

THE CELEBRATION OF MARRIAGE IN CANADA

A Comparative Study

of Civil and Canon Law outside of the Province of Quebec

by

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F O R E W O R D

The purpose of this dissertation is to make a comparative study of the civil legislation of the provinces and the territories of Canada and the ecclesiastical legislation of the Code of Canon Law on the celebration of marriage. This study does not include the civil province of Quebec because a comparative study of the civil code of that province and the Church Law on the form of marriage has already been made in a thesis entitled La Form du Mariage dans la province de Quebec by Rev. Paul-Emile Giroux, J.C.D., University of Ottawa, 1950. Quebec is the only province that has a civil code, and therefore a special treatise on the form of marriage in that province was advisable. The marriage legislation is quite uniform in the other provinces and the territories of Canada, but there are minor differences which will later be pointed out in this study.

Not all the prescriptions of the civil law or of Canon Law which concern matrimony will be treated here, but only those will be included which concern the celebration of marriage in a special way. Therefore, the chief points to be considered are the persons authorized to perform the marriage ceremony, the preliminaries required before the celebration of the marriage, the juridical form of marriage, the registration of marriages, and the penalties for failure to observe the marriage laws. It includes all those elements which are within the competence of the provincial legislatures to regulate.

Such questions as the mutual rights of husband and wife, the possession of property, and other civil effects will not be included in this study.

Part I of this dissertation deals with the historical development of the marriage legislation in Canada. A chapter is devoted to the marriage law of England because of its relation to the marriage law of Canada. The following chapter traces the main points of the ecclesiastical law on the celebration of marriage in force in Canada before the promulgation of the Code of Canon Law. The fourth chapter gives a brief but fairly complete account of the development of the marriage legislation in each of the provinces and the territories. Part II of the dissertation is devoted to an explanation of the present civil law of the provinces and the territories on the celebration of marriage. Each chapter in this part contains a summary of the ecclesiastical law on the matter and a discussion of the principal differences and conflicts between the civil and the Canon Law.

Frequent references will be made to judicial decisions of the civil courts and to the Statutes of the various provinces and the Ordinances of the territories. Special methods of making citations of such sources have become generally accepted.

Judicial decisions of the civil courts are usually cited in the following manner: the names of the litigant parties are first mentioned, then the volume, the name of the reports, and

the page of the volume in which the case is to be found, e.g., Doyle v. Deady, 57 D.L.R. 44. If the reports are not published in continuously numbered volumes, the year is first given, then the number of the volume of the reports of that year, the name of the reports, and the page, e.g., Swift v. Swift, (1920) 3 W.W.R. 874. References are also often made to other collections or reports in which the case may be found, e.g., Wylie (Patton) v. Patton, (1930) 1 W.W.R. 216, 24 Sask. L.R. 285, (1930) 1 D.L.R. 747.

An Act of the Statutes of Great Britain is usually cited by making reference to the short title of the Act or to the regnal year in which the Act was passed, and the chapter and section of any special enactment may also be added, e.g., 10 George VI, c. 29, s. 4.

An Act of the Statutes of Canada or of the individual provinces is usually cited by making reference to its short title or to the year of our Lord in which it was passed, and the chapter and section of any special enactment may also be added, e.g., Statutes of Canada, 1950, c. 1, s. 25; Statutes of Ontario, 1950, c. 42, s. 3 which is usually further abbreviated as S.O., 1950, c. 42, s. 3.

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ABBREVIATIONS

Canonical sources

A.A.S.	-Acta Apostolicae Sedis.
C.J.C.	-Codex Juris Canonici.
Fontes	-Codicis Juris Canonici Fontes

Reports of decisions of civil courts

A.C.	-Appeal Cases before the House of Lords.
Alta. L.R.	-The Alberta Law Reports.
Cl. & F.	-Clark and Finnelly's Reports of House of Lords Cases.
D.L.R.	-Dominion Law Reports.
L.C.J.	-Lower Canada Jurist.
L.T.	-The Law Times Reports.
N.S.R.	-Nova Scotia Reports.
N.W.L. Rep.	-Reports of the Supreme Court of the North-West Territories.
O.L.R.	-The Ontario Law Reports.
O.R.	-The Ontario Reports.
O.W.N.	-Ontario Weekly Notes.
Rev. Leg.	-Revue Legal.
Sask. L.R.	-The Saskatchewan Law Reports.
S.C.R.	-Reports of the Supreme Court of Canada.
W.W.R.	-Western Weekly Reports.

Statutes

C.O.N.W.T.	-Consolidated Ordinances of the North-West Territories.
C.O.Y.T.	-Consolidated Ordinances of Yukon Territory.
C.S.N.F.	-The Consolidated Statutes of Newfoundland.

R.S.A.	-Revised Statutes of Alberta.
R.S.B.C.	-Revised Statutes of British Columbia.
R.S.M.	-Revised Statutes of Manitoba.
R.S.N.B.	-Revised Statutes of New Brunswick.
R.S.N.S.	-Revised Statutes of Nova Scotia.
R.S.O.	-Revised Statutes of Ontario.
R.S.P.E.I.	-Revised Statutes of Prince Edward Island.
R.S.S.	-Revised Statutes of Saskatchewan.
S.A.	-Statutes of Alberta.
S.B.C.	-Statutes of British Columbia.
S.M.	-Statutes of Manitoba.
S.N.B.	-Statutes of New Brunswick.
S.N.F.	-Statutes of Newfoundland.
S.N.S.	-Statutes of Nova Scotia.
S.O.	-Statutes of Ontario.
S.P.E.I.	-Statutes of Prince Edward Island.
S.S.	-Statutes of Saskatchewan.

Chapter 1

PRELIMINARY DISCUSSION

In the following chapters there will be frequent references to the solemnization or the celebration of marriage in the various parts of Canada. The civil laws for the celebration of marriage are not uniform in this country. They differ from province to province even though there are many similarities. These facts immediately propose the following questions: What is the basic rule in regard to the law governing the celebration of a marriage in any determined point in Canada? What powers do the provincial legislatures have in regard to marriages? Which regulations must be observed for the validity of a marriage? In the following pages these three questions will be briefly discussed.

Article 1. The law governing the celebration of marriage

The validity and legality of a marriage depend upon the fulfillment of two conditions: the capacity of the parties to marry each other, and the celebration of the marriage in due form.

The capacity to marry depends on the personal status or condition of a party and is determined by the lex domicilii of each of the parties--the law of the country in which each of the parties resides, and this holds true even though they are domiciled in the same or in different countries (1).

(1) Walter S. Johnson, The Conflict of Laws (3 vols., Montreal, J. D. de Lamirande & Co., 1933-1937), vol. 1, p. 274.

The solemnization of the marriage and the formalities preliminary to the solemnization are governed, not by the lex domicilii, but by the lex loci celebrationis--the law of the place in which the marriage is solemnized.

It is the settled general rule of conflicts of law, in Quebec as in England and the English provinces of Canada, that as regards the formalities of the celebration of marriage--its formal validity--the governing law is the lex loci celebrationis--the lex loci actus. The domicile or the nationality of the parties is immaterial (2).

The marriage will be considered invalid or illegal if it is not celebrated according to the lex loci celebrationis. It is immaterial that the form in fact adopted would be sufficient in the place of one's domicile, or that it would not be sufficient there. It is the law of the place in which the marriage is contracted that must be considered (3).

The English rule as to the formalities of the celebration of marriage is obligatory, not facultative, and prevails in this sense in all the provinces of Canada (4).

Therefore, those who come from the United States or from other countries and wish to marry in Canada must follow the regulations prescribed in the province in which the marriage is to be celebrated. The same applies to residents of Canada who wish to marry in some province other than the one in which they reside. Each province has its own legislation on the solemnization of marriage, and such legislation must be complied with for a legal and valid marriage.

(2) Ibid., vol. 1, p. 275. Cf. also Dicey's Conflict of Laws, 6th ed. under the general editorship of J. H. C. Morris, London, Stevens & Sons--Sweet & Maxwell, 1949, p. 765f.; Falconbridge, Conflict of Laws as to Nullity and Divorce, Annotation in (1932) 4 D.L.R. 7.

(3) Johnson, op. cit., vol. 1, p. 290.

(4) Falconbridge, Annotation in (1932) 4 D.L.R. 7.

Furthermore, according to English law, the question whether a religious ceremony is essential depends entirely on the lex loci celebrationis. A marriage which is valid under that law cannot be questioned on the ground that it violates religious principles binding on one or even both of the parties to the marriage (5). And on the other hand, a religious marriage is treated as legally void if it does not receive recognition under the local civil law (6).

Article 2. Provincial powers over marriage

Each province has its own legislation regarding the solemnization of marriage. Section 92 of the British North America Act, 1867, enacted that in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated in this section. Among these is the solemnization of marriage in the province. Among the classes of subjects reserved in section 91 of the Act to the Parliament of Canada is marriage and divorce. The exact relation and

(5) W. Kent Power, The Law and Practice Relating to Divorce and other Matrimonial Causes in Canada, Calgary, Burroughs--Toronto, Carswell, 1948, p. 254f.; Dicey's Conflict of Laws, p. 763f.; John Westlake, A Treatise on Private International Law with principal reference to its practice in England, 7th ed. by Norman Bentwick, London, Sweet & Maxwell, 1925, p. 55; Despatie v. Tremblay, (1921) A.C. 702, 90 L.J.P.C. 121, 58 D.L.R. 29.

(6) Power, op. cit., p. 254f. Cf. also Berthiaume v. Dastous, (1930) A.C. 79 at p. 83, in which the Privy Council declared invalid the marriage of two persons domiciled in Quebec but which was celebrated in France by a Catholic priest but without the previous civil marriage ceremony as required by the French civil law.

distinction between the powers of the Parliament of Canada and the provincial legislatures was determined in 1912 by the Privy Council in the famous case re Marriage Legislation in Canada (7). The Judges of the Privy Council arrived at the conclusion that the jurisdiction of the Parliament of Canada does not, on the true construction of sections 91 and 92 of the British North America Act, cover the whole field of validity. They agreed that the provision of section 92 operates by way of exception to the powers conferred as regards marriage by section 91, and enables the provincial legislatures to enact conditions as to the solemnization of marriage which may affect the validity of the contract.

Granted that the provincial legislatures have power to regulate the solemnization of marriage within the province and may even impose conditions for the validity of the marriage, the question was highly controverted as to what exactly was to be included under the term solemnization. The scope of this thesis does not permit a lengthy discussion of this point. However, it may safely be said that, at least in practice, the term solemnization of marriage includes not only the actual marriage contract, but also the various preliminary steps or proceedings which authorize the ceremony to be performed (8).

(7) (1912) A.C. 880, 81 L.J.P.C. 237, 107 L.T. 330, 28 T.L.R. 580, affirming 46 S.C.R. 132, 6 D.L.R. 588.

(8) This view was upheld in Stewart v. Stewart, 56 D.L.R. 57, (1925) 1 D.L.R. 1; in Doyle v. Deady, 57 D.L.R. 44, (1925) 3 D.L.R. 317; in Jay v. Jay, (1925) 29 O.W.N. 149.

Among the preliminaries required before the solemnization of a marriage, that of the necessity of the consent of parents has been the most highly controverted. It may be argued that the consent of parents for the marriage of minors is not connected with the solemnization of marriage, but rather with the capacity of minors to marry. This subject has been debated among jurists and has been examined in several legal cases. It may be said that in English law the necessity of the consent of parents is not deemed as such a restraint on the capacity to marry to be governed by the lex domicilii, but rather as a prerequisite to or a part of the solemnization of marriage to be governed by the lex loci celebrationis (9).

The question has its importance in Canada, for if the necessity of the consent of parents is considered as a restraint on the capacity to marry, the provincial legislatures would not have jurisdiction to demand the consent of parents for the validity of the marriage because the British North America Act restricted the provincial jurisdiction to legislation of the solemnization of marriage (10). The question was brought up in a marriage case in Alberta in 1923. The provisions of the Marriage Act of the Revised Statutes of 1922, c. 213, s. 11 requiring the consent of parents for the marriage of a minor were declared to be directory only. In this case, Justice Beck enunciated the doctrine that a provincial legislature cannot

(9) Cf. Johnson, op. cit., vol. 1, p. 286f.; Dicey's Conflict of Laws, p. 765f.; John Delatre Falconbridge, Essays on the Conflict of Laws, Toronto, Canada Law Book Company Ltd., 1947, p. 54.

(10) Imperial Statute, 30 & 31 Victoria, c. 3, s. 92.

legislate so as to invalidate a marriage entered into contrary to the rules framed by it with regard to the consent of parents (11). But this opinion was reversed in a later case in Alberta which was finally taken to the Supreme Court of Canada. In 1931 the provincial legislature passed an amendment to the Marriage Act of 1925, c. 39, s. 20(3) requiring the consent of parents as a condition precedent to the valid marriage of a minor (12). Shortly after this amendment went into force, a girl who was only 19 years of age went through a form of marriage with a young man who was not quite 21. No consent was obtained from the parents of either party, the licence having been procured by means of a false affidavit as to their respective ages. The marriage was not consummated, nor did the parties live together after the ceremony. An action to have the marriage declared void for want of the prescribed consent was dismissed by the trial judge on the ground that the granting of the decree of nullity was a matter of discretion which he exercised against the plaintiff. The Court of Appeal held that the necessity of the consent of the parents was by the law considered a condition to a valid marriage but dismissed the appeal on the ground that the ruling of the amendment to the Marriage Act was directed, not to the solemnization of marriage, but rather to the capacity of minors to marry, and as such was not within the competence of the Alberta legislature. The Attorney General

(11) Henderson (Breen) v. Breen, (1923) 2 W.W.R. 480, 19 Alta L.R. 545, (1923) D.L.R. 600, affirming (1923) 2 D.L.R. 490.

(12) Statutes of Alberta, 1931, c. 16, s. 3.

for Alberta then intervened and appealed to the Supreme Court of Canada. Here it was held that parental consent was one of the forms to be complied with for the marriage ceremony, and did not relate to the capacity of the parties to marry. Accordingly, the amendment of 1931 requiring the consent of parents as a condition for the validity of the marriage was declared to be within the competence of the Alberta legislature (13).

The competence of a provincial legislature to require the parental consent as a condition precedent to the valid marriage of a minor was upheld also in a case from Ontario decided in 1934 in the Supreme Court of Canada (14). There are many other cases which concern this same subject (15).

We leave to those who are experts in the field of civil law the juridical question whether the necessity of the consent of parents should be considered as a restraint on the capacity to marry or as a part of the solemnization of the marriage (16).

(13) Attorney General for Alberta and Neilson v. Underwood, (1934) S.C.R. 635, (1934) 4 D.L.R. 167, revising (1933) 2 W.W.R. 609, (1933) 4 D.L.R. 154.

(14) Kerr v. Kerr and Attorney General for Ontario, (1934) S.C.R. 72, (1934) 2 D.L.R. 369, affirming (1932) O.R. 601, (1932) 4 D.L.R. 288 which reversed (1932) O.R. 289, (1932) 2 D.L.R. 349.

(15) Cf. e.g., Stewart v. Stewart, 56 D.L.R. 57, (1925) 1 D.L.R. 1; Doyle v. Deady, 57 D.L.R. 44, (1925) 3 D.L.R. 317; Jay v. Jay, (1925) 29 O.W.N. 149.

(16) For a discussion of this point cf. Johnson, op. cit., vol. 1, p. 286; Dicey's Conflict of Laws, p. 765f.; W. S. Scott, "Powers of Provincial Legislatures as to Marriage", in Canadian Bar Review, vol. 2 (1924), p. 381; J. F. Davison, "Marriage and Divorce", in Canadian Bar Review, vol. 5 (1927), p. 654; Falconbridge, Essays on Conflict of Laws, p. 54.

For all practical purposes, it is considered as a part of the solemnization of marriage, and as such^{is} within the competence of the provincial legislatures to regulate. It is for this reason that the discussion of the requirement of the consent of parents or guardians for the marriage of minors is included in this dissertation.

Article 3. Invalidating force of statutory requirements

Another very important consideration is the necessity of complying with statutory requirements for the validity or legality of a marriage. From the wording of the statutes it is often hard to determine whether a specific requirement is merely directory or whether it is mandatory as a condition for the validity of the marriage. In the statutes we frequently find such prescriptions as, e.g., "No marriage shall be celebrated unless pursuant to the issue of a marriage licence or the publication of the banns" or "the consent of parents or guardians shall be required for the marriage of persons under the age of 21 years". Is the fulfillment of such conditions always necessary for the validity of the marriage? The answer to this question may be found in court decisions in past years. On this subject, Evans states:

A multitude of both English and Canadian cases have established beyond peradventure the well-defined legal principle that unless such statutory enactments by express word or clear intendment render a marriage void or voidable in the event of such requirements not being fulfilled nullity will not result and such marriage cannot on such grounds be set aside and that even prohibition under penalty other than nullity does not imply nullity (17).

(17) R. R. Evans, The Law and Practice relating to Divorce and other Matrimonial Causes, Montreal, Burroughs & Co. Eastern Ltd., 1923, p. 143.

A striking example of the application of this principle is contained in the case of Harris v. Meyers decided by the Supreme Court of Nova Scotia in 1916 (18). In this case a girl only 15 years of age went through a form of marriage. Her parents had not, as the law required (19), consented thereto, and knew nothing about the marriage. The husband had stated in his affidavit that her age was 19 and that her father had given his consent to the marriage. As a fact the affidavit was void because it was filled up by a clerk in the office of the issuer of licences who did not administer any oath, but simply asked whether the statements were true. The clergyman was deceived and was told that the girl was 19 years of age. The form of the marriage licence (20) declared the licence null and void if there was any fraud in obtaining the licence by means of false suggestions or concealment of the truth. In spite of all these irregularities, Chief Justice Graham declared that the marriage was not invalid. The absence of a valid affidavit for obtaining the licence did not render the marriage invalid, because there was no express statement in the law that the affidavit was required for the validity of the marriage. The "strong language" of the licence form was not sufficient to render the marriage invalid. The licence was no doubt null and void, but nothing in the Marriage Act nor in the licence form provided for the nullity of the marriage because

(18) (1916) 50 N.S.R. 112, 30 D.L.R. 26.

(19) Revised Statutes of Nova Scotia, 1900, c. 111, s. 8.

(20) Ibid., Form A in the Schedule.

of fraud in procuring the licence. The Chief Justice summarized his decision in these words:

I think you must have an express provision rendering the marriage void for any act or omission, or the marriage cannot be declared void.

In giving his opinion of the case, Justice Harris added:

The policy of the law is evidently not to invalidate a marriage by reason of any irregularity or non-compliance with the provisions of the Act leading up to the issue of the licence, and this applies to the objection raised to the affidavit as well as to the want of consent in the case.

Similar cases were tried in the other provinces and the same principle was applied. Thus in Alberta there is the case of Burns v. Millis (21) in which the court dismissed an action to declare null the marriage of a girl at the age of 16 under a licence obtained by a false affidavit of the husband as to her age, and without the required consent of her parents. And in Swift v. Swift (22) a petition for a declaration of nullity was dismissed even though the girl was only 14 years of age and married without the consent of her parents.

In Saskatchewan there is the case of Wylie (Patton) v. Patton (23) in which the petition for declaration of nullity was dismissed even though the licence was not obtained until after the celebration of the marriage.

In the case of Peppiatt v. Peppiatt (24) Chief Justice Meridith of the Supreme Court of Ontario declared:

(21) (1915) 22 D.L.R. 74.

(22) (1920) 3 W.W.R. 874, 55 D.L.R. 393.

(23) (1930) 1 W.W.R. 216, 24 Sask. L.R. 285, (1930) 1 D.L.R. 747.

(24) (1916) 36 O.L.R. 427, 30 D.L.R. 1.

If it is intended that compliance with the requirements of the marriage law as to matters prior to the performance of the ceremony shall be essential to the formation of a valid marriage, it is, I think, incumbent on the Legislature to say so in plain and unequivocal language.

Therefore, even though the persons concerned may be liable to penalties if the requirements of the statutes are not complied with, such irregularities will not result in nullity of the marriage, nor will the courts declare such marriage null unless the statutes clearly and expressly state that the requirements are necessary for a valid marriage.

CONCLUSION

The preliminary formalities as well as the celebration of the marriage itself are governed by the law in force in the place in which the marriage ceremony is performed. Therefore, it is important that one know at least the essential requirements of the law of the place of the marriage. Most requirements are merely conditions to a legal marriage since the law does not expressly state that they are a condition to a valid marriage. However, it is to the interest of the parties themselves and to the common good that all the prescriptions of the civil law for the celebration of marriage be carefully fulfilled.

PART I

HISTORICAL DEVELOPMENT

Chapter 2

HISTORY OF MARRIAGE LEGISLATION IN ENGLAND

Article 1. Before the Act of Supremacy

1. Definition of the Common Law and its early development

In European countries there are two principal systems of law. One is called the civil law and is based on the system of law developed by the Romans and transmitted to almost all of continental Europe. Under this system the entire body of law is stated in a code which is a comprehensive statement of all accepted legal rules promulgated by the legislative authority. Disputes must be settled according to the principles contained in the code. The other system is called the common law which is based on judicial decisions rather than on legislative enactments (1). An historian of English law describes it as consisting of "a collection of customs and maxims, which derive their power and force of law from long and immemorial usage, coupled with the express sanction or tacit consent of the legislature" (2). In this case, disputes must be settled according to principles whose origin is in tradition, custom, and judicial decisions. This system is now in force in England and in most English-speaking countries.

(1) Blackstone's Commentaries on the Law, edited by Bernard C. Gavit, Washington, Washington Law Book Co., (1941), Dean Gavit's notes on the text, p. 23.

(2) George Crabb, A History of English Law or an attempt to trace the rise, progress, and successive changes on the Common Law, London, Baldwin and Cradock, 1829, p. 1.

Common law, in the sense that the term is used in the legal systems of the provinces of Canada other than Quebec, comprises the body of those principles and rules of legal action, relating to the government and security of persons and property, which derive their authority from usages and customs of antiquity, or from the judgment and decrees of the courts recognizing, affirming, interpreting, and enforcing such usages and customs. It has its roots in the ancient unwritten law of England (3).

As Alford (4) points out, we should not, strictly speaking, use the term civil law for the law in force in those countries which use the system of common law. However, the term civil law is generally used to refer to the laws made by the civil authorities in any country in contradistinction to those made by the ecclesiastical authorities. This way of speaking is also used in the Code of Canon Law without making any distinction between the laws of those countries which are based on the Roman civil law or on the English common law. When the term civil law is used in this dissertation we take it in the broad meaning just mentioned.

Countries whose system of law is based on the common law have in addition statutory enactments. Auld quotes Professor Geldart of Oxford University as follows:

The statutes are but the addenda and errata of the common law. Many of our basic rules have no statutory formulation whatsoever. If we could imagine all of our statute law repealed, we should still have a system; it would be

(3) F. C. Auld, "Principles of the Common Law", La Revue du Notariat, vol. 52 (1949), p. 6.

(4) Culver Bernard Alford, Jus Matrimoniale Comparatum, Jus Civile Matrimoniale in Statibus Foederatis Americae Septentrionalis cum Jure Canonico Comparatum, Romae, Anonima Libreria Cattolica Italiana--New York, Kenedy & Sons, 1938, p. 27.

crude and barbarous, but it would be a system. If we could imagine the common law repealed, we should have left only a collection of separate decrees torn from their context and having their centre and habitation nowhere (5).

The oldest of English statutes is the famous Magna Charta. Statutes either declare or confirm the common law or they supply defects or abrogate superfluities in the common law which may arise either from the imperfection of human laws, from changes of time and circumstances, from the mistakes of judges, or from any other cause (6). Most of the old statutes, such as Magna Charta, are largely a confirmation of the common law, and for that reason are very valuable because they serve to prevent good laws and customs from falling into desuetude. Modern statutes, on the other hand, are largely an introduction of some new law or regulation. The body of statute law in England, the United States, and Canada has increased to enormous proportions. Crabb remarks that since modern statutes are framed with a view to diminish as much as possible the discretionary power of those by whom they are administered, they are remarkable for their number, prolixity, and oftentimes for their incorrectness and want of clearness (7).

The common law is basically unwritten law (*jus non scriptum*) even though most of it has subsequently been put into writing. The principles of the common law are to be found mainly in

(5) Auld, "art. cit.", La Revue du Notariat, vol. 52, p. 9.

(6) Blackstone's Commentaries, p. 39; Crabb, op. cit., p. 4.

(7) Crabb, op. cit., p. 4.

recorded judicial decisions (8). It was the duty of the common law courts to decide what customs were good and to explain and interpret the statutes and apply them to particular cases. Their decisions acquired the force and authority of precedents and rules of law and formed a part of the common law (9).

This is the theory of stare decisis (abide by the decisions). The judge's conclusion on some point of law becomes a rule binding upon the court and upon courts of inferior jurisdiction until his judgment is overruled by a higher court or has its effect abrogated by a statute (10). In as far as possible new laws are to be decided in the light of previous decisions. But the common law system is fairly flexible. It must also be remembered that the concrete decision binds only the parties concerned and that it is only the abstract principles behind the decision that have the force of law or precedent (11).

The system of the common law had its origin in the customs of the barbarian nations who came to England from continental Europe in the sixth and subsequent centuries (12). Several

(8) Blackstone's Commentaries, p. 39; Crabb, op. cit., p. 3; Auld, "art. cit.", La Revue du Notariat, vol. 52, p. 190.

(9) Crabb, op. cit., p. 2.

(10) Auld, "art. cit.", La Revue du Notariat, vol. 52, p. 190.

(11) Ibid., p. 191.

(12) Frederic W. Maitland and Francis C. Montague, A Sketch of English Legal History, edited by James F. Colby, New York & London, G. P. Putnam's Sons, 1915, p. 3-10.

authors who have written on the history of English law consider the Norman Conquest as a catastrophe or rude shock which determined the whole future of English law (13). But they also admit that the common law was not as such dismissed. William the Conqueror had no desire to impose on his new subjects any foreign law (14). The people were attached to the common law because its decisions were universally known and were well adapted to the genius of the English nation (15). In the Magna Charta of 1215 the king acknowledged the principles of the common law. It did not introduce much new law but rather restored and confirmed the basic principles of the common law which had been disregarded by a lawless king (16).

2. Influence of Canon Law on English Common Law

It is quite evident that the old Church law had a very profound influence on the development of the English common law. Before the Act of Supremacy, the authority of the Roman Pontiffs had always been acknowledged and Catholicism was the accepted religion in England. Prior to the Norman Conquest the bishops sat with the lay judges in the common courts. The courts or dooms of the Anglo-Saxon kings had paid special attention to the rights of the Church (17). With the advent of William the

(13) Sir Frederick Pollock and Frederick William Maitland, The History of English Law (2 vols., 2nd ed., Cambridge University Press, 1911), vol. 1, p. 79; Blackstone's Commentaries, p. 18.

(14) Pollock and Maitland, op. cit., p. 79.

(15) Blackstone's Commentaries, p. 18.

(16) Maitland and Montague, op. cit., p. 79.

(17) Harold Potter, An Historical Introduction to English Law and its Institutions, 3rd ed., London, Sweet & Maxwell, 1948, p. 14.

Conqueror, a dual system of courts was set up in the country. The ecclesiastical courts enforced the Canon Law of the Church, and were definitely separated from the lay tribunals (18). But even after this separation the prelates of the Church often continued to serve the king in the lay tribunals. Since they were acquainted with the Canon Law, it was not surprising that their interpretation of the common law would be influenced by the principles of the Canon Law. Pollock and Maitland admit that Henry II quarreled with the bishops and clergy, but they regard as this king's greatest triumph in the legal field the fact that he made the prelates of the Church his justices. They go so far as to say that the English common law was converted by the ecclesiastical judges from a rude mass of customs into an articulate system, and that when they yielded to the command of the Pope and no longer sat as the principal justices of the king's court, the creative age of English medieval law had come to an end (19).

It is quite certain that the ecclesiastical courts had from the twelfth century undisputed jurisdiction in matrimonial causes. The temporal courts had no doctrine of marriage of its own. The law of marriage was the law of the Church (20). For the formation

(18) Ibid., p. 14; George Burton Adams, Constitutional History of England, New York, Henry Holt and Company, (1920), p. 61; Pollock and Maitland, op. cit., vol. 2, p. 367; George Hayward Joyce, S.J., Christian Marriage: an historical and doctrinal study, Heythrop Series: I, London and New York, Sheed and Ward, 1933, p. 227.

(19) Pollock and Maitland, op. cit., vol. 1, p. 132.

(20) Ibid., vol. 2, p. 372; W.S. Holdsworth, A History of English Law, vol. 1, 3rd ed., London, Methuen & Co., Ltd., 1922, p. 389.

of a valid marriage, the presence of a priest or ordained clergyman was not necessary (21). Clandestine and unblessed unions were prohibited and the husband and wife were punished, but the marriage was nevertheless valid (22). Already in the year 1076, the Council of Winchester forbade marriage without the sacerdotal blessing (23). The Council of London (1200) (24) prescribed a triple publication of the banns even before the fourth Lateran Council (1215) made the publication of banns obligatory for the universal Church (25). Pope Alexander III (1156-1181) upheld the validity of clandestine marriages and the invalidity of so-called Church weddings when they had been preceded by a clandestine marriage even though the second marriage was consummated and the first was not (26).

It has often been contended that in her marriage law and in the matrimonial courts the Church in England had held aloof from Rome. In opposition to this contention, Pollock and Maitland

(21) The decision in 1843 of the House of Lords requiring the presence of an ordained clergyman for a marriage according to the common law will be treated later on in the consideration of common law marriages.

(22) Pollock and Maitland, op. cit., vol. 2, p. 372.

(23) Jean Hardouin, S.J., Acta et Epistolae Decretales ac Constitutiones Summorum Pontificum (11 vols., Parisiis, Ex Typographia Regia, 1714-1715), vol. 6, pars 1, col. 1562.

(24) Ibid., vol. 6, pars 2, col. 1961.

(25) J. Mansi, Sacrorum Conciliorum Nova et Amplissima Collectio (53 t. in 59 vols., Paris and Leipzig, H. Welter, 1901-1927), vol. 22, col. 1038.

(26) Corpus Juris Canonici (Richter-Freidberg, 2 vols., Leipzig, 1879-1881), Alexander III, Belvacensi Episcopo, c. 2, X de clandestina desponsatione, IV, 3.

have the following pointed reply:

We have the clearest proof that from the middle of the twelfth century the law of the catholic and Roman church was being enforced in England. We have this not only in the decretal of Alexander III but also in the many appeals about matrimonial matters that were being taken from England to Rome. It would have been as impossible for the courts christian of this country to maintain about this vital point a schismatical law of their own as it would now be for a judge of the High Court to persistently disregard the decisions of the House of Lords: there would have been an appeal from every sentence, and reversal would have been the matter of course. And then, had this state of things existed even for a few years, surely some English prelate or canonist would have been at pains to state our insular law. No one did anything of the kind. To say that the English church received or adopted the catholic law of marriage would be untrue; her rulers never conceived that they were free to pick and choose their law (27).

Article 2. From the Act of Supremacy to the present day

1. Immediate influence of the English Reformation on ecclesiastical courts and marriage law

The events in the reign of Henry VIII which finally led to the rejection of the authority of the Pope were to have a very detrimental effect on the ecclesiastical courts and the marriage law of England. With the Act of Supremacy of 1524 (28), and the resultant rejection of the authority of the Pope, and later the persecution of the Catholics, the Catholic hierarchy in England

(27) Pollock and Maitland, op. cit., vol. 2, p. 373. In Roman Canon Law in the Church of England, London, Methuen & Co., 1898, Maitland proves at great length that the English ecclesiastical courts and the English clergy did not at all feel free to accept or reject the Roman Canon Law. He rightly maintains that there was no English law of marriage during this period; it was the law of the universal Church.

(28) Great Britain Statutes at Large, 26 Henry VIII, c. 1. (Hereinafter these statutes are cited in the abbreviated form: Imperial Statute, with the regnal year, chapter, and section of any enactment).

was destroyed. At the same time the truly Catholic tribunals disappeared. There were still ecclesiastical tribunals in England but they were now presided over by the clergy of the Church of England. At first their decisions must have been based on the Canon Law of the universal Church because they knew no other marriage law. But before long they were expected to enforce, and without complaint they did enforce, the statutes of the temporal legislature of the English parliament. Henceforth their decisions had to be based on the laws dictated by the acts of Parliament (29).

Before the Council of Trent, the Church had always taught that a marriage contracted by the mutual expression of consent between persons not otherwise impeded from marrying was valid even if not consummated. And if a person who had been married in that way married again, even if in facie Ecclesiae (30), and such marriage was consummated and children were born of it, the second marriage was declared invalid if the spouse of the clandestine marriage was still living at the time of the second marriage. But in 1540 Parliament passed a law declaring valid and indissoluble a marriage which was solemnized in facie Ecclesiae and later consummated, notwithstanding any pre-contract (clandestine marriage) which was not consummated before the time of the second marriage in facie Ecclesiae (31). Parliament argued that if non-consummated

(29) Maitland, op. cit., p. 90.

(30) The term in facie Ecclesiae generally meant a public celebration of marriage according to the rites of the Church.

(31) Imperial Statute, 32 Henry VIII, c. 38, s. 1.

pre-contracts were admitted, all valid marriages could easily be cast aside by one of the parties maintaining that he had previously been married (32).

But eight years later Parliament had to change this ruling because many persons abused it by going from one clandestine marriage to another, and as long as consummation of any of such marriages could not be proved they were legally free to enter a new partnership. To remedy the abuses, Parliament enacted that whenever a case of clandestine marriage arose, the king's ecclesiastical judge had the power to examine it. If the marriage contract was sufficiently proved, the judge could demand the parties to have the marriage solemnized in facie Ecclesiae, to consummate the marriage, and to live together "as becometh man and wife" (33).

2. Lord Hardwicke's Marriage Act, 1753

After the law of 1548 had made it possible for an ecclesiastical judge to force parties who had married clandestinely to have their marriage solemnized in facie Ecclesiae, there were no important changes in the marriage law of England for several centuries. But by the middle of the eighteenth century social affairs in England were so demoralized that there were many more clandestine marriages than marriages celebrated publicly with a religious ceremony. Things came to such a pass

(32) Ibid.

(33) Imperial Statute, 2 & 3 Edward III, c. 23, s. 2.

that Parliament thought it necessary to intervene and check abuses (34). The remedial legislation was prepared by Lord Hardwicke, and it was he who finally overcame the bitter opposition to the proposed bill. It is for this reason that the "Act for the better prevention of clandestine marriages" (35) is generally referred to simply as "Lord Hardwicke's Marriage Act".

This Act marked an important departure from the previous marriage law of England. The necessity of the presence of a clergyman of the Church of England for the validity of the marriage is taken for granted. The banns had to be published on three Sundays before the celebration of the marriage, in the church or chapel of the Church of England in the place in which each of the parties lived (36). Marriage licences in lieu of banns could be granted by any Archbishop or Bishop for the celebration of the marriage in the church or chapel of the parish in which one of the parties had resided for four weeks immediately preceding the issue of the licence. However, the Archbishop of Canterbury retained his right to grant a special licence to marry at any convenient time or place (37). Persons convicted of solemnizing marriage without banns or proper licence or in any other place than the proper church or chapel of the Church of

(34) Eversley's Law of Domestic Relations, 6th ed. by Stranger-Jones, London, Sweet & Maxwell, 1951, p. 14.

(35) Imperial Statute, 26 George II, c. 33.

(36) Ibid., s. 1.

(37) Ibid., s. 4, 6.

England were to be judged guilty of felony and transported to one of the colonies in America for fourteen years, and any such marriage was to be absolutely null and void (38). The marriage of anyone below the age of 21 years (not being a widow or widower) without the proper consent of parents or guardians was considered absolutely null and void (39). All marriages had to be solemnized in the presence of at least two witnesses beside the minister (40). After the ceremony the marriage had to be carefully recorded in the church register, and any wilful falsehood or forgery in such a register was severely punished (41).

After Lord Hardwicke's Marriage Act was enforced, mere consensual or clandestine marriage could no longer be compelled by an ecclesiastical judge to be solemnized in facie Ecclesiae (42). The provisions of the Act in no way affected the members of the royal family, nor did they extend to Scotland, nor to the marriage between Quakers or Jews, or any marriage solemnized "beyond the seas" (43). Therefore they did not apply to the colonies in Canada.

Lord Hardwicke's Marriage Act reduced the possibilities of clandestine marriages to a minimum, but it was extremely harsh and unjust in many ways. With the new restrictions it was very easy to procure invalid marriages and to fall under the harsh penalties. All members of nonconformist denominations were

(38) Ibid., s. 8.

(41) Ibid., s. 15, 16.

(39) Ibid., s. 11.

(42) Ibid., s. 13.

(40) Ibid., s. 15.

(43) Ibid., s. 17, 18.

compelled to come to the churches of the established Church of England if they desired to have their marriages valid before the law. But since the Act did not apply to marriages in Scotland, many persons tried to avoid the burdensome restrictions by going across the border to marry (44).

The Marriage Act amendment of 1823 (45) did little to remove any of the restrictions or requirements for a valid marriage. On the whole the provisions of Lord Hardwicke's Marriage Act were repeated but there were a few minor changes especially in the regulations for the issue of licences. A residence of 15 days in the place of the intended marriage sufficed (46). An affidavit as to the freedom to marry had to be made by one of the parties before the issue of the licence (47). All marriages had to be celebrated between the hours of 8 and 12 in the morning (48). Marriages of those under the age of 21 years without the consent of parents or guardians were no longer considered invalid, but if the licence or the publication of the banns had been obtained by fraud, the guilty party was forced to forfeit all advantages of property accruing from such marriage (49).

(44) Eversley's Law of Domestic Relations, p. 16.

(45) Imperial Statute, 4 George IV, c. 76.

(46) Ibid., s. 10.

(47) Ibid., s. 14.

(48) Ibid., s. 21.

(49) Ibid., s. 23.

3. Lord Russel's Marriage Act, 1836

The worst grievances of Lord Hardwicke's Marriage Act were finally removed in 1836. After this date all marriages solemnized by ordained persons of the Church of England had to be according to the ritual prescribed by the Book of Common Prayer but such marriages could be solemnized either by authority of a licence from some Archbishop or Bishop, by authority of publication of banns, or by authority of the certificate or licence of the superintendent registrar (50).

For all other marriages the certificate of the superintendent registrar was absolutely necessary. The parties had to give notice of their intended marriage to the superintendent registrar of the district in which they had been resident not less than seven days before the notification (51). This notice was entered by the superintendent registrar in a special "marriage notice book" open to the inspection of all the public (52). Persons whose consent was by law required for the marriage of minors could prevent the marriage by writing the word "forbidden" over the notice, and in that case the marriage could not be celebrated until such consent was finally given (53). The marriage could be celebrated either with or without a licence, and in the latter case not even the publication of banns was

(50) Imperial Statute, 6 & 7 William IV, c. 85, s. 1.

(51) Ibid., s. 4.

(52) Ibid., s. 5.

(53) Ibid., s. 9, 10.

required. If the marriage was to be celebrated by authority of a licence, the superintendent registrar could after seven days after the entry of the notice, grant a certificate stating that all the requirements had been fulfilled. If the marriage was to be solemnized without a licence, the certificate could not be granted until 21 days after the entry of the notice (54). The marriage could be celebrated immediately after the issue of the certificate or the licence as the case might be, but no marriage could be celebrated later than three months after the day on which the notice had been given by the parties (55).

This Act also abolished the requirement that all marriages be celebrated in a church or chapel of the Church of England. Marriages could henceforth be celebrated in all other places of worship if they were duly registered for the solemnization of marriages. The proprietor or trustee of the building had to see to its registration and no building could be registered unless it had been used at least one year as the usual place of worship. But this period was not required if the congregation merely moved from one building to another (56).

The presence of an ordained clergyman of the Church of England was no longer required. Instead, a registrar appointed by the superintendent registrar of the district had to be present at the marriage for its validity (57). The registrar did not have to officiate at the marriage; he was merely the official witness, and it was his duty to register the marriage after the

(54) Ibid., s. 7.

(56) Ibid., s. 18, 19.

(55) Ibid., s. 14, 15.

(57) Ibid., s. 17.

ceremony. The marriage ceremony could be conducted by any minister or any other person according to any form that he saw fit to use, provided that the marriage was solemnized with open doors between the hours of 8 and 12 in the morning, in the presence of some registrar and two or more witnesses, and that in some part of the ceremony each of the parties formally declared that he or she was free to marry and then formally pronounced the marriage consent (58).

But if the parties did not care to celebrate their marriage in a registered place of worship, they could contract marriage at the office and in the presence of the superintendent registrar and some registrar of the district. No ceremony other than the essential exchange of marriage consent was required (59).

Jews and Quakers were also subject to the law of giving notification of their intended marriage to the superintendent registrar but they did not have to observe the regulation about having the registrar present at their marriage. The registration of the marriage was performed by the registering officer of the Quakers or the official of the Synagogue (60).

Therefore, after the law of 1836 three kinds of marriage were permissible in England. Marriages could be performed either according to the rites of the Church of England in a church or chapel of that Church, or according to any rite or ceremony in the presence of a registrar in a registered place of worship, or

(58) Ibid., s. 20.

(59) Ibid., s. 21.

(60) Ibid., s. 2, 16.

finally in the office and in the presence of the superintendent registrar and some registrar of the district. One other important change introduced by the Act was that marriages were considered invalid only if both of the parties knew that there was something irregular about the marriage (61).

In 1856 there was a slight change in the requirements for a marriage celebrated by the authority of a licence from the superintendent registrar. The notification of the marriage had to be given to the superintendent registrar in whose district one of the parties had resided for the space of 15 days immediately before the entry of the notice (62). There was no suspension of the notice in the office of the superintendent registrar (63). The licence could be issued one day after the entry of the notice in the marriage notice book (64). Furthermore, no marriage could be celebrated in a registered building without the consent of the person in charge (65).

An amendment of 1886 permitted marriages to be solemnized at any time between the hours of 8 A.M. and 3 P.M (66). At present the hours are between 8 A.M. and 6 P.M (67).

(61) Ibid., s. 42.

(62) Imperial Statute, 19 & 20 Victoria, c. 119, s. 2, 6.

(63) Ibid., s. 5.

(64) Ibid., s. 9.

(65) Ibid., s. 11.

(66) Imperial Statute, 49 & 50 Victoria, c. 14, s. 1.

(67) Imperial Statute, 12 & 13 George VI, c. 76, s. 4.

4. Marriage Act of 1898

In a letter to the Royal Commission on the Laws of Marriage, 1865, the Catholic hierarchy of England had asked, among other requests, that civil marriage be abolished, that the requirement of the presence of a registrar be abolished and that the priests be made the legal witnesses of the marriage, and that the rule that a place of worship could not be registered for the solemnization of marriages unless it had been used for a year for religious services be abolished to allow for the exceptional cases where a sudden influx of workers in some area demanded the establishment of a separate church or chapel for them (68).

Of the above requests, only that of repealing the necessity of the attendance of registrars at marriages in non-conformist places of worship was finally granted by the Marriage Act of 1898 (69). When the parties gave the notice of their intended marriage to the superintendent registrar they were to declare whether or not they desired to have a registrar present at their marriage. If they did not desire his presence, they were to be given printed instructions for the due solemnization of their marriage (70). The marriage had to be solemnized in the presence of a person duly authorized for the purpose by the trustees or other governing body of the place of worship or of some other registered place of worship in the same registration district. In Catholic dioceses this authorization

(68) William Samuel Lilly and John E. P. Wallis, A Manual of the Law Especially Affecting Catholics, London, William Clowes & Sons, 1893, Appendix E, p. 191.

(69) Imperial Statute, 61 & 62 Victoria, c. 58, s. 4.

(70) Ibid., s. 5.

belonged to the Bishop or the Vicar General. But a person authorized in the above manner had to be registered with the Registrar General and the superintendent of the district in which the place of worship was situated (71).

Such marriages had to be celebrated in the presence of the authorized person and at least two witnesses. Immediately after the ceremony the officiating minister had to record the marriage in duplicate registers supplied by the superintendent registrar. When these registers were filled, one copy was kept in the place of worship and the other was sent to the superintendent registrar. Every person who kept a register of marriages had to send to the superintendent registrar in the months of April, July, October, and January of every year a certified copy of all marriages entered since the last certified copy was sent. If no marriages were performed during that period, he was at least to inform the superintendent registrar of that fact (72).

But if the parties declared in giving their notice that they desired the presence of a registrar, he was obliged to be present, and then he had the duty of registering the marriage as before this Act (73).

5. Recent marriage legislation

After the year 1898 there is very little change in the legislation governing the solemnization of marriages in England. The English statute law of marriage was until very recently

(71) Ibid., s. 6.

(72) Ibid., s. 7, 11.

(73) Ibid., s. 10.

contained in a great number of old statutes dating back as far as the law of 32 Henry VIII, c. 38. There was no single statute to which one could turn for a full treatment of the marriage law. However, the Marriage Act, 1949 (74), consolidated the marriage law of England and presented in a succinct and comprehensive form the statutory law on the subject (75).

6. Relation between English and Canadian marriage law

Lord Hardwicke's Marriage Act and subsequent marriage laws of England expressly stated that they did not apply to the celebration of marriages "beyond the seas". Therefore, these laws did not as such apply to the colonies in Canada. However, most of the provinces which accepted the English law as their own law in the early years of their development, also adopted the English marriage law, but usually only in a modified form in as far as it was applicable to the conditions in the new country. Thus, in none of the provinces was the requirement of registration of buildings for the solemnization of marriages adopted. Neither was the requirement of giving notice of an intended marriage to the registrar and of obtaining his certificate of compliance before the celebration of the marriage adopted in most of the provinces.

But even though the English marriage law did not apply directly to Canada, that law formed the basis or the pattern for the legislation on marriage in Canada. Thus, even though in the

(74) Imperial Statute, 12 & 13 George VI, c. 76.

(75) For a recent treatment of the Marriage Act, 1949, see J. C. Arnold, The Marriage Law of England, London and New York, Staples Press (1951).

early years the registration of clergymen authorized to solemnize marriages was not required by most provinces, it was gradually introduced so that at the present day all the provinces except Newfoundland and the Yukon Territory require such registration.

After the fourth Lateran Council the publication of banns was the usual practice in England, and this continued even after the English Reformation. As such it has always been accepted and prescribed by the civil law in Canada, but can be dispensed with if a marriage licence is obtained. In all provinces of Canada, marriages may be solemnized after the publication of the banns without the necessity of obtaining a civil marriage licence except for a few exceptional cases and especially for civil marriages. In the United States only three states (Georgia, Maryland, Ohio) allow the celebration of marriage after the publication of the banns without obtaining a civil marriage licence (76).

The English method of civil marriage has also been adopted in most provinces of Canada. In the early years, such marriages were allowed only if the parties could not conveniently obtain the presence of a minister of religion, but gradually civil marriage was permitted for anyone not desiring a religious ceremony. However, as will be seen later, several provinces still do not permit civil marriages.

(76) Alford, op. cit., p. 200.

Chapter 3

HISTORY OF ECCLESIASTICAL MARRIAGE LEGISLATION IN CANADA

In the previous chapter we considered the marriage law of England and its relation to the development of the marriage law of Canada. It may also be of interest to determine the more important elements of the ecclesiastical legislation on the celebration of marriage in this country. Unlike the civil law, the law of the Church is usually universal in its application. However, differences in regulations in various countries may be due either to special laws of the Holy See or to particular laws made by local ecclesiastical authorities.

The scope of this dissertation does not allow a detailed exposition of the history of marriage legislation of the Church in Canada, but the more important points concerning the form of marriage, the publication of the banns, the consent of parents, the celebration of the marriage and its registration will be considered.

1. The form of marriage

In order to prevent as far as possible the abuses of clandestine marriages and to provide for the proper registration of marriages, the decree Tametsi of the Council of Trent prescribed that marriages be celebrated in the presence of the proper pastor, or some other priest delegated by him or by the local Ordinary, and two or three witnesses. This form was required for the va-

lidity of the marriage (1). The decree was both territorial and personal in its application. Within the limits of the territory in which the decree had been published, everyone had to observe the Tridentine form. A person who had a domicile or quasi-domicile in a territory in which the decree had been published remained personally subject to the Tridentine form until he acquired a domicile or quasi-domicile in a territory in which the decree had not been published. However, in regard to the celebration of marriage in a place in which the decree had not been published, the principle held that the party who was not personally bound to observe the Tridentine form communicated his immunity or exemption to the other party so that the marriage could be validly celebrated without the presence of the proper pastor and at least two witnesses (2).

All baptized persons, even heretics and apostates, were bound to observe the Tridentine form. That this was so is clearly shown by the reply of the Sacred Congregation of the Council of January 8, 1678 that in places in which the Tametsi decree had

 (1) "Qui aliter, quam praesente parochi, vel alio sacerdote, de ipsius parochi, seu Ordinarii licentia, et duobus, vel tribus testibus matrimonium contrahere attentabunt; eos sancta Synodus ad sic contrahendum omnino inhabiles reddit: et hujusmodi contractus irritos, et nullos esse decernit, prout eos praesenti decreto irritos facit, et annullat" (Canones et Decreta Sacrosanctae Oecumenici Concilii Tridentini, Romae, Ex Typographia Polyglotta, 1904, sessio XXIV, c. 1 de reformatione matrimonii).

(2) Cf. F. X. Wernz, Jus Decretalium (6 vols., Prati, 1913), vol. 4, part 1, n. 171, p. 246; n. 173, p. 249; Petrus Gasparri, Tractatus Canonici de Matrimonio (2 vols., 1st ed., Paris, 1891), vol. 2, n. 963, p. 163; Henricus Joannes Feije, De Impedimentis et Dispensationibus Matrimonialibus, 3rd ed., Lovanii, Typis Caroli Peeters, 1885, n. 316, p. 200.

been published heretics could not validly marry unless they observed the form prescribed by the Council of Trent (3).

The failure to observe the Tridentine form of marriage was classified as a diriment impediment to marriage and was called the impediment of clandestinity (4).

One of the peculiar features of the Tametsi decree was that it had to be published in each parish separately; otherwise it did not oblige the faithful. In some countries the Tametsi was not published due to strained relations with the Holy See. This was the case in England and Scotland where the break with Rome and the persecution of the Church prevented the publication of the decree. In other countries it was published, but only in certain districts. This was the case especially in the United States and Canada.

It is certain that the Tametsi decree had been published in parts of Canada before the beginning of the English regime (5).

(3) "Haereticos quoque, ubi decretum dicti Capituli primi est publicatum, teneri talem formam observare, ac propterea ipsorum etiam matrimonia absque forma Concilii, quamvis ministro haeretico vel magistratu loci contracta, nulla et irrita esse" (Collectanea S. Congregationis de Propaganda Fide seu Decreta Instructiones Rescripta pro Apostolicis Missionibus (2 vols., Romae, Typographia Polyglotta S. C. DE Propaganda Fide, 1907), vol. 1, n. 149, p. 51.

(4) Cf. Wernz, op. cit., vol. 4, part 2, n. 307, p. 102.

(5) At the request of one of the judges of the Supreme Court of Canada, Mgr C.-A. Marois, the Vicar General of Quebec, prepared an official statement on the publication of the Tametsi decree in the Archdiocese of Quebec for the case concerning the Lancaster bill of 1911 (Cf. re Marriage Legislation in Canada, (1912) A.C. 880, 7 D.L.R. 629 affirming 46 S.C.R. 132, 6 D.L.R. 588). Mgr Marois certified in April, 1912, that "the decree Tametsi concerning the reform of marriage, adopted in

Soon after the English conquest of Canada, the Vicar General of Quebec proposed to the Sacred Congregation of the Propaganda a few questions concerning the celebration of marriage. Among these questions was one which concerned the marriage of a Catholic before a protestant minister, and another concerning the marriage of two non-Catholics without the presence of a priest. The reply of November 29, 1764, to these questions was that the Benedictine Declaration of 1741 should be extended to the whole of Canada (6).

In virtue of the Declaration of Pope Benedict XIV, non-Catholics in Holland and Belgium were exempted from observing the Tridentine form when they contracted marriages between themselves or with Catholics. Thereafter, mixed marriages were valid even though not celebrated before the proper pastor and two witnesses (7).

the 24th Session, 1st chapter, of the Council of Trent, has been read in each parish church of the Archdiocese of Quebec on the first Sunday after Epiphany and on the first Sunday after Easter each year, since its promulgation by Mgr de St Valier in the Rituel du Diocese de Quebec in 1700, until the Decree of the Sacred Congregation of the Council of 2nd August 1907 came into force " (Taken from an authentic copy from the archives of the Archdiocese of Quebec).

(6) "Extendendam esse generatim ad Ecclesiam Canadensem at Quebecensem Declarationem cum Instructione a S. N. Benedicto XIV datam die 4 novembris 1741, super dubiis respicientibus matrimonia in Hollandia et Belgio contracta et contrahenda" (Recueil d'Ordonnances Synodales et Episcopales du Diocèse de Québec, suivi d'une collection des indulgences accordées au diocèse, de décrets de la Congrégation des Rites, de décisions importantes sur différents sujets, Québec, J. T. Brousseau, 1859, p. 258.

(7) Bullarium SSmi Domini Nostri Benedicti Papae XIV (2 vols., editio quarta emendatior et auctior, Venetiis, Ex Typographia Joannis Gatti, 1778), vol. 1, p. 39.

This exemption was now applied also to Canada.

The Tametsi decree was published in practically all of the civil province of Quebec except in that portion of the province which belongs to the diocese of Ottawa (8). The suspicion with which any prescriptions from Rome were considered by the English officials prevented to a large extent the publication of the decree after the beginning of the English regime. The unsettled status of most parts of the country, no doubt, likewise retarded the publication of the decree which might have caused hardship in many cases.

Since we are primarily concerned with the celebration of marriage outside of the province of Quebec, we shall try to determine whether the Tametsi decree was published in other parts of Canada. Due to the unsettled conditions in Newfoundland and the later persecution of the Church in the Island, it seems very unlikely that the decree had ever been published there.

One sometimes hears it said that the Tametsi decree was not published outside of the civil province of Quebec. But the fairly well-established status of the Church in at least certain parts of the Maritime provinces already before the English regime seems to suggest at least the possibility of the publication of the Tametsi. The Discipline de Quebec of 1895 states that the decree was in force in Nova Scotia, Prince Edward Island, and

(8) Cf. Discipline du Diocèse de Québec par S. G. Mgr E.-A. Taschereau, Archevêque de Québec, 2nd ed., Quebec, Leger Brousseau, 1895, p. 46.

Cape Breton Island and then gives a reference to an instruction of the Sacred Congregation of the Propaganda Fide of October 16, 1824 (9). Several documents in the Archives of the Archdiocese of Quebec throw some light on this subject. In answer to several questions proposed by Bishop Plessis of Quebec concerning the force of the Tametsi decree in Canada and especially in certain regions around Lake Champlain which had continually been disputed between the French and the English and finally ceded to the United States, the Sacred Congregation of the Propaganda Fide in a reply of April 17, 1820, asked for further information concerning the circumstances in those places in which it was doubtful whether the Tametsi was in force. However, the Sacred Congregation declared that in the French colonies as well as in France itself, the publication of the Tametsi decree could be presumed if the custom prevailed of having marriages celebrated in the presence of the pastor and two or three witnesses in fulfillment of the prescriptions of the Council of Trent as well as in fulfillment of the prescriptions of the French civil law. The Sacred Congregation quoted the resolution of the Sacred Congregation of the Council of September 26, 1602 that the publication of the decree could be presumed in those places in which the decree had for some time been observed in the parish

(9) Ibid., p. 46.

according to the prescriptions of the Council of Trent (10).

According to the request of the Sacred Congregation of the Propaganda Fide for further information concerning the circumstances giving rise to doubts about the force of the Tametsi decree in certain regions of Canada, Bishop Plessis explained the situation to the Sacred Congregation and received the reply that because of the very unsettled conditions of the regions around Lake Champlain, the publication of the decree was very doubtful and therefore marriages could there be validly contracted without observing the Tridentine form. But because of the establishment of parishes in Acadia, Prince Edward Island and Cape Breton Island already before the deportation of the Acadians, the Sacred Congregation declared that the impediment of clandestinity was in force in those parts and remained in force even after the return of the Acadians and the re-establishment of the parishes (11).

(10) "Publicationem praesumi ubi id Decretum fuerit aliqua tempore in Parochia tanquam decretum Concilii observatum" (Instructio ad Episcopum Quebecensem qua S. Congregatio de Propaganda Fide respondit quaestionibus ab eodem Praesule propositis, April 17, 1820: Archives of the Archdiocese of Quebec, C.M.R., 180/8).

(11) "Sententiam etiam suam Sacra Congregatio protulit de iis quae referuntur ad eos, qui incolunt Litora Lacus Champlain, quaeque respiciunt Acadiam, seu Nova Scotiam et Insulas S. Joannis, seu Principis Edwardi, ac Capitis, seu Britannici Promontorii. Narrabas enim in memoratis Lacus Champlain Lictoribus nullas unquam sub Gallorum ditione constitutas esse Paraecias neque Incolas fuisse sed tantummodo militum, vel Gallicas, vel Indicas adventitias copias, quibus Sacerdos aderat aliquis seu Cappellanus: verisimillimum tamen esse ais, si iis temporibus matrimonium aliquando illhic celebratum est, ad Concilii Tridentini formam celebratum fuisse: Commemorabas vero de Acadia, seu Nova Scotia, et

However, in a footnote the Discipline de Québec adds that the opinion was that the impediment of clandestinity did not de facto exist in the ecclesiastical province of Halifax (12). Neither does the first provincial council of Halifax, 1857, make any reference to the Tametsi decree or to the requirements for a valid marriage (13). The legislation of this council extended to all of the Maritime Provinces and Newfoundland (14). The argument from silence is not a conclusive one, but it seems unlikely that a matter as important as the Tridentine form of marriage would not even have been referred to if it had actually been considered in force in this part of the country.

de Insula Principis Edwardi, et Capitis Bretonis, fuisse in iis primitus paraecias seu missiones, et agnitus ibi fuisse Impedimentum Clandestinitatis; eversas deinde funditus illas paraecias esse, agros occupatos, incolasque in exilium ejectos: Reversos tandem multos post annos Catholicos Acadiensis, novos agros coluisse, novas Missiones vel Paraecias eformasse, ac in iis locis vigere ut antea impedimentum Clandestinitatis. Haec autem de his rebus omnibus Sacrae Congregationis sententia fuit: 'Quoad lictora lacus Champlain cum ibi certa non constet de publicatione, et observantia Decreti Tridentini ibi matrimonia non irritari ob impedimentum Clandestinitatis, sed esse valida donec constitutis Paraeciis vel Missionibus publicetur Decretum Tametsi'; quoad vero Nova Scotiam seu Acadiam, et Insulam Principis Edwardi, et Caput Bretonis, constare de impedimento Clandestinitatis" (Letter of the S. C. of the Propaganda Fide, October 16, 1824: Archives of the Archdiocese of Quebec, C.M.R. III, f. 201).

(12) "On nous dit que de fait l'empêchement de clandestinité n'existe pas dans la province de Halifax" (Discipline de Québec, 1895, p. 46).

(13) Cf. Concilium Provinciale Halifaxiense I (1857): Acta et Decreta Sacrorum Conciliorum Recentiorum, Collectio Lacensis (7 vols., Friburgi Brisgoviae, Herder, 1870), vol. 3, c. 17, col. 749.

(14) Peter Kinlin, Canonical and Civil Status of Parishes in Canada (outside the Civil Province of Quebec), manuscript copy, Ottawa, St. Paul's Seminary, 1949, p. 126.

Even before the dispossessed Acadians began to return to their former homes, Catholic priests and laity migrated from the British Isles where the Tametsi decree had not been published. This fact plus the rupture of Catholic parishes in the Maritime provinces during the years of the anti-Catholic penal laws, probably explain to a large extent the general opinion that the impediment of clandestinity did not exist in this part of Canada.

It is quite certain that the Tametsi decree was not published in the province of Ontario. The Discipline de Quebec of 1879 states that it was not published outside of the province of Quebec (15). The second provincial council of Quebec, 1854, which extended to all of Canada except Newfoundland, the Maritime Provinces, British Columbia, and Yukon Territory, merely acknowledges that the Tametsi decree was published in parts of Canada but does not determine in which parts (16). However, pastors in the dioceses of Lower Canada (Quebec) were obliged to read and explain to the people on the second Sunday after Epiphany the prescriptions of the Tametsi decree (16a). The special mention of Lower Canada implies that the decree was not published in

(15) Discipline du Diocèse de Québec par Mgr E.-A. Taschereau, Archevêque de Québec, 1st ed., Quebec, P.-G. Delisle, 1879, p. 31.

(16) Concilia Provinciae Quebecensis I, II, III, IV, in Quebecensi Civitate celebrata et a Sancta Sede Revisa et Recognita, Quebeci, P.-G. Delisle, 1870, Concilium II, decretum 13, § 5.

(16a) Appendice au Compendium du Rituel Romain a l'usage des diocèses de la Province Ecclesiastique de Québec, seconde partie, Quebec, Aug. Côté et Cie, 1853, p. 171.

Upper Canada (Ontario) since it did not have to be read and explained to the people in that part of the country.

It is also very doubtful whether the decree had ever been published in western Canada. The Discipline de Québec of 1879, after stating that the Tametsi decree was not published outside of the province of Quebec, adds a very interesting note to the effect that several authors held that it was in force in certain parts of the ecclesiastical province of St.-Boniface. The author of the footnote objects that Bishop Taché, in a letter written in 1879, stated that the decree had never been published in that part of the country, and makes a reference to an instruction of 1820 of the Sacred Congregation of the Propaganda Fide to Bishop Plessis of Quebec not to have the decree published in that part of the country (16b).

(16b) "Plusieurs auteurs disent qu'il est en vigueur dans quelques parties de la province de St.-Boniface: Mgr Taché, le 12 février 1879, répond à l'Archevêque de Québec: 'De fait le décret Tametsi n'a jamais été publié dans ce pays'. En 1820, la Propagande a donné instruction à Mgr Plessis de ne pas l'y faire publier" (Discipline de Québec, 1879, p. 31). This instruction is no doubt the reply of April 17, 1820, of the Sacred Congregation of the Propaganda Fide to the questions proposed by Bishop Plessis, of which reply the following is an extract: "Quoad loca vero Missionum, quae archiepiscopi Quebecensis jurisdictioni subjiuntur in quibus nec olim extiterint, nec extant modo Parochiae, nec Parochi, et in quibus praesumi jam potest nulla unquam tempore praedictum decretum Tridentinum publicatum fuisse, pariter S. Congregationis mens est, non expedire, quod modo publicetur, cum iis in locis, ad quae nonnisi raro per annum Sacerdotes Missionarii accedunt ibi commode observari non possit. Posse vero incolas Catholicas eorum locorum per Missionarios induci, ut post contractum matrimonii, Sacerdote Missionario cum primum advenerit assistant pro recipienda ab ipso benedictione nuptiali, praemisso tamen per ipsum monito, quod talis benedictio ad validitatem eorum conjugii necessaria haud est" (Instructio ad

In view of the above mentioned instruction of 1820, it is hard to understand a remark of Bishop Provencher of St.-Boniface in a letter of June 12, 1825 to Bishop Plessis of Quebec:

I shall see that the decree of the Council of Trent is published and that this publication is enregistered, in order to have it for reference afterward (17).

Is it possible that Bishop Provencher still did not know of the instruction in 1825--five years after it was sent to Bishop Plessis? However, if Bishop Provencher actually saw to it that the decree was published in certain parishes, his successor, Bishop Tache', should have known about it, but he expressly stated that it had not been published in that part of the country. In the first provincial council of Saint-Boniface, 1889, the legislation of which extended to all the territory of what today includes the Archdiocese of Winnipeg, the ecclesiastical provinces of St.-Boniface, Regina, Edmonton, and Vancouver with the exception of the diocese of Victoria (18),

Episcopum Quebecensem qua S. Congregatio de Propaganda Fide respondit quaestionibus ab eodem Praesule propositis, April 17, 1820: Archives of the Archdiocese of Quebec, C.M.R., 180/12).

(17) Documents Relating to Northwest Missions, 1815-1827, edited with notes and an introduction by Grace Lee Nute, St. Paul, Minnesota Historical Society, 1942, p. 428. Translation by the editor.

(18) Kinlin, Canonical and Civil Status of Parishes in Canada (outside the Civil Province of Quebec), manuscript copy, p. 126.

there is no reference to the Tametsi or to the necessity of the presence of the pastor and two witnesses for the validity of a marriage (19).

A note added to a circular letter sent to his clergy by Archbishop Langevin of St.-Boniface, dated April 10, 1908, contains the following lines:

We herewith publish an extract from a circular issued by His Grace the Archbishop of Montreal, dated March 16, containing certain explanations and remarks concerning the decree "Ne Temere" on betrothals and marriages. We have however inserted a few modifications, as the decree "Tametsi" had not been published in this diocese, as in the province of Quebec (20).

The written testimony of both Bishop Taché and Bishop Langevin seems to prove quite conclusively that the Tametsi decree of the Council of Trent had not been published in western Canada.

The Règlements, Usages et Discipline du Diocèse de Saint-Albert, 1903, expressly states that a marriage contracted before a protestant minister is perfectly valid even though illicit and a case reserved to the Bishop (21). The context indicates that there is question here of mixed marriages. Therefore, it does not prove that the Tametsi had not been published and that the Tridentine form was not necessary for

(19) Acta et Decreta Primi Concilii Provinciale Sancti Bonifacii, 1889.

(20) Mgr A. Langevin, O.M.I., Circular Letter, April 10, 1908: Archdiocesan archives of St.-Boniface. Certified copy. The circular letters of Bishop Langevin were written in both French and English.

(21) Règlements, Usages et Discipline du Diocèse de Saint-Albert promulgués en l'année 1903 par Mgr Emile-Joseph Legal, O.M.I., Montréal, Librairie Beauchemin, 1903, c. 18, p. 29.

the valid celebration of the marriage of two Catholics. Neither does it prove that the Tametsi had been published but that, by reason of the Benedictine Declaration extended to Canada in 1764, mixed marriages could be validly celebrated without observing the Tridentine form. Nothing is said in any other part of the Règlements about the necessity of the pastor and two witnesses for the valid marriage of two Catholics.

As mentioned above, the territory of British Columbia with the exception of the diocese of Vancouver Island (now the diocese of Victoria) was subject to the first provincial council of St.-Boniface, 1889. Until 1846, British Columbia had been a part of the ecclesiastical province of Quebec. But by the Brief Universi dominici of July 24, 1846, Pope Pius IX erected the ecclesiastical province of Oregon and included in it the territory of British Columbia (22). In December, 1863, the Vicariate of British Columbia was erected and separated from the ecclesiastical province of Oregon and committed to the care of the Oblate Congregation (23). In 1870 it was made a suffragan of the Metropolitan See of St.-Boniface (24). The diocese of Vancouver Island remained a suffragan of Oregon until 1903 (25).

 (22) Juris Pontificii De Propaganda Fide, Pars Prima, complectens Bullas, Brevia, Acta S.S. a Congregationis institutione ad praesens juxta temporis seriem disposita, auspicio S.R.E. Cardinali Ioanne Simeoni, cura et studio Raphaelis de Martinis (7 vols., Romae, Ex Typographia Polyglotta, 1888-1897) vol. 6, part 1, p. 6.

(23) Ibid., vol. 6, part 1, p. 407.

(24) Ibid., vol. 6, part 2, p. 139.

(25) Leonis XIII Pontificis Maximi Acta (23 vols., Romae Ex Typographia Vaticana, 1881-1905), vol. 22, p. 357-358.

Since the Tametsi decree was not published in the ecclesiastical province of Oregon (26), it seems very unlikely that it was published in British Columbia during the years that it was a part of that province.

It therefore seems quite reasonable to conclude that the Tametsi decree had not been published in Canada except in the civil province of Quebec and in certain parts of the Maritime provinces. However, an article in the Analecta Juris Pontificii of 1858, merely states that it is very doubtful whether the decree had been published outside of Lower Canada (27). This reference seems to support the general opinion that the impediment of clandestinity did not at that time exist in the Maritime provinces even if the Tametsi had previously been published there.

The lack of universal application of the Tametsi decree and the doubts raised as to domicile and quasi-domicile and one's proper pastor were the chief reasons why a reform of the Tridentine regulation was desirable. This reform was effected in 1907 by the decree Ne Temere of Pope Pius X (28). The new decree extended to the entire Catholic Church. Marriage in the presence of the proper pastor was no longer a condition for a valid marriage. Territory was made the basis for valid assistance. A pastor could celebrate marriage validly only

(26) Acta et decreta Concilii Baltimorensis Tertii, Baltimore, Typis Joannis Murphy et Sociorum, 1866, p. cvii.

(27) Analecta Juris Pontificii. Dissertations sur divers sujets de Droit Canonique, Liturgie et Theologie (28 vols., Rome, 1855-1888), vol. 3 (1858), col. 1074.

(28) S. C. Concilii decretum Ne Temere, August 2, 1907: Codex Juris Canonici Fontes, cura Emorum Petri Card. Gasparri et Justiniani Seredi editi (9 vols., Romae, 1923-1939), vol. 6, n. 4340.

within his territory, but could validly marry anyone within such territory. Ample provision was also made for the celebration of marriage in certain extraordinary cases. The legislation of the Ne temere was repeated substantially in the Code of Canon Law (29).

2. Publication of banns

In an effort to stem the abuses of clandestine marriage, the fourth Lateran Council, 1215, prescribed the publication of the banns a suitable time before the actual celebration of the marriage (30). However, the Council did not determine how often the banns had to be published. It was not until the Tametsi decree of the Council of Trent that the publication of the banns was required on three consecutive days of precept (31). The dispensation of the banns was left to the prudent judgment of the local Ordinary.

Since the prescription of the triple publication of the banns was contained in the Tametsi decree, it was not as such

(29) Codex Juris Canonici Pii X Pontificis Maximi jussu digestus, Benedicti Papae XV auctoritate promulgatus, Romae, Typis Polyglottis Vaticanis, 1918, canons 1094-1099

(30) "Statuimus, ut, quum matrimonia fuerint contrahenda, in ecclesiis per presbyteros publice proponantur competenti termino praefinito, ut infra illum, qui voluerit et valuerit, legitimum impedimentum opponat, et ipsi presbyteri nihilominus investigent, utrum aliquod impedimentum obsistat" (c. 3, X de clandestina desponsatione, IV, 3: Corpus Juris Canonici (Richter-Friedberg), vol. 2, col. 679).

(31) "(Ecclesia) praecipit, ut in posterum, antequam matrimonium contrahatur, ter a proprio contrahentium parrocho tribus continuis diebus festiuis in ecclesia inter missarum solemnias publice denuntiatur, inter quos matrimonium sit contrahendum" (Council of Trent, sess. XXIV, c. 1).

obligatory in those places in which the Tametsi was not published. In such places the rule of the fourth Lateran Council remained in force until the Code (32). However, it seems that the triple publication of the banns was generally observed even though there was no strict obligation. In fact, there is evidence that the Bishops of Canada did ordinarily insist on the threefold publication of the banns (33). The first plenary Council of Quebec adopted the Tridentine rule for the publication of the banns (34).

According to the prescriptions of the Roman Ritual before the Code, the banns had to be republished if the marriage was not celebrated within two months after the publication (35).

3. Consent of parents

The Council of Trent condemned the opinion of those who

(32) Felix M. Cappello, S. J., Tractatus Canonico-Moralis de Sacramentis (5 vols., 5th revised ed., Rome, Marietti, 1947), vol. 5 de Matrimonio, n. 160, p. 162; Matthaeus Conte a Coronata, O.F.M.Cap., Institutiones Iuris Canonici ad usum utriusque cleri et Scholarum, De Sacramentis, Tractatus Canonici (3 vols., 2nd revised ed., Rome, Marietti, 1947), vol. 3, n. 88, p. 106.

(33) Cf. e.g., Concilium Provinciae Quebecensis II, decree 12, 4, p. 74, which makes no distinction between places in which Tametsi was published and places in which it was not; Règlements, Usages et Discipline du Diocèse de Saint-Albert, 1903, c. 16, n. 8, p. 27.

(34) Acta et Decreta Concilii Plenarii Quebecensis Primi, 1909, Quebec, Typis "l'Action Sociale Limitée", 1912, n. 506, p. 381.

(35) "Si vero infra duos menses post factas denuntiationes matrimonium non contrahatur, denuntiationes repetantur, nisi aliter Episcopo videatur" (Rituale Romanum, Pauli V Maxima iussu editum et a Benedicto XIV auctum et castigatum, Baltimore, Joannis Murphy, 1873, tit. VII).

taught that the marriages of minors without the consent of their parents were invalid and that the parents could ratify or declare such marriages null. However, the Council was careful to point out that the Church had for very good reasons always detested and prohibited such marriages (36).

Pope Benedict XIV (1740-1758) declared that, even though the Church in earlier centuries had either made her own or at least tolerated laws which required the consent of the parents for the validity of a marriage, nevertheless it was clear that this parental consent was no longer required; the validity of the marriage depended solely on the consent of the contracting parties to the exclusion of the will of the parents (37).

In 1835 a question was sent from Quebec to the Holy See whether the marriage of two Catholics who were minors was valid if it was celebrated according to the Tridentine form but against the will of the parents. The Sacred Congregation of the Holy Office replied on November 17, 1835 that such marriages were valid and referred to the declaration of the Council of Trent on the consent of parents (38).

(36) "Quique falso affirmant, matrimonia a filiis familias sine consensu parentum contracta, irrita esse, et parentes ea rata, vel irrita facere posse: nihilominus sancta Dei Ecclesia ex justissimis causis illa semper detestata est, atque prohibuit" (Council of Trent, sess. XXIV, c. 1).

(37) Benedictus XIV, De Synodo Diocesana (libri 13 in 2 tom., Romae, Ex Typographia S. C. De Propaganda Fide, 1806), tom. 1, lib. IX, c. 11, n. 4.

(38) Coll. Prop. Fide, n. 842, n. 488.

The first provincial council of Halifax instructed pastors to take to task those parents who, without concern for the eternal salvation of their children in such an important matter, either forced or forbade their children to marry (39).

4. Celebration of marriage

From the Council of Trent until the present Code of Canon Law came into force, the solemn celebration of the marriage with the nuptial blessing was not allowed from the beginning of Advent until the feast of Epiphany inclusive and from Ash Wednesday until the octave of Easter inclusive (40).

As to the place of marriage, the discipline before the Code was not as strict as it is today. However, the mind of the Church was expressed in the Roman Ritual: "Matrimonium in ecclesia maxime celebrare decet" (41). There is evidence that in Canada the rule that marriages be celebrated in a church if possible was generally enforced. Similar rules were made prescribing the celebration of marriage in the morning during Mass. The general rule also held that the marriage should be celebrated in the domicile of the bride (42).

(39) Concilium Provinciale Halifaxiense I (1857): Collectio Lacensis, vol. 3, c. 17, col. 749.

(40) Cf. Council of Trent, sess. XXIV, c. 10.

(41) Rituale Romanum, tit. VII, c. 1, n. 2.

(42) Cf. e.g., Concilium Provinciae Quebecensis II (1854), decree 13, 5, p. 75; Concilium Provinciale Halifaxiense I (1857): Collectio Lacensis, vol. 3, c. 17, col. 749; Règlements, Usages et Discipline du Diocèse de Saint-Albert, 1903, c. 16, n. 4, 6; Acta et Decreta Concilii Plenarii Quebecensis Primi, n. 507, 508.

5. Registration of marriages

The Tametsi decree of the Council of Trent required the pastor to keep a book for the registration of marriages. This register had to contain the names of the parties and the witnesses, and the date and place of the marriage (43). One of the reasons for prescribing the Tridentine form of marriage was to procure the proper registration of the marriage. But the same system of registration was also very important even if the marriage was not celebrated according to the Tridentine form. Just as the Tridentine form of marriage was observed as far as possible even in those places in which the Tametsi decree had not been published, so too, the system of registration of marriages as contained in the Tametsi decree was also observed as far as possible (44).

The decree Ne temere introduced the regulations for the registration of marriages which are today contained in the Code of Canon Law (45).

(43) "Habeat parochus librum, in quo coniugium, et testium nomina, diemque, et locum contracti matrimonii describat, quem diligenter apud se contineat" (Council of Trent, sess. XXIV, c. 1).

(44) E.g., the Règlements, Usages et Discipline du Diocèse de Saint-Albert, 1903, prescribed the keeping of a double register, one of which had to be sent to the Bishop (c. 16, n. 12, p. 27).

(45) S. C. Concilii decretum Ne temere, August 2, 1907: Fontes, vol. 6, n. 4340; C. J. C., can. 1103.

Conclusion

It is certain that the decree Tametsi of the Council of Trent had been published in the civil province of Quebec. It is also quite reasonably certain that it had been published in certain sections of the Maritime provinces, but not in the other parts of Canada. But even though the Tametsi decree had not been published in large portions of Canada, the Tridentine form of marriage and the other prescriptions of the Tametsi decree such as the triple publication of the banns and the registration of marriages were generally observed in as far as conditions in the new country permitted.

Chapter 4

HISTORY OF CIVIL MARRIAGE LEGISLATION IN CANADA

The scope of this thesis does not permit a very detailed exposition of the development of the marriage legislation of the provinces of Canada. However, since the present civil law of the provinces on the solemnization of marriage is the result of frequent changes and gradual additions, it seems advisable to indicate as briefly as possible the development of at least the more important matters which concerned more directly the officiating minister of the marriage ceremony, the preliminaries to a marriage, its celebration, and its registration.

The geographical and to a certain extent also the chronological order of the provinces is followed in the articles of this chapter.

Article 1. Newfoundland

The permanent settlement of Newfoundland probably dates back to the year 1622 when Lord Baltimore founded his colony of Ferryland, but there had been various attempts at colonization even in the sixteenth century. Another settlement was begun in Placentia about the year 1650 by the French who in 1635 had obtained permission to dry fish on the shores of the Island. In 1696 the French captured almost the whole Island and it remained in their possession until they ceded it to England in 1713 by the Treaty of Utrecht. Freedom of religion was

guaranteed but most of the French Catholics did not put much faith in the guarantee and left the country (1).

About the year 1683 the English merchants and fishermen believed that it would be ruinous to their business if the Island became settled with a fixed and resident population. Workers were brought to Newfoundland in the spring and were expected to return to England for the winter. One of the reasons for the persecution of the Irish Catholics who began to come to the Island toward the end of the seventeenth century was that they were determined to remain permanently in Newfoundland. Each governor in succession considered it his duty to renew the begoted attack against Catholics (2). During the worst years under the governorship of Hugh Palliser (1762-1772), when bigotry was at its height, priests were hunted and the authorities not infrequently burned the houses in which it was discovered that Mass had been said. The Quebec Act, 1774, which included Newfoundland in the extended province of Quebec, had guaranteed religious freedom (3), but such guarantees were not kept in Newfoundland.

A certain amount of toleration was finally granted as a measure of expediency following upon the American revolution. It was dangerous to weaken the allegiance of Catholic subjects

(1) M. F. Howley, Ecclesiastical History of Newfoundland, Boston, Doyle and Whittle, 1888, p. 164f.

(2) Ibid., p. 126, 172.

(3) Imperial Statute, 14 George III, c. 38, s. 5.

by open persecution. Therefore the policy of open persecution ceased and was followed by a system of exclusion from all public positions of honor or profit (4). As a result of the instructions of His Majesty George III directed to the governor, justices of the peace, and magistrates of the various Districts of the Island, all persons in Newfoundland were in 1784 allowed "liberty of conscience" and the "free exercise of all modes of religious worship as was not prohibited by law, provided people be content with a quiet and peaceable enjoyment of the same without giving scandal or offense to the Government" (5). Consequently, Catholic priests were again allowed to perform their sacred ministry.

However, soon after this guarantee of religious freedom, an obnoxious tax was exacted of Catholics on the occasions of their marriages and burials. This tax was demanded until Bishop Fleming absolutely refused to pay it shortly after his consecration as third bishop of Newfoundland in 1829, and the tax was dropped (6). It was largely through the influence and vigorous action of this prelate that the Catholics of Newfoundland finally gained their emancipation.

An Act was passed in the British Parliament in 1817 to regulate the celebration of marriages in Newfoundland (7). To

(4) Howley, op. cit., p. 178.

(5) Cf. the instruction as quoted by Howley, op. cit., p. 180.

(6) Howley, op. cit., p. 261.

(7) Imperial Statute, 57 George III, c. 51.

settle doubts which had arisen it was declared that all marriages had to be celebrated by persons in Holy Orders, but exceptions were made for cases in which it was very difficult to obtain the presence of a person in Holy Orders. This Act did not hinder Catholic priests from celebrating marriages according to the laws of the Church. An amendment of 1824 extended the exceptional cases in which marriages could be performed by persons not in Holy Orders. It also prescribed that the celebration of all marriages be reported to the Secretary of the Governor (8).

In 1833 Newfoundland was given a local Legislature. In that same year the Colonial government passed an Act repealing all previous marriage laws and providing for the celebration of marriages after that date, but much of the previous legislation was re-enacted (9). However, all clergymen, ministers, and licenced teachers and preachers of religion could solemnize marriages. The celebration of marriage in the presence of a licenced magistrate or other layman was allowed only in remote places in which a clergyman, minister, or teacher of religion could not be had. The banns had to be published on three consecutive Sundays, or notice of the marriage had to be posted in some conspicuous place for the space of three weeks if there was no church or chapel in the place. Minors were forbidden to

(8) Imperial Statute, 5 George IV, c. 68.

(9) Acts of the General Assembly of Newfoundland (1833-1933), St. John's, King's Printer, Acts of 1833, c. 10.

marry without the consent of their parents or guardians. All clergymen, ministers, or teachers of religion had to record every marriage they performed in a register kept in the church or chapel for that purpose. All those who did not have a church or chapel had to report the marriage to the Colonial Secretary.

The marriage legislation from 1833 to the Consolidated Statutes of 1916 concerns almost exclusively the registration of marriages. The registration Act of 1865 made the stipendiary magistrates ex officio registrars of marriages for their respective districts (10). The Registration Act of 1890 and its amendment of 1891 required every person who solemnized marriages to keep an accurate register and to send a copy of it to the Registrar General four times a year (11). This system of registration remains to the present day.

The only amendment of any importance since the Consolidated Statutes of 1916 is that of 1947 which exempts a minor who is an expectant mother from the necessity of obtaining the consent of her parents or guardian before she may marry (12).

CONCLUSION

There is a striking contrast between the present status of

(10) Acts of Newfoundland, 1865, c. 5, s. 1, 6.

(11) Acts of Newfoundland, 1890, c. 21, s. 5, 18; 1891, c. 9, s. 4.

(12) Acts of the Honourable Commission of Government of Newfoundland (1934-1948, St. John's, David R. Thistle, 1934-1948), Acts of 1947, No. 30, s. 1.

the Catholic Church in Newfoundland and the status in the middle of the eighteenth century. Until about the year 1784, Catholics were openly persecuted and were considered as social outcasts and enemies of the State. But today Catholics as well as all other religious denominations are exceptionally free from burdensome restrictions. This is the case especially in the matter of the celebration of marriage. Civil marriage licences do not even exist. Whereas most of the older provinces of Canada give very detailed regulations for the preliminaries preceding a marriage and for the celebration of the marriage itself, the laws of Newfoundland leave the responsibility for the proper celebration of the marriage to the clergyman, minister, or other person authorized to solemnize marriages.

Article 2. Nova Scotia

The first real colonizing venture of France in the New World was that of Sieur de Monts, the patron and associate of Champlain. The first settlement was founded in 1604 on a small island at the mouth of the St. Croix River but in the following year it was moved to the mainland of Acadia. Except for a few groups of Scots, the early settlers were almost all French (13).

During the first hundred years of its existence as a colony, Acadia had several times been handed back and forth between England and France. But by the Treaty of Utrecht in

(13) Arthur G. Doughty, The Acadian Exiles, A Chronicle of the Land of Evangeline, No. 9 of Chronicles of Canada Series, Toronto, Glasgow, Brook and Company, 1916, pp. 3ff.

1713, France ceded Acadia, which at that time included the present provinces of Nova Scotia and New Brunswick, to Great Britain. During the early years of the English regime the Acadian inhabitants were apparently left much to themselves and were not molested by any restrictive or penal measures. However, the growing tension between the Acadians and the British authorities and the threat of another war between England and France prompted Governor Lawrence in 1755 to order the exile of over 6000 Acadians to the New England colonies further south (14).

The New England colonists who came in to replace the exiled Acadians, as well as the United Empire Loyalists who followed later, brought with them to Nova Scotia their intense hatred of the Catholic Church which soon took the form of proscriptive and persecuting laws (15). Thus in the laws made by the first General Assembly of Nova Scotia in 1758 we find an act for the establishment of religious worship in the province and for the suppression of popery (16). The rites and ceremonies of the Church of England were declared the official form of

(14) R. Coupland, The Quebec Act, A Study in Statesmanship, Oxford, Clarendon Press, 1925, p. 16.

(15) Brother Alfred, F.S.C., Catholic Pioneers in Upper Canada, Toronto, MacMillan, 1947, p. 109.

(16) The Statutes at Large, passed in the several General Assemblies in His Majesty's Province of Nova Scotia (1758-1804, Halifax, John Howe and Son, 1905), Statutes of 1758, chapter 1. (Hereinafter all statutes are cited in the abbreviated form: S.N.S., with the year, chapter and section of any enactment).

worship, but all dissenters from the Church of England were guaranteed full religious freedom. However, anyone who exercised the functions of a Catholic priest was to depart from the province before March 25, 1759. Severe penalties were imposed on such persons and on those who dared to conceal them after that date (17).

The first Marriage Act of 1758 required the publication of the banns on three Sundays or Holy Days in the place of residence of each of the parties (18).

The Registration Act of 1761 provided that in those districts which did not have established parishes, every marriage be reported within 30 days to the clerk of the district (19). After 1795 every marriage without exception had to be reported in this manner (20).

In 1783 the penal laws against Catholics were repealed and priests were again free to perform their sacred functions (21), but Catholics were still subject to many other civil disabilities until the year 1830 (22).

(17) S.N.S., 1758, c. 5, s. 1-4.

(18) S.N.S., 1758, c. 17, s. 1.

(19) S.N.S., 1761, c. 4.

(20) S.N.S., 1795, c. 2, s. 2.

(21) S.N.S., 1783, c. 9.

(22) S.N.S., 1830, c. 1.

Marriage under the authority of a licence had always been permitted if the ceremony was performed by a clergyman of the Church of England, but it was only in 1834 that ministers or clergymen of other religious denominations were permitted to solemnize marriages under the authority of a licence issued by the Lieutenant Governor (23).

The Revised Statutes of 1851 required the publication of the banns a total of three times on two or more Sundays (24). Every person who solemnized marriages had to keep a register and every year send a duplicate copy of the entries in his register to the clerk of the county (25).

After 1864 the publication of the banns was required in the place of residence of only one of the parties (26). If the marriage was celebrated under the authority of a licence, the officiating clergyman or minister had to send the licence, endorsed with the particulars of the marriage, to the deputy registrar of the district within 10 days (27).

The Marriage Act of 1899 declared residence in Canada sufficient for those who wished to solemnize marriages in Nova

(23) S.N.S., 1832, c. 31, s. 1. This Act did not go into force until May 1st, 1834.

(24) R.S.N.S., 1851, c. 122, s. 2.

(25) R.S.N.S., 1851, c. 123, s. 1.

(26) R.S.N.S., 1864, c. 120, s. 3.

(27) Ibid., s. 22.

Scotia (28). Formerly residence in the province was required. All marriages had to be reported within 10 days to the nearest issuer of licences, and the annual report was abandoned (29). Anyone below the age of 21 years and not a widow or widower was not permitted to marry without the consent of parents or guardians (30).

Since 1912 a permit obtained from a deputy issuer of marriage licences has been required before a clergyman or minister may publish the banns. Before receiving the permit, the parties have to make an affidavit concerning their freedom to marry, and pay a fee of \$1.00 (31).

In 1916 the Supreme Court of Nova Scotia was given power to declare null a marriage which had been contracted without the consent of parents or guardians required by law, provided that the parties did not cohabit as man and wife after the ceremony (32).

Since 1919 marriages have been considered invalid if celebrated by a person not authorized to solemnize marriages or if the banns have not been published or a licence has not been obtained according to the requirements of the law (33). Since 1937 the marriage has also been considered invalid if the permit

(28) S.N.S., 1899, c. 26, s. 3.

(29) Ibid., s. 15.

(30) S.N.S., 1899, c. 26, s. 11.

(31) S.N.S., 1912, c. 44, s. 1.

(32) S.N.S., 1916, c. 15.

(33) S.N.S., 1919, c. 48, s. 3.

to publish the banns has not been obtained (34).

The system of registration of all persons wishing to solemnize marriages was introduced in 1937. Residence in Nova Scotia was again required, but there were special provisions made for temporary registration of those who were only temporarily resident in the province (35).

Conclusion

The Catholic Church in Nova Scotia received a heavy blow in the exile of the Acadians in 1755 and in the penal laws which followed in 1758. After the repeal of these unjust laws in 1783 and the final emancipation of Catholics in 1830, the Church gained steadily in the province. Since then she has been left quite free to celebrate marriage according to her own rites, but the statutes to the present day require certain additional formalities, such as a special permit to publish the banns, which are not required in most other provinces. Penalties for the failure to observe the requirements of the Marriage Act have always been heavy, and no marriage is considered civilly valid unless it is celebrated by a duly registered clergyman or minister, and unless a marriage licence has been obtained or the banns have been published after the reception of a permit.

(34) S.N.S., 1937, c. 38, s. 3.

(35) Ibid., s. 2.

The permanent settlement of Prince Edward Island (known as St. John's Island until 1799) dates back to the year 1719 when all the islands in the Gulf of St. Lawrence were granted by the King of France to the Comte de Saint-Pierre. Until the year 1758 the French colonists increased in number and prosperity. But after the fall of Louisburg and the English invasion of 1758, most of the French inhabitants were transported, the churches were burned, and the clergy were forced to leave the country. For this reason Prince Edward Island was without a resident priest from 1758 until 1772 when Father James MacDonald came to the Island with a group of Scotch immigrants. After his death in 1785, there was no resident priest until the arrival of Father Angus MacEachern in 1790 (36).

By the Treaty of Paris, 1763 (37), France relinquished all right to Prince Edward Island. The Island was annexed to Nova Scotia, but in 1773 was given its own government. The first General Assembly was held at Charlottetown, July 7, 1773 (38).

(36) Emmet J. Mullally, "A Sketch of the Life and Times of the Right Reverend Angus Bernard MacEachern, the First Bishop of the Diocese of Charlottetown", Canadian Catholic Historical Association, Report 1945-46, p. 78f.; The Catholic Encyclopedia (15 vols., New York, Robert Appleton Co., 1907-1912), vol. 3, p. 632.

(37) Canadian Archives: Documents relating to the Constitutional History of Canada, 1759-1791, edited by Adam Shortt and Arthur G. Doughty, Canadian Sessional Paper, No. 18 of 1907, 2nd revised ed., Ottawa, J. de la Taché, 1918, pp. 97-122.

(38) The Acts of the General Assembly of Prince Edward Island, 1773-1852, printed by John Ings, at the "Royal Gazette" Office, 1862, introduction to the Acts of the first session of the first General Assembly. (Hereinafter all Acts are cited in the abbreviated form: S.P.E.I., with the year, chapter, and section of any enactment).

Even though Catholics were still subject to many civil disabilities, they were not prevented from having their marriages celebrated by a Catholic priest. Father Angus MacEachern was not molested by the first three governors who were in office after his arrival in Prince Edward Island. But in 1813 Governor Charles Douglas Smith proceeded to show that the penal laws could still be enforced. He wrote Father MacEachern that all marriages solemnized by the priest without first having obtained a licence from the Governor would be "notified as null and void and of no effect in law". Through a friendly intermediary, Father MacEachern pointed out that the Catholics were loyal citizens and would remain such, but that it would be bad policy to cause ill will among the comparatively large number of Catholics in Prince Edward Island with war (39) waging not far away. In a few years the Governor dropped his intention of introducing State action in the celebration of Catholic marriages (40). The other civil disabilities which had been imposed on Catholics were finally repealed in 1830 (41).

To avoid the inconveniences resulting from not registering marriages, the Registration Act of 1830 obliged every person who solemnized marriages to send a certificate to the surrogate of the Island within six months after the ceremony (42).

(39) The war of 1812-14 between England and the United States.

(40) Mullally, "art. cit.", Can. Cath. Hist. Assoc., Report 1945-46, p. 92.

(41) S.P.E.I., 1830, c. 7.

(42) S.P.E.I., 1830, c. 5.

The marriage Act of 1832 imposed a penalty of 500 pounds on anyone who dared to solemnize a marriage without a licence or the publication of the banns, or without the consent of parents or guardians for persons under the age of 21 years. The marriages of minors without the required consent or its proper dispensation were considered null and void (43). To prevent fraud in obtaining marriage licences, an amendment of 1843 required the applicant for the licence to produce the written consent of the parents if either party was below the age of 21 years, and a bond and one surety guaranteeing the freedom of the parties to marry (44).

The Vital Statistics Act of 1906 required that a report of each marriage be sent to the Registrar General within 30 days after the ceremony (45). The publication of the banns on only one Sunday was declared sufficient (46). Formerly the publication had to be made on three consecutive Sundays.

The Vital Statistics Act of 1919 prescribed the keeping of marriage registers by all persons authorized to solemnize marriages in the province. In addition, a report of each marriage had to be sent to the district registrar within 48 hours after the ceremony (47).

(43) S.P.E.I., 1832, c. 14, s. 3.

(44) S.P.E.I., 1843, c. 8. After 1926 an affidavit concerning freedom to marry, and after 1934 a birth certificate were also demanded of the parties (S.P.E.I., 1926, c. 7, s. 7; 1934, c. 19, s. 10).

(45) S.P.E.I., 1906, c. 6, s. 19.

(46) S.P.E.I., 1906, c. 7.

(47) S.P.E.I., 1919, c. 10, s. 15, 16.

The Marriage Act of 1926 marks an important point in the marriage legislation of the province, much of which has remained to the present day. All ministers or clergymen resident in the province and either in charge of a congregation or actually and bona fide discharging the duties of a clergyman were authorized to solemnize marriages. The banns had to be published in the place of residence of one of the parties on a Sunday or Holy Day celebrated as a Sunday. A general affidavit to prove freedom to marry had to be made by the applicant for a marriage licence. The consent of parents or guardians was not necessary for the marriage of a minor who was already a widow or widower. Consent was no longer demanded as a condition to a valid marriage (48).

After 1932 registration with the Registrar General was required of all those who wished to solemnize marriages in the province (49).

Since the Premarital Health Examination Act of 1946, both parties to an intended marriage must either before the issue of a marriage licence or the publication of the banns submit to a physical examination and a serological test for syphilis (50). An amendment of the Marriage Act in the same year required the consent of parents or guardians for the marriage of any male below the age of 21 years or any female below the age of 18 years if he or she was not already a widower or widow (51).

(48) S.P.E.I., 1926, c. 7.

(49) S.P.E.I., 1932, c. 11, s. 15.

(50) S.P.E.I., 1946, c. 23.

(51) S.P.E.I., 1946, c. 21.

Conclusion

Although the Church suffered much from open persecution and bigotry during the early years of the English regime in Prince Edward Island, her rights were eventually acknowledged. Priests and other ministers of religion have not been burdened with excessive detailed and regulations concerning the celebration of marriage. They are expected conscientiously to fulfill their duties respecting the investigations of parties intending to marry. No special affidavit to prove their freedom is required by the civil law before the publication of the banns. The method of producing evidence of such freedom is left to the clergyman to determine. Furthermore, Prince Edward Island is the only province which permits the publication of the banns on a Holy Day celebrated as a Sunday.

Article 4. New Brunswick

Until the year 1784 New Brunswick was a part of the province of Nova Scotia. But in that year it was separated and given its own local government (52).

The Church of England had always been very influential in the province, but after the repeal of the penal laws of Nova Scotia in 1783, Catholic priests were again free to perform their sacred functions. However, the Marriage Act of 1791 forbade the ministers of most of the congregations dissenting from the Church

(52) The Makers of Canada (11 vols., Toronto, Morang and Co., 1911), vol. 7, p. 5f.

of England to solemnize marriages. Catholic priests were free to perform the marriage ceremony only if both of the parties were Catholics (53). The consent of the father or guardian was required for the marriage of anyone below the age of 21 years.

An Act of 1812 required that after May 1st of that year, all marriages be solemnized in the presence of at least two witnesses besides the officiating minister and that within two months the certificate of the marriage be sent to the clerk of the county for the official registration (54).

After 1838 any person authorized to solemnize marriage could officiate at the marriage of any two persons even if they did not belong to his religious denomination (55).

The Revised Statutes of 1854 required the publication of the banns in the parish of either of the parties (56). Formerly publication had always been required in the place of residence of each of the parties. In addition to the report of each marriage to the clerk of the county, every person who solemnized marriages had to send annually to the Provincial Secretary a list of the marriages celebrated by him during the year (57).

(53) The Acts of the General Assembly of Her Majesty's Province of New Brunswick, 1786-1836, Fredericton, John Simpson, 1838, chapter 5 of the Acts of 1891. (Hereinafter the Acts are cited in the abbreviated form: S.N.B., with the year, chapter, and section of any enactment). The restriction on the marriages celebrated by priests was abolished in 1838.

(54) S.N.B., 1812, c. 21.

(55) S.N.B., 1838, c. 42.

(56) R.S.N.B., 1854, c. 106, s. 3.

(57) R.S.N.B., 1854, c. 106, s. 13.

The New Brunswick Registration Act of 1887 divided the province into registration districts and required every person who solemnized marriages to keep a register and to report each marriage within 90 days to the division registrar (58). After 1889 a certified list of all marriages entered in the register also had to be sent to the registrar every three months (59).

The Marriage Act of 1900 introduced the system of registration of persons wishing to solemnize marriages. The chief requirements were that such persons be residents of the province and in charge of or connected with some congregation. The consent of parents was required only for the marriages of those below the age of 18 years (60).

By reason of an amendment of 1911 the publication of the banns on two consecutive Sundays sufficed (61), and in 1914 the publication on only one Sunday was required (62). In 1915 publication in the place of residence of each party was re-introduced (63).

(58) S.N.B., 1887, c. 5.

(59) S.N.B., 1889, c. 11.

(60) S.N.B., 1900, c. 4.

(61) S.N.B., 1911, c. 44, s. 1.

(62) S.N.B., 1914, c. 30. But in 1942 it was expressly stated that no marriage could be celebrated until five days after the first publication of the banns (S.N.B., 1942, c. 22, s. 24).

(63) S.N.B., 1915, c. 46, s. 1.

In 1915 the Provincial Secretary Treasurer was given authority to grant temporary registration to one who was in the province only temporarily and wished to solemnize marriages (64).

The registration of marriages was in 1918 entrusted to the Department of Health. The report of the marriage had to be sent to the District Medical Health Officer within a week after the ceremony (65).

An amendment of 1929 forbade anyone to solemnize a marriage unless he had, not less than five days before the marriage, received notice of the names, residence, occupation, age, and condition of the parties to the intended marriage, but exceptions were made for urgent cases. Before the issue of a licence, the parties each had to present an affidavit concerning their freedom to marry made by some trustworthy person other than the parties themselves (66). But the Marriage Act of 1942 required each of the parties to make the affidavit personally and separately. No licence could be issued until five days after the application, and the regulation concerning the five-day notice of the marriage was dropped (67).

In 1950 the registration of marriages came under the Vital

(64) S.N.B., 1915, c. 46.

(65) S.N.B., 1918, c. 36, s. 34.

(66) S.N.B., 1929, c. 36, s. 1, 2.

(67) S.N.B., 1942, c. 22.

Statistics Act which prescribed that within seven days after the ceremony the officiating minister send a report of the marriage to the registrar of the district (68).

Conclusion

Even though the laws of New Brunswick at first forbade dissenters from the Church of England to solemnize marriages according to their own rites, the Catholic Church was fortunate enough to have its rights acknowledged. On the whole, the Church in New Brunswick has not been burdened with many of the detailed regulations made in many other provinces. Thus, for example, the priest or clergyman who publishes the banns is merely required by law to satisfy himself that the parties to the intended marriage are legally competent to contract marriage.

Article 5. Ontario

The territory which today comprises the province of Ontario was visited by Champlain in 1615. It was subsequently explored by French missionaries and voyageurs. But except for the missionaries, the trappers, the soldiers in a few isolated posts, and a few settlers on the Detroit and Ottawa rivers, and near Georgian Bay, Ontario at the beginning of the English regime in Canada was an uninhabited wilderness roamed over by various Indian Tribes.

(68) S.N.B., 1950, c. 171, s. 10.

Beginning about the year 1777, families of the Loyalists belonging to Butler's Rangers, the Royal Yorkers, Indian Department, and other corps doing duty at the upper posts had from time to time come into the country (69). But it was only about the year 1784 after the American War of Independence that many Loyalists crossed over to Upper Canada in search of new homes. Most of these early settlers were non-Catholics, but there was a strong settlement of Catholic Scots in Glengarry County (70).

The Constitutional Act of 1791 divided Canada into the two provinces of Upper and Lower Canada (71). The first local Legislature of Upper Canada was organized in the following year at Kingston under the governorship of John Graves Simcoe (72). The first session opened at Niagara on September 17, 1792 (73).

The validity of the marriages performed within the province was apparently the cause of much anxiety. This is indicated by the fact that at the very first session of the local Legislature, the Assembly proposed a measure for the

(69) Makers of Canada, vol. 4, p. 86.

(70) Ibid., p. 165; Dean Harris, The Catholic Church in the Niagara Peninsula, 1626-1895, Toronto, William Briggs, 1895, p. 163.

(71) Imperial Statute, 31 George III, c. 31.

(72) Makers of Canada, vol. 4, p. 79.

(73) The Statutes of His Majesty's Province of Upper Canada, in North America (1792-1840), introduction to the first Act of 1792. (Hereinafter these statutes are cited in the abbreviated form: S.U.C., with the year, chapter and section of any enactment).

legalization of all marriages previously contracted in the province. It is interesting to determine the reason for the doubts about the validity of previous marriages. The Marriage Act of 1793 seems to imply that the marriages were doubtfully valid because they were not celebrated in the presence of a protestant parson nor in a consecrated church as was required by the law of England (74). However, at the time when Upper Canada was made a separate province, the French civil law and the English criminal law were in force in the country. It was only at the first session of the first local Legislature that the English civil law was also introduced in Upper Canada (75). Therefore, it seems more correct to say that it was feared that the Quebec Act, by confirming the law of Canada in all questions relating to civil rights, had made such marriages doubtfully valid because the French civil law followed the Canon Law and required the presence of a priest for the validity of a marriage (76).

However, after the introduction into Upper Canada of the English civil law and the Marriage Act of 1793, all marriages

(74) S.U.C., 1793, c. 5, the preamble.

(75) S.U.C., 1792, c. 1, s. 3. Cf. also the Quebec Act (Imperial Statute, 14 George III, c. 38, s. 8); William Renwick Riddell, "The Law of Marriage in Upper Canada", The Canadian Historical Review, vol. 2 (1921), p. 226.

(76) Cf. Adam Shortt and Arthur G. Doughty, Canada and its Provinces, a history of the Canadian people and their institutions (23 vols., Toronto, Glasgow, Brook and Company, 1914), vol. 3, p. 174; Riddell, "art. cit.", Can. Hist. Rev., vol. 2, p. 226.

had to be performed in the presence of an ordained priest or clergyman. All dissenters from the Church of England had to have their marriages celebrated in the presence of a clergyman of that Church (77). At first glance, one might conclude that only clergymen of the Church of England were allowed to perform the marriage ceremonies in Upper Canada, but it seems quite certain that Catholic priests retained their right to celebrate marriages. The Quebec Act, 1774, had solemnly guaranteed freedom of religion for Catholics (78), and the Constitutional Act, 1791, acknowledged this freedom and in no way repealed it (79). In the law there was never any express exclusion of Catholic priests, nor in any of the works dealing with the marriage law of Upper Canada or with the status of the Church during those early years is there ever any reference which would indicate that Catholic priests were not allowed to perform the ceremonies of marriage (80). This right of

 (77) The restrictions placed on certain dissenting denominations were not completely repealed until the year 1847 (Cf. Statutes of the Province of Canada (1841-1866), statutes of 1847, c. 18).

(78) Imperial Statute, 14 George III, c. 38, s. 5.

(79) Imperial Statute, 31 George III, c. 31. Cf. also Duvio, O.M.I., Législation civile du Canada concernant le Mariage et le Divorce en regard de la Législation ecclésiastique et en particulier des Règles de Décret "Ne Temere", Ottawa, Scolasticat Saint-Joseph (1912), p. 20.

(80) Cf. e.g., Riddell, "art. cit.", Can. Hist. Rev., vol. 2, p. 266ff.; Brother Alfred, F.S.C., op. cit.; Dean Harris, op. cit.; Wm. Perkins Bull, From MacDonell to McGuigan, The History of the Growth of the Roman Catholic

Catholics was taken for granted; therefore there was no special mention of Catholic priests being allowed to solemnize marriages.

The Marriage Act of 1793 provided that all those who had been married by a commander of a post or by some other lay person could, within three years after the passing of the Act, have their marriage recorded and the birth of their children registered by going before any magistrate of the district and taking an oath that they had publicly married. The clerk of the district was to record the attestation in his official register, which was to be full evidence of the marriage (81). Until there were five parsons or ministers of the Church of England resident in any district of the province, the parties to an intended marriage could, if they were both living more than 18 miles from a minister of the Church of England, be married by any justice of the peace in the district (82).

The amendment of 1798 required the person who solemnized the marriage to give the parties a certificate of the marriage. The parties had to present this certificate to the clerk of

Church in Upper Canada, Toronto, The Perkins Bull Foundation (1939). After 1804 the Rev. Father Alexander MacDonell of Glengarry even received an annual allowance of 50 pounds from the Government, and after 1824 he was, as Bishop of Kingston, receiving 500 pounds annually. In a report made by John Strachan in 1815 on the state of religion in Upper Canada, we find this sentence: "It does not appear expedient for the Government to countenance or assist any denomination of Christians beyond the established Church except the Church of Scotland and that of Rome" (The John Strachan Letter Book; 1812-1834, edited with an introduction and notes by George W. Spragge, Toronto, The Ontario Historical Society, 1946, p. 75).

(81) S.U.C., 1793, c. 5, s. 2.

(82) Ibid., s. 3, 5.

the peace for the official registration (83). The amendment of 1830 placed the burden of registration on the person who solemnized the marriage. Every twelve months he had to send to the clerk of the district a certified list of all marriages solemnized by him during that period (84). After 1857 he also had to keep a special marriage register supplied by the clerk at the expense of the county (85). The Registration Act of 1868 required every person who solemnized marriages to report each marriage within 90 days to the registrar of the district (86).

The Marriage Act amendment of 1874 was concerned chiefly with the publication of the banns and the issue of marriage licences. After this date one publication of the banns on one Sunday was required in the place in which one of the parties had his usual place of abode for 15 days before the marriage. Before the issue of a marriage licence, one of the parties had to take an affidavit concerning the freedom of the parties to marry, their residence, and the consent of parents or guardians if either party was below the age of 21 years (87).

(83) S.U.C., 1798, c. 4, s. 5.

(84) S.U.C., 1830, c. 36, s. 6.

(85) Statutes of the Province of Canada, 1857, c. 66, s. 3, 8.

(86) The Statutes of the Province of Ontario (1867-1952), statutes of 1868, c. 30, s. 12. (Hereinafter these statutes are cited in the abbreviated form: S.O., with the year, chapter, and section of any enactment).

(87) S.O., 1874, c. 6, s. 2, 5-8.

An amendment of 1888 declared residence in Canada sufficient for those who wished to solemnize marriages in the province (88). Formerly residence in Ontario had been required (89).

After 1894 the consent of parents or guardians was required only for the marriages of those below the age of 18 years, but the issuer of licences could dispense with this requirement in certain exceptional cases. Granting a licence to or marrying anyone below the age of 14 years was absolutely forbidden (90).

After 1896 the banns had to be published in the place of residence of each of the parties at least one week before the marriage. No marriage could be celebrated after three months from the last publication or from the date of the issue of the marriage licence (91). All marriages had to be reported within 30 days to the district registrar (92), but in the following year a biannual copy of all entries in the marriage register also had to be sent in (93).

An amendment of 1897 allowed the marriage of a person below the age of 14 years if the parties could produce a

(88) S.O., 1888, c. 20, s. 1.

(89) Cf. Statutes of the Province of Canada, 1857, c. 66, s. 1.

(90) S.O., 1894, c. 40, s. 1, 2.

(91) S.O., 1896, c. 39, s. 4, 5.

(92) Ibid., s. 20.

(93) S.O., 1897 c. 14, s. 69. This report was no longer required in 1911 (S.O., 1911, c. 32, s. 26).

certificate from a legally qualified practitioner showing that the marriage was necessary to prevent the illegitimacy of offspring (94).

In 1907 the High Court of Justice was given power to declare null the marriage of a person who had married below the age of 18 years without the consent required by the law. The Court could not declare such a marriage null if it was consummated or if the parties lived together as man and wife after the ceremony (95).

The consent of parents or guardians for the marriages of those below the age of 18 years was expressly mentioned in 1911 for the first time as a requirement before the publication of the banns (96). Previously it had been mentioned only in relation to the requirements before the issue of a licence.

In 1914 any person who was duly qualified to solemnize marriages but was only temporarily resident in Canada for the purpose of assisting some clergyman in Ontario was considered as being resident in Canada, and therefore was authorized to solemnize marriages in the province (97).

The Marriage Act of 1921 introduced the system of registration of all persons qualified to solemnize marriages. Anyone who dared to solemnize a marriage without first having

(94) S.O., 1897, c. 14, s. 68.

(95) S.O., 1907, c. 23, s. 8.

(96) S.O., 1911, c. 32, s. 15.

(97) S.O., 1914, c. 21, s. 33.

been registered was subject to a penalty of \$500.00 and 12 months imprisonment (98).

The amendment of 1925 demanded that the party who made the statutory declaration concerning the freedom of the parties to marry produce a copy of the birth certificate or other proof of birth of the other party, but in the following year this could be dispensed with if both parties made the usual statutory declaration (99). The marriage could not be celebrated until the third day after the issue of the licence (100).

In 1927 further exceptions were made to the requirement of the consent of parents if they were mentally ill, non-resident and actually absent from the province, or if their whereabouts were unknown (101). After 1932 the required consent of parents was no longer considered as a condition for a valid marriage (102).

By an amendment of 1949 the parties have been made responsible for filling in the particulars required in the registration form. Within two days after the marriage the officiating minister has to send the completed form to the Registrar General (103).

The Marriage Act of 1950 introduced civil marriage into the province. Previously all marriages had to be celebrated

- (98) S.O., 1921, c. 51, s. 2, 7.
- (99) S.O., 1925, c. 45, s. 3; 1926, c. 43, s. 5.
- (100) S.O., 1925, c. 45, s. 4; 1926, c. 43, s. 6.
- (101) S.O., 1927, c. 47, s. 18.
- (102) S.O., 1932, c. 53, s. 17.
- (103) S.O., 1949, c. 55, s. 1.

in the presence of some clergyman or minister. This Act also reintroduced the requirement of residence in Ontario for all those who wish to solemnize marriages in the province, but temporary registration is provided for those who are in Ontario only temporarily (104).

Conclusion

The efforts to establish the Church of England in Upper Canada kept many non-conformist denominations for several decades from celebrating marriage according to their own rites and ceremonies. The Catholic Church also had to bear with considerable bigotry for many years, but she was not seriously impeded in the celebration of marriage or in any other sacred functions. Freedom of religion for Catholics was guaranteed, even though perhaps somewhat reluctantly.

There have been many changes in the marriage legislation of Ontario during the years. Most of these changes concern the preliminaries to a marriage and its registration after the ceremony. The developments of the marriage law of Ontario have not infrequently been followed in other provinces and especially in Manitoba. The consent of parents is no longer considered as a condition to a valid marriage of a person below the age of 18 years. Until very recently all marriages in Ontario had to be celebrated in the presence of a clergyman or other minister of religion.

(104) S.O., 1950, c. 42, s. 21, 25.

What is now the province of Manitoba originally formed part of the territory of Canada as had been included by King Charles II in the Charter which he granted in 1670 to the Hudson Bay Company. The area granted by this Charter extended to what later became known as Rupert's Land and the North-Western Territory. When the Dominion of Canada was formed in 1867, the Hudson Bay Company's territory was not brought into the union. But it was admitted by an order in council of June 23, 1870. Before 1870 the territory was governed by the laws made by the Hudson Bay Company and by such portions of the laws of England of 1670 as were applicable under the circumstances. In the course of time some Imperial legislation took place, but this did not take away the general legislative powers of the Hudson Bay Company. In the District of Assiniboia, a portion of Rupert's Land, the Company had set up a Governor and Council with power to make laws for the district (105) When Manitoba was admitted into the union by the Manitoba Act, the laws of the Governor and Council of Assiniboia which were not inconsistent with the Act were extended to all of Manitoba (106).

(105) For a summary of the legal history of the territory now included in the province of Manitoba confer the decision of the Privy Council in the case of Walker v. Walker, (1919) 2 W.W.R. 935, (1919) A.C. 947.

(106) Statutes of Canada, 1870, c. 3; Statutes of the Province of Manitoba (1871-1952, Winnipeg, Government Printer, 1871-1952), 1881, c. 2, s. 52. (Hereinafter these statutes are cited in the abbreviated form: S.M., with the year, chapter, and section of any enactment).

The legislation respecting marriage was during the early years confined to the bare essentials. Ministers of religion were free to celebrate marriages according to their own rites and customs. In the later development of its marriage legislation, Manitoba adopted many enactments from the marriage law of Ontario, and occasional reference is made to the statutes of that province.

Until the year 1873 the registration of marriages was left to the care of each person who officiated at the ceremony. But the Registration Act of 1873 prescribed a system of duplicate marriage registers. One of these registers was retained in the church; the other had to be sent at the end of the year to the clerk of the County Court (107).

The Marriage Licence Act of 1877 required the applicant for a licence to give a bond and to take an oath to guarantee the freedom of the parties to marry. The consent of parents or guardians was also required if either of the parties was below the age of 21 years (108).

A new system of registration was introduced by the Registration Act of 1881. Only one register had to be kept, but each marriage had to be reported separately to the division registrar (109). After 1883 the registers were supplied by the municipality and remained the property of the church or

(107) S.M., 1873, c. 13.

(108) S.M., 1877, c. 10, s. 2, 3.

(109) S.M., 1881, c. 8.

denomination to which the officiating minister belonged at the time of the first entry (110).

The Statutes of 1883 acknowledged the right of resident clergymen and ministers of every church or religious denomination to solemnize marriages according to their own rites and customs between any two persons not legally disqualified. The banns had to be published only once in the place in which at least one of the parties had a 15 day residence. The head of the church or congregation to which at least one of parties belonged could grant a dispensation of the banns to take the place of a marriage licence (111).

An amendment of 1900 required the parties to make a statutory declaration concerning their freedom to marry before they could obtain a dispensation of the banns (112).

The Marriage Act of 1906 declared residence in Canada sufficient for those who wished to solemnize marriages in Manitoba. The banns had to be published in the place of residence of each of the parties. No marriage could be solemnized unless the parties presented a certificate of the publication of the banns or of their dispensation. Consent of parents or guardians was required for the marriages of those below the age of 18 years. No one below the age of 16 years was allowed to marry unless a certificate from a legally qualified practitioner or an affidavit of the father or mother was produced

(110) S.M., 1883, c. 18, s. 11, 12.

(111) S.M., 1883, c. 18, s. 1-3.

(112) S.M., 1900, c. 26, s. 1.

to show that the marriage was necessary to prevent illegitimacy of offspring (113).

The amendment of 1913 expressly required the consent of parents before the publication of the banns if either of the parties was below the age of 18 years. Previously it had been mentioned only in relation to the requirements before the issue of a marriage licence. The statutory declaration of the parties was now demanded also before the publication of the banns (114).

The Marriage Act amendment of 1931 introduced the registration of persons qualified to solemnize marriages and permitted civil marriages under the authority of a common marriage licence (115).

In 1935 the consent of parents or guardians for the marriages of minors was made a condition for a valid marriage unless it was consummated after the ceremony or unless the parties lived together as man and wife (116).

Since 1946 a serological test for syphilis has been required of the parties before they are allowed to marry (117).

(113) S.M., 1906, c. 41, s. 2, 5, 15, 16.

(114) S.M., 1913, c. 31, s. 1, 2.

(115) S.M., 1931, c. 32, s. 2.

(116) S.M., 1935, c. 26, s. 1, 3.

(117) S.M., 1946, c. 36.

Conclusion

Although the rights of the Church in the field of education were not respected by the government of Manitoba, the Church was more fortunate in other respects. Thus there is little evidence of restrictive measures in regard to the celebration of marriages beyond those found in most of the other provinces. The regulations on the preliminaries to a marriage are very detailed but cause no serious hardship. Manitoba is the only province to allow the dispensation of the publication of the banns as required by the civil law. The proper head of each religious congregation has this power, but a fee is demanded on the occasion of a dispensation because it takes the place of the marriage licence.

Article 7. The Territories

1. Northwest Territories

The portion of Rupert's Land and the North-Western Territory which was not included in the new province of Manitoba in 1870 was styled the North-West Territories and was subject to the "Act for the temporary government of Rupert's Land, and the North-Western Territory when united with Canada" passed in 1869. The Lieutenant Governor of Manitoba was appointed to act as Lieutenant Governor of the North-West Territories (118).

(118) Statutes of Canada, 1870, c. 3.

"An Act to amend and consolidate the laws respecting the North-West Territories" of 1875 provided a separate Lieutenant Governor and Council. Provision was made for the election of a member or members to the Council when in a district there were a certain number of inhabitants. When the number of elected members amounted to 21, the Council was to cease and the members were to form instead a Legislative Assembly (119).

The Marriage Ordinance of 1878 acknowledged the right of all duly ordained or appointed resident ministers and clergymen to solemnize marriages between any two persons according to their own rites and customs. All justices of the peace could solemnize marriage by virtue of their office. The banns had to be published on at least one Sunday, but if there was an urgent case and a licence could not be obtained, the clergyman or minister could solemnize the marriage without a licence or the publication of the banns (120). Before receiving a marriage licence one of the parties had to take an affidavit concerning their freedom to marry. Anyone below the age of 21 years and not a widow or widower had to obtain the consent

(119) Statutes of Canada, 1875, c. 49, s. 2, 13.

(120) The first draft of this law forbade priests to dispense from all three publications of the banns and then to solemnize the marriage without obtaining a marriage licence. Formerly the missionaries of the Northwest had always been free to dispense with the banns in exceptional circumstances in the name of their bishops and the Holy See. It was only on the firm stand of Bishop Taché of Saint-Boniface that the law was finally amended to allow for the dispensation of the banns without obtaining a marriage licence for the marriage if such a licence could not easily be obtained (Cf. Dom Benoit, Vie de Mgr Taché, Archevêque de Saint-Boniface (2 vols., Montreal, Librairie Beauchemin, 1904), vol. 2, p. 340ff.).

of parents or guardians. All marriages had to be celebrated in the presence of two witnesses besides the officiating minister. Immediately after the ceremony a duplicate certificate of the marriage had to be made, one of which was kept by the celebrant, and the other was sent to the Registrar of Deeds (121).

The Registration Ordinance of the first Legislative Assembly of 1888 required every person solemnizing marriages to keep a register, and to report each marriage to the division registrar (122).

An ordinance of 1892 required the publication of the banns at least three times on two consecutive Sundays, but the authority of the celebrant to dispense with the banns was no longer included (123).

After 1903 any female between the ages of 18 and 21 years who was living apart from her parents or guardian and earning her own living could be excused from obtaining their consent to her marriage (124).

After Alberta and Saskatchewan were erected as separate provinces in 1905, the Northwest Territories were confined to

(121) Ordinances of the North-West Territories passed by the Lieutenant-Governor in Council (1878-1887, Regina, Printer to the Government of the North-West Territories, 1884-1887), 1878, No. 9. (All Ordinances of the Northwest Territories are hereinafter cited in the abbreviated form: O.N.W.T., with the year, number or chapter, and section of each enactment).

(122) Ordinances of the North-West Territories passed by the Legislative Assembly (1888-1905, Regina, Printer to the Government of the North-West Territories, 1888-1905), 1888, No. 6, s. 6, 12.

(123) O.N.W.T., 1892, No. 25, s. 2.

(124) O.N.W.T., 1903, 1st session, c. 11, s. 1.

the northern section of Canada which contained very few inhabitants. The government of this territory was again intrusted to a Commissioner and his Council. The marriage legislation remained almost without change from 1905 to 1949. The only new legislation of any importance was the Registration Ordinance of 1926. Marriage registers were thereafter supplied by the Department of Vital Statistics but remained the property of the government and were subject to periodical inspection. Each marriage had to be reported within 30 days to the district registrar. The executive body of every religious denomination was obliged to send to the Department at least once a year a list of all persons in his denomination who were qualified to solemnize marriages. One whose name was not included in such a list could not solemnize marriages unless he forwarded to the Department a certificate of his ordination or appointment (125).

The Marriage Ordinance of 1949 consolidated the marriage law of the Territories (126). The last previous consolidation had been that of 1898. It is very closely patterned on the marriage law of Saskatchewan. An explanation of the various enactments of the Marriage Ordinance of 1949 will be included in the commentary on the present marriage law of Canada, and therefore will not be explained here.

(125) O.N.W.T., 1926, s. 3, 15, 22.

(126) O.N.W.T., 1949, c. 10.

2. Yukon Territory

Until 1897 the territory now known as Yukon Territory was part of the Northwest Territories. But in that year the Klondike gold rush began and the territory was created a judicial district by a proclamation of the Governor General of Canada (127). By the Yukon Act of 1898 it was made the Yukon Territory with a government of its own (128).

The marriage law of the Northwest Territories as it existed in 1898 was adopted in Yukon Territory. The only amendment of any importance was that of 1931 concerning the consent of parents or guardians for the marriages of minors. Anyone below the age of 18 years needed the consent of both father and mother. Anyone between the ages of 18 and 21 years needed the consent of either father or mother, but certain exceptions were made for cases in which such persons were supporting themselves or in which the parents or guardians unreasonably refused their consent (129).

Conclusion

As in most of the provinces, the civil government of the Northwest Territories did not fully acknowledge the right of the Church to regulate the marriages of her subjects. But on

(127) The Encyclopedia of Canada (6 vols., Toronto, University Associates of Canada, 1937), vol. 6, p. 395.

(128) Statutes of Canada, 1898, c. 6.

(129) Ordinances of the Yukon Territory passed by the Yukon Council (1903-1948, Dawson, 1903-1948), 1931, c. 1.

the whole, the Church was not seriously hindered in this respect. However, it was largely due to the firm stand of capable men such as Bishop Taché of Saint-Boniface that the rights of Catholic priests and missionaries to dispense with some of the ordinary requirements of the civil law in exceptional and urgent circumstances were maintained at least during the most difficult years of the development of the Northwest Territories. The Yukon Territory has hardly changed its marriage law since 1897, but the Northwest Territories have since 1949 prescribed very detailed regulations much like those found in the western provinces of Alberta and Saskatchewan.

Article 8. Saskatchewan

The Saskatchewan Act of 1905 established the province of Saskatchewan and provided for its government. The laws of the Northwest Territories before the creation of the new province remained in force until they were amended or repealed by the provincial Legislature (130). The first session of the first Legislature was held at Regina from March 29th to May 26th, 1906, with His Honour Amedee Emmanuel Forget as Lieutenant Governor (131).

(130) Statutes of Canada, 1905, c. 42, s. 16.

(131) Statutes of the Province of Saskatchewan (1906-1952, Regina, Government Printer, 1906-1952), introduction to the first session of the first parliament of 1906. (Herein-after these statutes are cited in the abbreviated form: S.S., with the year, chapter, and section of any enactment).

The marriage law of Saskatchewan at the time of its erection as a separate province was therefore the same as that of the Northwest Territories before the year 1905. Until the statutes of Saskatchewan were revised in 1919, amendments in the marriage law referred back to the Consolidated Ordinances of the Northwest Territories of 1898.

The Northwest Territories Marriage Ordinance of 1898 was amended in 1908 by the provincial Legislature to require the publication of the banns at least once on each of two Sundays (132).

The Vital Statistics Act of 1916 required every person who solemnized a marriage to send a full report of it to the division registrar (133). There was no longer any obligation to keep a marriage register in the church. The amendment of 1919-20 required that the form for the report of the marriage be signed by the minister, the parties, and two witnesses (134).

A system of registration of persons qualified to solemnize marriages was introduced in Saskatchewan in 1920. The executive bodies of all religious denominations had to send to the Commissioner of the province at least every six months a list of those persons in their denomination who were qualified to solemnize marriages (135).

(132) S.S., 1908, c. 22, s. 1.

(133) S.S., 1916, c. 13, s. 36.

(134) S.S., 1919-20, c. 11, s. 32.

(135) Ibid., s. 33.

The Marriage Act of 1924 prescribed the publication of the banns in the place of residence of each of the parties. No one was allowed to solemnize a marriage unless he was presented with a certificate of the publication of the banns. The marriage had to be celebrated within two months after the second Sunday of the publication of the banns, otherwise they had to be republished. The consent of father and mother was required for the marriage of anyone below the age of 18 years and not a widow or widower, and the consent of father or mother for anyone between the ages of 18 and 21 years. If both parents were dead the consent had to be given by the appointed or acknowledged guardian. However, special exceptions were made for cases in which there was no one available to give the consent or in which consent was unreasonably refused. No person below the age of 15 years was allowed to marry (136).

After the Marriage Act of 1933 the list of persons qualified to solemnize marriages had to be sent annually to the Registrar General. The Registrar General could grant temporary registration to one who was only temporarily resident in the province. The period for the celebration of the marriage after the publication of banns was extended to three months. Before the publication of the banns or the issue of a marriage licence the parties had to produce a health certificate of the male party. Both parties had to make a statutory declaration concerning their freedom to marriage before the issue of a licence (137). In

(136) S.S., 1924, c. 36, s. 4, 11, 20, 21.

(137) S.S., 1933, c. 59, s. 4-8, 18, 30.

1936 this statutory declaration was required also before the publication of the banns. Persons below the age of 15 years were allowed to marry only if they could produce a certificate from a duly qualified medical practitioner showing that immediate marriage was necessary to avoid illegitimacy of offspring (138)

The Marriage Act amendment of 1937 required the consent of both parents for the marriage of anyone below the age of 21 years if both parents were living and not legally separated. The consent was made a condition for the validity of the marriage unless it was consummated or unless the parties lived together as man and wife after the ceremony (139).

Since 1941 the health certificate has been demanded of both of the parents before the celebration of the marriage (140).

Conclusion

Apart from the general attempt of the civil law to regulate the marriages of Catholics even in those things which concern the validity of marriage, the Church in Saskatchewan has not been seriously impeded from celebrating marriages according to her own laws provided that the requirements of the provincial statutes are also complied with. In Saskatchewan, as in the other prairie provinces, there are detailed regulations in regard to affidavits to prove freedom to marry, publication of banns, consent of

(138) S.S., 1936, c. 89, s. 3, 13.

(139) S.S., 1937, c. 70, s. 3.

(140) S.S., 1941, c. 66, s. 6.

parents, etc., but these regulations generally do not cause any great hindrance to the proper celebration of marriage.

The consent of parents for those below the age of 21 years is considered a condition for a valid marriage only in the rather rare cases in which the marriage is not consummated or in which the parties do not even cohabit and live together as man and wife. The necessity of annual registration of clergymen and other persons qualified to solemnize marriages seems questionable.

Article 9. Alberta

The "Act to establish and provide for the government of the province of Alberta" of 1905 provided that all laws of the Northwest Territories before the creation of the province were to remain in force until they were changed by the lawful authority (141). The first session of the first provincial Legislature was held at Edmonton from March 15th to May 9th, 1906 (142).

The marriage law of Alberta at the time of its erection as a separate province was therefore the same as that of the Northwest Territories before the year 1905.

The Vital Statistics Act of 1907 required the executive bodies of all religious denominations to notify the Department

(141) Statutes of Canada, 1905, c. 3, s. 16.

(142) Statutes of the Province of Alberta (1906-1952, Edmonton, King's Printer, 1906-1952), introduction to the first session of the first Parliament of 1906. (Hereinafter these statutes are cited in the abbreviated form: S.A., with the year, chapter, and section of any enactment).

of Vital Statistics of the names of all their clergymen or ministers who were qualified to solemnize marriages. Marriage registers had to be kept in every church, and each marriage had to be reported to the nearest registrar (143). The Vital Statistics Act of 1916 prescribed that anyone whose name had not been included in the annual notification of persons qualified to solemnize marriages had to forward to the Department his certificate of ordination or appointment before he could solemnize marriages. The marriage registers were supplied by the Department but remained the property of the government (144).

The Statute Law Amendment Act of 1916 required the consent of father and mother for the marriage of anyone below the age of 18 years, and of father and mother for anyone between the ages of 18 and 21 years. If both parents were dead the appointed or the acknowledged guardian had to give his consent. No one below the age of 15 years was allowed to marry (145). But after 1919 such persons were allowed to marry if they could produce a certificate from a medical practitioner showing that the marriage was necessary to prevent illegitimacy of offspring. Certain exceptions were also made for minors who could not obtain the consent of their parents or who were supporting themselves and living apart from their parents (146).

(143) S.A., 1907, c. 13, s. 11-13, 17.

(144) S.A., 1916, c. 22, s. 13-15.

(145) S.A., 1916, c. 3, s. 20.

(146) S.A., 1919, c. 4, s. 48; 1920, c. 4, s. 40.

The Marriage Act of 1925 required the publication of the banns at least three times on two or three consecutive Sundays in the place in which one of the parties had his or her residence for 15 days before the first publication. A certificate of the publication had to be presented to the officiating minister of the marriage. If the marriage was not celebrated within two months after the second Sunday of the publication, the banns had to be republished. If they applied for a licence, both parties had to make a statutory declaration concerning their freedom to marry. The minimum age requirement was raised from 15 to 16 years (147).

In 1931 the consent of parents or guardians was made a condition for the validity of a marriage unless the marriage was consummated or the parties lived together as man and wife after the ceremony (148).

The Marriage Act amendment of 1935 prescribed the publication of the banns either once on the first and twice on the second of two consecutive Sundays, or once on each of three consecutive Sundays in the place of residence of each of the parties. Before the publication of the banns, the clergyman or the parties had to obtain a permit. The application for this permit had to be accompanied by an affidavit of each of the parties that he or she was not infected with any venereal disease or with tuberculosis. This affidavit also had to

(147) S.A., 1925, c. 39, s. 3, 5, 7, 8, 13, 15, 23.

(148) S.A., 1931, c. 16, s. 3.

accompany the application for a licence (149).

After 1945 no issuer could issue a marriage licence nor any clergyman publish the banns unless each of the parties produced a certificate from a duly qualified physician showing that a specimen of blood had been taken for the serological test for syphilis. Indians living on Indian Reserves were exempted from this requirement (150).

Conclusion

As in Manitoba and Saskatchewan, the marriage laws of Alberta contain very detailed regulations on the investigations and affidavits to prove the freedom of the parties to marry, the publication of the banns, and the consent of parents, but most of these regulations can quite easily be complied with and the Church has never been seriously impeded in the proper celebration of marriage. As in Nova Scotia, Alberta is the only other province that requires a permit for the publication of the banns. The registers supplied by the Department of Vital Statistics remain the property of the government and are subject to inspection, but pastors are not forbidden to keep an additional register of their own according to the prescriptions of Canon Law.

(149) S.A., 1935, c. 51, s. 3, 4.

(150) S.A., 1945, c. 67, s. 4.

In 1849 Vancouver Island passed from an unorganized geographical division to the status of a Crown Colony. From 1849 to 1856 it was administered by the Governor with the advice and assistance of his Council. But the growth of the colony soon demanded a colonial legislature, and in 1856 Governor Douglas received instructions from the Imperial Government to organize such a legislature. The first Assembly met at Victoria on August 12, 1856. In 1858 the mainland of British Columbia was also made a Crown Colony, and Douglas was appointed its first governor without ceasing to be governor of Vancouver Island. The gold rush and the resultant increase in population soon led to the formation of a colonial legislature in 1863. It met for the first time at New Westminster on January 21, 1864 (151). By an Act of the Imperial Parliament of 1866, Vancouver Island was united to British Columbia to form but one colony (152).

The earliest legislation of the Vancouver Island and its dependencies on the subject of marriage was an Act of 1859. It authorized all ministers and clergymen, ordained or appointed according to the rites and ceremonies of the church or denomination to which they belonged, to solemnize marriages according to their own rites and usages between any two persons not

(151) Henry J. Boam, British Columbia, its History, People, Commerce, Industries and Resources, London, Sells Ltd., 1912, p. 39. Cf. also O. H. Cogswell, History of British Columbia, Victoria, the "Colonist" Presses, 1894, pp. 60ff.; Adam Shortt and Arthur G. Doughty, Canada and its Provinces, vol. 21, p. 89.

(152) Imperial Statute, 29 & 30 Victoria, c. 67.

legally hindered from marrying. Two witnesses were always required in addition to the presence of the officiating minister. Marriage could be celebrated either under the authority of a licence from the governor or the publication of the banns on three consecutive Sundays in a place of worship belonging to the religious denomination of the minister who was to officiate at the marriage ceremony. Every person who solemnized a marriage had to record it in the marriage register supplied by the clerk of the county. These registers remained church property. Once a year a certified copy of the entries in the register had to be sent to the registrar of the district or county (153).

The Marriage Ordinance of 1865 of the separate Colony of British Columbia was practically the same as the above with a few additions. Civil marriage before a registrar appointed by the governor was permitted for anyone not desiring a church wedding (154). Marriage had to be celebrated within three months after the date of the issue of the marriage licence or the completion of the publication of the banns. The consent of

(153) A Collection of the Public General Statutes of the Colony of Vancouver Island, passed in the years 1859-1866, Victoria, British Colonist Office, 1866, Statutes of 1859, No. 3, s. 1, 2, 5, 13, 14.

(154) Ordinances passed by the Legislative Council of British Columbia, 1858-1870 (2 vols., New Westminster and Victoria, Government Printing Office), Ordinances of 1865, No. 21, s. 1. Until 1913 it was absolutely forbidden to have a religious ceremony performed after a civil marriage (Cf. Ordinance of 1865, No. 21, s. 6; Statutes of the Province of British Columbia, 1913, c. 42, s. 5. Hereinafter these statutes are cited in the abbreviated form: S.B.C., with the year, chapter, and section of any enactment).

parents or guardians was required for the marriage of anyone below the age of 21 years and not a widow or widower. The regulations on consent of parents were patterned very closely upon those of England. All marriages had to be recorded in a marriage register but it was not supplied by the county. Twice a year a certified list of the entries in the register had to be sent to the Registrar General (155).

When Vancouver Island and British Columbia were united in 1866, the laws in force in the separate colonies before the union were to remain in force until they were repealed or amended by legislation of the new Colony of British Columbia (156). Accordingly, an Ordinance was passed in 1867 to regulate the solemnization of marriages in the new colony. All previous marriage legislation was repealed, but the Marriage Ordinance of 1865 of the former Colony of British Columbia was re-enacted with very few changes (157).

The Marriage Ordinance Amendment Act of 1872 required the applicant for a marriage licence to make a statutory declaration that he or she knew of no impediment hindering the marriage (158). The Registration Act of the same year prescribed that every marriage be reported to the registrar of the district within

(155) Ordinances of British Columbia, 1865, No. 21, s. 2, 9, 19-21.

(156) Imperial Statute, 29 & 30 Victoria, c. 67.

(157) Ordinances of British Columbia, 1867, n. 33.

(158) S.B.C., 1872, No. 20, s. 2.

90 days after the ceremony (159). This system was abolished in 1897 and instead every person who was authorized to solemnize marriages had to send to the registrar of the district on the 15th days of March, June, September, and December of each year a record of all marriages celebrated by him during the preceding three months (160). But this method of registration was repealed in 1911 and a full account of each marriage had to be sent to the district registrar within 48 hours after the ceremony (161).

The Marriage Act amendment of 1913 prescribed that no minister or clergyman could solemnize marriages if he had not been a resident of the province for at least one month before the marriage, unless he was in charge of a church or was stationed by his denomination in any particular place in the province. Marriage registers were supplied free of charge by the registrar to all persons authorized to solemnize marriages, but they remained the property of his office and were subject to his inspection (162).

An amendment of 1919 required the consent of both parents for the marriage of anyone below the age of 21 years. If both parents were dead the lawfully appointed guardian had to give his consent. It was expressly declared that the consent was

(159) S.B.C., 1872, No. 26, s. 9.

(160) R.S.B.C., 1897, c. 33, s. 15.

(161) S.B.C., 1911, c. 6, s. 10.

(162) S.B.C., 1913, c. 42, s. 1, 6.

not necessary for the validity of the marriage. No one below the age of 16 years was allowed to marry unless he could produce an order from a judge of the Supreme Court or of a County Court authorizing the marriage (163).

The Marriage Act of 1930 introduced the system of registration of persons wishing to solemnize marriages. The chief requirements were that a person be a resident of the province, in charge of or connected with some congregation or other unit of his religious body, or retired and in good standing in his religious body. The publication of the banns was required on only two consecutive Sundays in the place in which at least one of the parties had his or her place of residence for the period of eight days immediately preceding the marriage (164).

Since 1938 no person below the age of 21 years has been allowed to marry unless he has been able to produce a birth certificate or other satisfactory proof of his age. A serological test for syphilis has also been required before any issuer may grant a licence, before any Commissioner may solemnize a marriage, or before any minister or clergyman may publish the banns (165).

(163) S.B.C., 1919, c. 52, s. 2-4.

(164) S.B.C., 1930, c. 41, s. 3, 4, 9.

(165) S.B.C., 1938, c. 33, s. 16, 19.

Conclusion

The Marriage Ordinance of 1865 of the colony of British Columbia stated that "in all matters relating to the mode of celebrating marriage, or the validity thereof, and the qualifications of parties about to marry, and the consent of guardians or parents, or any person whose consent is necessary to the validity of such marriage, the law of England shall prevail, subject always to the provisions of this Ordinance" (166).

The Marriage Act of the Revised Statutes of 1948 contains an almost identical clause (167). The law of England as it existed on November 19, 1858, is made a supplementary source of law for the solemnization of marriage in British Columbia. The present law of this province is so complete and detailed that it is hard to see how the above clause can have much practical value. Section 28 of the Marriage Act expressly states that the regulations regarding the consent of parents or guardians required for the marriages of minors shall not touch the validity of the marriage. What then is the value of the reference to the law of England as

(166) O.B.C., 1865, No. 21, s. 18.

(167) "In all matters relating to the mode of solemnizing marriages, or the validity thereof, and the qualifications of parties about to marry, and the consent of guardians or parents, or any person whose consent is necessary to the validity of such marriage, the law of England as the same existed on the nineteenth day of November, 1858, shall prevail, subject always to the provisions of this Act and of any Act of the Dominion in force in the Province" (R.S.B.C., 1948, c. 201, s. 35).

the same existed on November 19, 1858, in those matters relating to "the consent of guardians or parents, or any persons whose consent is necessary to the validity of such marriage"?

By reason of the English Marriage Act of 1836, which was still in force on November 19, 1858, marriages were considered invalid only if both of the parties knew that there was some irregularity in the celebration of their marriage (168). Can we then, on the force of section 35 of the present Marriage Act, say that the same rule is applicable in British Columbia today? The insertion of a clause of this sort seems to be of doubtful practicality (169).

We find no trace of proscriptive legislation against any religious denomination in the marriage laws of British Columbia. From the beginning all religious groups were free to solemnize marriages according to their own rites and customs. Although the marriage law of the province was closely patterned upon that of England, we do not find the restrictive elements nor the harsh penalties which were a part of the marriage law of England for so many years. However, the Marriage Act contains very detailed regulations similar in many respects to those found in the prairie provinces.

(168) Cf. Imperial Statute, 6 & 7 William IV, c. 85, s. 42.

(169) Repeated attempts to obtain from the provincial department charged with the administration of the Marriage Act an official interpretation or explanation of the force of this clause were unsuccessful.

P A R T I I

P R E S E N T L E G I S L A T I O N

O N T H E C E L E B R A T I O N O F M A R R I A G E

I N C A N A D A

Chapter 5

PERSONS AUTHORIZED TO SOLEMNIZE MARRIAGES

Both the civil and the ecclesiastical law maintain that the essence of the marriage contract is the mutual exchange of consent by the two parties being married. Between baptized persons, the contract is at the same time a sacrament. But even then the contract is made by the parties; the sacrament is administered by the parties themselves. The priest or the minister or other official is merely the official witness of the marriage. However, this does not mean that the Church, and also the State in certain limited cases, cannot demand the presence of this official witness for a valid marriage. The reason for having marriages performed before an official witness is to assure the proper performance of the ceremony and to provide for the proper registration of the marriage as proof of its celebration.

Even apart from the sacrament, there is something religious and sacred about the marriage contract. It is for this reason that in all countries and at all times the marriage contract was generally accompanied by various religious ceremonies. The provinces of Canada acknowledge this religious character of marriage at least to a certain extent in as far as they all provide for the celebration of marriage accompanied by certain religious ceremonies. In several provinces a marriage cannot be validly celebrated except before a priest or some other minister of religion. But in other provinces

parties are free to go before a civil official if they desire. But in no province is civil marriage demanded as it is in certain European countries. And if the parties desire, they may have both a civil and a religious ceremony.

All the provinces prescribe that marriages be celebrated before some person acknowledged by the law as authorized to solemnize marriages, even if there is no religious ceremony whatsoever. Therefore this chapter will deal with those persons who may lawfully solemnize marriages in the various provinces. In the chapters on the preliminaries before the marriage, there will be frequent references to persons authorized to solemnize or celebrate marriages. In order to avoid confusion, the writer decided to place the consideration of persons authorized to solemnize marriages before the chapters on the preliminaries rather than to include it in the chapter on the celebration of the marriage itself.

Article 1. Qualifications required of those who wish to solemnize marriages

1. Ordination or appointment by a religious body

a) Religious body

There is no church established by law in Canada or in any of the provinces. In Canada there is no connection between the Church and the State as there is in England. In this country,

all religious denominations are legally equal (1). But certain basic requirements must be met before a religious body is entitled to have its ministers solemnize marriages. Thus several of the provinces require that the religious body be sufficiently well established both as to continuity of existence and as to recognized rites and usages respecting the solemnization of marriage (2). Therefore, one cannot start a new religious sect and expect to be allowed to solemnize marriages at once. In a case concerning the right of the Victoria City Temple to have its minister registered to solemnize marriages, it was declared that the Victoria City Temple was sufficiently well established both as to continuity of existence and as to recognized rites and usages with respect to the solemnization of marriage to warrant the registration of its minister as authorized to solemnize marriages (3). In 1908 a minister of an independent church in Ontario was accused and convicted of unlawfully solemnizing marriage. On

(1) D. A. O'Sullivan, Government in Canada, the Principles and Institution of our Federal and Provincial Constitutions, 2nd ed., Toronto, Carswell and Company, 1887, p. 243; Edmund F. Moore, Reports of Cases heard and determined by the Judicial Committee and the Lords of Her Majesty's most Honourable Privy Council (New Series, 9 vols., London, V. & R. Stevens, Sons, and Haynes, 1862-1873), vol. 1, p. 411, at p. 461. Cf. also Arthur Caron, O.M.I., Législation matrimoniale civile et canonique au Canada, in Revue de l'Université d'Ottawa, vol. 2 (1932), p. 95*

(2) Cf. S.N.S., 1946, c. 4, s. 6(c); S.O., 1950, c. 42, s. 21(3); S.S., 1951, c. 72, s. 4(2); R.S.B.C., 1948, c. 201, s. 4(d); O.N.W.T., 1949, c. 10, s. 3(2).

(3) Victoria City Temple v. Thompson, (1934) 3 W.W.R. 761. Cf. also R. v. Dickout, (1893) 24 O.R. 250.

appeal, it was held that the conviction should be affirmed. The accused's church was a mere isolated congregation and possessed no rites or ceremonies whereby a minister could be ordained or appointed, and was not connected with any religious body (4).

b) Ordination or appointment

Not every person who claims to be a minister of some sufficiently well established religious body is necessarily qualified to solemnize marriages. All the provinces demand that a minister or clergyman be ordained or appointed according to the rites and the usages of the religious body to which he belongs or that he be at least deemed by the religious body to have been duly ordained or appointed by reason of some prior ordination or appointment.

Some of the provinces state that the person must be duly recognized by the religious body to which he belongs as authorized to solemnize marriages according to its rites and usages (5). Accordingly, one who had previously been ordained or appointed but is rejected by his religious body would not be qualified to solemnize marriages.

Some of the provinces are very general in their terminology and include under the terms clergyman or minister any person who is duly ordained or appointed by his religious body with au-

(4) R. v. Brown, (1908) 17 O.L.R. 197.

(5) Cf. S.N.S., 1946, c. 4, s. 6(b); S.O., 1950, c. 42, s. 21(3); R.S.B.C., 1948, c. 201, s. 4(c).

thority to solemnize marriages (6). Other provinces go more into detail and make special mention of certain religious bodies. Thus, in most of the provinces there is special mention of commissioners and commissioned officers other than probationary lieutenants of the Salvation Army. New Brunswick, Saskatchewan, and Manitoba make special mention of a duly ordained or appointed Jewish Rabbi (7). Manitoba specially includes any minister, evangelist or missionary employed by any congregation or missionary society of the religious people commonly called the Disciples of Christ, or any elder of such a congregation who from time to time is chosen by the congregation for the solemnization of marriages (8).

Nova Scotia, New Brunswick, and Prince Edward Island do not permit marriage to be contracted before a civil magistrate or other person who is not a minister of religion. Newfoundland does not allow optional civil marriage but permits marriage in some exceptional circumstances to be celebrated before a civil magistrate. But when a priest or other minister of religion is available, a civil marriage is not permitted (9).

(6) E.g., in British Columbia the term minister or clergyman includes any priest, rabbi, elder, evangelist, missionary, or commissioned officer duly ordained or appointed by the religious body to which he belongs (R.S.B.C., 1948, c. 201, s. 2).

(7) S.N.B., 1951, c. 181, s. 2(d); S.S., 1951, c. 72, s. 9(e); R.S.M., 1940, c. 126, s. 3.

(8) R.S.M., 1940, c. 126, s. 2(b).

(9) C.S.N.F., 1916, c. 121, s. 7.

In most of the provinces which permit civil marriage as a matter of choice, the marriage must be celebrated before a marriage commissioner appointed for that purpose by the Lieutenant Governor in Council or the Commissioner of the Territories (10). In Manitoba civil marriages may be celebrated before any judge of the County Court in his district (11), and in Ontario before any judge or magistrate (12).

2. Residence and occupation

All the provinces except Alberta and Manitoba require that persons who wish to solemnize marriages must be residents of the province in which the ceremony is performed. But special permission can usually be obtained for those who are only temporarily resident in the province. Alberta requires only residence in Canada (13). Manitoba used to require residence in Canada, but since 1952 there has been no special requirement (14). Several provinces require that a person who wishes to be authorized to solemnize marriages must be in charge of, or at least connected with, some congregation in the province (15).

(10) Cf. S.S., 1951, c. 72, s. 9(d); R.S.A., 1942, c. 303, s. 3(c); R.S.B.C., 1948, c. 201, s. 30; O.N.W.T., 1949, c. 10, s. 26; C.O.Y.T., 1914, c. 60, s. 2. In the Northwest Territories, every justice of the peace who has the powers of two justices of the peace is ex officio a marriage commissioner.

(11) R.S.M., 1940, c. 126, s. 6.

(12) S.O., 1950, c. 42, s. 25.

(13) R.S.A., 1942, c. 303, s. 3.

(14) S.M., 1952, c. 39, s. 1.

(15) Cf. S.N.B., 1951, c. 181, s. 2(c); R.S.B.C., 1948, c. 201, s. 4(b).

Saskatchewan mentions this requirement only for Jewish Rabbis (16). Prince Edward Island prescribes that a person who wishes to solemnize marriages have actual spiritual charge of a parish or congregation within the province or actually and bona fide discharge the duties of his office as clergyman within the province (17). Ontario demands that he be resident in the province or have his parish or pastoral charge in whole or in part in the province (18). Newfoundland requires that ministers have a church or chapel or that persons are employed as teachers or preachers of religion (19).

Most of the provinces which require that a person wishing to solemnize marriages be either in charge of or connected with a parish or congregation of his religious body, also allow a person who has retired from the active ministry to solemnize marriages if he remains in good standing with his religious body (20).

3. Age

Manitoba is the only province that requires a minimum age for those who wish to be authorized to solemnize marriages.

(16) S.S., 1951, c. 72, s. 9(e).

(17) R.S.P.E.I., 1951, c. 91, s. 1.

(18) S.O., 1950, c. 42, s. 21(3) (d).

(19) C.S.N.F., 1916, c. 121, s. 1.

(20) Cf. S.N.B., 1951, c. 181, s. 2(c); R.S.B.C., 1948, c. 201, s. 4(b).

Since 1949 that province has prescribed that such persons be of the full age of 21 years (21).

4. Sex

It is interesting to note that Nova Scotia and Prince Edward Island restrict to men the authorization to solemnize marriages (22). British Columbia expressly includes both men and women (23). The other provinces neither expressly allow nor forbid women ministers of religion to solemnize marriages. Manitoba restricted it to men until 1944 (24). The writer inquired of the department in charge of the administration of the Marriage Act in several of the provinces and received the reply that women ministers of religion would not be excluded from the right to solemnize marriages if they complied with the requirements demanded of male ministers of religion. The fact that the Marriage Act uses only the masculine gender when referring to persons authorized to solemnize marriages does not necessarily exclude women.

Article 2. Registration of persons qualified to solemnize marriages

Even though a person may be qualified in every way for the

(21) S.M., 1949, c. 36, s. 1.

(22) S.N.S., 1946, c. 4, s. 5, 6; R.S.P.E.I., 1951, c. 91, s. 1(1).

(23) R.S.B.C., 1948, c. 201, s. 2.

(24) S.M., 1944, c. 22, s. 2.

solemnization of marriages, it is still necessary for him to be registered before he may function at any marriage ceremony. All the provinces except Newfoundland and Yukon Territory require such registration. Newfoundland requires teachers or preachers of religion to be registered or licenced by the Lieutenant Governor, but no licence or registration is necessary for clergymen and ministers (25). In all the other provinces all clergymen and ministers of religion must be registered with the Registrar General or other official in charge of such registration. Persons authorized to perform civil marriages do not have to register; their appointment serves as their authorization. However, Alberta forbids any marriage commissioner to solemnize marriages unless he is a holder of a certificate of registration for that year from the Registrar General (26).

1. Application for registration

Application for registration in most of the provinces must be made by the governing body of a religious denomination. Nova Scotia, New Brunswick, and Manitoba permit the application to be made either by the qualified person himself or by the governing body of his religious denomination (27). Ontario and Prince Edward Island do not determine by whom the application

(25) Cf. C.S.N.F., 1916, c. 121, s. 1.

(26) R.S.A., 1942, c. 303, s. 3(4).

(27) S.N.S., 1946, c. 4, s. 5(2); S.N.B., 1951, c. 181, s. 3(1); R.S.M., 1940, c. 126, s. 5(1).

must be made (28). Saskatchewan, Alberta, and Northwest Territories require a renewal of registration and therefore a new application at least once a year (29). Anyone in Alberta and the Northwest Territories whose name has not been included in the list of applications must, before he may solemnize marriages, forward to the Department his certificate of ordination or appointment, which, when duly examined and registered, is returned to him personally or by registered mail (30).

Most of the provinces issue certificates of registration to all those who are registered to solemnize marriages. Saskatchewan, Alberta, and the Northwest Territories require a new certificate each year. In the other provinces, a person who has once been registered remains authorized to solemnize marriages until his registration is cancelled.

To keep the Registrar General or other official informed of persons qualified to solemnize marriages, most provinces demand that the proper ecclesiastical authority of each religious body notify him of every clergyman who has died or in any other way ceased to possess the qualifications entitling him to be registered. The Registrar General, Director, or other official in charge of the registration in the various provinces, has the right to cancel the registration of any person if he is convinced that the person no longer possesses the required

(28) S.O., 1950, c. 42, s. 21(2); R.S.P.E.I., 1951, c. 91, s. 1(2).

(29) S.S., 1951, c. 72, s. 6; R.S.A., 1942, c. 303, s. 3(2); O.N.W.T., 1949, c. 10, s. 4.

(30) R.S.A., 1942, c. 303, s. 3(3); O.N.W.T., 1926, s. 15.

qualifications.

Most of the provinces make provision for temporary registration of those who are otherwise qualified to solemnize marriages but who are only temporarily resident in the province. Such persons may be registered for a definitely determined period (31).

2. Necessity of registration for the validity of a marriage

Nova Scotia is the only province which expressly declares that a marriage will not be valid unless it is solemnized by a person registered as authorized to solemnize marriages in the province. However, even though registration of the minister or clergyman is necessary for the validity of the marriage, the marriage will not be invalid merely because the officiating minister or clergyman did not at the time of his registration possess all the qualifications entitling him to be registered (32). It is the approbation of the civil authorities that is most important in the eyes of the law.

All the other provinces which require registration forbid marriages to be solemnized by anyone who is not registered. But Saskatchewan, Manitoba, and the Northwest Territories expressly state that a marriage will not be invalid merely because the person performing the ceremony was not registered (33).

(31) Cf. S.N.S., 1946, c. 4, s. 6(d); S.N.B., 1951, c. 181, s. 4; S.O., 1950, c. 42, s. 21 (3) (d); S.S., 1951, c. 72, s. 5; R.S.B.C., 1948, c. 201, s. 4(d); O.N.W.T., 1949, c. 10, s. 3(4).

(32) S.N.S., 1946, c. 4, s. 4(1), 10(3).

(33) S.S., 1951, c. 72, s. 8; R.S.M., 1940, c. 126, s. 5(4); O.N.W.T., 1949, c. 10, s. 18.

The province of Ontario declares that all marriages solemnized in good faith and intended to be in compliance with the Marriage Act shall be deemed valid notwithstanding the fact that the person who solemnized the marriage was not authorized to solemnize marriages, provided that the parties lived together and cohabited as man and wife after the ceremony (34).

New Brunswick, Alberta, and British Columbia authorize the Director, Lieutenant Governor in Council, or judge of the Supreme Court respectively to declare valid a marriage which was in good faith solemnized by a person not duly authorized to solemnize marriages (35).

Furthermore, what has previously been said about the necessity of fulfilling statutory requirements for the validity of a marriage, must also be kept in mind (36).

3. Protection of clergymen and ministers

The provinces of Ontario, Manitoba, Saskatchewan, Alberta and the Northwest Territories have in their marriage legislation a special clause to the effect that no person who solemnizes a marriage shall be subject to any action or liability by reason of there having been any legal impediment to the marriage unless, at the time he performed the ceremony, he

(34) S.O., 1950, c. 42, s. 44.

(35) S.N.B., 1951, c. 181, s. 27; R.S.A., 1942, c. 303, s. 26; R.S.B.C., 1948, c. 201, s. 37.

(36) Cf. chapter 1, p. 8ff.

was aware of the impediment (37).

Article 3. Summary of canonical legislation and comparison with civil legislation

The present law of the Catholic Church prescribes that marriages be celebrated in the presence of the parish priest or the local Ordinary, or some priest delegated by either of them, and at least two witnesses (38). This manner of celebrating marriage is called the canonical or juridical form of marriage. The law also provides for exceptional cases in which the juridical form need not be observed in its entirety (39). These exceptional cases will be considered in a later chapter. Here we are concerned with the persons who may officiate at a marriage ceremony according to the canonical form.

It may be helpful to point out who are obliged to observe this canonical form. All those are obliged who have been baptized in the Catholic Church or who have been converted to the Catholic Church, even though they should later fall away from the Church by heresy, schism, or open apostasy. The above persons must observe the canonical form even if they marry baptized or non-baptized non-Catholics (40).

(37) S.O., 1950, c. 42, s. 42; R.S.M., 1940, c. 126, s. 34; S.S., 1951, c. 72, s. 12; R.S.A., 1942, c. 303, s. 28; O.N.W.T., 1949, c. 10, s. 17; C.O.Y.T., 1914, c. 60, s. 5.

(38) C.J.C., can. 1094.

(39) Ibid., can. 1098.

(40) Ibid., can. 1099, § 1.

Until January 1, 1949, an exception was made for those who were born of non-Catholic parents, but who were baptized in the Catholic Church, and who from their infancy were brought up in heresy, schism, paganism, or without any religion. But by a decree of August 16, 1948, this section of canon 1099, §2 was declared no longer to be applicable after December 31, 1948 (41). Therefore, since January 1, 1949, all persons who have been baptized in the Catholic Church are without exception bound to observe the juridical form unless the special provisions of canon 1098 are applicable.

The marriages of all Catholics and of all those who have ever been Catholics must therefore be celebrated in the presence of at least two witnesses and one of the following official witnesses of the Church (42):

- a) The local Ordinary within the limits of his territory.
- b) The parish priest within the limits of his territory (43).
- c) Any other priest who is properly delegated by either the local Ordinary or the pastor for the celebration of marriage within their respective territory. Any priest may be delegated for a determined marriage. But only a priest who is a parish

(41) Pius XII, Motu Proprio Decretum Ne temere, March 1, 1948: A.A.S., vol. 40 (1948), p. 305.

(42) Pope Benedict XIV called the priest assisting at the marriage the testis auctorizabilis--"parochus interest matrimonium tamquam testis auctorizabilis pro Ecclesia" (De Synodo Diocesana, lib. XIII, c. 23, n. 6).

(43) C.J.C., can. 1094, 1095.

curate or assistant can receive general delegation to celebrate marriages (44).

The civil laws of the provinces do not acknowledge the Church's law that the marriages of all Catholics in order to be valid must be celebrated in the presence of a Catholic priest who is either a local Ordinary or a parish priest in his respective territory or a priest delegated by either of them. It is true that the civil law acknowledges the marriages of Catholics according to the juridical form as valid marriages, but it also considers as valid the marriages of Catholics in the presence of a protestant minister, a civil magistrate, or any other person who may be authorized by the law to celebrate marriages. As will have been noticed in the historical section, ministers of certain religious denominations were formerly allowed to celebrate marriage only if both parties to the intended marriage belonged to the religious denomination of the minister. But at the present day, all persons who are authorized by law to solemnize marriage may celebrate the marriage of any two persons regardless of their religious affiliation.

It is this aspect of the marriage laws of the provinces that causes the greatest conflict with the Canon Law. On the one hand, marriages which are absolutely valid before God and the Church may, for some lack of compliance with the statutory requirements regarding persons authorized to celebrate marriage,

(44) Ibid., can. 1096, §1.

be considered invalid or at least illicit by the State; and on the other hand, marriages which are invalid before God and the Church may be considered as valid and legal marriages by the civil law. The Church can usually avoid the first conflict by seeing that the requirements of the civil law as to registration and the qualifications for registration such as residence and occupation are carefully observed. Although such laws may at times be troublesome, they can usually be observed without evident hardship.

The greatest difficulty for the Church lies in the fact that the civil law will not consider as invalid those marriages which are celebrated contrary to the laws of the Church. The nature of the marriages of baptized persons and the nature of the supernatural society of the Church demand that the power which regulates the valid celebration of these marriages should belong exclusively to the Church (45). And this power of the Church is entirely independent of the good will of the State. By the will of God this power belongs only to the Church, and the State can legislate only in regard to the merely civil effects which are to follow upon the marriages of baptized persons (46). The marriage of two non-Catholics, one of whom at least is baptized, is valid without the observance of the canonical form solely because the Church does not oblige them

(45) Alaphridus Ottaviani, Institutiones Juris Publici Ecclesiastici (2 vols., Rome, Typis Polyglottis Vaticanis, 1947), vol. 2, n. 340, p. 209.

(46) C.J.C., can. 1016.

to the observance of that form. But if not celebrated according to the juridical form, the marriages of Catholics are invalid even though the civil law will not consider them as such.

The civil law would do well to acknowledge this right of the Catholic Church. The Church is much more careful than the civil law itself in seeing that only those persons marry who are not rightfully impeded from doing so. Therefore the State has no reason to fear that marriages will be improperly performed if celebrated according to the laws of the Church.

Chapter 6

PRELIMINARIES BEFORE ISSUE OF LICENCES OR PUBLICATION OF BANNS

An intended marriage may be unlawful either because of some impediment of the divine or natural law such as certain degrees of consanguinity or existing bond of marriage, or because of some impediment established by the ecclesiastical law or by the civil law of a country. To prevent parties from marrying when they are thus lawfully impeded, both the ecclesiastical and the civil law require certain preliminaries to insure the freedom of the parties to marry. These preliminaries consist chiefly of the publication of the banns or the granting of a marriage licence. But before the banns may be published or a licence may be issued, certain investigations must be made and evidence must be produced to establish the freedom of the parties to marry. The very purpose of the publication of the banns is to publicize the intended marriage so that any existing impediments may be discovered. The issue of a marriage licence does not fulfill this purpose nearly so well, and it is probably for this reason that in some of the provinces a more detailed investigation is demanded before the issue of a licence than before the publication of the banns.

Article 1. Investigations to ascertain freedom of parties to marry

Evidence of the freedom of the parties to marry is usually of two kinds, namely, sworn declarations made by the parties

themselves, and documentary evidence such a birth certificate or a certificate of the death of a former spouse. In most of the provinces such evidence is required before the banns may be published or a marriage licence may be issued.

1. Declarations made by the parties

a) General affidavit

All provinces except Newfoundland require that the parties to an intended marriage make an affidavit or statutory declaration before they may receive a marriage licence. This affidavit varies slightly in the various provinces but most of them require a statement concerning such particulars as the names of the parties, their age, occupation, condition in life, religious denomination, residence, place of birth, and intended place of marriage. In this affidavit the parties usually also have to state that to the best of their knowledge they are not hindered from marrying by reason of affinity, consanguinity, prior marriage or any other lawful impediment. And if there is a requirement as to residence in the province, that also is usually mentioned in the declaration. The affidavit must state all facts which may be necessary to help the issuer to judge whether or not the required consent of parents or guardians has been duly given, or whether or not such consent is necessary.

New Brunswick, Manitoba, Saskatchewan, Alberta, and the Northwest Territories require that each of the parties to the

intended marriage make the affidavit separately and personally (1). Nova Scotia and Prince Edward Island prescribe that the affidavit be made by the party who applies for the licence (2). In British Columbia and the Yukon Territory it is sufficient if either of the parties makes it (3). Ontario requires either that both parties to the intended marriage make the affidavit, or that only one of the parties make it and in addition deposit with the issuer a birth certificate of the other party or an affidavit by the other party or by some member of his family having personal knowledge of the facts, stating the age, date, and place of birth of such other party (4).

In all the provinces the affidavit may be made before the issuer of marriage licences. In Ontario and Manitoba it must be made before the issuer (5). In Nova Scotia and Prince Edward Island it may be made either before the issuer or before a notary public, justice of the peace, or a commissioner for taking affidavits (6). If not made before the issuer, the

(1) S.N.B., 1961, c. 181, s. 14(1); R.S.M., 1940, c. 126, s. 18(1); S.S., 1951, c. 72, s. 30(1); R.S.A., 1942, c. 303, s. 14(1); O.N.W.T., 1949, c. 10, s. 36.

(2) S.N.S., 1946, c. 4, s. 15; R.S.P.E.I., 1951, c. 91, s. 6.

(3) R.S.B.C., 1948, c. 201, s. 13(1); C.O.Y.T., 1914, c. 60, s. 9.

(4) S.O., 1950, c. 42, s. 13.

(5) Cf. S.O., 1950, c. 42, s. 13 and Form 4 in the schedule; R.S.M., 1940, c. 126, s. 18.

(6) S.N.S., 1946, c. 4, s. 15; R.S.P.E.I., 1951, c. 91, s. 6.

affidavit has to be presented to him when application is made for the licence. New Brunswick, Saskatchewan, Alberta, British Columbia, Northwest Territories and the Yukon Territory require that the affidavit be ordinarily made before the issuer of the licence, but make exceptions for circumstances which make it inconvenient for either of the parties to attend personally before the issuer. In such cases Saskatchewan and the Northwest Territories authorize the issuer to allow the affidavit to be made before a justice of the peace, notary public or a commissioner for oaths (7). In Alberta it may be made before a notary public (8); in New Brunswick and British Columbia before any person authorized by law to receive statutory declarations (9), and in Yukon Territory before any justice of the peace (10). But if the affidavit is made before a person other than the issuer, it has to state the reason relied upon to excuse personal attendance before the issuer of licences.

In addition to the statutory declaration concerning freedom to marry required before the issue of a marriage licence, the law of Prince Edward Island requires a bond with one sufficient surety to guarantee the freedom of the parties to marry. The condition of this bond is that the parties will have to pay to the Lieutenant Governor the sum of \$500.00 if after the marriage

(7) S.S., 1951, c. 72, s. 31; O.N.W.T., 1949, c. 10, s. 37.

(8) R.S.A., 1942, c. 303, s. 14.

(9) S.N.B., 1951, c. 181, s. 15; R.S.B.C., 1948, c. 201, s. 13.

(10) C.O.Y.T., 1914, c. 60, s. 9.

it is discovered that there was some impediment which hindered the parties from lawfully contracting marriage (11). No doubt, the purpose of this bond is to remove as far as possible any fraud or perjury which the parties may be tempted to commit in making the statutory declaration.

All the provinces that issue marriage licences require the general affidavit before the issue of the licence. But only Nova Scotia, Manitoba, Saskatchewan, and the Northwest Territories require a similar affidavit before the publication of the banns (12). In Manitoba this affidavit is required also before the dispensation of the banns by the proper ecclesiastical authority (13). The Marriage Act of New Brunswick merely states that a clergyman to whom an application for the publication of banns is made shall satisfy himself that the parties to the intended marriage are legally competent to contract such marriage, and that unless and until he is so satisfied he may not publish the banns (14). The other provinces apparently leave it to each clergyman or minister to investigate whether the parties are free to marry.

(11) R.S.P.E.I., 1951, c. 91, s. 8. Cf. also Form "C" in the schedule.

(12) S.N.S., 1946, c. 4, s. 13(4); R.S.M., 1940, c. 126, s. 18; S.S., 1951, c. 72, s. 14(3)1; O.N.W.T., 1949, c. 10, s. 24.

(13) R.S.M., 1940, c. 126, s. 18.

(14) S.N.B., 1951, c. 181, s. 20.

b) Health affidavit

The province of Alberta requires in addition to the general affidavit a special affidavit made by each of the parties, setting out that he or she is not aware of being infected with any venereal disease or with tuberculosis (15). A person may subscribe to this oath if he has never had a venereal disease or tuberculosis; or if he has had a venereal disease and has been examined within 14 days immediately preceding by a qualified physician registered in and for the province, and by such examination it has been established that he is no longer so infected; or if he has ever had tuberculosis, it has been established by a proper examination made by a qualified physician within two months immediately preceding the affidavit that he is no longer so infected (16). The above affidavit is prescribed before the issue of a licence or of a permit for the publication of the banns, and therefore the parties will not be allowed to marry unless they make this affidavit.

2. Documentary evidence**a) Birth certificate**

In addition to the personal affidavits made by the parties, other documentary proof of their freedom to marry is sometimes required. Prince Edward Island is the only province that requires that all parties present to the issuer of marriage

(15) S.A., 1945, c. 67, s. 4.

(16) Cf. Form E in the schedule.

licences a copy of their birth certificate (17). Several other provinces require such a certificate only for persons who are minors. Such requirements will be dealt with under the section on the consent of parents or guardians for the marriage of minors.

b) Certificate of death

Special documentary proof is usually also required if either of the parties to an intended marriage has previously been married. Saskatchewan and the Northwest Territories alone expressly demand that if either of the parties intending to be married is a widow or widower, he or she must furnish the clergyman publishing the banns or the issuer of marriage licences with a certificate of the death of the former spouse. And if the clergyman or issuer is satisfied that a widow or widower cannot obtain a certificate of the death of the deceased spouse, he may accept as proof of death an affidavit made by a credible adult person who has knowledge of the death. The affidavit has to be made before a justice of the peace, a commissioner of oaths, or a notary public by a person other than either of the parties intending to marry (18).

The other provinces do not expressly require a certificate of death of a former spouse, but the issuer may not grant a licence unless he is satisfied that there is no legal impediment

(17) R.S.P.E.I., 1951, c. 91, s. 6(c).

(18) S.S., 1951, c. 72, s. 14, 30; O.N.W.T., 1949, c. 10, s. 41.

to the marriage. For evidence of freedom to marry in cases in which one of the parties has previously been married, the issuer will probably ask for a certificate of death. However, Ontario, Manitoba, Alberta, British Columbia, and the Yukon Territory, as well as Saskatchewan and the Northwest Territories, have special requirements for cases in which a former spouse is thought or presumed to be dead even though there is no direct proof of the death. The procedure varies slightly in the different provinces but the general requirements are as follows: the party who thinks that his or her spouse is dead may petition the Court (19) for an order declaring that the other party to a former marriage shall be presumed to be dead. With the petition, the party wishing to marry must present evidence that the former spouse has been continually absent from the petitioner for a period of seven years or more; that the former spouse has not been heard from or heard of during that period by the petitioner or, to the knowledge of the petitioner, by any other person; that the petitioner has made reasonable inquiries and has no reason to believe that such former spouse is still living. If the judge is satisfied as to the truth of the matters stated in the petition and as to the evidence submitted in support thereof, he may, in his discretion, make an order declaring that the spouse shall be

(19) This petition must be made in Ontario and Yukon Territory to the judge of a court; in Manitoba and Saskatchewan to the Court of Queen's Bench; in Alberta and British Columbia to the Supreme Court of the province; and in the Northwest Territories to a stipendiary magistrate.

presumed dead. But such a declaration has no effect except to permit the celebration of another marriage. No marriage may be celebrated in the above mentioned provinces unless a copy of the order of the judge is deposited with the person issuing the licence or publishing the banns (20). But in addition to the order of the judge, special affidavits must also be made. The widow or widower has to make an affidavit that he or she still believes that the former spouse is not living and that he or she has given careful consideration to the question of the validity of the proposed marriage if the former spouse is not in fact dead at the time of the solemnization of the proposed marriage. The other party to the intended marriage must make an affidavit that he or she is aware of the former marriage of his or her intended spouse and of the presumption of death of the former spouse, and that he or she has given careful consideration to the question of the validity of the proposed marriage if the former spouse is not in fact dead at the time of the solemnization of the proposed marriage (21).

c) Decree of divorce or annulment

New Brunswick, Ontario, Saskatchewan, Alberta, and the

(20) In Ontario the order of the judge must be deposited with the person who solemnizes the marriage pursuant to the publication of the banns (S.O., 1950, c. 42, s. 11(3)).

(21) Alberta and Yukon Territory do not require these affidavits. Ontario requires an affidavit only of the widow or widower but it is practically a combination of the two affidavits required by the other provinces (Cf. S.O., 1950, c. 42, s. 11(3), and Form 3 in the schedule). Cf. Also S.M., 1943, c. 30, s. 2; 1944, c. 22, s. 12; S.S., 1951, c. 72, s. 14; R.S.A., 1942, c. 303, s. 27; R.S.B.C., 1948, c. 201, s. 48; O.N.W.T., 1949, c. 10, s. 43; O.Y.T., 1943, c. 11, s. 2.

Northwest Territories also require special documentary proof of freedom to marry if either of the parties to an intended marriage has previously been married but has had the marriage dissolved or annulled. The Marriage Act of New Brunswick merely states that if either of the parties is divorced, the decree of divorce or a certified copy thereof has to be filed with the issuer before the issue of the licence (22). Ontario has a similar rule for decrees of dissolution or annulment which have been granted in Canada. But if the decree or declaration of nullity has been granted elsewhere than in Canada, the issuer may not issue a licence unless the written authorization of the Provincial Secretary is obtained (23). In Alberta no issuer may issue a licence for a marriage between two parties either of whom has obtained a decree of divorce or a declaration of nullity of marriage until 30 days after the date of entry of the final decree or declaration. And if the final decree or declaration was granted within the province, the licence may not be issued until the applicant has filed with the issuer a certificate from the Clerk of the Supreme Court of Alberta that no appeal has been entered from the final decree or declaration and that the time for appeal has expired. If an appeal has been entered the licence may not be issued until the applicant furnishes satisfactory evidence that the appeal has been finally disposed of (24).

(22) S.N.B., 1951, c. 181, s. 14(5).

(23) S.O., 1950, c. 42, s. 12.

(24) S.A., 1949, c. 94, s. 2.

In Saskatchewan and the Northwest Territories the licence may not be issued and the banns may not be published unless the parties furnish the issuer or the clergyman publishing the banns with a certificate of dissolution or annulment obtained from the Director of Vital Statistics, or the decree absolute or decree of annulment, or a certified copy thereof, obtained from the local registrar of the Court, and a certificate to show that the time for appeal has expired, and either that no appeal had been made or that the appeal has been dismissed, or, if the appeal was accepted, that the decision has been in favor of the dissolution or annulment of the marriage. If the former marriage was dissolved or annulled elsewhere than in Saskatchewan or the Northwest Territories respectively, the parties have to present a certificate of the dissolution or annulment or the decree absolute or decree of annulment, or a certified, notarial or photographic copy thereof, obtained from a public or court official of the province, state, or country in which the marriage was dissolved or annulled (25).

Article 2. Consent of parents or guardians for the marriage of minors

1. Minors

All the provinces of Canada require the consent of parents or guardians for the marriages of minors. But the age of majority is not the same in all the provinces. In New Brunswick,

(25) S.S., 1951, c. 72, s. 14; O.N.W.T., 1949, c. 10, s. 43.

Ontario, and Manitoba consent is required for the marriages of those below the age of 18 years (26). In Prince Edward Island the age of majority is 21 for males and 18 for females (27). In all the other provinces and in the territories the age of majority is 21 years for both males and females.

2. Persons whose consent is required

There is a certain amount of uniformity in general in regard to the persons whose consent is required in the various provinces for the marriages of minors, but there are also many details which differ considerably. Some of the provinces are very brief in their legislation on this subject; others are very profuse and very detailed. Newfoundland merely forbids anyone to solemnize marriage in the province between any two persons either of whom is under the age of 21 years unless he first obtains the written consent of the parents or guardians of the minor. But such consent is not required for the marriage of an expectant mother (28). On the other hand, some of the provinces have several pages of legislation on this subject.

In most of the provinces consent is usually required from one of three groups of persons in the following order, namely, parents, guardians, official guardians or a judge or some other

(26) S.N.B., 1951, c. 181, s. 17; S.O., 1950, c. 42, s. 7; S.M., 1947, c. 27, s. 9.

(27) R.S.P.E.I., 1951, c. 91, s. 9.

(28) S.N.F., 1947, No. 30, s. 1.

public official. As to the consent of parents, Saskatchewan, British Columbia, and the Northwest Territories require the consent of both parents if they are both living and not legally separated. If the parents are legally separated, the consent must be given by the parent or other person who has legal custody of the minor (29). Alberta and Yukon Territory require the consent of both parents if both are living, if the minor is below the age of 18 years, and the consent of father or mother if the minor is between the ages of 18 and 21 years (30). Prince Edward Island, New Brunswick, and Ontario require the consent of the father if living, but if he is dead or living apart from his family and not contributing to the support of the minor, the consent of the mother is necessary (31). Nova Scotia and Manitoba require the consent of the father, but if he is dead the consent of the mother must be given (32).

If both father and mother are disqualified to give consent or are both dead, the consent for the marriages of minors is usually required of the lawfully appointed guardians.

Saskatchewan, Alberta, Northwest Territories and Yukon Territory require the consent of the lawfully appointed guardian or the acknowledged guardian who may have brought up or who,

 (29) S.S., 1951, c. 72, s. 39(1)(a); R.S.B.C., 1948, c. 201, s. 26(1)(a); O.N.W.T., 1949, c. 10, s. 44(3).

(30) R.S.A., 1942, c. 303, s. 21; O.Y.T., 1931, c. 1.

(31) R.S.P.E.I., 1951, c. 91, s. 9; S.N.B., 1951, c. 181, s. 17(1); S.O., 1950, c. 42, s. 7(1), (2).

(32) S.N.S., 1952, c. 67, s. 1; S.M., 1947, c. 27, s. 9.

for three years immediately preceding the intended marriage, may have supported the minor (33).

If there is no qualified guardian, several of the provinces authorize some official person to grant the consent. In such cases, British Columbia authorizes the Official Guardian or a judge of the Supreme Court or any County Court to give the consent (34); Prince Edward Island requires the consent of a judge of a Court of Chancery (35), and Nova Scotia and Saskatchewan demand the consent of the Director of Child Welfare or the Director of a Children's Aid Society if the minor is a ward of such an association (36).

3. Exceptions

Most of the provinces provide for exceptional circumstances in which the consent is either not required at all or can be dispensed with by the proper authority. The consent of parents or guardians is usually not required if the minor is already a widow or widower. However, Newfoundland, Ontario, Northwest Territories, and Yukon Territory make no such exception. Saskatchewan also makes an exception for a minor who has been previously married but whose marriage has been dissolved (37).

 (33) S.S., 1951, c. 72, s. 39(1)(b); R.S.A., 1942, c. 303, s. 21; O.N.W.T., 1949, c. 10, s. 44(3); O.Y.T., 1931, c. 1.

(34) R.S.B.C., 1948, c. 201, s. 26(1)(c).

(35) R.S.P.E.I., 1951, c. 91, s. 9.

(36) S.N.S., 1952, c. 67, s. 1; S.S., 1951, c. 72, s. 39(1)(d).

(37) S.S., 1951, c. 72, s. 39(2).

Several provinces authorize the issuer of the marriage licence or the clergyman who is to publish the banns or to solemnize the marriage to waive the requirement of consent if the party under age deposits with him an affidavit clearly showing that certain exceptional circumstances exist. Such exceptional circumstances may be either that the father and mother are dead and that there is no guardian (38); that the person whose consent is required is declared mentally ill or is confined to a hospital for the mentally ill (39); that the father and mother are beyond the seas and that there is no guardian (40); that the person whose consent is required is not resident in the province or cannot be found (41); that a parent whose consent is required is not, though living, a resident of the province, and is not in the province at the date of the statutory declaration and that the minor is and has been a resident of the province for the 12 months immediately preceding (42); that

(38) This and the following exceptions apply to Saskatchewan and the Northwest Territories only if the minor is at least 18 years of age. Cf. also S.N.S., 1952, c. 67, s. 1; S.N.B., 1951, c. 181, s. 17(3); S.O., 1950, c. 42, s. 7(4); S.M., 1947, c. 27, s. 9(3); S.S., 1951, s. 72, s. 40(a); R.S.A., 1942, c. 303, s. 22(a); O.N.W.T., 1949, c. 10, s. 45(2)(a).

(39) Cf. S.O., 1950, c. 42, s. 7(4); S.S., 1951, c. 72, s. 40(b); R.S.A., 1942, c. 303, s. 22(a); O.N.W.T., 1949, c. 10, s. 45(2)(c).

(40) Cf. R.S.A., 1942, c. 303, s. 22(a).

(41) Cf. S.O., 1950, c. 42, s. 7(4).

(42) Cf. R.S.M., 1940, c. 126, s. 16(4); S.S., 1951, c. 72, s. 40(c); O.N.W.T., 1949, c. 10, s. 45(b).

the minor is at least 18 years of age and has, for not less than three months immediately preceding the date of the statutory declaration, been living apart from his or her parents or guardian without having received financial aid or support from such parents or guardian (43); and that in any of the above cases the minor is not a ward of some Child Welfare Association or Society (44). If the issuer or the clergyman is satisfied that any of the above exceptional circumstances are realized, he may issue a licence, publish the banns, or celebrate the marriage, as the case may be, without obtaining the consent.

If the minor is unable to obtain the consent of parents or guardians because they withhold consent unreasonably or are not interested in the well-being of the minor under their charge, or if it is uncertain whose consent is required, a petition may be made, in Ontario to any judge (45), in Nova Scotia to a judge of the County Court of the district in which the minor resides (46), in Saskatchewan to a judge of the Court of Queen's Bench (47), in Alberta to a judge of the

(43) Cf. S.S., 1951, c. 72, s. 40(d); R.S.A., 1942, c. 303, s. 22(b); O.N.W.T., 1949, c. 10, s. 45(d); O.Y.T., 1931, c. 1. However, in the Northwest Territories the minor must have been living apart from his or her parents for at least six months.

(44) S.N.S., 1952, c. 67, s. 1; S.S., 1951, c. 72, s. 40(e).

(45) S.O., 1950, c. 42, s. 9.

(46) S.N.S., 1952, c. 67, s. 1.

(47) S.S., 1951, c. 72, s. 41.

Supreme or District Court (48), in Northwest Territories to a stipendiary magistrate (49), in Yukon Territory to the judge of the Territorial Court (50), who may in his discretion grant an order dispensing with such consent.

In New Brunswick and British Columbia a similar order of a judge of the Supreme Court or of any County Court is needed when the person whose consent is required is mentally incompetent, or is out of the province or unreasonably or arbitrarily refuses or withholds his consent to the marriage (51).

The British Columbia Marriage Act forbids an issuer to issue a licence or any clergyman or marriage commissioner to solemnize a marriage if either of the parties to the intended marriage is below the age of 21 years unless the minor also produces a birth certificate or other satisfactory proof of age (52). New Brunswick and Manitoba also require a birth certificate, but only for those cases in which the issuer or clergyman waives the requirement of consent, and if the production of a certificate is impossible or impracticable, the issuer or clergyman may accept instead an affidavit of some

(48) R.S.A., 1942, c. 303, s. 22.

(49) O.N.W.T., 1949, c. 10, s. 46.

(50) O.Y.T., 1931, c. 1. However, such a petition may be made only by a minor between the ages of 18 and 21 years.

(51) S.N.B., 1951, c. 181, s. 17(4); R.S.B.C., 1948, c. 201, s. 26(2).

(52) R.S.B.C., 1948, c. 201, s. 26(4).

person having personal knowledge of the facts (53). In the Northwest Territories, a clergyman who is to publish the banns or the issuer of marriage licences, as the case may be, may if he is not satisfied that the minor is over the age of 15 years, require the minor to present as proof of his age a birth certificate or an affidavit made by a credible adult who has knowledge of the date of the birth of the minor (54).

The Alberta Marriage Act prescribes that when application is made for a licence for the marriage of a person below the age of 21 years, the issuer must send by mail a written notice to the parents or guardian of such person, setting out the fact that a licence has been applied for and the name and address of each party to the intended marriage. The licence may not be issued until the eighth day after the mailing of the notice unless the parents or guardian come in person before the issuer and give their consent (55).

All the provinces require that the consent of parents or guardians be produced in written form before the issue of the licence, and most of them also require that the consent be given in the form of an affidavit. If the marriage is celebrated after the publication of the banns, Newfoundland, Ontario and British Columbia merely require that the consent

(53) S.N.E., 1951, c. 181, s. 17(3); R.S.M., 1942, c. 126, s. 16(6); S.M., 1947, c. 27, s. 9(3).

(54) O.N.W.T., 1949, c. 10, s. 47.

(55) R.S.A., 1942, c. 303, s. 6, 21; S.A., 1949, c. 94, s. 3.

be obtained before the solemnization of the marriage (56), whereas the other provinces prescribe that the consent be given before the publication of the banns (57).

4. Minimum age for marriage

Closely connected with the consent of parents or guardians required for the marriages of minors is the minimum age requirement for anyone desiring to marry. Not all the provinces have a specified minimum age requirement. Manitoba, Alberta, and British Columbia require a minimum age of 16 years (58); Saskatchewan and Northwest Territories 15 years (59); and Ontario only 14 years (60).

(56) S.N.F., 1947, No. 30, s. 1; S.O., 1950, c. 42, s. 7(5); R.S.B.C., 1948, c. 201, s. 26(1).

(57) Cf. S.N.S., 1952, c. 67, s. 1; S.N.B., 1951, c. 181, s. 17(2); R.S.M., 1940, c. 126, s. 16(5); S.S., 1951, c. 72, s. 39(1); R.S.A., 1942, c. 303, s. 21; O.N.W.T., 1949, c. 10, s. 44(2); O.Y.T., 1931, c. 1. In the Marriage Act of Prince Edward Island there is no mention of the necessity of obtaining the consent of parents or guardians for the marriage of minors before a clergyman may publish the banns or celebrate the marriage (Cf. R.S.P.E.I., 1951, c. 91, s. 9 which refers only to the issue of a marriage licence).

(58) S.M., 1947, c. 27, s. 12; R.S.A., 1942, c. 303, s. 24; R.S.B.C., 1948, c. 201, s. 27(1).

(59) S.S., 1951, c. 72, s. 32; O.N.W.T., 1949, c. 10, s. 22.

(60) S.O., 1950, c. 42, s. 8. According to the common law, any male below the age of 14 years and any female below the age of 12 years could not validly marry. However, in the case of a marriage of persons below such age, it seems that apart from statute law to the contrary, the marriage would not be absolutely void but at most voidable before or at the time when the person concerned reaches the required age (Cf. Power, The Law and Practice of Divorce and other Matrimonial Causes in Canada, p. 249).

Ontario, Saskatchewan, Alberta, and Northwest Territories allow persons who are below the minimum age to marry only if they have obtained the required consent of parents or guardians and produce a certificate of a legally qualified medical practitioner stating that the marriage is necessary to prevent illegitimacy of offspring. If, in the Northwest Territories, no qualified medical practitioner is available, other evidence satisfactory to the issuer or clergyman that the female party is pregnant is sufficient to allow the marriage of a minor below the age of 15 years. Such marriages may also be celebrated if the written permission of the Commissioner is obtained (61). Manitoba requires either the certificate from a legally qualified medical practitioner or an affidavit to the same effect made by the father or mother of the woman, and in such cases the consent of parents or guardians is not required (62). British Columbia allows the marriage of persons under the age of 16 years only if they obtain the required consent of parents and also obtain an order made by a judge of the Supreme Court or of any County Court if he is satisfied that the marriage is shown to be "expedient and in the interests of the parties " (63).

(61) O.N.W.T., 1950, c. 19; 1952, 2nd session, c. 11.

(62) S.M., 1947, c. 27, s. 13. When shown that the marriage is necessary to prevent illegitimacy of offspring, Manitoba allows marriage if either or both of the parties are below the age of 16 years. But the Marriage Act of Alberta states that the woman must be the minor below the age of 16 years (Cf. R.S.A., 1942, c. 303, s. 24).

(63) R.S.B.C., 1948, c. 201, s. 27(2).

5. Necessity of consent for a valid marriage

New Brunswick and British Columbia expressly declare that the consent of parents is not a condition for the valid marriage of minors (64). On the other hand, Manitoba, Saskatchewan, Alberta, and Northwest Territories expressly declare that the consent of parents is deemed to be a condition precedent to a valid marriage unless it has been consummated or the parties have after the ceremony lived together as husband and wife (65). If in these provinces a form of marriage is gone through between persons either of whom is below the age of majority without the required consent, and the marriage has not been consummated and such persons have not after the ceremony cohabited and lived together as husband and wife, the Court of Queen's Bench, the Supreme Court of the province, or the stipendiary magistrate, as the case may be, has jurisdiction and power to entertain an action by the person who was at the time of the ceremony under the age of majority required by the province, and to declare and adjudge that a valid marriage was not effected or entered into. But the court may not declare a marriage void if carnal intercourse has taken place between

(64) S.N.B., 1951, c. 181, s. 17(6); R.S.B.C., 1948, c. 201, s. 28.

(65) R.S.M., 1940, c. 126, s. 16(7); S.S., 1951, c. 72, s. 39(3); R.S.A., 1942, c. 303, s. 21; O.N.W.T., 1949, c. 10, s. 44(4).

the parties before the ceremony (66). It is interesting to note that whereas Nova Scotia and Alberta require the consent of parents for all those below the age of 21 years, the power of the Supreme Court is limited to cases in which a minor below the age of 18 years married without the required consent, and such action must be taken by the minor in question before he or she has attained the age of 19 years (67). Furthermore, Nova Scotia declares that the Supreme Court shall not be bound to grant relief in cases in which carnal intercourse has taken place between the parties before the ceremony. Newfoundland, Prince Edward Island, Ontario, and Yukon Territory make no reference to the necessity of the consent as a condition for a valid marriage.

(66) Cf. R.S.M., 1940, c. 126, s. 32, 33; S.S., 1951, c. 72, s. 48-51; R.S.A., 1942, c. 303, s. 25; O.N.W.T., 1949, c. 10, s. 49. Civil jurists make a distinction between void and voidable marriages. A void marriage is one which never had legal existence but which stands until the non-existence is positively declared by a competent court. A voidable marriage is one which may be attacked by certain persons within fixed periods. It remains valid unless and until it is successfully attacked in court (Cf. Johnson, Conflict of Laws, vol. 2, p. 201f.). The provinces that require the consent of parents for the validity of the marriage of minors state that the marriage will be invalid if the consent is not obtained unless it is consummated or unless the parties live together as man and wife after the ceremony. However, it seems that such marriages will be merely voidable because in cases where a statute requiring the consent of parents for the marriage of minors concerns the validity of a marriage solemnized without such consent, the marriage is usually only voidable because the statutes impose conditions such as non-consummation and a time limit on the right to take court action to declare the marriage invalid (Cf. Power, The Law and Practice of Divorce and other Matrimonial Causes in Canada, p. 142).

(67) S.N.S., 1946, c. 4, s. 40; R.S.A., 1942, c. 303, s. 25(2).

Applying the principles outlined in the first chapter (68), in the absence of an express statutory provision declaring a marriage invalid if celebrated in breach of the statutory requirements as to consent of parents, such requirements must be considered as directory only, and failure to comply therewith will not invalidate a marriage.

Article 3. Premarital health examinations

The western provinces and Prince Edward Island prescribe that all parties intending to marry must submit to certain forms of medical examination. In Manitoba, Alberta, and British Columbia a serological test for syphilis is all that is required. In Prince Edward Island and Saskatchewan the parties must have a sample of blood taken for the serological test but must also submit to a medical examination.

The sample of blood must be taken by a duly qualified medical practitioner and sent to an approved laboratory for the serological test for syphilis. The sample of blood must in Prince Edward Island be taken between 30 to 5 days before the issue of the licence or the day on which the publication of the banns is requested; in Manitoba and Saskatchewan within 30 days before the marriage; in Alberta within 14 days before the application for the licence or the first publication of the banns; in British Columbia within 20 days before the issue of the marriage licence or the solemnization of the

(68) Cf. p. 8f. above.

marriage. In Prince Edward Island, Alberta, and British Columbia the certificate of health must be presented to the issuer before he issues a marriage licence or to the clergyman or minister before he publishes the banns. In Manitoba and Saskatchewan it must be presented to the person who solemnizes the marriage (69).

It is only in Prince Edward Island and British Columbia that the law prescribes that the results of the serological tests be made known to both of the parties. In the other provinces, only the applicant need be notified of the result of his or her test.

Non-residents are not exempted from the requirement of the health certificate. However, exceptions are made in the western provinces for those who live in certain more remote northern regions because it would be very inconvenient for them to obtain the certificate of a duly qualified medical practitioner. The Minister of Health also may dispense the parties from the obligation of obtaining a health certificate.

Saskatchewan is the only province that forbids the marriage if the medical examination or the serological test shows that either of the parties to an intended marriage is suffering from mental illness or from a communicable disease which is in a communicable stage (70). The Northwest Territories also forbid

(69) For the full text of the law of this subject cf. R.S.P.E.I., 1951, c. 119; S.M., 1948, c. 36; 1947, c. 27; 1948, c. 30; S.S., 1951, c. 72, s. 57; S.A., 1945, c. 67, s. 4; 1946, c. 66, s. 1; R.S.B.C., 1948, c. 201, s. 41.

(70) S.S., 1951, c. 72, s. 56, 57.

anyone to marry if he knows that he or his intended spouse is suffering from a communicable disease which is in a communicable stage, but a medical examination is not required (71). In Alberta the parties must each make an affidavit setting out that they are not to the best of their knowledge infected with any venereal disease or with tuberculosis (72).

Prince Edward Island, Manitoba, Saskatchewan, and the Northwest Territories forbid anyone to solemnize marriage between any two persons if he knows or believes that either of them is an idiot or is insane (73). In Ontario, Saskatchewan, and the Northwest Territories there are also special prohibitions against marrying anyone who is under the influence of intoxicating liquor (74). In this prohibition, Ontario includes also those who are under the influence of narcotic drugs.

Article 4. Summary of canonical legislation and comparison with civil legislation

1. Investigations to ascertain freedom of the parties to marry

In regard to the investigations of the parties, the general law of the Code is that before the marriage is celebrated one

(71) O.N.W.T., 1949, c. 10, s. 20.

(72) S.A., 1945, c. 67, s. 4.

(73) R.S.P.E.I., 1951, c. 91, s. 20; R.S.M., 1940, c. 126, s. 17; S.S., 1951, c. 72, s. 57; O.N.W.T., 1949, c. 10, s. 19.

(74) S.O., 1950, c. 42, s. 6; S.S., 1951, c. 72, s. 58; O.N.W.T., 1949, c. 10, s. 21.

must have proof that there is nothing to hinder the valid and the licit celebration of the marriage (75). This proof will ordinarily have to be more than just the word of the parties themselves, but if in danger of death no other evidence can be obtained, the sworn affirmation of the parties that they are baptized and not hindered by any impediment is sufficient if there are no indications or circumstances to suggest the contrary (76).

The Holy See has always been very careful to see that these investigations are properly made. In 1921 the Sacred Congregation of the Sacraments published a special Instruction on the proof of freedom to marry and on giving notice of the marriage (77) and in 1941 it published another Instruction on the rules to be observed by the pastor in conducting the canonical investigations before admitting the parties to the celebration of marriage (78).

The duty of making the investigations rests with the pastor whose right it is to celebrate the marriage, that is, the pastor of the bride unless there is some reasonable excuse (79).

(75) C.J.C., can. 1019, §1.

(76) Ibid., can. 1019, §2.

(77) S. C. of the Sacraments, Instruction, July 4, 1921: A.A.S., vol. 13 (1921), p. 348.

(78) S. C. of the Sacraments, Instruction, June 29, 1941: A.A.S., vol. 33 (1941), p. 297.

(79) C.J.C., can. 1020, §1.

However, the pastor of the groom may also assist to ascertain the freedom of the groom to marry.

As to the time for the investigation, it is prescribed that it be made at a suitable time before the celebration of the marriage, that is, before the publication of the banns or during their publication (80). But if the civil law requires an affidavit to be made by the parties before the publication of the banns, the pastor will have to see that at least the investigations required by the civil law are made before the publication of the banns.

As to the matter of the investigations, it should include all the circumstances that may in any way be an obstacle to the marriage. According to canon 1020, §2, the investigations of the parties should include especially three things, namely, the absence of impediments, the freedom of consent, and sufficient knowledge of Christian doctrine.

As to the manner of conducting the inquiry, canon 1020, §2 prescribes that the pastor question the parties separately and cautiously. The word cautiously is generally interpreted as meaning distinctly, with modesty, due prudence and circumspection, particularly when asking about impediments and other circumstances which might suggest infamy or shame (81).

Documentary evidence required by the Church consists chiefly of the certificate of baptism which serves also as a

(80) Ibid.

(81) Cf. S. C. of the Sacraments, Instruction, June 29, 1941: A.A.S., vol. 33 (1941), n. 4d, p. 297.

birth certificate. The certificate of baptism must be a recent one issued not more than six months before the date of the marriage, and must contain the annotations as to reception of confirmation, celebration of marriage, reception of the sub-deaconate, or pronouncement of solemn vows, as prescribed by canon 470, §2 (82), and the annotation as to a declaration of nullity, as prescribed by the Instruction of 1936 to be observed by diocesan tribunals (83).

In regard to the proof of the death of a former spouse, the Church is much stricter than the civil law. Canon 1069, §2 forbids anyone to contract a second marriage until the nullity or the dissolution of the marriage has been legitimately and certainly proved. This includes dissolution of the first marriage by death of one of the spouses. A proper certificate of death will, of course, be sufficient evidence. But death is sometimes very hard to prove. An Instruction of the Holy Office of 1868 is still to be followed in cases to prove the death of a spouse (84). Chief among the directions of this Instruction is that the argument based on mere absence is never sufficient to constitute proof of death even though the civil laws of most countries accept that argument at least to a certain extent. It is only in cases in which it is

(82) Ibid., n. 4c, p. 297.

(83) S. C. of the Sacraments, Instruction, August 15, 1936: A.A.S., vol. 28 (1936), p. 313, art. 225, 2.

(84) S. C. of the Holy Office, Instruction, 1868: Fontes, vol. 4, n. 1002, p. 306.

impossible to produce witnesses that the Church will accept proof of death from presumptions. But even then, there must be indications and circumstances present which are sufficient to produce moral certitude of the death of the person. Such cases are not left to the judgment of the pastor, but to that of the local Ordinary. And if he does not feel that the facts of the case are sufficient to warrant a decree of presumption of death, he may send the case to the Holy See for consideration.

Even though the civil laws of the provinces admit that the second marriage will be invalid if the former spouse who is presumed dead is actually living at the time of the second marriage, they are much too lenient in granting orders of presumed death. All that is usually required is that the former spouse has been missing for at least seven years, that nothing has been heard from or about him or her during that period, and that the other spouse has made "reasonable inquiries" and has "no reason to believe that such former spouse is still living". A judge who too readily grants such orders of presumption of death may be a contributing cause of many invalid marriages and very difficult and almost impossible situations should the person who has been presumed dead return to his lawful spouse.

The investigations prescribed by the Church are much more complete than those prescribed by the civil law. However, some of the provinces insist on very detailed regulations for determining the freedom of the parties. The writer cannot

speak for the practice in non-Catholic denominations, but it is certain that the State would not suffer if it left to Catholic priests the responsibility of ascertaining whether the parties to an intended marriage are free to marry. But as long as the theory prevails that the rights of the Church are subject to the good will of the State, the Church will hardly have its rights in this regard acknowledged by all the provinces.

2. Consent of parents or guardians for the marriages of minors

According to Canon Law, the consent of parents or guardians is not required for the valid marriage of persons who are minors, that is, those who are below the age of 21 years (85). The validity of the marriage depends solely on the consent of the contracting parties to the exclusion of the will of the parents (86).

Canon 1034 imposes upon the pastor the grave obligation of exhorting minors not to marry if their parents do not know of their intended marriage or if they reasonably object to the marriage. And if the minors refuse to follow this sound advice, the pastor may not assist at their marriage unless he first consults the local Ordinary. However, the objection of parents must be reasonable, otherwise minors may marry in

(85) C.J.C., can. 88, §1.

(86) Cf. Benedictus XIV, De Synodo Diocesana, Tom. 1, lib. 9, c. 11, n. 4.

spite of the objections of their parents. Parents are not justified in refusing consent merely because the civil law grants them the right to impede the marriage of their children who are minors.

In several provinces the marriage of minors without the consent of parents or guardians can be declared invalid unless the parties consummate the marriage or live together as man and wife after the ceremony. This regulation of the civil law may at times prove difficult for the Church since she does not accept this concept of voidable marriages. However, these cases should not arise frequently because the pastor may not perform the marriage ceremony if minors try to marry in spite of the reasonable objection of their parents. The cases in which parents unreasonably withhold their consent can in most provinces be dealt with by petitioning a judge for an order dispensing with such consent.

3. Premarital health examinations

The Church has no special law requiring the parties to an intended marriage to have a physical examination nor any law forbidding the marriage of persons infected with certain diseases. As long as such diseases do not prevent the parties from giving true matrimonial consent, such persons are not forbidden to marry (87). It may at times be a matter of prudence and justice not to marry while one is infected with certain diseases and especially with contagious diseases of

(87) Cf. C.J.C., can. 1035, 1081, 1082.

a serious nature. It is for this reason that in some dioceses it is strongly recommended that the parties exchange medical certificates before their marriage (88). However, it is one thing to dissuade people from marrying and quite another thing to forbid them to marry.

The State has a legitimate interest in the health of its citizens. Those persons who marry when they are suffering from a disease which is in a communicable stage, help to spread contagion. And if the condition of such a person is unknown to his or her intended spouse, great injustice may be caused. Each of the parties to an intended marriage has a right to be informed about the health of his future spouse. One who is afflicted with a serious communicable disease has a grave

(88) "We feel, Dear Young People, that in the interests of your earthly happiness, as well as your spiritual welfare, we should recommend the mutual exchange of your medical certificate of health, even before your definite engagement. How many unions have brought unhappiness to innocent parties, because they were unable to fulfil the rights and duties incumbent on married life, due to hereditary illnesses, impotence, mental disorders, contagious diseases, and other maladies that cannot fail to offend the sensibilities of the other party. A conscientious and reputable doctor would be able to find out conditions of health that it would be very imprudent to overlook, especially in our day when deceit and injustice are so rampant. We have no wish to impose this as an obligation: the natural and primary right to marriage belongs so essentially to the individual, that no law, no earthly power can take it away or restrict it. However, the obligations of Justice and Charity must still prevail when two people pledge their mutual fidelity and unite themselves for life and in a certain sense for eternity". (Joint Pastoral Letter and Decree of His Eminence Cardinal Archbishop of Quebec, and of Their Excellencies the Archbishops and Bishops of the Ecclesiastical Provinces of Quebec, Montreal and Ottawa, concerning the investigations to be made prior to the solemnization of marriages, Quebec, Chancellerie de l'Archevêché, 1943).

obligation in justice to inform his future spouse of his condition. Therefore, to protect the rights of the individual and for the good of society, the State has a right to insist that the parties to an intended marriage submit to a prenuptial medical examination. The State may also demand that the result of such an examination be made known to the intended spouse, but it may not forbid the marriage if the medical report is unfavorable. The State does not have the right to establish diriment or prohibitive impediments to the marriages of baptized persons (89). The right to marry comes from the natural law, and therefore the State probably could not establish an absolute impediment of this sort even for those who are not baptized. Apart from the lack of sufficient use of reason, there is only one impediment of the natural law in regard to the health or physical fitness of a person and that is absolute and incurable impotence (90). In his encyclical on Christian Marriage, Pope Pius XI asserts that all who are naturally fit have a right to marry and to procreate children (91).

To forbid marriage if an unfavorable report is given, would be injurious to the liberty of the individual, to the rights of the Church, and to public morals because it is

(89) Cf. C.J.C., can. 1038, §2.

(90) Charles Augustine, O.S.B., A Commentary on the New Code of Canon Law (8 vols., 5th revised ed., St. Louis, Herder, 1935), vol. 5, p. 30.

(91) Pope Pius XI, Encyclical Letter Casti Connubii, December 31, 1930: A.A.S., vol. 22 (1930), p. 564.

liable to lead to concubinage and illicit unions (92). On the other hand, a medical examination will inform the parties of their state of health and help them from being the cause of contagion to each other. But after the parties have informed each other of the result of the examination, they must be left free to disregard an unfavorable report if they so desire (93).

Some authors maintain that the State has no right to demand a medical examination of all those who intend to marry. They say that such an examination is of its very nature odious and fraught with dangers to morality (94). However, it seems that one should not insist on this opinion too strongly. A prenuptial examination may be very beneficial to the parties themselves and will not be any more odious or dangerous to morals than any other medical examination which is properly conducted.

Therefore, the provincial legislatures may be justified in demanding a prenuptial medical examination or blood test provided that the parties are not denied the right to marry if the report of such an examination or test is unfavorable.

 (92) P. G. Payen, S.J., Déontologie Médicale d'après le droit naturel, Devoirs d'état et droits de tout médecin, nouvelle édition, Zi-Ka-Wei, T'ou-sè-wè, Imprimerie de la mission, 1935, n. 220, p. 231; Cf. also Louis J. Nau, Manual of the Marriage Laws of the Code of Canon Law, New York--Cincinnati, Pustet, 1934, n. 19, p. 27.

(93) Payen, op. cit., n. 220, p. 231.

(94) Cf. Felix M. Cappello, S.J., Tractatus Canonico-Moralis de Sacramentis (5 vols., 5th revised ed., Rome, Marietti, 1947), n. 70, p. 60; Edward F. Regatillo, S.J., Jus Sacramentarium, 2nd ed., Santander, Sal Terrae, 1949, n. 1066, p. 600.

It would be preferable if the parties would of their own accord inquire about the state of their health before their marriage, but the provincial legislatures also seem to have the right to prescribe such health examinations.

The preliminaries required by the civil law before the publication of the banns or the issue of a marriage licence are therefore in general much the same as those required by the law of the Church. However, the Church can accept neither the concept of voidable marriages because of lack of consent of parents nor the absolute prohibition to marry if one is infected with certain diseases.

Chapter 7

PUBLICATION OF BANNS AND ISSUE OF MARRIAGE LICENCES

In the previous chapter the preliminaries which are required before the publication of the banns or the issue of a marriage licence were considered. The present chapter will deal with the actual publication of the banns and the issue of the licence. According to the civil law of the provinces, marriages may be celebrated either on the authority of the publication of the banns or of a marriage licence. But the two things differ considerably. The publication of the banns is of its very nature a public notification of the intended marriage, whereas the issue of a marriage licence does not as such publicize the intention of the parties to marry. Formerly, such publication of the marriage was a part of the preliminaries required before the issue of a licence, but today parties may obtain a licence and marry with only a few persons knowing about the marriage. Because of these differences, the publication of the banns and the issue of a marriage licence are considered separately in the following pages.

Article 1. Publication of banns

1. Nature and purpose of the publication of banns

Banns may be defined as the promulgation or publication of the intention of two persons to contract marriage. These banns had their origin in ecclesiastical legislation, and therefore to the present day are considered even by the civil

law as the publication made in connection with some religious service at which a large number of people are present. Such services are public gatherings and anything of importance that is said in such circumstances will necessarily become widely publicized.

The reason for publicizing the intention of two persons to marry is not to give friends and relatives ample time to purchase suitable gifts for the occasion, but to give the public sufficient time to make known any impediment which might possibly hinder such persons from marrying. The publication of the banns also helps to prevent the celebration of marriage under the influence of sudden emotion, or without the knowledge or consent of parents.

2. Time and place of the publication of banns

a) Time of publication

As will have been noticed in the historical section of this dissertation, the rule that the banns be published on three consecutive Sundays was universally accepted in all parts of Canada in the formative years of the country. Gradually most of the provinces reduced the requirement to publication of the banns on two consecutive Sundays or even to only one Sunday. The following table shows the number of times that the banns must at present be published in the various provinces (1).

 (1) Cf. C.S.N.F., 1916, c. 121, s. 3; R.S.A., 1942, c. 303, s. 3; C.O.Y.T., 1914, c. 60, s. 3; S.N.S., 1946, c. 4, s. 13; S.S., 1951, c. 72, s. 14; R.B.D.C., 1948, c. 201, s. 9; O.N.W.T., 1949, c. 10, s. 23; S.N.B., 1951, c. 181, s. 10; S.O., 1950, c. 42, s. 15; R.S.M., 1940, c. 126, s. 7; R.S., P.E.I., 1951, c. 91, s. 3.

N.F. ----- on 3 consecutive Sundays
 Alta ----- once on the first and twice on the second
 or once on 3 consecutive Sundays
 Yukon ----- 3 times on 2 consecutive Sundays
 N.S. ----- once on 2 consecutive Sundays
 Sask. ----- once on 2 consecutive Sundays
 B.C. ----- once on 2 consecutive Sundays
 N.W.T. ----- once on 2 consecutive Sundays (2)
 N. B. ----- on at least one Sunday
 Ont. ----- on at least one Sunday
 Man. ----- on at least one Sunday
 P.E.I. ----- on a Sunday or Holy Day celebrated as a
 Sunday

Nova Scotia, New Brunswick, Ontario, Saskatchewan, British
 Columbia, and the Northwest Territories allow the banns to be
 published on a Saturday or other day of the week if the practice
 or faith of any religious body substitutes such a day as the
 usual and principle day of the week for the celebration of
 divine service.

Almost all the provinces prescribe that the publication
 of the banns be made openly and in an audible voice during
 divine service, and several specify that it may be made im-
 mediately before, during, or immediately after the service.

b) Place of publication

The banns must be published in a church, chapel, meeting-

 (2) However, if in any place in the Northwest Territories
 divine services are not regularly held on successive Sundays,
 Saturdays, or other days, the banns must be published at not
 less than two successive divine services other than on the same
 day (O.N.W.T., 1952, c. 11, s. 1).

house, or other place of public worship. In Newfoundland the banns must be published in some church or chapel, and where there is no church or chapel, the intended marriage must be published by posting a notice in some conspicuous place of public resort for the space of three weeks immediately preceding the day appointed for the celebration of the marriage (3).

Yukon Territory merely prescribes that the banns be published in some public religious assembly (4). In Ontario banns must be published in the church (in Canada) in which each of the parties is in the habit of attending worship (5); In Prince Edward Island in any church or place of worship in the place in which at least one of the parties resides (6); in New Brunswick in some church or place of worship in the city, town, or parish in which each of the parties resides, but if only one party is resident in the province, then only in the place of his or her residence (7); in Nova Scotia in a church or place of worship which belongs to the religious denomination of the clergyman who is to solemnize the marriage and which is situated in the city, town, or municipality in which at least one of the parties resides (8); in Alberta in a church or place of worship

(3) C.S.N.F., 1916, c. 121, s. 3.

(4) C.O.Y.T., 1914, c. 60, s. 3.

(5) S.O., 1950, c. 42, s. 15.

(6) R.S.P.E.I., 1951, c. 91, s. 3.

(7) S.N.B., 1951, c. 181, s. 10.

(8) S.N.S., 1946, c. 4, s. 13.

which belongs to the religious denomination of each of the parties and which is situated in the municipality, parish or pastoral charge within which each of the parties has had his residence for the space of 15 days immediately preceding the first publication of the banns (9); in British Columbia in a church or place of worship which belongs to the religious denomination of the clergyman who is to solemnize the marriage and which is situated in the local municipality, parish, circuit, or pastoral charge in which at least one of the parties has had his usual place of residence for the space of eight days immediately preceding the publication (10); in Manitoba, Saskatchewan, and Northwest Territories in a church or place of worship in which each of the parties has been in the habit of attending worship or in a church or place of worship which belongs to the religious denomination of the clergyman who is to solemnize the marriage and which is situated in the local municipality, parish, circuit, or pastoral charge in Canada in which each of the parties has had his usual place of residence for the space of 15 days immediately preceding the publication of the banns (11).

3. Prohibition to publish banns

The publication of the banns is generally not forbidden

(9) R.S.A., 1942, c. 303, s. 8.

(10) R.S.B.C., 1948, c. 201, s. 9.

(11) R.S.M., 1940, c. 126, s. 7; S.S., 1951, c. 72, s. 14; O.N.W.T., 1949, c. 10, s. 23.

unless the marriage is itself forbidden. Nova Scotia even prescribes that the officiating minister or clergyman must publish the banns of any intended marriage when requested so to do, after presentation of a permit from a deputy issuer of marriage licences, unless such intended marriage would be illegal or inconsistent with the rules and discipline of the church or religious denomination to which he belongs (12). But Ontario forbids the publication of the banns if either of the parties to an intended marriage has already been married and has had the marriage dissolved or annulled, or if neither of the parties has had his usual place of abode within Ontario for 15 days immediately preceding the request for publication (13). In such cases a marriage licence must be obtained. Civil marriages may be celebrated only on the authority of a marriage licence.

In Nova Scotia and Alberta the banns may not be published unless a special permit is obtained from the civil authorities.

In Nova Scotia the permit may be obtained from a deputy issuer of marriage licences. The party who applies for the permit must make the usual affidavit concerning the freedom of the parties to marry and must pay a fee of \$1.00. This permit

(12) S.N.S., 1946, c. 4, s. 13(2).

(13) S.O., 1951, c. 42, s. 17.

is valid for three months from the date of its issue (14). So strict is this law that the marriage will be considered invalid if a permit has not been obtained before the publication of the banns (15).

In Alberta the application to the Registrar General or other person appointed for that purpose may be made by either party to the intended marriage or by the clergyman or minister who is to publish the banns. It must be made in writing and must be accompanied by an affidavit made by each party that he or she is not knowingly infected with any venereal disease or with tuberculosis. The fee for the permit is \$3.00 (16).

4. Certificates of publication of banns

Several of the provinces require the production of a certificate of the publication of the banns before the marriage may be celebrated. Ontario, Manitoba, Saskatchewan, and Alberta require a certificate from each clergyman who publishes the banns (17). In British Columbia the minister or clergyman who solemnizes the marriage must demand of the parties a certificate of the publication of the banns if he did not himself publish

(14) S.N.S., 1946, c. 4, s. 13.

(15) Ibid., s. 12.

(16) R.S.A., 1942, c. 303, s. 8; 1945, c. 67, s. 3.

(17) S.O., 1950, c. 42, s. 15, 16; R.S.M., 1940, c. 126, s. 7, 8(5); S.S., 1951, c. 72, s. 14(2), 17; R.S.A., 1942, c. 303, s. 9; S.A., 1945, c. 67, s. 5.

them. Such a certificate is to be attached to the marriage register (18). The other provinces do not require separate certificates of the publication of the banns, but the marriage report contains a statement that the banns were duly published by some named minister or clergyman.

5. Dispensation of banns

Manitoba is the only province that allows the dispensation of the publication of the banns required by the Marriage Act. The head of the church or congregation to which one of the parties belongs has the authority to grant a dispensation of the publication of the banns according to the rites and usages of the church or congregation. Such a dispensation of the banns has the same effect as a marriage licence and the same fee demanded for a marriage licence has to be paid to the Provincial Treasurer on the occasion of a dispensation (19).

6. Time of publication of banns before the marriage

Of the provinces which require the publication of the banns on only one Sunday, all except Prince Edward Island forbid the celebration of the marriage until a certain number of days after the day of the publication. Thus Ontario and Manitoba require the publication of the banns at least one week before the date of the intended marriage (20). New Brunswick

(18) R.S.B.C., 1948, c. 201, s. 9.

(19) R.S.M., 1940, c. 126, s. 7(5).

(20) S.O., 1950, c. 42, s. 15(2); R.S.M., 1940, c. 126, s. 8(1).

forbids the celebration of the marriage until after the expiration of a period of five days from the Sunday on which the banns were first published. If the clergyman is satisfied that because of urgent and exceptional circumstances a marriage should be solemnized before the expiration of the five day period, he may waive the requirement and celebrate the marriage at such time as he deems proper, but must immediately after the marriage advise the Registrar in writing of the reasons for his action. A clergyman who celebrates marriage earlier than prescribed without sufficient reason is liable to have his registration authorizing him to solemnize marriages cancelled (21). In the provinces which require the publication of the banns on more than one Sunday, the marriage may be celebrated immediately after the last day of the publication.

Most of the provinces also determine the time limit after the publication of the banns after which the marriage may no longer be celebrated unless the publication is repeated. Thus Prince Edward Island, New Brunswick, Ontario, Manitoba, Saskatchewan, British Columbia and the Northwest Territories prescribe that if the marriage is not celebrated within three months after the publication of the banns, the publication lacks all validity for the celebration of any marriage (22).

(21) S.N.B., 1951, c. 181, s. 21, 23.

(22) R.S.P.E.I., 1951, c. 91, s. 4; S.N.B., 1951, c. 181, s. 24; S.O., 1950, c. 42, s. 18; R.S.M., 1940, c. 126, s. 8(1); S.S., 1951, c. 72, s. 18; R.S.B.C., 1948, c. 201, s. 34; O.N.W.T., 1949, c. 10, s. 10.

Alberta limits this period to 60 days after the second Sunday of publication (23). Nova Scotia does not make a limitation of this kind, but the permit required before the publication of the banns is valid for only three months from the date of its issue (24).

7. Publication of banns as a requirement for the validity of marriage

Only a few of the provinces make any mention of the relation of the publication of the banns to the validity of a marriage. Saskatchewan and the Northwest Territories expressly state that no irregularity or insufficiency in the proclamation of intention to marry or in the certificate of the publication shall invalidate a marriage (25). On the other hand, Nova Scotia declares that no marriage shall be valid unless a permit has been obtained for the publication of the banns and unless the banns have actually been published as required by the Marriage Act (26). Ontario states that if the parties to a marriage solemnized in good faith and intended to be in compliance with the requirements

(23) R.S.A., 1942, c. 303, s. 10.

(24) S.N.S., 1946, c. 4, s. 13(3).

(25) S.S., 1951, c. 72, s. 19; O.N.W.T., 1949, c. 10, s. 27.

(26) S.N.S., 1946, c. 4, s. 12(b). The writer personally knows of a case in this province in which a clergyman was told that a marriage which he had performed was invalid because he had published the banns on the first Sunday before he had obtained the permit. To avoid difficulties with the civil authorities, he had to obtain a licence for the parties and repeat the ceremony.

of the Marriage Act are not legally disqualified to marry and after the solemnization have lived together and cohabited as man and wife, the marriage will be deemed valid notwithstanding the absence of or any irregularity or insufficiency in the publication of the banns or in the issue of the licence (27). This appears to leave open the question of the effect of non-compliance with the required formalities where one or both of the parties was or were not acting in good faith, or where, if both were acting in good faith, there was no subsequent cohabitation as man and wife. However, it has been repeatedly held that provisions in a statute regarding the formalities of marriage are directory only, and that failure to comply therewith does not invalidate the marriage unless the statute expressly or by necessary intendment so provides (28).

8. Forwarding of material furnishing evidence of freedom to marry

Most of the provinces prescribe that the issuer of marriage licences or the minister or clergyman who publishes the banns or solemnizes the marriage forward to the Registrar General, or some other provincial official as the case may be, all documentary material that has been gathered as evidence of the freedom of the parties to marry. Such documentary material also serves as the justification of the action of the person who

(27) S.O., 1950, c. 42, s. 44.

(28) Canadian Encyclopedic Digest, Ontario, 2nd ed., vol. 6, p. 153. Cf. also chapter 1, p. 8f. above.

solemnized the marriage or published the banns or issued the licence. We are here concerned chiefly with the minister or clergyman and therefore will exclude the duties of the issuer of marriage licences.

In Ontario all such documentary material must be sent to the Registrar General immediately after the publication of the banns (29). In Nova Scotia it must be forwarded to the issuer before the issue of a permit for the publication of the banns (30). In Newfoundland, Prince Edward Island, New Brunswick, and Yukon Territory no affidavits are required by law before the publication of the banns, and no special mention is made of forwarding other documents. In British Columbia every minister or clergyman who publishes the banns must, during the week between the first and the second publication, mail to the district registrar a certificate of banns (31). The affidavit is not required before the publication of the banns. The consent of the parents or a declaration of a judge dispensing with such consent must be filed with the minister or clergyman who publishes the banns (32). If an order of presumption of death is required, it and the statutory declarations must be sent by the minister or clergyman or the marriage commissioner to the Director of

(29) S.O., 1950, c. 42, s. 35(2).

(30) S.N.S., 1946, c. 4, s. 13(4).

(31) R.S.B.C., 1948, c. 201, s. 9(5).

(32) Ibid., s. 26(3).

Vital Statistics (33).

In Manitoba the certificate of the publication of the banns or of their dispensation must after the marriage be sent to the Department of Health and Public welfare (34). The clergyman or minister who publishes the banns or the head of the church or congregation who grants a dispensation of the banns must forward to the Department the affidavit and any other documentary evidence satisfying him of the facts (35). In Saskatchewan all documents furnished to the minister or clergyman by the parties must be sent together with the certificate or certificates of the publication of the banns to the Director within one week after the second publication of the banns. But if the banns are published by the clergyman who officiates at the marriage ceremony, all such documents may be forwarded by him to the Director within 48 hours after the marriage (36). In Alberta the minister who solemnizes the marriage must send all such documents to the district registrar within three days after the ceremony together with the report of the marriage (37). In the Northwest Territories the clergyman who solemnizes the marriage must within 48 hours after the ceremony send to the

(33) Ibid., s. 48(4).

(34) R.S.M., 1940, c. 126, s. 8(5).

(35) Ibid., s. 18(4).

(36) S.S., 1951, c. 72, s. 14(4).

(37) S.A., 1945, c. 67, s. 5.

Commissioner a certificate of the publication of the banns and all other documentary evidence of the freedom of the parties to marry (38).

Article 2. Issue of marriage licences

If an intended marriage is not preceded by the publication of the banns, the parties have to obtain a marriage licence. A marriage licence may be defined as a document granted by the competent civil authority showing that it has been informed of the intention of marriage between two determined parties and that, since there is no legal objection to the marriage, a duly qualified person may officiate at the ceremony. A marriage licence does not prove absolutely that there is no impediment to the marriage, but merely indicates that the requirements of the civil law have been fulfilled and that the minister or clergyman is free to solemnize the marriage without fear of being punished for his action. If there had been evidence of some impediment to the marriage, the issuer could not have issued the licence.

Prince Edward Island is the only province in which the licence is addressed to some determined minister or clergyman. Licences in the other provinces authorize any duly qualified person to solemnize the marriage within the province. Another slight exception is the licence granted in Alberta which

(38) O.N.W.T., 1949, c. 10, s. 26.

determines the place in which the marriage is to be celebrated (39).

A marriage licence is not required in Canada unless the banns are not published. The province of Newfoundland does not have marriage licences at all. And in the other provinces a licence is required only for civil marriages and for a few other cases in which the banns may not be published.

1. Issuers of marriage licences

In most of the provinces marriage licences can be obtained from persons who have been appointed to act as issuers or deputy issuers of marriage licences. The licence is officially issued by the Lieutenant Governor, Registrar General, or some other provincial official as determined by the various Marriage Acts (40). But no licence is effective until it is properly completed and signed by some issuer or deputy issuer at the request of the parties to an intended marriage (41). Such issuers of marriage licences have authority to receive the required application, the statutory declarations, and may demand additional evidence of the parties or even of other persons if they have reason to

(39) R.S.A., 1942, c. 303, Form A in the schedule. However, when asked for an explanation of this licence form, the Deputy Registrar General of the province replied that "the marriage may be performed anywhere in the Province of Alberta" (Private letter to the writer).

(40) In Ontario the Provincial Secretary may grant a special permit for the solemnization of marriage. This permit takes the place of an ordinary marriage licence (Cf. S.O., 1950, c. 42, s. 4(3), and Form 1 in the schedule).

(41) In Yukon Territory the ministers or clergymen of any church or religious denomination are ex officio issuers of marriage licences (Cf. C.O.Y.T., 1914, c. 60, s. 6).

think that any statements are not true or that the parties are under some impediment. Saskatchewan and the Northwest Territories prescribe that the issuer read to each of the parties separately the form of the licence in order to prove that they fully understand its contents. And in case either of them does not understand the English language, an independent interpreter must be employed (42).

2. Application for marriage licences

In most of the provinces the application for a marriage licence is made by the party or parties presenting to the issuer the affidavit or statutory declaration required before the issue of a licence. At such time they must also present the other required documents such as the consent of parents, birth certificates, health certificates, etc., depending on the requirements of each province as explained in the previous chapter. But Alberta requires that the parties present a special application besides the general affidavit (43).

All the provinces prescribe that the application be accompanied by a licence fee. This fee ranges from \$1.00 for Indians in British Columbia to \$2.00 in Northwest Territories, \$3.25 in Prince Edward Island, \$4.00 in New Brunswick, \$5.00 in Nova Scotia, Ontario, Manitoba, Saskatchewan, British Columbia, and Yukon Territory, and \$6.00 in Alberta.

(42) S.S., 1951, c. 72, s. 26; O.N.W.T., 1949, c. 10, s. 35.

(43) R.S.A., 1942, c. 303, s. 6. Cf. also Form B in the schedule.

3. Objections to or disputes over the issue of marriage licences

Upon the payment of a fee of \$2.50 in British Columbia and of \$3.00 in New Brunswick, any person may lodge with the issuer of marriage licences a caveat or objection against the issuing of a licence for the marriage of any person named in such a caveat. If the caveat is lodged with the issuer and is duly signed by or on behalf of the person who lodged the same, and if such person states his place of residence and the ground of objection on which his caveat is founded, no marriage licence may be issued until the issuer has examined into the matter of the caveat and is satisfied that it ought not obstruct the issue of the licence, or until the caveat is withdrawn by the person who lodged it. In difficult or doubtful cases the issuer may refer the matter of the caveat to the Director or Registrar General for his advice (44).

If the issuer in British Columbia decides against the person lodging the caveat, that person may appeal to the Director, on giving notice of his intention to appeal within two clear days after the decision, stating the grounds of the appeal. The decision of the Director is final and is binding on the issuer of marriage licences (45).

Prince Edward Island provides that if, upon the application of any parties for a licence to marry, any question or

(44) R.S.B.C., 1948, c. 201, s. 21; S.N.B., 1951, c. 181, s. 16.

(45) R.S.B.C., 1948, c. 201, s. 22.

dispute arises as to the eligibility of either of such parties to obtain a licence, either of the applicants or the Attorney General may apply to the Supreme Court of Judicature for a ruling as to the eligibility of such applicant (46).

4. Issue of marriage licences

The issuer may not issue a licence unless he is satisfied that the parties to an intended marriage are free to marry. To make it possible for the issuer to ascertain whether all the requirements have been complied with and whether there is any lawful impediment to the proposed marriage, several of the provinces prescribe that the licence may not be issued until a certain number of days after the application for the licence has been made. Thus in Prince Edward Island the period of delay is one week; in Saskatchewan seven days; in Nova Scotia and New Brunswick five days, and in British Columbia and Alberta three days.

In Nova Scotia, New Brunswick, Saskatchewan and Alberta the issuer may waive the requirement of the period of delay if there are exceptional and urgent circumstances to warrant the earlier celebration of the marriage (47). In Prince Edward

(46) S.N.B., 1951, c. 181, s. 23.

(47) S.N.S., 1946, c. 4, s. 17; S.N.B., 1951, c. 181, s. 13, 22; S.S., 1951, c. 72, s. 30; R.S.A., 1942, c. 303, s. 6. However, in Alberta the issuer may waive the requirement of the period of delay only if he is satisfied that both parties are over the age of 21 years or that either or both of them have previously been married and that there is no legal impediment to the marriage. He may also waive the requirement for the marriage of a minor if the proper parent or guardian appears personally before him and then and there gives his consent to the marriage.

Island and British Columbia the issuer must obtain the permission of the Provincial Secretary or the Director respectively if he wishes to issue a licence before the expiration of the required period of waiting (48).

Several provinces do not require any definite period between the application for the licence and its issue, but do prescribe that the marriage may not be celebrated until a certain number of days after the issue of the licence. Thus in Ontario the marriage may not be celebrated earlier than the third day after the issue of the licence. However, the Provincial Secretary may in his absolute discretion authorize the solemnization of the marriage earlier than such third day (49).

Manitoba and the Yukon Territory require a lapse of 24 hours between the issue of a licence and the celebration of the marriage, but Manitoba permits the person who is to solemnize the marriage to have the ceremony earlier if he is satisfied that there are exceptional circumstances rendering it advisable and proper to do so (50).

The Marriage Act of Nova Scotia forbids anyone to solemnize any marriage unless he has, not less than three days before such solemnization, received notice of the names, places of residence, occupation, age and conjugal condition of the parties to the intended marriage, except upon the production of evidence satis-

(48) R.S.P.E.I., 1951, c. 91, s. 6; R.S.B.C., 1948, c. 201, s. 13(4).

(49) S.O., 1950, c. 42, s. 14.

(50) R.S.M., 1940, c. 126, s. 8; O.Y.T., 1938, c. 5.

factory to him that there exist exceptional and urgent circumstances sufficient to justify the earlier solemnization of the marriage. But this rule does not apply to a marriage between persons either of whom has landed at any port in the province from overseas with the intention of marrying upon arrival at the said port (51).

Several of the provinces require that at least one of the parties must have resided in the province for a certain number of days before the application for a licence. Thus Ontario and Manitoba prescribe that no licence may be issued if neither of the parties to the intended marriage has, for 15 days immediately preceding the date of the application for a licence, had his usual place of abode within the province, unless the Provincial Secretary or the Minister of Health and Public Welfare respectively in writing authorizes the issue thereof. An additional fee of \$5.00 must be paid by the party for such an authorization (52).

In British Columbia an eight-day residence is required of at least one of the parties. But an application may be made to the Director for a permit authorizing the issuer to receive the statutory declaration without it containing a statement that either of the parties had previously resided in the province (53).

(51) S.N.S., 1946, c. 4, s. 19.

(52) S.O., 1950, c. 42, s. 5, 38; R.S.M., 1940, c. 126, s. 18(5); S.M., 1944, c. 22, s. 11.

(53) R.S.B.C., 1948, c. 201, s. 13(4).

As to the hour of the day for issuing licences, Saskatchewan and the Northwest Territories make special mention in their Marriage legislation that no licence may be issued between the hours of ten o'clock in the evening and six o'clock in the morning unless the issuer is satisfied from evidence adduced to him that the proposed marriage is legal and that exceptional circumstances exist which render the issue of the licence advisable (54). In Manitoba no licence may be issued between eleven o'clock in the evening and six o'clock in the morning, but the same exceptions are made as in Saskatchewan and the Northwest Territories (55).

In all the provinces the marriage licence is valid for only three months from the date of its issue. If the marriage is not celebrated within that period, a new licence must be obtained.

5. Return of marriage licences

Several of the provinces require the return of the licence to the Department in charge of the registration of marriages. The form for the report of the marriage is sometimes endorsed on the licence form. In this way the licence is returned with

(54) S.S., 1951, c. 72, s. 33; O.N.W.T., 1949, c. 10, s. 39.

(55) R.S.M., 1940, c. 126, s. 20(3).

and forms part of the registration of the marriage. This method is followed in Nova Scotia, Prince Edward Island, and Ontario (56). In Manitoba and Saskatchewan the clergyman or minister must send in the licence separately (57). In the other provinces the licence is kept by the clergyman or minister in the records of his church as his authority for the celebration of the marriage (58).

6. Necessity of a marriage licence for the validity of marriage

Nova Scotia is the only province which expressly declares that a marriage shall not be valid unless a licence has been obtained for the solemnization of the marriage (59). This, of course, applies only to those marriages for which the banns have not been published. New Brunswick, Manitoba, Saskatchewan, British Columbia, and the Northwest Territories expressly state that no irregularity in the issue of a licence shall invalidate a marriage celebrated in pursuance thereof if it has been obtained or acted on in good faith (60). This appears to leave open the question of the effect of the complete absence

(56) S.N.S., 1946, c. 4, s. 21; R.S.P.E.I., 1951, c. 91, s. 5(4); S.O., 1950, c. 42, s. 28.

(57) R.S.M., 1940, c. 126, s. 8(5); S.S., 1951, c. 72, s. 37.

(58) Cf. e.g., S.N.B., 1951, c. 181, s. 24(3).

(59) S.N.S., 1946, c. 4, s. 12.

(60) S.N.B., 1951, c. 181, s. 12(4); R.S.M., 1940, c. 126, s. 13; S.S., 1951, c. 72, s. 34; O.N.W.T., 1949, c. 10, s. 40.

of a licence or of the non-compliance with the required formalities where one or both of the parties did not act in good faith. However, according to the principles outlined in chapter 1 (61), it seems that even in these cases the marriage would not necessarily be considered invalid, but the offending parties would be liable to a penalty. The other provinces say nothing about the marriage licence as a requirement for a valid marriage. The registration of the marriage will show whether or not a licence has been obtained. If the licence has not been obtained, or if there has been some irregularity, the parties or the officiating clergyman or minister will usually be asked by the authorities to see that such irregularities are rectified.

Article 3. Summary of ecclesiastical legislation and comparison with civil legislation

According to the Code of Canon Law, the publication of the banns is necessary for the licit celebration of marriage but not for its validity (62), and there are no special penalties attached for the unauthorized omission of the banns. However, the publication may not be omitted even if it is certain that no impediment exists to hinder the marriage (63).

(61) Cf. p. 8f. above.

(62) C.J.C., can. 1022.

(63) Cf. C.J.C., can. 21.

The obligation of publishing the banns rests with the proper pastor (64). The proper pastor is the pastor of the place in which either of the parties to the intended marriage has either a domicile or a quasi-domicile (65). Therefore the banns may have to be published in even more than two places if the parties do not have the same domicile and if either of them has more than one domicile. And if either of the parties lived for six months in any other place after having attained the age of puberty, the local Ordinary may order the publication of the banns in such a place or prescribe other means of proving the freedom to marry. If there is any reason for suspicion of a possible impediment, the banns may also have to be published in a place in which a party resided for less than six months after having attained the age of puberty (66). It is therefore evident that the ecclesiastical laws on the publication of the banns are much stricter than those of the civil laws of the provinces.

Banns must be published on three consecutive Sundays or other days of precept before the marriage. This publication may be made during Mass or other divine services which are usually attended by the faithful (67). However, it is only in the province of New Brunswick that the civil law accepts

(64) C.J.C., can. 1023, § 2.

(65) Ibid., can 94, § 1.

(66) Ibid., can. 1023, § 2, 3.

(67) Ibid., can. 1024.

the publication of the banns on Holy Days celebrated as Sundays. In the other provinces, pastors will have to see that, if they desire to publish the banns on a day of precept other than Sunday, the banns are published at least on that number of Sundays as required by the civil law. The Code authorizes the local Ordinary to substitute for the publication of the banns a public notice of the marriage affixed to the doors of the church for a period of at least eight days, which period must include two days of precept (68). But nowhere in Canada will this method of publication be accepted by the civil law, which prescribes that the publication of the banns be made "openly and in an audible voice".

As to the time of the celebration of the marriage after the publication of the banns, canon 1030, §1 prescribes that the marriage may not be celebrated until three days after the last publication unless there is a reasonable cause for having the marriage earlier than the third day. Pastors will not find much difficulty from the civil law in this respect because it is only in those provinces which require only one publication of the banns that a period of delay is prescribed. If the marriage is not celebrated within six months after the last publication, the banns must be repeated unless the local Ordinary provides otherwise. However, to avoid conflict with the civil authorities, this period must for practical purposes be shortened because in all the provinces the banns must be

(68) Ibid., can . 1025.

repeated if the marriage does not follow within three months after the publication, and Alberta prescribes their repetition if the marriage does not follow within two months.

The banns may not be published for mixed or disparate marriages unless the local Ordinary judges that it is opportune to do so (69). Furthermore, canon 1020 gives the local Ordinary authority to dispense with the publication of the banns in whole or in part if there is some good reason why the banns should not be published. If the dispensation is given to omit only one publication of the banns there will generally be no conflict with the civil law because most of the provinces demand the publication on only two and some on only one Sunday before the marriage. But if the dispensation includes all three publications, or so many of the publications that the requirements of the civil law of the province can no longer be complied with, a civil licence will have to be obtained. This applies to all cases in which the banns may not or are not de facto published. Manitoba is the only province which allows the proper ecclesiastical authority to dispense with the publication of the banns as required by the Marriage Act of the province (70).

(69) Ibid., can. 1026.

(70) In practice, however, Catholics usually do not frequently use this right of dispensing with the civil requirements because a fee equal to that demanded for a marriage licence must be paid to the Provincial Treasurer on the occasion of a dispensation. Therefore, the parties are usually told to obtain a marriage licence. In such cases the local Ordinary dispenses from the banns but it is not considered as a dispensation according to the civil law. However, this power to dispense could be very useful for urgent cases in which it might be hard to obtain a marriage licence.

In Canon Law there is no such thing as a marriage licence, unless the dispensation of the banns may be considered as comparable to the civil marriage licence. Otherwise, the only thing that could in some way correspond with the marriage licence is the nihil obstat of the local Ordinary (71).

(71) Cf. S.C. of the Sacraments, Instruction, June 29, 1941: A.A.S., vol. 33 (1941), p. 297.

Chapter 8

THE CELEBRATION OF THE MARRIAGE

Having first discussed the preliminaries required before the celebration of a marriage, we now turn to the consideration of the marriage ceremony itself. The State and the Church are concerned not only that proper investigations be made to ascertain whether the parties are free to marry, but also that the marriage ceremony be performed in proper manner. It is for this reason that both the civil and the ecclesiastical law determine who may perform the marriage, and how, when, and where the ceremonies are to be performed.

For the sake of clarity we shall treat separately of the three different kinds of marriages, namely, marriages in the presence of a clergyman or minister, marriages in the presence of a civil magistrate, and marriages according to the common law.

Article 1. Marriage in the presence of a clergyman or minister of religion

1. Persons authorized to officiate at the ceremony

A previous chapter has dealt with the persons who are authorized to perform the ceremony of marriage. As was there stated (1), all such persons must be registered with the Registrar General or other official before they may solemnize marriages. Only Newfoundland and Yukon Territory do not

(1) Cf. p. 112 above.

require such registration. All the provinces require that the marriage be performed in the presence of a duly qualified officiating minister who acts as the official witness of the marriage.

2. Presence of witnesses

All the provinces and the territories require the presence of at least two witnesses at the marriage besides the officiating clergyman or minister. However, in none of them is it expressly stated that the presence of such witnesses is necessary for the validity of the marriage. They merely prescribe that the marriage shall not be celebrated without the presence of at least two witnesses besides the person who solemnizes the marriage.

The legislation on the requirement of the presence of witnesses is very brief. Nova Scotia, Prince Edward Island, Manitoba, Saskatchewan, Alberta, and the Northwest Territories prescribe that the witnesses be adult persons. Newfoundland, New Brunswick, Saskatchewan, British Columbia, Northwest Territories, and Yukon Territory specify that they must be credible persons (2). In most provinces the witnesses must sign the register or certificate of marriage immediately after the ceremony. That is all that the Marriage Acts of the

(2) Cf. C.S.N.F., 1916, c. 105, s. 2; S.N.S., 1952, c. 8, s. 11; S.P.E.I., 1950, c. 31, s. 12; S. N.B., 1951, c. 181, s. 24(2); R.S.M., 1940, c. 126, s. 8(3); S.S., 1951, c. 72, s. 54; R.S.A., 1942, c. 303, s. 7; R.S.B.C., 1948, c. 201, s. 10; O.N.W.T., 1949, c. 10, s. 11; C.O.Y.T., 1914, c. 60, s. 4.

various provinces have to say on the subject of witnesses.

3. Time, place, and manner of celebration

a) Time

The civil law of the provinces has little to say about the time for the celebration of marriage. Marriage may be celebrated on any day of the year. No day of the year is as such excluded. However, in some of the provinces a marriage may not be celebrated until a certain number of days after the issue of the licence or the publication of the banns (3). Such periods of waiting are no doubt required to prevent as far as possible abuses resulting from hurried and ill-considered marriages.

A few of the provinces specify the hours during which marriage may or may not be celebrated. In Manitoba, Saskatchewan, and Northwest Territories no one may celebrate a marriage between the hours of ten o'clock in the afternoon and six o'clock in the forenoon unless he is satisfied that the proposed marriage is legal and that exceptional circumstances exist which render its performance between those hours advisable. But Manitoba expressly states that the fact that the ceremony was not performed between any particular hours shall not be a valid objection to the legality of a marriage (4).

The ceremony of marriage is an important public contract

(3) Cf. p.162 above.

(4) R.S.M., 1940, c. 126, s. 8(2), 22; S.S., 1951, c. 72, s. 59; O.N.W.T., 1949, c. 10, s. 12.

which must not be entered upon as it were stealthily and upon the urgings of a sudden whim or fancy. The purpose of restricting the celebration of marriage to certain hours is no doubt to prevent the possibility of hurried marriages which are usually regretted later on and not too infrequently lead to the divorce court.

b) Place

In the civil law the place of marriage is not very important. Once the parties have proof of the due publication of the banns or have a valid marriage licence, they may marry anywhere within the province. They are not obliged to have the marriage solemnized in the place in which the banns were published nor in the place in which they obtained their marriage licence. However, there are a few minor exceptions. The form of the licence in use in Alberta seems to indicate that the marriage must be celebrated in the place mentioned in the licence (5). The licence in Prince Edward Island is addressed to the parties and to the person who is to solemnize the marriage (6). In the other provinces the licence authorizes the solemnization of the marriage by any qualified person within the province.

There is likewise little or nothing said about the immediate place or building in which marriage must be celebrated. Several of the provinces state that the marriage must be

(5) Cf. note (39) on page 171 above.

(6) R.S.P.E.I., 1951, c. 91, Form A in the schedule.

celebrated openly or publicly. It is, of course, taken for granted that marriage will usually be performed in a church or other place of worship. But there seems to be nothing in the marriage legislation of any of the provinces that obliges one to have the marriage celebrated in any special building. Manitoba expressly states that the fact that the ceremony was not performed in a consecrated church or chapel shall not be a valid objection to the legality of a marriage (7).

c) Manner of celebrating marriage

The essence of the marriage ceremony is that the parties take each other as man and wife by means of the expression of the marriage consent. None of the provinces prescribes any special form or ritual. Special mention of ceremonial is made only in reference to civil marriages. It seems to be taken for granted that each person who solemnizes marriage is supposed to perform the ceremony according to the rites and usages of the religious denomination to which he belongs. All the religious denominations are left free to follow their own liturgical rules. However, there may be an exception for Quakers and similar religious societies which ordinarily do not have an officiating minister at the marriage. These exceptional cases are considered in the following section.

4. Exceptional forms

a) Special provisions for certain religious societies

Certain religious groups or societies do not have any

(7) R.S.M., 1940, c. 126, s. 22.

specially appointed person to act as the minister of the congregation. When the members of such societies contract marriage, they do not have the ceremony performed before a minister. They contract marriage by merely manifesting the marital consent in the presence of the society or congregation. Those who wish to marry according to such rites may run into difficulties because the civil law requires that the ceremony be performed in the presence of a competent minister or other person authorized to solemnize marriages. Such persons are free to have a civil marriage contract, but they usually prefer to be married according to their own rites.

Several provinces make provisions for marriages of this kind. Ontario and Manitoba provide for the solemnization of marriage according to the rites, usages, and customs of the religious Society of Friends, commonly called Quakers. All the duties imposed upon other persons who solemnize marriages must, with respect to such marriages, be performed by the clerk or secretary of the society or of the meeting at which the ceremony is performed; but this does not require the marriage to be celebrated or solemnized by such clerk or secretary (8).

British Columbia also permits the members of the Society of Friends to contract marriage according to their rites and ceremonies provided that they comply in all respects with the provisions of the Marriage Act as to registration of ministers or clergymen and as to the registration of the marriage. The

(8) S.O., 1950, c. 42, s. 21(4); R.S.M., 1940, c. 126, s. 4.

freedom of the Society of Friends is therefore only partial because they still must have their marriages performed in the presence of an official witness approved or registered by the Director of Vital Statistics (9).

Saskatchewan makes special provision for the marriages of Doukhobortsí according to the rites and ceremonies of their own religion or creed, if either of the parties is a Doukhobor. The presence of a minister or other official witness is not required. The parties must obtain a licence and comply with the other preliminaries to the celebration of a marriage. The male party is made responsible for the registration of the marriage (10). Several court decisions have upheld the validity and legality of marriages celebrated according to the rites and ceremonies of the Doukhobortsí (11).

b) Marriage by proxy, interpreter, etc.

In none of the provinces is there any law expressly permitting marriages by proxy. Ontario and British Columbia are the only provinces whose Marriage Act expressly states that both parties to the marriage must be present in person at the ceremony (12). It seems that even though the other provinces

(9) R.S.B.C., 1948, c. 201, s. 9(4).

(10) S.S., 1951, c. 72, s. 42.

(11) Cf. e.g., Polovnikoff v. Polovnikoff, (1930) 2 W.W.R. 177; Chernenkoff, v. Chernenkoff, (1930) 2 W.W.R. 165, (1930) D.L.R. 1001.

(12) S.O., 1950, c. 42, s. 19; R.S.B.C., 1948, c. 201, s. 10.

do not expressly demand the personal presence of both parties, they will not accept marriage by proxy as a valid contract. The writer inquired of several provinces and was told that marriage by proxy would not be accepted, but that if a resident of the province married in this manner in a foreign country which permits marriage by proxy, the marriage would be accepted as valid in the province.

Marriage with the use of an interpreter will no doubt be accepted by the civil law of the provinces. However, only Saskatchewan and the Northwest Territories expressly declare that no clergyman or commissioner may perform a marriage ceremony if either of the contracting parties does not speak or understand the language in which the ceremony is to be performed unless an independent interpreter is present to interpret and convey clearly to that party the meaning of the ceremony (13).

Since marriages by proxy are not accepted by the civil law, it seems that marriages by letter, messenger, or other means of communication will likewise not be accepted.

Article 2. Marriage in the presence of a civil magistrate

In New Brunswick, Nova Scotia, and Prince Edward Island all marriages must be celebrated in the presence of some duly qualified and registered minister of religion. These provinces do not permit the celebration of marriage in the presence of a civil magistrate. Newfoundland permits such marriages only in

(13) S.S., 1951, c. 72, s. 60; O.N.W.T., 1949, c. 10, s. 13.

certain exceptional circumstances when a minister or clergyman or licenced teacher or preacher cannot be obtained because of the remoteness of the parties from such persons. In the other provinces and in the territories the parties may have their marriage solemnized by a civil magistrate if they do not desire a religious ceremony.

1. Preliminaries to a civil marriage

In most of the provinces the preliminaries for a civil marriage are the same as those for a marriage celebrated in the presence of a minister or clergyman under the authority of a marriage licence instead of the publication of the banns. In other words, the ordinary marriage licence is sufficient also for a civil marriage. It is only in the province of British Columbia that special preliminaries are required before the celebration of a civil marriage. These preliminaries are still much the same as they were in England in 1836 (14). The parties must give notice in writing of their intended marriage to the marriage commissioner of the district in which they propose to marry. The notice must be given at least three days before the date of the intended marriage, and one of the parties must make a statutory declaration in the presence of the marriage commissioner. If neither of the parties can conveniently attend before the commissioner, the statutory declaration may be made before any person authorized by law to receive statutory declarations, in which case the reason relied

(14) Cf. p. 26 above.

upon to excuse personal attendance before the commissioner must be stated. Upon receipt of the notice and the declaration, the commissioner enters the notice in a special book kept in his office for that purpose. When he is satisfied that the parties have complied with all the requirements, he may, upon the expiration of a period of three days after the giving of the notice, grant a certificate of compliance. No irregularity in the compliance with the above provisions will invalidate a marriage if it is entered upon in good faith. Upon receipt of a petition from the parties that it is expedient or in the interests of the parties that a marriage be solemnized at once, the Director may issue a permit authorizing the marriage commissioner to receive the notice and the statutory declaration without a statement that at least one of the parties has had his residence in British Columbia for at least eight days prior to the making of the declaration, and to grant the certificate of compliance, and to solemnize the marriage at any time before the expiration of the period of three days after the reception of the notice (15).

2. Form of a civil marriage

A civil marriage must be performed in the presence of the competent civil magistrate and two or more credible adult witnesses. Ontario, Saskatchewan, and British Columbia require that the marriage be solemnized in the office of the civil magistrate. British Columbia limits the time for such marriages

(15) R.S.B.C., 1948, c. 201, s. 16-19.

from ten o'clock in the morning to four o'clock in the afternoon, and Ontario from nine o'clock in the morning to five o'clock in the afternoon (16).

The essence of the marriage ceremony is that in the presence of the civil magistrate and the witnesses each of the parties declares: "I do solemnly declare that I do not know of any lawful impediment why I, A. B., may not be joined in matrimony to C. D.", and that each of the parties says to the other: "I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife (or husband)." British Columbia and Saskatchewan seem to limit the whole ceremony to just these essential elements (17), but Ontario and Manitoba state that no particular form of ceremony is required except that in some part of the ceremony, in the presence of the magistrate and the witnesses, the parties must make the above declarations (18). Fees for civil marriages range from \$1.00 for Indians in British Columbia to \$10.00 in Ontario. Manitoba, Saskatchewan, and the Northwest Territories require a fee of \$5.00, and British Columbia a fee of \$7.50 for parties other than Indians.

(16) S.O., 1950, c. 42, s. 25(2); R.S.B.C., 1948, c. 201, s. 19(1)(a).

(17) Cf. S.S., 1951, c. 72, s. 46; R.S.B.C., 1948, c. 201, s. 19(1). Upon inquiry by the writer, the Director of Vital Statistics of Saskatchewan stated that additional ceremonies would not necessarily be excluded but that they would not form a part of the civil ceremony as such.

(18) Cf. S.O., 1950, c. 42, s. 25; R.S.M., 1940, c. 126, s. 6(3).

Saskatchewan, British Columbia, and the Northwest Territories make special provision for those who have been married by a civil contract but who may desire a second ceremony for religious purposes. Such a ceremony is merely supplementary to the civil contract and is not registered as a marriage. In British Columbia such a second marriage ceremony may be performed if the parties produce the marriage commissioner's certificate containing a copy of the registration of the civil marriage. In the Northwest Territories the licence obtained for the prior civil marriage is sufficient authorization for the performance of the second ceremony even though it is not performed within three months from the date of the issue of the licence (19). It seems that in the other provinces which allow civil marriages it is not forbidden to perform a second ceremony for religious purposes. However, civil marriages are resorted to usually only in cases in which the parties either do not desire or for some reason find it impossible to have a religious ceremony.

Article 3. Marriage according to the common law

The term common law marriage is generally taken to mean a marriage which is contracted without fulfillment of the statutory solemnities for marriage and especially without a legally authorized ecclesiastical or civil ceremony. It is a union which arises from the mutual agreement between a man and a woman to become husband and wife and to live together as

(19) Cf. S.S., 1951, c. 72, s. 53; R.S.B.C., 1948, c. 201, s. 20; O.N.W.T., 1949, c. 10, s. 15.

such, followed by their actual cohabiting as man and wife and holding themselves out to their acquaintances as occupying that relationship. A common law wife is a woman who is united with a man by marriage which though informal is such as was recognized by the common law (20).

There is a certain amount of confusion as to the requirements for a common law marriage. Before Lord Hardwicke's Marriage Act of 1753 (21) it was generally accepted that the presence of a priest or ordained clergyman was not necessary for a valid marriage. Under the ancient Canon Law, which was the basis of the matrimonial law of England, the intervention of a priest was not required as an essential to the validity of a marriage (22).

However, in 1844 in the case of Regina v. Millis (23), the House of Lords declared that to constitute a valid marriage by the common law of England it must have been celebrated in the presence of a clergyman in Holy Orders. This decision

(20) Cf. Johnson, The Conflict of Laws, vol. 1, p. 297; C. Bernard Alford, "Common Law Marriage in Relation to the Code", in The Jurist, A Quarterly Review Published by the School of Canon Law, Washington, The Catholic University of America, vol. 2 (1942), p. 248; Robert E. Dillon, Common Law Marriage, The Catholic University of America Canon Law Studies, n. 153, Washington, The Catholic University of America Press, 1942, p. 6; Blanchett v. Hansell, (1943) 3 W.W.R. 275, (1944) 1 D.L.R. 21, affirmed (1944) 1 W.W.R. 432, (1944) 1 D.L.R. 799.

(21) Cf. Chapter 2, p. 22 for the provisions of this Act.

(22) Alexander Wood Renton and George Granville Phillimore, The Comparative Law of Marriage and Divorce, London, Sweet and Maxwell, Limited, 1910, p. 177.

(23) R. v. Millis, 10 Cl. & F..534.

was criticized in Canada and even in England and was itself adopted on an equal division of opinion on the principle that semper praesumitur pro negante (24). It was not followed in the United States. All that is there required for a valid common law marriage is that marriageable parties take each other as husband and wife and live together as such (25).

However, there may possibly be exceptions to the general rule laid down in Regina v. Millis. Lord Campbell admitted that "in circumstances where it is utterly impossible to procure the presence of a priest, there may be a valid marriage by the consent of the parties." Therefore, if no ordained clergyman is available, as is sometimes the case at mission stations or isolated colonial settlements, a marriage contracted by mere agreement and not solemnized by a priest in Holy Orders would be recognized as valid by the common law (26).

Apart from the question of the necessity of the presence of an ordained clergyman, there are two essential conditions for any valid marriage according to the common law. These are the legal capacity and the agreement to marry. The necessity of these two elements was pointed out in a case decided in

(24) Renton and Phillimore, op. cit., p. 178.

(25) Ibid.; Dillon, op. cit., p. 6.

(26) Cf. Clive M. Schmitthof, A Textbook of the English Conflict of Laws (Private International Law), 2nd ed., London, Sir Isaac Pitman & Sons, Ltd., 1948, p. 305; Rayden, Practice and Law in the Divorce of the High Court of Justice, 5th ed., London, Butterworth & Co., Ltd., 1949, p. 67, footnote; William Latey and Perronnet Rees, Latey's Law and Practice in Divorce and Matrimonial Causes, 14th ed., London, Sweet and Maxwell, Ltd., 1952, p. 32.

the Manitoba King's Bench in 1943. A man, after having been deserted by his lawful wife, lived for twenty years with another woman. Both realized that they were incapable of marrying. After his death there was a dispute concerning insurance benefits. The Court declared that the second woman could not be his common law wife because they were incapable of marrying. The judge admitted that there was some confusion as to what formalities could be dispensed with without invalidating a marriage but that the two above mentioned elements were absolutely essential for a valid marriage (27).

The use of the term common law marriage for the union of two persons, one of whom is already legally married, is therefore not proper. Nor should the union of two persons, even if neither of them is already married, without any true matrimonial intent be termed a common law marriage. Mere cohabitation without genuine matrimonial consent is not sufficient. Experience has shown that many, if not most, of these unions are a mere living together in concubinage.

Having considered the definition and the basic requirements for a common law marriage, we now turn to the difficult question whether it is possible to contract marriage according to the common law in Canada.

According to the principle of lex loci celebrationis, a marriage which has been contracted according to the common law

(27) Cf. Blanchett v. Hansell, (1943) 3 W.W.R. 275, (1944) 1 D.L.R. 21.

in a place or country which accepts that form of marriage will be accepted as valid in Canada. This principle was applied in a case in Ontario in 1912 to determine the lawful heirs of a man who had married according to the common law in the State of Michigan. His common law wife and their three children were declared the lawful heirs of the valid common law marriage (28).

There are a few very interesting cases which show that common law marriages have been accepted in Canada at least in certain exceptional circumstances. These cases chiefly concern the question of the validity of marriages between white men and Indian women which were contracted according to the Indian customs and without any religious or civil ceremony.

A marriage was held to be valid where evidence showed that a white man from Lower Canada went to a place called Rat River in the Indian country, and while still a minor took to live with him as his squaw, or Indian wife, an Indian girl residing there. The marriage was celebrated according to the customs of the country without any religious or civil ceremony. Since there was no priest, clergyman, or civil officer with authority to solemnize marriages resident there at the time it could not be celebrated in any other manner. The woman went by the man's name, and they faithfully cohabited for twenty-eight years in the Indian country. When the man returned with the woman and his children to Lower Canada, he introduced the

(28) Cf. Forbes v. Forbes, (1912) 20 O.W.R. 924, 3 O.W.N. 557, 3 D.L.R. 243.

woman as his wife and had the priest baptize two of his children on the assurance that she was his lawful wife. Shortly afterward he repudiated her and married a white woman. In the legal proceedings after his death to determine the lawful heirs, the Indian woman was declared to have been his lawful wife (29).

In 1889 it was unanimously held by the Supreme Court of the Territories that the laws of England respecting the solemnization of marriage were not applicable to the Indians residing there and that a marriage between Indians by mutual consent and according to Indian customs was valid, provided that neither of the parties had a consort living at the time (30).

However, in an action by the administrator to have the next of kin of the deceased ascertained and the rights of all claimants to the estates decided, it was held that a contract of marriage per verba de praesenti in the Territories, entered into between a white man and an Indian woman domiciled there without a ceremony of any kind followed by cohabitation as husband and wife, was not a legally valid marriage in view of the fact that in that portion of the Territories where the contracting parties were domiciled there were facilities for the solemnization of the marriage within reach of the parties (31).

(29) Cf. Johnstone v. Connolly, Rev. Leg. 253, affirming Connolly v. Woolrich, 11 L.C.J. 197; 3 D.L.R. 243, annotation.

(30) Cf. The Queen v. Nan-e-quis-a-Ka, 1 N.W.T. Rep., part 2, p. 21, 1 Terr. L.R. 211; 3 D.L.R. 243, annotation.

(31) Cf. Re Sheran, 4 Terr. L.R. 83; 3 D.L.R. 243, annotation.

In view of the above cases one cannot but come to the conclusion that common law marriages without the presence of a priest or clergyman or some civil official with authority to perform the marriage ceremony will not generally be accepted as valid in Canada unless they are contracted in remote regions where it is impossible to have a priest or other authorized official to perform the ceremony. In most of the provinces the question has as such never been expressly determined. The problem usually arises only in cases to determine the next of kin and the rights of claimants to insurance or inheritance. In view of the regulations for the registration of marriages, it seems that if the parties should try to register a common law marriage, they would no doubt be told that they have to have another ceremony performed in the presence of an authorized ecclesiastical or civil official. The regulations made by the authorities of the armed forces as to who may be entitled to receive a marriage allowance have no direct bearing on the legal question concerning common law marriages.

Article 4. Summary of ecclesiastical legislation and comparison with civil legislation

1. Marriage in the presence of a clergyman or minister of religion

a) Witnesses

According to Canon Law, the marriage must be celebrated in the presence of at least two witnesses in addition to the local Ordinary, pastor, or other priest delegated by either

of them (32). The Code requires no special qualifications of those who are to be the witnesses of a marriage. The only requirements are those demanded by the very nature of a witness, namely, use of reason and ability to testify to the marriage. It is not necessary that they be formally chosen to act as witnesses. As long as they perceive the marriage in such a way as to be able to testify that a marriage has taken place between two determined persons, they can be valid witnesses of the marriage. However, the licit celebration of the marriage demands that suitable witnesses be chosen beforehand and that they are close at hand at the time of the actual marriage ceremony. There is little room for conflict with the civil law in regard to the witnesses required to be present at a marriage. Those who are not obliged to observe the canonical form of marriage can validly marry without the presence of witnesses.

b) Time, place, and manner of celebration

According to Canon Law, no less than according to the civil law, marriages may be validly celebrated on any day of the year. However, the Code forbids the solemn blessing of the marriage during the penitential seasons from the first Sunday of Advent to Christmas Day inclusive and from Ash Wednesday to Easter Sunday inclusive. During these so-called closed seasons the nuptial blessing which ordinarily takes place during the nuptial mass may not be given unless the local Ordinary grants permission for some just reason (33).

(32) C.J.C., can. 1094

(33) Ibid., can. 1108.

There is in the canons no prohibition against celebrating marriage in the afternoon or in the evening as well as in the morning. However, the Church has always persuaded the faithful to marry in the morning in connection with the Mass. The local Ordinary would have authority to forbid afternoon or evening marriages in particular cases, and the more probable opinion is that he could do so even by a general precept or statute (34). Only Manitoba, Saskatchewan, and the Northwest Territories prescribe that marriages may not be celebrated between the hours of ten o'clock in the afternoon and six o'clock in the morning. Circumstances would indeed have to be very exceptional to require the celebration of marriage during the hours forbidden by the civil law.

As to the place of marriage, canon 1109, §1 states that marriages between Catholics must be celebrated in the parish church, but not in other churches, public, or semi-public oratories except with the permission of the local Ordinary or the pastor of the place. The celebration of marriage in private houses may be permitted by the local Ordinary only in extraordinary cases and for a just and reasonable cause, but he may not permit the celebration of marriage in the churches or oratories of seminaries or of women religious except for a case of urgent necessity and with the application of proper precautions (35). A domestic oratory is not a sacred place,

(34) Cf. Cappello, De Sacramentis, vol. 5, n. 726, p. 711.

(35) C.J.C., can. 1109, §2.

and therefore marriages may not be celebrated there except with the permission of the local Ordinary (36).

Marriages between a Catholic and a non-Catholic party are to be celebrated outside of the church, but if the local Ordinary foresees that this cannot be done without giving rise to greater evils, he may in his discretion permit the marriage in the church and may also permit some of the usual ceremonies accompanying the celebration of marriage, but never the Mass itself (37). Such marriages are usually celebrated in the parish rectory or in the sacristy.

Therefore, as to the immediate place of celebrating marriage, the pastor need not worry about any restrictions of the civil law because any of the places approved by Canon Law will also be accepted by the civil law.

As has already been mentioned in a previous chapter (38), the parish priest can validly assist at marriages only within the limits of his territory. Canon 1097, §2 lays down the general rule that the marriage should be celebrated by the pastor of the bride unless there is some good excusing cause. But marriages of parties who are of different rites are to be celebrated in the rite of the bridegroom and in the presence of his proper pastor. And if for good reasons the marriage is celebrated in a place in which neither of the parties have

(36) Wernz-Vidal, Jus Canonicum (7 vols., Romae, 1937), vol. 5, n. 579, p. 677.

(37) C.J.C., can. 1101, §3; 1102, §2.

(38) Cf. p. 118 above.

a proper pastor, there is nothing to fear from the civil law because there is no rule in any of the provinces that the marriage must be celebrated in the place in which the banns were published or in which either of the parties has his or her residence or in which they received their marriage licence.

As to the liturgical form or ritual, canon 1100 requires that, apart from cases of necessity, the rites prescribed by the rituals approved by the Church or accepted by laudable customs be followed. The pastor has to see that the spouses receive the solemn blessing which may be given even long after their marriage, but only during Mass and not during the closed season except with the permission of the local Ordinary (39).

Even for the marriage of a Catholic and a non-Catholic, the officiating minister must ask and receive the consent of the parties, but the other rites are to be omitted unless the local Ordinary permits some of them with the exception of the Mass (40).

The Church will not be hindered in observing the above regulations because the laws of the provinces do not prescribe any special ritual or ceremonies for the celebration of marriage.

c) Exceptional forms

Canon 1088, §1 states that for a valid marriage the parties must be present personally or represented by a procurator. In order that a marriage by procurator or proxy may be valid,

(39) C.J.C., can. 1101; 1103.

(40) Ibid., can. 1095, §1, n. 3; 1102.

the absent party to the marriage must send a special mandate to a determined person to act as proxy for him in his marriage with the other determined party. This mandate must be signed by the mandator and by either the pastor or the local Ordinary of the place in which the mandate is made or by a priest delegated by either of them, or by at least two witnesses. If the mandator cannot write, that fact must be mentioned in the mandate and another witness must also sign the mandate. If the mandator revokes the mandate or becomes insane before the marriage is contracted, the marriage is invalid even if the proxy does not know of the revocation of the mandate. The proxy must act personally in carrying out the mandate, otherwise the marriage will be invalid. Diocesan statutes must also be observed, but they will not affect the validity of the marriage (41).

The pastor may not assist at a marriage by proxy unless there is a good reason for celebrating the marriage in this manner and unless he is sure of the authenticity of the mandate. If there is sufficient time, the permission of the local Ordinary must also be obtained (42). Because of possible difficulties with the civil law, marriages by proxy should be avoided if at all possible.

Marriage with the use of an interpreter will be much more readily accepted by the civil law. Canon 1090 merely states

(41) Ibid., can. 1089.

(42) Ibid., can. 1091.

that marriage may be contracted with the aid of an interpreter. However proper precautions must be taken to assure the integrity of the interpreter. This form of marriage may possibly be practical in these days when people from many different countries of Europe are migrating to Canada. The scarcity of priests who can speak the language of such immigrants may possibly render the use of an interpreter a real necessity.

By reason of canon 1038, §1 and 1094, marriages cannot be validly contracted by letter, messenger, telegraph, telephone, radio, or television by those who are bound to observe the canonical form of marriage. Marriages of this kind between those who are not baptized may be valid unless the civil law expressly requires the personal presence of the contracting parties for the validity of the marriage. It is a bit doubtful whether baptized non-Catholics could validly marry in this manner (43). At any rate, the practice is not to be recommended because it is very doubtful whether the civil law of the provinces will accept such marriages. If the civil law will not accept marriages by proxy, it seems that marriages by letter or other means of communication will likewise not be accepted.

As has already been explained in a previous chapter (44), all those who have been baptized in the Catholic Church or have been converted to it must observe the canonical form

(43) Cf. Cappello, De Sacramentis, vol. 5, n. 617, p. 597.

(44) Cf. p. 117 above.

of marriage. Canon 1098 makes two notable exceptions when this form need not be followed, at least not in its entirety. These exceptions cover the cases in which the presence of the pastor, local Ordinary, or a priest delegated by either of them cannot be had without grave inconvenience. The first case is that in which there is danger of death. If either of the parties is in danger of death and a competent priest cannot be obtained without grave inconvenience, the marriage may be performed in the presence of two witnesses. The second case is that in which neither of the parties is in danger of death. If the parties cannot without grave inconvenience approach a competent priest or obtain his presence and it is prudently foreseen that these conditions will endure for at least a month, they may marry in the presence of two witnesses alone. The grave inconvenience of obtaining the presence of a competent priest may be either physical or moral, and the absence may also be either physical or moral. Among moral absence would be the case in which a competent priest can be present physically but cannot perform the ceremony according to the canonical form because of fear of grave punishment or incarceration by civil authorities, and if the parties can not without grave inconvenience go to a place in which they can legally marry according to the civil law (45). If in any of

(45) Cf. Pontifical Commission for the Interpretation of the Code: A.A.S., vol. 23 (1931), p. 388; Petrus Card. Gasparri, Tractatus Canonicus de Matrimonio, editio nova ad mentem codicis juris canonici (2 vols., Romae, Typis Polyglotta Vaticanis, 1932), n. 1017. Cf. also John Joseph Carberry, The Juridical Form of Marriage, The Catholic University of America Canon

the above cases a priest is available, he must, together with the witnesses, assist at the marriage, but his presence is not necessary for the validity of the marriage (46).

Even though a marriage celebrated according to the exceptional form of canon 1098 may be accepted by the civil law as a common law marriage if it is later contested in court, such a marriage will not be accepted for registration as long as the parties are living.

If a marriage has been licitly and validly performed according to the exceptional forms which will not be acknowledged by the civil law, the parties still have a right to enjoy the civil effects of their marriage, and may even have a civil ceremony performed if that is the only way of obtaining such civil effects. If they can be obtained by having a second ceremony before a priest, the parties may be obliged to use that method in order to avoid scandal which may be caused by a ceremony before a magistrate.

Another exceptional manner of celebrating marriage is that which is known as a marriage of conscience. It is a marriage which is celebrated according to the canonical form, but in such a manner as to remain secret. There is no publication of the banns, and the assisting priest, the witnesses, the local Ordinary and his successors are all bound by a grave obligation

Law Studies, n. 84, Washington, The Catholic University of America, 1934, p. 147f. for an explanation of the cases in which canon 1098 may be applied.

(46) C.J.C., can. 1098, n. 2.

to keep the marriage secret. Even the parties are individually bound by this obligation of secrecy unless they both agree to make the marriage known (47).

Canon 1104 warns that marriages of conscience may be allowed only ^{by} the local Ordinary, or the Vicar General if he has a special mandate, and only for very grave and very urgent reasons. The chief reason for which Pope Benedict XIV permitted marriages of conscience was to regularize the status of a man and woman who were living in concubinage but were considered as truly married. To save the reputation of such persons and to make it easier for them to be reconciled with God and with the Church, a marriage of conscience could be allowed (48). But other very grave reasons could also be accepted, e.g., if the civil law imposes conditions injurious to the freedom to marry, or if a person would lose his employment and as a result could not support himself or his dependents if it became known that he was married (49).

There is, of course, no question of having marriages of conscience accepted by the civil law because such marriages are known only to those who are immediately concerned with its celebration. If the marriage is later divulged by the parties or by the local Ordinary, steps should be taken to

(47) Ibid., can. 1104; 1105.

(48) Pope Benedict XIV, Encyclical Letter Satis Vobis, November 17, 1741: Fontes, vol. 1, n. 319, p. 701.

(49) Cappello, De Sacramentis, vol. 5, n. 723, p. 708.

have the parties enjoy the civil effects of their marriage.

2. Marriage in the presence of a civil magistrate

Even though the majority of the provinces permit civil marriages, in no part of Canada is a civil marriage obligatory as it is in some countries of continental Europe where a religious ceremony may not be performed unless it has been preceded by a civil ceremony. Civil marriage in Canada is a matter of choice. All religious marriages are acknowledged by the civil law if they meet the statutory requirements for the celebration of marriage. Therefore the Church is free to celebrate marriage according to her own canonical form.

Some authors of the public law of the Church say that the State has the right to demand that all marriages be celebrated either before a clergyman or minister of religion or before a civil magistrate, and even go so far as to maintain that the State should permit civil marriage for those who are not obliged to observe the canonical form so as not to force them to partake in an act of false religion (50).

However, the civil law permits civil marriage not only for those who are not in conscience bound to observe any special form, but for anyone at all, regardless of his belief or religious affiliation. This regulation of the civil law sometimes causes difficulties for the Church because marriages which are de facto invalid are regarded by the civil authorities

(50) Cf. Felix Cavagnis, Elementa Juris Publici Naturalis et Ecclesiastici (2 vols., Romae, 1889), vol. I, n. 597, p. 369.

as legal and valid marriages. The civil authorities are staying within the limit of their legislative competency when they allow civil marriage for those who are not bound to marry according to the canonical form of the Church, but overstep that limit when they permit such marriages even for those who cannot validly marry in that manner.

The faithful may have a civil ceremony performed in addition to their marriage according to the laws of the Church if that is necessary so that they may enjoy the civil effects of their marriage. In fact, it may even be obligatory in order to avoid unnecessary conflicts and penalties and for the good of the children who may otherwise be considered as illegitimate (51).

The marriage laws of the Church can generally be observed without difficulties with the civil laws of the provinces. With but a few exceptions, marriages performed according to the prescriptions of the Code of Canon Law are accepted as legal and valid, and ipso facto entitle the parties to the civil effects regulated by the civil law.

(51) Cf. the Instruction of the Sacred Penitentiary, January 15, 1866: Fontes, vol. 8, n. 6427. Cf. also Gasparri, op. cit., vol. 2, n. 1293, p. 314; Coronata, De Sacramentis, vol. 3, n. 705, p. 975; Cappello, De Sacramentis, vol. 5, n. 733, p. 716.

Chapter 9

REGISTRATION AND PENALTIES

Once two persons have lawfully married, they are entitled to be considered as such by their acquaintances and by the civil authorities. However, the civil authorities will not acknowledge a marriage unless they are officially notified of the performance of the marriage ceremony. This official notification is given by the proper registration of the marriage according to the laws of each province. It is generally at the time of the registration that any irregularities in the performance of the marriage ceremony or in the preliminaries to the marriage are discovered. Therefore the question of penalties for having failed to observe the requirements of the Marriage Act will generally be raised only after the celebration of the marriage and especially at the time of its registration.

Therefore, this chapter will deal with the obligation of having marriages registered and of the penalties to which one may be liable for having failed to observe the requirements of the Marriage Act.

Article 1. The registration of marriages

It is to the interest not only of the parties to a marriage themselves but also to the State that there be some form of proof of the marriage after its celebration. Since the State has the right to regulate the merely civil effects of marriage (1),

(1) C.J.C., can. 1016.

it also has the right to know which of its citizens are actually married. It is for these reasons that the State as well as the Church provides for the registration of marriages. The proper registration of a marriage serves as proof that the marriage was performed and that it was properly contracted unless evidence is produced to prove the contrary.

In several of the provinces two systems of registration are prescribed, namely, registration in church registers and registration with the civil authorities or department set up for that purpose. Therefore, the two systems of registration will be separately explained in this chapter.

1. Registration in church records

All the provinces except Nova Scotia, Prince Edward Island, New Brunswick and Saskatchewan require by law that all marriages be recorded in a special book by all those who solemnize marriages. If the marriage is celebrated in a church, the record must be entered in the church register kept for that purpose. If the marriage is celebrated elsewhere than in a church, the record must be entered in a register kept for that purpose by the person who solemnizes the marriage.

a) Supply, custody, and property of registers

In some provinces the registers are supplied by the municipality or by the provincial government, but in others they have to be supplied by the church or congregation. In Ontario and Manitoba every person registered as authorized to solemnize

marriages who is in charge of a church that has no marriage register may apply to the clerk of the local municipality for a marriage register for his church. Every person registered as authorized to solemnize marriages may also apply to the clerk of the municipality in which he resides for a marriage register for his own use. In unorganized territories such registers are supplied by the Provincial Secretary. Every judge and magistrate is entitled to receive a marriage register from the Provincial Secretary. All the registers except those for the judge or magistrate are and remain the property of the religious body to which the person belongs who applied for the register (2).

In Alberta and the Northwest Territories the registers are supplied by the Department of Vital Statistics and remain the property of the government but are retained by the church or congregation to which the minister, clergyman or other person performing the ceremony belongs at the time of the first marriage which he records therein. If the church is abandoned the register must be filed with the Department (3). In British Columbia marriage registers are supplied by the Director of Vital Statistics and remain the property of his office. If a minister or clergyman is removed or transferred and no successor is named to take his place, the marriage register must be surrendered to the registrar of the district in which the

(2) S.O., 1950, c. 42, s. 27; R.S.M., 1940, c. 126, s. 25, 26.

(3) R.S.A., 1942, c. 30, s. 14; O.N.W.T., 1926, s. 13.

pastoral charge is situated (4).

b) Method of registration

An entry in a marriage register usually includes such particulars as the full names of the parties, their age, condition in life, occupation, religious denomination, residence, the names of their parents, the names of the witnesses, and whether the marriage was celebrated upon the authority of a licence or the publication of the banns. Some of the provinces which require the keeping of a marriage register merely state that the person who solemnizes the marriage must enter it in the register, whereas Ontario and Manitoba prescribe exactly what must be included in the entry. The register must always be signed by the person who performed the marriage ceremony. Ontario and British Columbia also prescribe that the entry be signed by the parties and the witnesses (5). Manitoba requires that it be signed by at least two witnesses (6).

c) Inspection and return of marriage registers

In British Columbia, Alberta, and the Northwest Territories the marriage registers are subject to inspection by the Director or by the district registrars. In fact, British Columbia prescribes that the registers be inspected by the Director and compared with the returns of marriage at least once in each year

(4) R.S.B.C., 1948, c. 201, s. 23.

(5) S.O., 1950, c. 42, s. 26; R.S.B.C., 1948, c. 201, s. 23(1).

(6) R.S.M., 1940, c. 126, s. 8(3).

or as often as he considers necessary. The registers have to be returned to him on demand or on the holder ceasing to be authorized to solemnize marriages (7).

Every person in Manitoba who has in his custody a marriage register which he has received from the local municipality must on or before the eighth days of July and January of each year make and deliver to the clerk of the municipality a complete copy of the entries relating to every marriage recorded in his register during the half year ending on the last days of June and December (8). In Newfoundland a copy of the entries made in the marriage register must be sent quarterly to the Register General. The clergyman or other person is entitled to receive a fee of twenty cents for each entry contained in such a copy (9).

2. Registration with civil authorities

Even though some of the provinces require the keeping of marriage registers, all of them require that every marriage be reported to the civil authorities in charge of the registration of marriages in the province. The way in which this registration must be made varies slightly in the different provinces. In some provinces the report of the marriage is sent directly to a central department; in others it is sent to the district or regional registrar, who in turn makes his report to the

(7) R.S.B.C., 1948, c. 201, s. 23(2); R.S.A., 1942, c. 30, s. 14; O.N.W.T., 1928, s. 13.

(8) R.S.M., 1940, c. 126, s. 25(1).

(9) C.S.N.F., 1916, c. 19, s. 3, 17; S.N.F., 1949, No. 19, s. 1.

central registration department. For this report of the marriage, special forms are supplied to persons authorized to solemnize marriages, or the forms are sometimes attached to the marriage licence or to the certificate of the publication of the banns. These forms vary slightly in different provinces, but in general they require such particulars as the place and date of the marriage; whether it was preceded by a licence or by the publication of the banns; the full names of the parties, their residence, condition in life, occupation, age and place of birth, citizenship, racial origin, religious denomination; and the names and place of birth of the parents of the parties. After the marriage ceremony, this statement must be signed by the bridegroom and the bride, by the witnesses with the addition of their address, and by the person who solemnized the marriage.

In Ontario the parties are responsible for filling in the form with all the required information before the marriage. After the ceremony, the person who solemnized the marriage need only complete the form to the effect that he solemnized the marriage, and it is not necessary for him to certify as to the truth of the particulars completed by the parties (10). In the other provinces the responsibility of completing the form for the report rests with the person who performs the ceremony.

The following table shows the person to whom and the time within which the report of each marriage must be sent.

(10) S.O., 1950, c, 42, s. 28(1).

N.S. within 48 hours to the issuer of the permit
or licence

P.E.I. within 2 days to the Director of Vital
Statistics

N.B. within 7 days to the division registrar

Ont. within 2 days to the Registrar General

Man. within 2 days to the district registrar

Sask. within 2 days to the Director of Vital
Statistics

Alta. within 3 days to the nearest district registrar

B.C. within 48 hours to the district registrar

N.W.T. within 30 days to the district registrar

Yukon within 1 month to the district registrar

In Newfoundland the only report required is the copy of all
entries in the marriage registrar, which copy must be sent
quarterly to the Registrar General (11).

In Nova Scotia the issuer pays a fee of twenty-five cents
to the person from whom he receives the report of the marriage (12)
The Marriage Act of New Brunswick entitles the person who
solemnizes the marriage to demand from the parties a regis-
tration fee of fifty cents (13).

(11) C.S.N.F., 1916, c. 19, s. 3, 17; S.N.F., 1949,
No. 19, s. 1.

(12) S.N.S., 1946, c. 4, s. 21(2).

(13) S.N.B., 1951, c. 181, s. 29(2).

3. Certificates of marriage

It is but proper that the parties have at hand some ready proof of their marriage. It is for this reason that the majority of the provinces prescribe that the person who solemnizes the marriage give the parties a certificate of their marriage. In Ontario and Manitoba the certificate need be given only if the parties require it (14). In Nova Scotia, Prince Edward Island, New Brunswick, Saskatchewan, and the Northwest Territories it is obligatory even if the parties do not expressly ask for a certificate (15). The particulars included in such a certificate are usually only such items as the names of the parties, the time and place of the marriage, the names of at least two witnesses to the marriage, and whether the marriage was solemnized pursuant to a marriage licence or the publication of the banns. This certificate must be signed by the person who solemnizes the marriage. In New Brunswick the parties and the witnesses also must sign it (16). In Manitoba the person who solemnizes the marriage may demand a fee of \$1.00 from the person requiring a certificate of the marriage (17).

Most of the provinces also make provisions whereby the parties may have searches made of the official records of the

(14) S.O., 1950, c. 42, s. 20; R.S.M., 1940, c. 126, s. 23.

(15) S.N.S., 1946, c. 4, s. 20; R.S.P.E.I., 1951, c. 91, s. 11; S.N.B., 1951, c. 181, s. 25; S.S., 1951, c. 72, s. 11; O.N.W.T., 1949, c. 10, s. 16.

(16) S.N.B., 1951, c. 181, s. 25.

(17) R.S.M., 1940, c. 126, s. 23.

district registrar or of the Department, and may also receive certified copies from such official records if they make the proper application and pay the required fee.

Article 2. Penalties for failure to observe marriage law

According to the principles determined in chapter 1, the non-observance of statutory enactments will not invalidate a marriage unless the statutes expressly declare that certain things are necessary for the valid celebration of marriage. Since there are very few cases of such an express declaration in the statutory enactments of the provinces and the territories, failure to observe the requirements of the Marriage Act will generally result only in an illegal but not an invalid marriage. However, this does not mean that the regulations of the Marriage Act may be disregarded with impunity. In all the provinces and in the territories various penalties have been established for those who violate the marriage laws.

Penalties established by the civil law are chiefly of two kinds, namely, pecuniary fines and imprisonment. The usual penalty is that of a pecuniary fine which in some of the provinces may range as high as \$500.00 for more serious offenses. Imprisonment is usually, but not exclusively, employed as an alternative penalty in the case of default of payment by the person who has been convicted of an offense. Imprisonment generally does not exceed a term of twelve months.

In all the provinces, practically every regulation of the Marriage Act has its penal sanction. Most of the provinces

have special penalties for certain determined offenses and have in addition a general penalty which may be imposed for any violation of the law which does not have its special penalty.

A person who performs the marriage ceremony may be liable to a penalty if he is not registered as authorized to solemnize marriages or if for some reason he has been deposed or removed from his ministry or disqualified in any other way (18). One who is duly qualified and registered to solemnize marriages may be subject to penalization if he fails to observe any of the preliminaries demanded by the Statutes before the publication of the banns or the celebration of the marriage, or if he accepts a forged or altered licence for the marriage (19). He may be liable to a penalty if he solemnizes a marriage between parties either of whom he knows to be an idiot, insane, or under the influence of intoxicating liquor (20). If he neglects to register a marriage or falsifies a marriage report he may be subjected to severe penalties (21).

(18) Cf. e.g., C.S.N.F., 1916, c. 121, s. 1; S.O., 1950, c. 42, s. 47; S.S., 1951, c. 72, s. 64; R.S.A., 1942, c. 303, c. 29; O.N.W.T., 1949, c. 10, s. 53.

(19) Cf. e.g., C.S.N.F., 1916, c. 121, s. 3; S.N.S., 1946, c. 4, s. 30-32; R.S.P.E.I., 1951, c. 91, s. 17-19.

(20) Cf. e.g., R.S.P.E.I., c. 91, s. 20; S.O., 1950, c. 42, s. 46; R.S.M., 1940, c. 126, s. 17(2); S.S., 1951, c. 72, s. 63; R.S.A., 1942, c. 303, s. 33; R.S.B.C., 1948, c. 201, s. 36.

(21) Cf. C.S.N.F., 1916, c. 121, s. 6; S.N.S., 1946, c. 4, s. 33, 36; 1950, c. 8, s. 41; R.S.P.E.I., 1951, c. 172, s. 42; S.N.B., 1951, c. 181, s. 29(2); S.M., 1951, c. 66, s. 45; S.S., 1950, c. 13, s. 41; R.S.B.C., 1948, c. 201, s. 25; c. 357, s. 35.

The Nova Scotia Marriage Act provides a penalty for any officiating clergyman or minister of a congregation who refuses or neglects to publish the banns of an intended marriage when he is requested to do so unless the marriage would be illegal or inconsistent with the rules and discipline of the church or congregation to which he belongs (22).

Other penalties concern chiefly the parties and any other persons who may make false statements in documents such as the statutory declarations required before the issue of a licence or the publication of the banns, the birth certificates, the consent of parents, or any other documents which may be required (23). Altering a licence or knowingly using a faulty licence may also be severely punished (24). Destroying or defacing any public notice connected with the registration of marriages or altering a marriage register are considered serious offenses (25).

In Nova Scotia and Prince Edward Island every person who knowingly sends a false statement of a marriage to any newspaper publisher or other person for publication in any newspaper in the province is liable to a penalty of \$100.00 (26).

(22) S.N.S., 1946, c. 4, s. 29.

(23) Cf. S.O., 1950, c. 42, s. 48; R.S.M., 1940, c. 126, s. 35(1); S.S., 1951, c. 72, s. 65; R.S.B.C., 1948, c. 201, s. 44; c. 357, s. 36; O.N.W.T., 1949, c. 10, s. 54.

(24) Cf. e.g., S.N.S., 1946, c. 4, s. 30-32; R.S.P.E.I., 1951, c. 91, s. 17-19.

(25) Cf. e.g., R.S.P.E.I., 1951, c. 172, s. 43; S.N.S., 1950, c. 8, s. 42; S.S., 1950, c. 13, s. 42; S.M., 1951, c. 66, s. 46.

(26) S.N.S., 1946, c. 4, s. 37; R.S.P.E.I., 1951, c. 91, s. 22.

On the whole, the penalties established by the civil law for the violation of the Marriage Act are quite severe. However, the marriage laws of Canada are in general quite reasonable and can be faithfully observed without considerable trouble. Therefore the cases in which the penalties have to be applied seem to be fairly rare. It is seldom that one hears of anyone being penalized for wilful violation of the marriage laws. The officials in charge of the administration of the Marriage Act are quite willing to help persons correct some irregularity especially if there is no question of wilful fraud.

Article 3. Summary of ecclesiastical legislation and comparison with civil legislation

The marriage register is one of the parish books which must be carefully kept by every pastor (27). As soon as possible after the celebration of the marriage, the pastor or the priest who takes his place must make the proper entry of the marriage in this register. If the marriage is celebrated by a delegated priest, the entry should still be made by the pastor of the parish in which the marriage was celebrated (28).

The particulars entered in the register should include the names of the parties, their age, proper parish, and the names of their parents; the names of the witnesses, their proper parish, and the names of their parents; the exact date

(27) C.J.C., can. 470, §1.

(28) Ibid., can. 1103, §1.

and place of the marriage; the name of the pastor or the delegated priest who officiated at the marriage; the fact and dates of the publication of the banns or of their dispensation; and any dispensations from impediments which may have been necessary. The register should then be signed by the pastor and stamped with the parish seal (29).

If the marriage has been performed according to canon 1098, the priest who assisted at the marriage must register the marriage if he was present; otherwise the obligation rests equally with the parties and the witnesses (30). Marriages of conscience may be registered only in the secret archives of the Curia (31).

An annotation of the marriage must also be made in the register of baptisms. If a party was not baptized in the parish in which the marriage ceremony was performed, the pastor must send a notification of the marriage to the pastor of the parish in which the baptism had been performed (32).

The church is not hindered by the civil law from keeping matrimonial registers according to her own laws. If there is sufficient safeguard that registers supplied by the provinces will remain the property of the church in which they are kept, they may even be used as the registers prescribed by Canon Law.

 (29) Ibid.; Rituale Romanum Pauli V Pontificis Maximi jussu editum aliorumque Pontificum cura recognitum atque auctoritate Sanctissimi D. N. Pii Papae XI ad normam codicis accomodatum, editio juxta typicam, Romae--Tornaci--Parisiis, Desclée et Socii (1947), tit. XII, c. 4.

(30) C.J.C., can. 1103, §3.

(31) Ibid., can. 1107.

(32) Ibid., can. 1103, §2.

Such seems to be the case with the registers supplied in Ontario and Manitoba. However, in Manitoba the parishes usually supply their own registers because if the registers supplied by the municipality are used, a copy of the register has to be sent twice a year to the municipal clerk. In those provinces in which the registers are supplied by the province but remain the property of the government or are subject to recall, a separate parish matrimonial register will have to be kept to fulfil the prescriptions of Canon Law.

The report of each marriage which has to be sent to the civil authorities is usually quite easy to comply with and causes little difficulty. The Church is willing to cooperate with the civil authorities in the registration of marriages in the civil registers.

When the prescriptions of the civil law for the celebration of marriage can be observed without injury to the essence of marriage or the laws of the Church, the civil authorities may punish those who violate them, whether the parties themselves or the witnesses (33). An example of a proper penalty would be to punish the negligent by pecuniary fines proportionate to the gravity of the offense. But such penal laws should not, strictly speaking, touch the priest who performs the marriage ceremony because he is not subject to the State in the exercise of his sacred ministry, but is responsible only to his

(33) Cappello, Summa Juris Publici Ecclesiastici, n. 436, p. 413; De Sacramentis, vol. 5, n. 72, p. 68.

ecclesiastical superior. The privilegium fori exempts him from being cited before a civil tribunal (34). Since the civil effects flowing from a valid marriage pertain only to the parties, they should be made responsible for presenting proper proof of their freedom to marry and for the proper notification of their marriage. However, the Church is willing to cooperate with the civil authorities in these matters. And if the civil law prescribes under the pain of penal sanctions that the priest who assists at the marriage must give written testimony of the marriage to the civil authorities, the priest should be very careful to do so, not because he is strictly bound by the civil law in this respect, but out of charity in order to prevent serious harm to himself and to others (35).

(34) Cf. C.J.C., can. 121.

(35) Cf. Response of the S. C. of the Holy Office, January 12, 1881: Collectanea S. C. de Prop. Fide, vol. 2, n. 1545; Cappello, Summa Juris Publici Ecclesiastici, n. 436, p. 413; De Sacramentis, vol. 5, n. 74, p. 70; Nau, Manual of the Marriage Laws of the Code of Canon Law, n. 11, p. 17.

CONCLUSION

From a comparative study of the civil legislation of the provinces and territories of Canada and the canonical legislation on the celebration of marriage certain conclusions may be drawn respecting the general relations between the civil and the Canon Law on this subject.

The marriage law of Canada has a definitely religious origin. It can be traced back to the early English law which was itself based on the marriage law of the universal Church. Throughout the centuries there have been many deviations from the early English marriage law, but to the present day there are still elements in the marriage law of Canada which are very similar to the laws of the Church. Thus in all the provinces the ordinary manner of celebrating marriage is the religious ceremony of the exchange of the matrimonial consent in the presence of a clergyman or minister of religion and at least two witnesses. This ceremony is usually preceded by the publication of the banns, but in most of the provinces a marriage licence may be substituted. After the ceremony, the marriage must be registered with the civil authorities, and several provinces also prescribe the registration of the marriage in the church records.

Civil marriage in the presence of a judge or other civil magistrate is optional in all the provinces except Newfoundland, Nova Scotia, Prince Edward Island, and New Brunswick. But even though the majority of the provinces allow civil marriages,

they seem to be the exception to the general rule of marriage in the presence of a clergyman or minister of religion.

On the whole, the Church is not seriously hindered in the proper celebration of marriage. Marriages celebrated according to the ordinary canonical form are throughout Canada acknowledged and accepted as legal and valid. But even though the position of the Church is not too unfavorable, there is still much room for improvement on the part of the regulations of the civil law. During the past twenty-five or thirty years there seems to have been a gradual increase in minute prescriptions which tend to restrict the freedom of the Church. There are also several instances of glaring conflict of law.

The chief source of this conflict lies in the form of marriage itself. On the one hand, marriages celebrated according to the exceptional forms provided by the Code of Canon Law are not accepted by the civil law as valid or at least not as legal marriages; and on the other hand, marriages of Catholics which are absolutely invalid because contracted in the presence of a non-Catholic minister or a civil magistrate are considered as valid and legal marriages.

According to the Code of Canon Law, the consent of parents is at most only a condition for the licit marriage of minors, but in several of the provinces the marriage may be declared null and void if the consent of parents or guardians was not obtained according to the prescriptions of the Marriage Act.

However, the prescriptions of the civil law for the celebration and the registration of marriages can generally be observed without grave inconvenience or prejudice to the laws of God or of the Church. Civil marriage is never obligatory. It is true that many of the things that the State vindicates to itself cannot be reconciled with the doctrine of the Church concerning the regulation of the marriages of baptized persons. But we must also remember that in the eyes of the civil law all religions are considered as equal. It would of course be better if the civil law would acknowledge the Church's exclusive competence over the marriages of baptized persons, but this is hardly probable in view of the principles of the civil law.

While not compromising the divinely established rights of the Church, we must continue to foster the amicable relations which in general exist between the Church and the civil authorities in Canada.

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