. It is also a learning time, and can be a period of growth.

This therapeutic and learning aspect for the parties is expressed by a psychiatric consultant to the Tribunal of the Diocese of Brooklyn:

In fact, the experience in the first marriage is often a significant learning experience and the therapeutic effectiveness of the Tribunal procedure plays a significant role in choosing a better suited mate and entering a more respectful, loving, collaborative marriage.⁹³

An important learning experience may take place as a party writes out his own case history, or as he is interviewed with perceptive questions. In reviewing his past experience with marriage, he is also deciding his future. Even confrontation, understood correctly,⁹⁴ can be a therapeutic activity. The parties must often be led, never forced, to admit their own problems or faults. These revelations of self can influence their future decision on whether or not to remarry. They will also provide the expert and the judge with valuable criteria for evaluating the credibility and the

⁹³Leon SALZMAN, M.D., loc. cit., p. 174. Also cf. Mel KRANTZLER, Creative Divorce: A New Opportunity for Personal Growth, New York, M. Evans, distributed by Lippincott, Philadelphia, 1973, especially chapters two ("Coming to Terms with your Past Marriage"), and three ("The Healing Process of Mourning").

⁹⁴See James L. HAWKINS, "Counselor Involvement in Marriage and Family Counselling," in Journal of Marriage and Family Counselling, 2(1976), pp. 39-41.

consensual capacity of the person. Psychic incapacity cases often involve psychological or emotional problems in both parties.

C. Pastoral Approach

The pastoral approach for which an interviewer ought to strive, can perhaps be illustrated better from a negative perspective. At times, unnecessarily offensive or indiscreet questions and attitudes of interviewers have been a factor responsible for making some parties, witnesses and even parish priests reject the whole tribunal process. An example is the Jewish parents who are asked repeatedly whether their child was ever baptized, and why he was never baptized! Even if the Church retains its formal trial process for marriage cases, is it not possible to eliminate many of the intimidating court terms, almost making a person feel they are on the witness stand for a criminal offense?⁹⁵ "Contentious" terms are hardly welcomed or conducive to the truth-seeking process. Many North American tribunals have improved their verbal and psychological image in this regard, and have met with exceptional cooperation. This often involves more "informality" in preliminary investigations, without implying any decrease in the seriousness of purpose. This is the main

⁹⁵See G. LESAGE, "Pour une rénovation de la procédure matrimoniale," loc. cit., pp. 270, 271.

reason why various dispensation procedures were studied in this thesis. Although annulment and dispensation involve a different type of decision, the process is no less pastoral, no less a search for truth in either case.

D. Total Pastoral Care

A tribunal decision itself, whether affirmative or negative, is "pastoral" in a true sense, because it declares the marital status of persons, so that the parties can direct their lives accordingly. However, there are also other pastoral concerns and considerations for the total spiritual care of people. One of these areas is often called "pastoral solutions."

Although preliminary investigations do not, as part of the tribunal process, directly concern "pastoral solutions," in reality, there may be a close connection. When A. Brossard gives the scope of the first visit of a plaintiff to an advocate, he mentions four purposes: 1) the correction of false opinions and a clarification of the party's status in the Church; 2) the possibility of a declaration of nullity; 3) referral to professional help (e.g. psychological, legal, religious); 4) preparation of pastoral solutions.⁹⁶ The many meanings of "pastoral solutions" cannot be explained in

⁹⁶A. BROSSARD, "De avvocato ecclesiastico," loc. cit., p. 4.

a few sentences. The bibliography is already immense and growing daily, with the Bishops' Conferences of both the United States and Canada deeply concerned about the problem.⁹⁷ For purposes of this thesis, it need only be shown that the tribunal is not the Church's only means of reconciling persons in second marriages, and receiving them back to the Eucharist. But it will be presumed here, that the tribunal is ordinarily to be the "first resort" for reconciliation. In plain words, this means that a parish priest, advocate, etc., will first direct a plaintiff to a competent tribunal to see whether any external forum solution is possible (annulment, dispensation, etc.). When a tribunal cannot resolve the problem, the pastoral role of the Church's representatives is not necessarily finished, and the advice given will often be based on the type of information found in a preliminary investigation. One such area of consultation is often referred to as "internal forum solutions."

On April 11, 1973, the Sacred Congregation for the Doctrine of the Faith issued a letter urging teachers of

⁹⁷Part of a doctoral dissertation was devoted to this study in recent American periodicals: Lawrence E. BURNS, The Indissolubility of Christian Marriage, Recent American Catholic Thought on Divorce and Remarriage, Buffalo, N.Y., [for P.U.L., Academia Alfonsiana], 1974. See Chapter 6, "Pastoral Considerations in the United States," pp. 83-118. Also, the Bishops' Conferences of both France and Germany have produced confidential reports on pastoral solutions, and the Bishops of England and Wales have announced that such a study is to be made.

religion and judicial vicars of tribunals to faithfully uphold the Church's teaching on the indissolubility of marriage.

The letter also included this paragraph:

As to the matter of admission to the Sacraments, Ordinaries of places should wish to urge, on one hand, the observance of current Church discipline, but on the other hand, to make sure that pastors of souls seek out with special care those also who are living in irregular unions by using, in the solution of such cases besides other right means, the approved practice of the Church in the internal forum.⁹⁸

There are many interpretations as to what constitutes the "Church's approved practice in the internal forum,"⁹⁹ but the important fact here is that there are internal forum solutions, which could include both the sacramental and the non-sacramental forum. In either case, a prudent decision or counsel would seem to demand a sufficient grasp of the whole case history, which is more likely to be adequate in the non-sacramental forum, where the party could be guided to an informed decision of conscience. Much of this area is guided

⁹⁸Sacra Congregatio Pro Doctrina Fidei, Prot. No. 1284/66; 139/69: "Admissionem ad Sacramenta quod attinet velint Ordinarii loci ex una parte observantiam urgere vigentis Ecclesiae disciplinae; ex alia parte autem curare ut animarum pastores peculiari sollicitudine prosequantur eos etiam qui in unione irregulari vivunt adhibendo in solutione talium casuum, praeter alia recta media probatam Ecclesiae praxim in foro interno."

⁹⁹For one private interpretation, see John T. FINNEGAN, in Canon Law Society of America, Proceedings of the Thirty-Fifth Annual Convention, Washington, D.C., October 15-18, 1973, pp. 79, 80.

by principles of moral theology.¹⁰⁰ The possibility of such decisions being made in a forum other than a local tribunal because, perhaps, moral certitude of nullity could not be established with canonical proofs, is recognized in the Sacred Penitentiary. Since these are usually internal forum solutions only, they are seldom published, even anonymously.¹⁰¹ Again, the point here is not a complete discussion of these other means, but simply that the information gathered, and relationship formed with a plaintiff in a preliminary investigation need not be limited to preparation for a formal annulment process. This would seem to imply a definite pastoral competence and interest in the person doing the preliminary interview. If this person be the parish priest, pastoral

¹⁰⁰ However, the Canon Law Society of America has examined the canonical ramifications. At its annual Convention in 1974, a resolution was adopted that: "the CLSA prepare a commentary on the letter of the Congregation for the Doctrine of the Faith of April 11, 1973, so that pastors can use it to reconcile persons in irregular marriages," and a report on this subject was presented to the 1975 annual Convention by Eugene FITZSIMMONS. Cf. Canon Law Society of America, Proceedings of The Thirty-Seventh Annual Convention, San Diego, California, October 6-9, 1975, CLSA, 1976, p. 218. See also "Report of Committee on Alternatives to Tribunal Procedures," ibid., pp. 162-178; and Richard A. McCORMICK, S.J., "Indissolubility and the Right to the Eucharist-- Separate Issues or One?" ibid., pp. 26-37.

¹⁰¹ One such decision of the S. Penitentiary is reported in the Canon Law Digest, Vol. 5, p. 712. A declaration of nullity was granted implicitly along with a sanation of the civil marriage on May 22, 1950. Although an invalidating condition had been placed, the case went for twenty-three years in a tribunal since it was impossible to prove in the external forum.

sister, brother or Catholic lay counsellor, man or woman, then he or she would seem to be in the best position to follow through with the total pastoral care necessary. Even if the interviewer is more of a "legal" person such as the judge or tribunal advocate, the obligation is still present to be "pastoral"--in one's attitude, in a few simple words of understanding, of encouragement, of referral, of prayer--to guide the plaintiff to the right choice, beyond the decision of the tribunal "case." Each of these pastoral persons represents the ecclesial community, affirming the Christian belief in indissoluble covenant marriage, but also incarnating the compassion and understanding of the loving Christ toward the victims of broken marriages.

The dangers of a purely legal approach seem obvious. A plaintiff might mail a formally correct petition to some distant tribunal, even with competent legal aid, and receive back a negative letter, decree of rejection, or sentence, never having spoken to any Church "minister" about the real problem. Rather than needed support and wise advice (even to consider not remarrying) from the Christian community, there are only terms, implicit and explicit, of rejection, exclusion and shame. Even if a person does not remarry, or is apparently in "good standing" in God's sight according to the best-founded moral judgment, there are often misunderstandings and misinterpretations, e.g. that one is excommuni-

cated, is not permitted to enter a church, etc. In a preliminary investigation, the interviewer, whether he be a tribunal or parish representative, may be the first and last Church person that a plaintiff speaks to on this intimate level. Unless the investigation is christian, therapeutic and pastoral as well as canonically precise and procedurally correct, the party may not be ministered to properly, even if the tribunal decision is favorable. The procedural medium must be the pastoral message.¹⁰²

¹⁰²See John T. FINNEGAN, "Spiritual Direction for the Catholic Divorced and Remarried," in Canon Law Society of America, Proceedings of the Thirty-Fifth Annual Convention, Washington, D.C., October 15-18, 1973, pp. 70-77.

SUMMARY

This summary can do no more than trace the broad lines of the picture of preliminary investigations that emerges from the history of canon and civil law.

Roman law is no longer normative in any way for interpreting Church law, but it has provided many reasons and explanations of the formal procedure we now use. The legal (in jure) investigation before the magistrate revealed the necessity of some facts as the foundation of the law. The magistrate, it seems, could help the plaintiff, but without an elementary foundation for a case, would have to dismiss the action himself. The important event of litis contestatio meant that the issue was clear, the law could be formulated, the parties were serious and willing to stake their money on the outcome, and witnesses were there who could testify, at the very least, that the process had been legally initiated.

The development of the formal canonical process for the Church followed, in large measure, the extraordinary process of a later period of Roman law, in which the in jure stage was not separate from the stage before the judge, when the merits of the facts and proofs were evaluated. The procedure adopted many safeguards for the truly contentious cases, and the introductory stage from petition to litis contestatio became a defining of the adversary positions rather than a judicial evaluation of the legal foundation.

Clement V recognized that this process was not the most fitting for some types of cases, including marriage nullity, and officially introduced his summary process which would allow the plaintiff a clearer exposition of the story orally, in person. This summary process also eliminated many of the unnecessary formalities such as litis contestatio that sometimes added only to the length and complication of a case.

More administrative and "gracious" decisions such as dissolutions of non-consummated marriages made evident the bipolarity of process in the Church: making decisions that were sometimes of judgment, sometimes of favor. Some marriage cases dealt with guilt and civil effects such as adultery in separation cases. Others were strictly status questions, whether involving a right in justice, or petitioning the Holy Father for a dispensation. Preliminary investigations developed for the dispensation procedure in order to inform the Sacred Congregations that a petition was well-founded and worthy of consideration. But formal judicial process seemed more strict, to safeguard rights, prevent prejudice, and monitor the tribunal officials lest annulments be granted unjustifiably and the indissolubility of marriage weakened.

This safeguarding of a tribunal from unjustified cases, and giving justice to those that were well-founded, were both accomplished in XIX century Austria by the authorization of a preliminary investigation. Drawn up by Cardinal Rauscher

of Vienna, but approved by the Apostolic See, in ordinary form, for all of the Austrian Empire, it provided a canonically determined method of preliminary investigation. The commissary, with his notary and the defender, would interrogate the parties (with counsel able to be present), and the chief witnesses. This investigation, transmitted to the tribunal in writing, established a clear foundation and direction either toward a well-considered rejection, or a clearly-defined acceptance and process. Apparently successful in Austria, it was copied at least in France as witnessed by Bassibey, and in the United States, as recommended by the Third Plenary Council of Baltimore.

Why was the preliminary investigation of the Austrian Instruction not incorporated into the Code or Provida Mater? Was it perhaps because of the quasi-judicial yet informal aspect, since statements were received before a commissary, defender of the bond and notary, although not under oath? Or was it, as Wanenmacher suggests, because the witnesses and respondent were often not willing to submit to a double interrogation? There seems no definitive answer, but canonical practice did preserve various types of informal preliminary evaluations that did not seem to violate the laws of the Code and other instructions. Since the Code provided only a general procedure for all types of contentious cases, previous law, tribunal experience, and eventually Provida

Mater had to fill in some of the details to make the introductory process more suited to marriage cases. Since Provida Mater did not supplant or change the Code, these principles had been implicit and somewhat hidden, for example, in c. 1915 where temerarious requests were excluded at least in cases of free advocacy. When this evaluative principle was incorporated in Art. 64 of Provida Mater, free advocacy was given a new and seemingly stronger screen: fumus boni juris. Yet canonists like Mazzacane could easily extend this evaluative criterion to all cases, which was only just, unless there were to be a double standard for rich and poor. Tribunal practice confirmed this theory in countries like Spain, where Muniz attests to a preliminary evaluative investigation ever since the Code.

Other procedures in the Code and instructions from the Congregations used preliminary investigations not only for the more administrative and summary cases, but also for the judicial. The Propagation of the Faith in 1884 had approved for the United States, in criminal and disciplinary cases, both an extrajudicial and a judicial preliminary inquiry before the formal canonical process began. The Code reduced this to a single investigation which seems closer to the judicial form. Another area where a preliminary investigation often preceded a formal annulment process was for petitions attacking the validity of sacred orders. This

was true in all cases until 1971, and would still be the case today if a priest chose the judicial process to attack validity, rather than the much simplified procedure for dispensation. Non-consummation petitions also provide clear parallels for an informal investigation before the process, and the analogies can be most apropos in view of the unity of object of all types of process: pro rei veritate--to attain the truth of the matter.

Since the Church uses a formal judicial procedure for marriage cases, a comparison was made in the parallel process of civil procedures. The results, both in the civil law and common law tradition, reveal a similar inspiration to try to keep the testimonies and proofs within the established juridical safeguards of a trial. They allow witnesses to be officially interrogated before the trial only as an exception, for good reasons, and under the direction of the court. This substantiates and shows canon 1730 to be within the best traditions of jurisprudence for formal, contentious procedure. But within the common law tradition, especially in modern American procedure, there is great latitude given for informal preliminary investigations as a discovery device. Whereas in the civil law tradition, there is less investigation of the facts, and practically no contact with witnesses before the process, common law lawyers customarily make a thorough investigation before the trial. The main reasons are summed

up in the three words: immediacy, orality and concentration. Since the trial-event is so critical and concentrated in the common law tradition, it takes diligent and detailed preparation. Modern pre-trial discovery and pre-trial hearings are bold innovations, risking prejudice or possibly giving too much helpful information to the adversary, but legislators are willing to run the risk, for the higher goal of the full truth and adequate preparation by both sides. The comparison succeeds best, perhaps, by contrast with the ecclesial marriage process, which is seldom contentious, and is a fortiori concerned with the search for truth.

The present practices of North American tribunals show preliminary investigations to be mainly informal information-gathering by the tribunal itself. Its purposes are to obtain sufficient information for the preliminary evaluation of a petition, and to facilitate the process and proofs if a case is accepted. The means used generally consist of a questionnaire filled out by a plaintiff, and/or an interview with a representative of the tribunal; some contact with the respondent, also obtaining some statement, depending on his cooperation; and perhaps some brief contacts with witnesses, to ascertain whether they can be helpful to the case, and whether they are willing and able to testify. All of this background information (including documents), especially the case history, is used in the evaluation of a

petition, and is vital for psychological incapacity cases. The judges and the experts often find this essential to making a sufficiently-informed evaluation.

The situation in North America affects these preliminary investigations favorably in a number of ways, giving rise to presuppositions or presumptions that make the search for truth easier. The fact that Church decrees generally have no civil effects almost always removes the contentious aspect. Parties seeking mainly spiritual benefits are much more likely to be credible witnesses. A very high percentage of psychological grounds has lessened the number of "confessions" of wrong intentions. Although invalidating intentions still exist in significant numbers, statements of the parties are more likely to reveal incapacities and problems, sometimes on the part of both. Since the grounds are not always juridically or psychologically simple, the concept of "non-suspect time" must be broadened, as it is not as simple for parties to fabricate or deceive the court or experts.

The dangers in various types of preliminary investigations have been pointed out by Rotal advocates: Villegiante, Della Rocca and Avallone. Their legitimate concern is for the rights of the plaintiff--to present his case completely and accurately, with counsel, and not to have his petition rejected except for reasons which clearly come under

the strict interpretation of the law (odiosa sunt restringenda). They object to practices such as interviews too brief to be adequate; summaries written from memory without the approval of the plaintiff; negative informal evaluations, often inaccurate, that prejudice all future hearings; informal rejection by one person, whether notary or officialis; and neglecting to mention rights of formal presentation or appeal which the law provides. Although these objections may sometimes be valid, there is another side to the picture. A well-conducted preliminary investigation may do more to safe-guard the rights of a plaintiff, especially where there are no professional advocates available. It may provide a more adequate interview, summaries written and spoken by the plaintiff himself, and evaluations made with the help and agreement of the plaintiff. When all of this, combined with documents and even probing contacts with witnesses and experts fails to produce any semblance of foundation or grounds, a rejection is more easily seen as just and inevitable. Contrary to what some seem to imply, there is valid law (P.M., Art. 64) and jurisprudence for rejecting petitions on substantial defects, i.e. no foundation in law or fact, no positive doubt of validity, no fumus boni juris. If this is true for requests for gratuitous advocacy, it must be true for all cases.

Justified rejection of petitions is one purpose of preliminary investigations. Careful jurisprudence does not make a premature judgment on the merits of the case or the proofs, but rather an evaluation of its foundation. This preliminary examination is of concrete facts (presumably true with allowance for exaggeration and emotion), and of concrete application to law and jurisprudence (legitimate grounds). The examination of the petition and other information also includes possibilities and indications of available proofs.

The more important purpose, however, is not the rejection, but the acceptance of worthy petitions, especially where more information is required to discover any grounds (e.g. psychological types of cases). A good preliminary investigation can guide their course to a more just and equitable outcome. It can help supplement the lack of availability or training of advocates. Since it is often carried out by a more impartial representative of the tribunal, some of the hazards of professional "partisan" advocacy, e.g. a "one-sided" investigation, can be avoided.

Judges ought to be given great latitude of discretion in evaluating the results of preliminary investigations. In North America, this has often led to receiving some or all of these results into the acts of a case, giving it the force of evidence (probata) according to the various principles and scales set up by jurisprudence, and according to the cir-

cumstances of the culture and of the case. Canon 1730 on the preservation of evidence should also be used, within legal limits, to obtain judicial testimony where the judge fears that it may be lost or unavailable later. In the free evaluation of evidence, the judges should make full use of existing recognized means such as presumptions and oaths in Title X of Book IV of the Code. Likewise, the particular context of North America is certainly to be considered.

"Pastoral" is not only a popular, but also an accurate word to describe the overall purpose of marriage procedure: the salus animarum. Although preliminary investigations are ordered mainly to a legal evaluation of marriage, a pastoral approach is essential to all these persons, some of whom will obtain a favorable decision from a tribunal, many of whom will not. Pastoral counselling is to be rarely done by a tribunal representative. However, an investigation ought to be pastorally considerate as well as juridically adequate. The method itself can be therapeutically helpful.

The total pastoral care of the victim of a broken marriage goes beyond the limits of a tribunal, and must be a cooperative effort by many representatives of the Christian community on a parish and diocesan level. When no tribunal solution is possible, this does not always mean that there is no other pastoral solution. The interviewer in a preliminary investigation may be in the best position to comprehend the

whole story of a marriage. The results of a preliminary investigation would certainly be most helpful to any pastoral person who ministers to the parties.

CONCLUSIONS

1. The extrajudicial preliminary investigation is nowhere forbidden in Church law.
2. Even the Sacred Roman Rota has used the results of preliminary investigations in arriving at decisions.
3. There is canonical precedent for a preliminary investigation in the approved practice of many tribunals under the pre-Code Austrian Instruction.
4. A caution must be added if the inquiry becomes judicial.
5. Although the preliminary investigation of the Austrian Instruction contains quasi-judicial elements, the tradition of marriage nullity trials in the Church, from the Decretals of Gregory IX until the Instruction Provida Mater, forbids judicial interrogations before the litis contestatio.
6. Some exceptions which allow witnesses to be interviewed under oath before the probative period, are consistently accepted in those same sources (see canon 1730); and the same principle is, in general, operable in secular laws.
7. No legislation is necessary to authorize a judge to conduct an extrajudicial investigation. This practice is included in his judicial discretion to obtain all necessary information to make a preliminary evaluation on the acceptance or rejection of a petition.
8. A preliminary investigation may perhaps be seen as a modern-day application of the litis contestatio, where the grounds of nullity are clarified, possible witnesses and other proofs are determined in general, and the course of the judicial investigation is charted.
9. When judges have sufficient information to see a solid foundation for a case, they should formally accept the petition, and begin the probative stage with as little delay as possible.
10. When a case is obscure, difficult or seemingly non-existent, judges should make every effort to investigate further, if there is any reasonable chance that the marriage is null, and that sufficient evidence may be discovered for moral certitude.

11. For this last purpose especially, a preliminary investigation should be positively recommended, if not on the level of the general law of the Church, at least by the North American bishops. For, the common law system of trials approves such instruments of justice and truth, and the ecclesiastical tribunals of North America have been profitably and pastorally using these means of discovering truth, and helping more people.

12. If the Church should see fit to introduce an alternative to the formal judicial trial for marriage cases, more in the tradition of the Clementine Saepe, or in the more administrative mode of the priesthood dispensation, a preliminary investigation would be indispensable and eminently suited to this more-summary search for truth. Its use could also continue to make possible, when necessary, the formal judicial trial, when demanded by a party, by circumstances, or ex conscientia by the defender of the bond.

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