

PHILIPPINE LAW JOURNAL

Vol. X

DECEMBER, 1930

No. 6

The Austrian Law on Marriage and Divorce

By GERARD E. PELIKAN *

INTRODUCTION

At the time of the writing of this investigation into the part of the law concerning the formation and dissolution of family relations, there was a considerable movement in the Philippines aiming at a modification of the present law governing this important section of human relationships.

It seems, that a study of the Austrian law on this point might furnish valuable comparisons, all the more so, as the political and social forces influencing the formation of public opinion with regard to the character of these social institutions and subsequent appropriate legislation appear to be similar in an astonishing degree.

As in the Philippines, the vast majority of the Austrian population belongs to the Roman-Catholic Church. As in the Philippines, Church and State are separated. In both countries, the marriages were contracted by and before Church authorities and this fact has left a deep impression on the State marriage laws. In both countries, more recent changes in the social structure affect, or at least begin to affect public opinion on this subject. The strange and almost grotesque development, which took place in Austria, might possibly be an indication of what might happen in the Philippines, if a considerable discrepancy should arise between the existing legal norm and the public opinion influenced by vastly changed social conditions.

With regard to the formal part of this study, I should like to observe that, Austria being strictly a civil law country, it has little use for leading cases. Paragraph 12 of its Civil Code provides, that judicial decisions and judgments can never have the force of law, and expressly forbids the application of such to other cases or parties. In spite of this provision, said decisions are cited by way of interpretation of the law. The

* Ph.D. (Univ. of Gratz); LL.B. (Univ. of the Philippines).

manner of citation is different from the American system, in use in the Philippines; one merely cites the date of the decision, and often the page of the "Sammlung," a sort of reports edited by private persons. This system of citation is adopted here for Austrian cases.

THE SOURCES OF THE LAW

1. The major part of the provisions of the law on the subject of marriage and divorce can be found in the "Allgemeine Buergerliche Gesetzbuch" (Common Civil Code) of 1811. This code, although more than a hundred years old, compares still favorably with many codifications of a more recent date. Even with regard to the law on marriage and divorce, it was inspired with the quality, of which the Austrian used to pride themselves at all times, with tolerance. As we shall see afterwards, already this old code endeavoured not to impose the view-point of the Catholic majority on the minority denominations, although, of course, a large part of our doctrine, such as marriage impediments, Catholic marriage, marriage ban, marriage celebration, is derived from canonical sources. It certainly is not the fault of the legislators of 1811, that the Austrian divorce law in its present state offers such a grotesque aspect.

2. In due time, the provisions of the Civil Code were found not to suffice for later needs, and in order to fill in a gap left by the Code, the Parliament passed the Act of May 25, 1868, providing for a "conditional" Civil Marriage. The term "conditional" in the title of this Act is misleading and should read "subsidiary." It was the first step to adjust the law to changing conditions.

3. This Act of May 25, 1868, was supplemented by an Ordinance of the Minister for Justice, Cult and Interior, dated July 1, 1868, regulating the application of the Act of May 25, 1868. This ordinance regulates the details of the proceeding, dispensation and the Register of Marriages and Births, to be kept by the political magistrate.

4. A further step in the enactment of progressive legislation is the Act of April 9, 1870, "on the marriages of persons not belonging to a legally recognized Church or Denomination and on the corresponding Registers of Births, Deaths and Marriages." This Act was designated to fill in another gap left by the Civil Code, which apparently had not even considered the possibility of a person not belonging to a legally recognized Church or Denomination. At the same time, this Act covers

the law affecting persons not belonging to any denomination whatever, whether legally recognized or not.

5. Only for completeness's sake, mention is made of the *Teilnovelle* of Oct. 12, 1914, an Imperial Edict partially amending the Civil Code. This Edict modifies considerably the law on obligations as contained in the Civil Code, whereas the changes in the law on marriage are really negligible.

Ever since, the law on this important chapter has not been modified, in spite of the great changes which occurred in the wake of the war, revolution, inflation and social readjustment. The reasons therefor will be dealt with in another chapter.

BETROTHAL AND MARRIAGE

1. *Nature of the Contracts.* A number of codes have avoided the answer to this question by simply stating how marriage is contracted without giving any definition of what marriage is. This is the course taken by the Spanish Civil Code of 1889, which was also followed by General Orders No. 68. Nor does the Hungarian Marriage Law of 1894, still in force of the now Austrian province of Burgenland, give any definition of the marriage contract.

Not so, however, the Austrian Civil Code, which gives the following definition of marriage in Par. 44: "Family relations are created by the contract of marriage." By the marriage contract, two persons of different sex declare their intention in the manner prescribed by law "to live in inseparable community, to beget children, to raise the same and to give each other mutual support."

Taking into consideration that this definition was given in 1811, one cannot be astonished to find the same no more in accordance with our actual conception of marriage. The clause with regard to the prospective off-spring is obviously obsolete. Birth control and different views as to desirability of children, and also changed economic conditions in a society which developed from the agricultural stage to a highly industrialized one, have given us a great many childless marriages. From the legal point of view, however, they are just as much marriages as the most prolific ones.

Par. 45 of the Austrian Civil Code defines Betrothal as a preliminary promise to marry, giving hereby practically the same definition as Art. 43 of the Civil Code of Spain. The law provides, that such a promise cannot be enforced, nor can there be a penalty stipulated in the case of a breach. The one,

however, who without just cause refuses to marry, shall be bound to indemnify the innocent party for the actual damages suffered by reason thereof. A similar provision can be found in the Hungarian Marriage Law, and also in the Civil Code of Spain with the further qualification, that such promise must have been made either by an adult in a public instrument or private instrument, or by a minor with the necessary consent.

The Austrian Supreme Court, in a decision of May 28, 1868, has held, that the cause for the breach of promise must have arisen after the betrothal in order to be considered as a just one. The obligation to repair the actual damages exists not only in favor of the innocent party, but also in favor of the father of the same (Decision Nov. 25, 1903).

From the aforesaid characteristics of the two contracts, we can gather the following striking points: Whereas there is no doubt, that the marriage contract is considered a civil contract, creating rights and obligations, yet it differs from an ordinary contract in many ways. In an ordinary contract, the parties thereto are always in a position to rescind the same by mutual consent, whereas no such right is given to the spouses. A party guilty of the breach of an ordinary civil contract is not liable to a criminal action. Adultery, however, is an offense punishable, under certain conditions, by the state.

The contract of betrothal, on the other hand, is just the opposite. If we may be justified in saying, that marriage is the strictest civil contract, the contrary is true of the betrothal. It is a non-actionable, executory contract. The intention of the legislator is clear. Since marriage is considered indissoluble, all the more freedom is granted to the future spouses to change their minds, while it is still time to do so. Once married, however, the State will look after the faithful fulfillment of their contractual obligations.

2. *Capacity to contract Marriage.* Only the most general aspect of this question can be considered here, inasmuch as the details will be dealt with under the heading of "marriage impediments," following the disposition of the Civil Code.

Paragraph 47 provides in this respect, that everybody may contract marriage, as far as there is no legal impediment. This rule needs no further comment with regard to Austrian citizens, inasmuch as lack of consent by reason of nonage is treated as one of the legal impediments. But what is the position of foreigners? In this connection, we have to keep in mind that marriage is a civil contract, and therefore subject to the gen-

eral rule established in Par. 34, which says: "The personal capacity of a foreigner to make contracts is determined by the laws of the place to which he belongs as a subject by virtue of his residence, or in absence of a proper residence, by virtue of his birth." In order to fully comprehend the meaning of the paragraph, we have to consider, that the *jus soli* with regard to the acquisition of citizenship does not exist in Austria. This paragraph merely intends to say, that the personal status of a foreigner is to be determined by his national law, which, in turn, is determined by a person's residence or descent, but not by his birth in a certain State. In other words, the age limit established by the Civil Code is only binding upon Austrians, whereas foreigners follow their own rules. This point of view was also taken by the Imperial Court Chancellery in its decree of Dec. 22, 1814, requiring foreigners desiring to contract marriage in Austria to produce a certificate evidencing their personal capacity.

With regard to the age required for the making of a betrothal, the Supreme Court held in its decision of Oct. 10, 1906, that nonaged persons need the consent of their guardian.

~~§ 24.~~

IMPEDIMENTA MATRIMONII

1. *Nature of the Marriage Impediments.* Impedimentum, derived from impedire, to hinder, is everything which hinders the performance of a certain act, prevent it from producing the intended consequences or usual results. It is a bar to the legal effects of a determined act, in this case a bar, an obstacle to the marriage contract.

Such impediments have been recognized, to some extent at least, by all legal systems. Legal impediments, declaring void incestuous marriages, polygamic marriages, etc. were known to the ancient Hebrews, Greeks, Romans, Germans, etc. As a complicated doctrine, however, it was evolved by the Roman Catholic Church in the Middle Ages, and through the reception of the canonical law, became the law of Austria. With certain modifications, the Civil Code of 1811 followed the canonical doctrine already in force at the time of its passage.

(a). *Marriage Prohibitions as distinguished from Marriage Impediments.* A marriage impediment, as we have seen, is an obstacle to a legal marriage. The marriage contracted under such conditions is no marriage at all. Legally relevant circumstances which make it impossible that a marriage be contracted are known in the canonical law as "impedimenta dirimentia," as impediments dissolving the "ligamen matrimonii."

On the other hand, the canonical law knows also "impedimenta impedientia," circumstances, under which a legal marriage may be validly celebrated, but under which the contracting of marriage is merely forbidden, and the parties thereto or the authority before whom such marriage is contracted make themselves liable to punishment.

When the Civil Code speaks of impediments, it always refers to the former, the *dirimentia*. The reason therefor is, that the *impedimenta impedientia* with the exception of one are of purely religious character. They are contained in canones 1058/1066 of the *Corpus Juris Canonici*. They are the following: *Vota Religiosa*, *Virginitatis*, etc.; prohibition of marriage between adoptive parents and children; *impedimentum mixtae religionis seu imparitatis cultus*, relative to marriage between Roman Catholics and other Christians; *apostasias notoriae catholicae religionis*; adherence to secret organizations condemned by the Church; state of impenitence of a public sinner. Similar in character are *vetita Ecclesiae*, e.g. the prohibition to celebrate marriages of persons residing less than 1 month in the parish. A marriage contracted in spite of such impediment or *vetitum* is a valid marriage. The Austrian Civil Code has left it to the Church to deal with the transgressor.

The State, however, without adopting the canonical provisions on the *impedimenta impedientia*, has established its own rules on this subject. The counterpart of these "impedientia" of the canonical law is a number of Acts, Decrees or Acts of the "Laender" (more or less corresponding to the States of the American Union), which are known under the term of "marriage prohibitions." Marriages contracted in contravention of these prohibitions are perfectly valid, but the parties thereto, or the person in authority, before whom such marriages were contracted, incur either punishment or have to suffer other disadvantages. Such marriage prohibitions were also known to the Civil Code of Spain and enumerated in Art. 45. They are, however, entirely different of nature from the ones contemplated by Austrian legislation subsequent to the passing of the Austrian Civil Code. These Austrian marriage prohibitions refer exclusively to persons in the Government service. Members of the Austrian Federal Service are obliged to notify the "Dienstbehoerde" before contracting marriage (*Dienstpragmatik*, Jan. 25, 1914). Officers and employees of the Consular Service have to obtain the consent of the Minister of the Exterior (Ordinance of May 2, 1899). Female teachers in

Carinthia "may contract marriage after having obtained the previous consent of the Landesschulrat. . . . If such consent is not requested or denied, the contracting of marriage will be deemed to be equivalent to resignation. . ." (Act March 10, 1922). Soldiers and non-commissioned officers may not contract marriage (Act March 18, 1920). The purpose of these prohibitions is obviously to assure an efficient Government service and protection of the social and financial position of its individual officers and employees.

2. *Classification of the Marriage Impediments.* In addition to the classification discussed above, the marriage impediments admit of other classifications according to the point of view, either with regard to the public interest in permitting the continuation of the relationship, or to the possibility of the removal of such obstacles.

(a). *Private and public impediments.* Marriage is not treated in exactly the same way as the other civil contracts. One reason therefor is the public interest in upholding an institution widely considered to be the foundation of civilized society. Another is the historical fact, that the administration of this part of the law was in the hands of the clergy and consequently saturated with religious ideas, which still influence more modern legislation. At any rate, the Austrian Civil Code, following the doctrine laid down by the canonical law, reserves the State the right to intervene in certain cases and to institute proceedings to have certain marriages declared null and void. Circumstances which give rise to this right of the State are called public marriage impediments. Par. 94 determines the public or private character of the individual impediments and this distinction in on the whole logical in view of the aspect taken on this subject by the Civil Code. The public or private character of each impediment will be indicated when they are treated one by one.

(b). *Dispensable or Not Dispensable Impediments.* The Church already reserved the right to reconsider individual cases and permit the marriage of persons which, under the provision of the canones, would have been null and void. Such dispensations could be granted to individuals, or to entire classes of persons, such as the *privilegium Paulinum*, confirmed by the *constitutio "Trans Oceanum,"* which comprises also the Philippines, authorizing marriage between blood relations of the 3rd degree (canonical computation).

The Civil Code recognizes the right of the executive branch of the Government to grant dispensation of marriage impediments. Par. 83 provides that dispensation may be asked for from the "Landesstelle," now replaced by the "Landeshauptmann," a magistrate which might be likened to the provincial governor in the Philippines. Dispensation from the obligatory marriage bann may also be granted in certain cases by the political magistrate of 1st instance viz. the head of a district. By a ministerial ordinance, the right to decide questions of dispensation in the last instance was reserved to the Minister of Interior (now Federal Chancellor).

The Civil Code fails to state from what impediments dispensation may be granted. This point will be discussed later in the chapter on the dispensation of the impedimentum ligaminis.

3. *The Marriage Impediments of the Civil Code.* The Civil Code enumerated the marriage impediments under three headings: lack of consent, lack of fitness for the purposes of marriage, and lack of the necessary solemn formalities of the celebration. The single impediments enumerated under these headings are substantially the impedimenta dirimentia of the Corpus Iuris Canonici. A short consideration, however, will reveal this classification as unsatisfactory from a scientific point of view. Defects of the consent are not exactly marriage impediments, but merely a circumstance, or rather the absence of a such, which is essential for the perfection of any contract. Likewise, the lack of compliance with the formalities prescribed by law is not exactly in the nature of a marriage impediment. If two persons do not agree to contract marriage, or if they intend to marry, not the other party present at the celebration, but somebody else, or if they fail to express their consent to a strictly formal contract in the manner prescribed by law, the essential prerequisites for a contract are absent and there is hardly a chance for an obstacle to intervene, for a circumstance which would be a bar to a contract, since there is no contract at all. In spite of the above, this section will follow the headings of the Civil Code with the exception of the lack of the required formalities, which will be dealt with in the next chapter.

Defect of Consent:

(a). *Nonage and Insanity.* Persons judicially declared insane and "Unmuendige" (persons below the age of 14, Par. 21) cannot contract a valid marriage. (Par. 48).

Minderjaehrige (persons between 14 and 21) need the consent of their father or of the guardian *and* the courts (Par. 49).

The Austrian law on this point is stricter than the *Corpus Iuris Canonici*, which requires merely the age of 16 for the male and of 14 for the female party, the same as the Philippine law. The "Minderjaehrige," however, to whom the consent is denied without just reason, may appeal to the Courts. Disease of contagious nature, lack of sufficient income, generally known bad habits are considered to be just reasons (Par. 53), but not poverty of the bride (Dec. 5, 1901).

(b). *Force and Intimidation*. Unnecessary to say, a consent given by reason of fear is no consent at all, and a marriage contract entered into under these circumstances is void. This impediment is considered as a private marriage impediment, that is to say, annulment proceedings have to be instituted by the offended party. By its very nature it is not dispensable. The fact, that the consent was given by an abducted person which has not been released, is alone sufficient to constitute a marriage impediment (Par. 56). In this latter case, the impediment is of a public nature and the State reserves the right to institute the proceedings leading to the annulment of such a marriage (Par. 94).

(c). *Fraud and Mistake*. In order that any contract may be valid, the parties thereto must mean what they express and express what they mean. Their motives, on the other hand, are legally irrelevant. The same applies to the marriage contract. The law provides, that a mistake invalidates the consent only in the case that such mistakes concern the person of the future spouse. (Par. 57). All other mistakes of the spouses, such as disappointments with regard to the expected or even stipulated conditions do not invalidate the marriage (Par. 59). The Supreme Court held in a decision of Feb. 7, 1888, that the marriage to a man, whom the bride knew personally, is valid in spite of the fact that he pretended to be the son of a certain family. An exception to this well established principle is the case of an "error in qualitate in personam redundans." So it was decided by the Supreme Court, that the marriage was invalid, which was contracted with a criminal against whom a warrant of arrest had issued and who had assumed a false name and forged a birth certificate (Dec. Dec. 9, 1874).

Paragraph 68 contains another interesting ground for annulment, which is another example of error in qualitate in personam redundans: if the husband finds that his wife has become pregnant by another man, he may demand annulment of the marriage. It is necessary, however, that he have discovered this fact after the wedding.

Lack of Fitness for the purposes of marriage:

Under this heading, the Civil Code crowds a number of heterogeneous marriage impediments, of which only a few bear a real relation to the caption. The legislator simply followed the Corpus Juris Canonici with minor deviations. Some of the impediments enumerated thereunder are of such nature as to make it appear incredible, that Austria has adopted the system of separation of State and Church and one has to bear in mind that this part of the law dates back to 1877 and has never been changed thereafter.

(d). *Impotence.* This impediment follows the doctrine of the canonical law, viz. it has to be "perpetuum et antecedens" (Canon 1068/1, Par. 60). It is the same as the cause of annulment mentioned under Sec. X, 6, Gen. Orders 68. The Supreme Court held, that not the possibility of begetting off-spring, but the possibility of cohabitation is the essential characteristic of this impediment (Dec. Sept. 26, 1916). This doctrine is incorporated in the text of the Hungarian Marriage Law, Par. 60, which is in force in the Austrian province of Burgenland. Needless to say, that this impediment is not public and by its very nature not dispensable.

(e). *Existing Marriage Tie.* Par. 62 establishes the rule of monogamy for Austria. It says, that a man can only be married to one woman, and a woman only to one man. This is natural enough for the present republic, but was not quite so for the former Empire, since a considerable Mohammedan minority inhabited the provinces of Bosnia and Herzegovina. Nevertheless, with the incorporation of the said provinces, the Civil Code was extended to them and monogamy established there too, a proceeding no more logical than the introduction of the monogamy clause in the Jones Law, although an Act of July 15, 1912, at least recognized the Mohammedans' right to divorce. A marriage entered in contravention of this paragraph does not convalidate by the death of the former spouse (Dec. July 18, 1918). This decision follows the same doctrine as is expressed by Gen. Order 68 in Sec. III, par. 1, which declares a bigamous marriage as void from the beginning.

(f). *Clergymen ordained in sacris and members of ecclesiastical orders*, who made a solemn vow not to marry, can not contract a valid marriage (Par. 63). Gen. Orders 68 do not include this impediment, but the Civil Code of Spain mentions it under Art. 83, 4. In a decision of June 8, 1881, upheld in numerous other decisions, the Supreme Court of Austria held, that this impediment is not removed by abandoning the Catholic (or Greek Orthodox) Church, in spite of the passage of the law of May 25, 1868, declaring the separation of Church and State. This impediment, the same as the one mentioned under "e", is a public one. There is no decision to determine, whether this impediment is dispensable by the State, but it can certainly be dispensed with by the Church. The Supreme Court decided that the release from the vows by the Church removes this impediment without further necessity of dispensation by the State (July 4, 1923). This decision, however, does not touch the question whether the right of dispensation might be exercised by the State. The Civil Code of Spain expressly requires dispensation by the proper canonical authorities (Art. 83, 4).

(g). *Disparitas Cultus*. Although the origin of this impediment is found in the Canonical law, and although the wording is practically the same, declaring invalid marriages between Christians and persons not professing a Christian religion, the scope of this impediment in the Civil Law is rather different from the Canonical Law. For the purposes of the canonical law, a person baptized is a Christian, but not so for the Civil Code. A Christian is, in the eye of the law, a person belonging to a recognized Christian denomination. This definition is rather a *circulus viciosus*. What a Christian denomination is, is not determined by law, but remains to be decided in the individual case. The stress is rather on the requirement of belonging to a denomination, considered as Christian. For the canonical law, a person abandoning the Catholic Church without joining another denomination, or joining e. g. the Jewish denomination, still remains a Christian, since according to canonical doctrine the baptism is an indelible mark. Not so in the eye of the Civil Code, in whose contemplation such a person becomes either a non-denominational or a Jew. The mentioned person would be perfectly able to contract a canonical marriage, but not one in accordance with the Civil Code!

This impediment is considered to be a public one, and is dispensable (Dec. Nov. 30, 1920). A marriage contracted in

contravention thereof does not convalidate by the baptism of the non-Christian spouse (Dec. June 15, 1905).

(h). *Blood Relationship*. Marriages between ascendants and descendants, brothers and sisters of the half as well as of the whole blood, uncles and nieces or aunts and nephews and between first cousins are void, whether the relationship is based on legitimate or illegitimate birth (Par. 65). The scope of this marriage impediment is the same as the one mentioned under Sec. II of Gen. Orders 68, but in addition thereto also invalidates marriages between first cousins. This impediment is of public nature.

(66). *Affinity*. "Out of affinity arises the impediment, that a husband may not marry any of the relations of his wife mentioned in par. 65 (above), and that the wife may not marry the corresponding relations of her husband" (Par. 66). Based upon canonical doctrine, the scope of this impediment is the same as the one of the *Corpus Iuris Canonici*, which extends to the second degree laterally (canon 97). The impediment is public.

(i). *Adultery*. Par. 67: "A marriage entered into between two person who together have committed adultery, is void. But the adultery must be proved before the marriage is contracted." Adultery, to be a marriage impediment, must be proved before the adulterers marry, and must be proved judicially (Dec. May 12, 1909). A confession made before the priest or spiritual authorities can not be considered sufficient (Decree of the Imperial Court Chancellery of Dec. 6, 1833). Also this impediment is a public one.

(k). *Murder of Spouse*. If two persons, even without previous adultery, have promised marriage to each other, and if, in order to attain that aim, only one of them, at least, has attempted to take the life of the spouse that formed an obstacle to such marriage, such persons cannot contract a valid marriage (par. 68). Also this impediment is a public marriage impediment.

CELEBRATION OF MARRIAGE

1. *Ecclesiastical and Civil Marriage*. According to the Civil Code, marriages are solemnized by the priest of one of the future spouses. This marriage, however, is essentially different from canonical marriage. To begin with, the priest is not necessarily a Catholic clergyman, but may be a protestant pastor, a Jewish rabbi, or even a Mohammedan priest. Furthermore, the formalities to be observed are not the ones of the cor-

responding Church, but the ones prescribed by the Civil Code, which only in the case of a Catholic marriage almost coincide with the canonical requirements. The denominational priest, when solemnizing a marriage in accordance with the provisions of the Civil Code, acts as a government employee, and as such he is entrusted with the keeping of the marriage register, register of births, etc. Marriages contracted before such priest in accordance with the Civil Code are the so-called "kirchlichen Ehen", ecclesiastical marriages, which are compulsory for practically everybody.

When the Civil Code was passed, the legislators apparently failed to contemplate the possibility, that there might be a person nefarious enough to desire to contract marriage in disregard of a canonical marriage impediment. As already seen, the marriage impediments of the Civil Code fail to coincide completely with the canonical ones, in addition thereto there is the possibility of dispensation by the State without dispensation simultaneously granted by the religious authorities, so that the situation could very well arise, that a person might be refused solemnization of marriage by his or her priest, in spite of the fact, that such person is willing and able to comply with all requirements of the Civil Code. The Civil Code offers no redress to person desirous to contract marriage, but who cannot find a priest to solemnize the same.

For reasons to be found in the political history of the Austrian Empire, this obvious gap in the law was filled no earlier than in 1868, by the Act of May 25th. This law introduces what is known in Austrian jurisprudence as the institution of the "Notzivilehe," subsidiary civil marriage. If a priest required by law to publish the marriage banns or to solemnize the marriage refuses to do so for reasons not recognized by the law of the State, the parties desirous to contract marriage may do so before the Bezirkshauptman (Head of an Administrative District) or, in cities with special charter, before the magistrate. The parties are required to produce a certificate of the priest stating his refusal, or, in case they cannot comply with this requirement, the political magistrate will write to the priest requiring him to state his reasons why he refused to solemnize the marriage. In case the reasons given by said priest are not sufficient in the eye of the law, or if he fails to state specific reasons or does not answer at all, the magistrate will proceed after the lapse of eight days with the solemnization of the marriage in the manner provided by the Civil Code.

The "Notzivilehe" constituted the first step to perfect the legal structure covering this important matter. Another possibility, however, arose, certainly never contemplated by the authors of the Civil Code of 1811: that there could appear a class of persons, to whom the provisions of the Code would not be applicable for the simple reason that these persons could not go to their priest for the celebration of marriage, since they had none! A denomination, in order to be recognized in Austria, has to comply with a few fundamental requirements. What if a person belonged to a denomination, which had not applied for recognition, or having applied, was not granted recognition? Or what to do in the case, that a person did not belong to any denomination at all, whether recognized or not? Apparently, neither the Civil Code nor the Act of May 25, 1868, had contemplated this case. It remained to be solved by the Act passed on April 9, 1870, providing for compulsory civil marriage for the aforesaid persons. In addition thereto, it also granted future spouses, of whom one belonged to a recognized denomination and the other not, the alternative to have their marriage solemnized either before the priest of the one spouse or before the political magistrate. Ever since, the law on this point remained unchanged, so that at present the Austrian citizen desirous to marry has to follow one of the following proceedings:

Ecclesiastical Marriage for persons belonging to a recognized denomination;

Notzivilehe (subsidiary civil marriage) for the above persons in case the priest refuses to solemnize the marriage for a reason not recognized by law;

Compulsory Civil Marriage for persons not belonging to a recognized denomination or to the Islam (Act July 15, 1912); and

Facultative Civil Marriage in case a person belonging to a recognized denomination marries one who does not.

2. *The Marriage Bann.* "The marriage bann consists in the announcement of the marriage with mention of the name, surname, 'Stand',* place of birth and place of residence of both the future spouses, together with a notice that whosoever knows of an impediment against the impending marriage, may so inform the priest. Such information has to be given to the priest solemnizing the marriage, either directly or indirectly through the priest publishing the banns" (Par. 70).

* "Stand" refers to the estate of a person, whether a nobleman or not. The provision has become obsolete.

It is understood, that "priest" is substituted by "political magistrate" in case of civil marriage.

The lack of this formality invalidates the marriage, but this impediment is of private nature. The banns have to be published on three Sundays or holidays at the regular church meetings of the parish of the future spouses and if each of them lives in a different parish, in both of them. If the future spouses, or one of them, has resided in such parish for less than six weeks, the banns have to be published also in the parish wherein such future spouse or spouses resided thereto.

It is sufficient for the validity of the banns and consequently of the marriage, that the names of the future spouses and an announcement of the marriage be published in the parish of each one of them at least once and a mistake in the form of such announcement does not invalidate the marriage, but the future spouses and the priest incur a penalty in case of any defect in one form or number of publications. The publication of an incorrect name, however, is not a defect of form and invalidates the marriage (Dec. March 11, 1911), likewise the unauthorized bearing of a title of nobility (Feb. 22, 1921). The requirement of the publication of the correct name somewhat modifies the consequences of the rule, that a marriage is valid if one spouse knew the other personally, in spite of the fact that he falsely pretended to be the son of a certain well-known family. Although the impediment of error could not be made the basis of an annulment proceeding, the marriage is still invalid for the reason of insufficient marriage banns.

3. *The Solemn Declaration of Consent.* Not any expression of the consent to take each other as husband and wife is sufficient to perfect the marriage contract. The law requires a consent under special formalities. It has to be solemnly declared in the presence of the proper authority and of two witnesses. As to who is regarded as a proper authority, reference is made to section One of this chapter. But not only declaration of consent in the presence of the proper priest or civil magistrate is necessary, such priest or magistrate has also to accept this declaration (Dec. March 9, 1875). Any defect of this formality constitutes a public impediment (Par. 94).

This declaration must not necessarily be made by the parties personally. It can also be done by means of an agent with the consent of the "Landestelle" (a political magistrate), which agent must be granted a power of attorney definitely designating the person with whom the marriage is to be contract-

ed. If the power of attorney is revoked, before the marriage is contracted, such marriage is void, but the grantor is liable for the damages. Following the general rules of civil agency, also this "mandatum specialissimum" is revoked by the death of the grantor.

In case the parties fail to produce a certificate to the effect that the marriage banns have been properly published, or their birth certificate if doubts arise as to their age, or if a marriage impediment is alleged, the priest or civil magistrate is strictly forbidden to solemnize the marriage.

The celebration of marriage is evidenced by the corresponding entry in the marriage register, containing name and surname, age, residence and "Stand", of the spouses, whether they had been married before, name and surname of the parents, day of the celebration of the marriage and name of the authority before which it was solemnized.

ANNULMENT OF MARRIAGE

1. *The Right to Demand Annulment* has to be distinguished from the right to annul the marriage. The latter right is reserved exclusively to the courts. The spouses have no right to dissolve the marriage, although both may agree on that point (Par. 93). Of course they may separate in fact, although not in law.

Different from the right to annul the marriage is the right to demand annulment by the competent authority. According to the grounds on which the annulment is sought, this right may be exercised either by the Government or by the offended party. This differentiation has already been discussed in Chapter III under the heading of private and public marriage impediments. It will therefore only be necessary to restate the provisions of par. 94, which provides that the validity of a marriage contracted in contravention of the impediments of the paragraphs 56, 62, 63, 64, 65, 66, 67, 68, 75, and 119, is to be examined at the instance of the Government; in all other cases proceedings will only be instituted by the initiative of the offended party. The impediments thereby declared public are the following: abduction, *ligamen matrimonii*, *ordines* and *vota castitatis*, *disparitas cultus*, *cognatio*, *affinitas*, adultery, murder of spouse, defect in solemn declaration of consent. Par. 119 invalidates the marriages between a divorced person and the person who through his unjust acts, proved in the divorce proceedings, has given cause to the divorce.

(a). *Right of the Government to institute annulment proceedings.* In the above mentioned cases, for reasons, which at the time of the passage of the Civil Code, were considered as reasons of public policy, the Government will institute annulment proceedings. The representative of the Government is an office known as "Finanzprokurator," resembling in some respects to the office of the Attorney-General in the Philippine Islands. Third persons have no right to attach the validity of a marriage, but may only denounce an impediment to the proper authorities. An exception to this principle was established by a decision of the Supreme Court on Oct. 3, 1922, followed by another decision of April 23, 1924, declaring that the spouse of the first marriage may impugn the validity of a second "Dispensehe" (marriage by dispensation) of the other spouse. Of course it is the right also of the offended party to institute annulment proceedings on the ground of a public marriage impediment. This right is also transmitted to the heirs.

The law does not prescribe a certain period of time, within which the Government has to exercise its right to demand annulment. Even after the death of one or both of the spouses the validity of a marriage may be inquired into, "insofar as it is requested by parties having a legal interest for the purpose of asserting civil rights or claims, or by a criminal court in connection with a judicial proceeding pending before it, or by an administrative magistrate in the interest of the Government" (Imperial Court Chancellery Decree of June 27, 1837).

(b). *Right of the Offended Party to institute Annulment Proceedings.* Paragraph 94, enumerating the public marriage impediments, states that all others are of private nature and reserves the right to demand annulment only to the offended party. These other impediments are: nonage and insanity, intimidation, fraud and mistake, impotence and defect in the publication of the marriage banns. With the exception of the last one, they are the same ground of annulment as are enumerated in Gen. Orders 68, Sec. X, 1, 3, 4, 5, 6. The right of the spouse of the first marriage to have a second marriage annulled, expressed in subsection 2 of the cited law, is granted in the Austrian law to the Government, and by virtue of a decision cited above, also to such spouse. Of course the party causing or taking advantage of the error or intimidation, or concealing his nonage, is estopped from instituting annulment proceedings on these grounds, on the principle "ne quis audiatur turpitudinem suam allegans".

But even the innocent party may lose the right to annulment, if he or she, after discovery of the impediment, freely cohabits with the other spouse, or if the father or guardian fails to commence the proceedings before the minor has come of age. The Supreme Court even held, that the right of a father to have the marriage annulled, is lost in case the minor attains the age of consent during the trial (Dec. April 4, 1916). Since impotence makes cohabitation impossible, annulment on this ground may be demanded at any time (Dec. 10, 1901). In case both spouses are at fault (as for instance in case of an insufficient publication of the marriage banns), none of them has a right to demand annulment.

2. *Character of the Annulment Proceedings.*

The "Landesgericht" (Court of First Instance) of the District, wherein the spouses reside, has jurisdiction over annulment cases. The procedure, and specially the rules of evidence (as far as existent in Austria) for the trial thereof are, however, essentially different from ordinary civil cases. Whereas in ordinary civil litigation, the parties, (with a few limitations in order to expedite the proceedings) are considered as the "domini litis", annulment proceedings rather resemble the criminal procedure. This does not only apply to cases of nullity based on public impediments, but to private impediments as well.

In both cases, the Court appoints a "defensor matrimonii" from the staff of the fiscals office, or any other competent and honest man, whose duty it is to defeat the validity of the marriage. In case the validity of a marriage depends on the decision of the preliminary question, whether a previous marriage is valid, the Court will appoint another defensor matrimonii for the first marriage. The latter is strictly limited to his task, he may not, for instance, appeal from the decision annulling the second marriage (Dec. February 21, 1911).

The presumption is always in favor of the validity of the marriage. The alleged impediment must be proved beyond doubt, and neither the confession of both spouses nor their oath may be introduced as evidence. In case that previous and perpetual impotence is alleged, proof thereof has to be made by means of experts (Par. 100). This idea, although not expressly provided by their laws, is frequently adopted by other jurisdictions. Although General Orders 68 make no mention of any special procedure in cases of nullity, it seems to be against the

spirit of the whole law to decide a case of nullity on an agreed statement of facts.

Moreover, the law not only upholds the presumption in favor of the validity, only to be overcome by weighty evidence to the contrary, it also orders the Court to endeavor to persuade the parties to remove the impediment, wherever this may be possible. And only if the parties insist on the annulment in spite of the persuasions of the Court, the Court shall proceed to try the case. This authority of the Court does not extend beyond more or less urgent suggestions, and a dispensation from an impediment can not be obtained against the will of the parties (Dec. Nov. 27, 1901).

In case of alleged impotence proof has to be made that the same is perpetual, and if the latter fact remains doubtful, the spouses may be required to live together for another year. If the impotence has not been cured during this time, the Court may declare the marriage null and void.

Children begotten in a marriage which has been declared invalid are taken care of in accordance with the provision of the Chapter of the Civil Code containing the law on the Duties of Parents.

(To be Continued)