

## SECTION 2. TEMPORARY SEPARATION

The Code of Canon Law, while recognizing specifically only a single cause as justification for a permanent separation, does not furnish an all-inclusive enumeration of the causes which justify a temporary separation, but merely lists the principal reasons for which a temporary separation may be instituted. The law of the Church relative to temporary separation, in particular with reference to the reasons for which it may be permitted, is contained in canon 1131, §1.<sup>62</sup>

The causes listed in canon 1131, §1—joining a non-Catholic sect; educating the children as non-Catholics; living a criminal and ignominious life; bringing grave danger to the soul or body of the other spouse; rendering the common life too difficult by reason of harsh treatment—as well as others of equal gravity are considered as legitimate causes for which the departure of the injured spouse may be justified. It is not proposed here to examine in detail each of the recognized causes for a temporary separation, since the circumstances which accompany individual cases make each case unique in its final determination. Rather, the intention of the writer is to make clear that, though from a

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formale et consummatum. Formale dicitur, si patratum sit cum cognitione intellectus et cum libera voluntate. Ideo ex hoc capite non est causa separationis perpetuae adulterium patratum cum ignorantia ligaminis coniugalibus, ex quo adulterium peculiarem accipit malitiam, neque adulterium admissum ob violentiam. Consummatum vero dicitur adulterium per actum per se aptum ad proles generationem. Ideo ex capite hoc non sunt causae separationis perpetuae illicitae amicitiae, actus luxuriae non consummatae, immo neque ipsi actus luxuriae consummatae qui non habeant naturam copulae perfectae. Ex communi autem interpretatione sunt causa separationis perpetuae etiam sodomia et bestialitas. Cum vero adulterium sit crimen quod generatim patratum in occulto, eius probatio fieri solet per praesumptiones violentas, nempe per coniecturas ex factis quae non nisi in casu adulterii contingere solent.—*S. R. Rotae Decisiones seu Sententiae* (Romae: Typis Vaticanis, 1912—), XXI (1937), 525-526.

<sup>62</sup> "Si alter coniux sectae acatholicae nomen dederit; si prolem acatholicae educaverit; si vitam criminiosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaquae id genus, sunt pro altero coniuge totidem legitimaе causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora."—Canon 1131, §1.

cursorily reading of canon 1131, §1, the Church may seem to favor a wide latitude in the matter of legitimate causes which warrant a temporary separation, such is not the mind of the Church as is evidenced by its practice. However, before noting the true mind of the Church as reflected in the decisions of the Sacred Roman Rota, the writer considers it opportune to make the following observations.

While a temporary separation may be granted for a definite time or for an indefinite period for a variety of causes, in all temporary separations the obligation of cohabitation resumes its binding force immediately upon the cessation of the cause for which the separation was granted, unless a definite period was decreed by the ordinary and before the lapse of this period he has not seen fit to decree an immediate resumption of cohabitation. Concerning the individual causes listed in the law, one must necessarily consider the following points in forming a judgment regarding the justifying strength of the alleged cause.

A simple profession of heresy and a seeming apostasy are not in themselves just causes for a temporary separation; an actual enrollment in a heretical sect, or an act of formal apostasy is required.<sup>63</sup> If heresy or apostasy is to exist as a basis for a legitimate temporary separation, then two elements are necessary: the abandonment of the Catholic faith and the affiliation with a non-Catholic sect.<sup>64</sup> That those who belong to an atheistic sect are to be judged according to the same norms as those who belong to a non-Catholic sect is clear from a reply of the Pontifical Commission for the Interpretation of the Canons of the Code under date of July 30, 1934.<sup>65</sup>

The promise to baptize and educate in the Catholic religion any children to be born of the marriage is a condition precedent

<sup>63</sup> Wernz-Vidal, *Ius Canonicum*, V, n. 645.

<sup>64</sup> Doheny, *Canonical Procedure in Matrimonial Cases* (2 vols., Milwaukee, Bruce Publishing Co., 1938-1944), II, *Informal Procedure* (1944), 631.

<sup>65</sup> P.C.I., 30 iul. 1934, ad I: An ad normam Codicis iuris canonici, qui sectae atheisticae adscripti sunt vel fuerunt, habendi sint quoad omnes iuris effectus etiam in ordine ad sacram ordinationem et matrimonium ad instar eorum qui sectae acatholicae adhaerent vel adhaeserunt. R. Affirmative.—*AAS*, XXVI (1934), 494.

to the permission granted by the Church for a mixed marriage. Hence, if the non-Catholic party flagrantly violates this solemn promise by insisting on the non-Catholic education of the children, the Catholic consort may have the right to departure. It is to be noted that the guilt of educating the children in a non-Catholic sect, in the case of a mixed marriage, as a reason for separation, must attach to the non-Catholic party. But separation from a Catholic consort is likewise authorized if this Catholic consort is the cause of the non-Catholic education of the children.<sup>66</sup>

The criminal life or ignominious conduct proposed as a cause for a temporary separation must connote a habitual state.<sup>67</sup> A single isolated defection is not sufficient to justify a disruption of the conjugal life. Likewise the conduct of the offending spouse must be of a public character, since the resulting ignominy and disgrace is attributable to the notoriety of the conduct. Grave danger to the soul is verified if the action of the offending partner will draw his spouse into grave sin. Grave danger to the body may be verified when there is danger of bodily infection through the use of the matrimonial right, though generally, if cohabitation can be had without danger, a partial separation only is conceded.<sup>68</sup>

The actual adjudications of the Sacred Roman Rota quite logically appear to be a source from which to determine the mind of the Church regarding the sufficiency of the cause in cases wherein a temporary separation is sought. From these decisions the severity and reluctance of the Church to grant a separation is evident. Lega (1860-1935) in a decision written only thirty-seven years ago explained the reasons for this severity and reluctance on the part of the Church.<sup>69</sup>

<sup>66</sup> Doheny, *op. cit.*, II, 632-633.

<sup>67</sup> Cappello, *De Matrimonio*, n. 828.

<sup>68</sup> De Smet, *De Sponsalibus et Matrimonio*, n. 257; Ballerini-Palmieri, *Opus Theologicum Morale*, VI, 509.

<sup>69</sup> S. R. Rota, *Separationis quoad thorum et mensam*, 5 iul. 1910, *coram* R.P.D. Michaeli Lega, Decano, Dec. XXIV, n. 11: "Quare constans iurisprudencia fuit et huius S[ancti] O[fficii] et S[acrae] C[ongregationis] Concilii caute admodum procedendum esse ad indulgendam thori separationem, quippe quod separatio opponatur directe fini ipsius matrimonii (quod est coniunctio maris et foeminae, individuae vitae consuetudinem retinens) scandalum gignit, familiam pessumdat, periculo incontinentiae coniuges ex-

Lega pointed out that great caution has constantly been advised by the Sacred Roman Rota and the Sacred Congregation of the Council in the granting of separations from bed and board. The reason for this extreme caution has been the recognition that separation is directly opposed to the purpose and ends of marriage. Not only does separation offer such opposition, but it also gives rise to scandal, destroys the family, exposes the consorts to the danger of incontinence, and inflicts a severe loss on the children, if there be any. He likewise noted the conviction of the Most Reverend Auditors of the Sacred Roman Rota that this wise jurisprudence of the Holy See must be adhered to, and especially so when modern customs are tending to scuttle with facility all conjugal rights, either "through absolute divorce or through imperfect divorce." This conviction was fortified through the realization that matrimony exists also as a remedy for concupiscence and that a dissolution of the common life by means of a separation immediately opens the door to adulterous amours and illicit associations.<sup>70</sup>

The apparent tendency of some modern theologians to depart from the rigor of the older jurisprudence was reproved by Lega

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ponit, prolemque, si quae sit, damnis afficit . . . (Cases are cited in which the practice of the Sacred Roman Rota has been upheld.)" "Imo etiam in dubio utrum matrimonium validum sit, maxime in dubio facti, facilius admitti potest probatio, sive per testes, sive per documenta, ad effectum evincendi nullitatem; dum e contrario in causa separationis thori, cum certa sit et incontrovertita validitas matrimonii, omnia iura clamant ut coniugale consortium non disiungatur, nisi invicte comprobetur, adesse causam canonicam separationis."—S. R. *Rotae Decisiones seu Sententiae*, II (1913), 243-244.

<sup>70</sup> S. R. Rota, *Separationis quoad thorum et mensam*, 5 iul. 1910, *coram* R.P.D. Michaeli Lega, Decano, Dec. XXIV, n. 12: "Cui sapientissimae iurisprudentiae tum H[uius] S[ancti] O[fficii] tum S[acrae] C[ongregationis] C[oncilii] fortius adhaerendum esse considerarunt R[everendissimi] P[atres] A[uditores] quo hodierni mores ad facile pessumdanda coniugalia iura sive per divortium plenum, sive per divortium semiplenum, inclinant. Et nemo non scit quomodo, per divortii semipleni facilem concessionem, via sternatur facilis et veluti necessaria ad divortium plenum. Nam matrimonium datum est etiam in remedium concupiscentiae; dissoluto itaque semiplene maritali consortio, statim irrepunt adulterini amores et illiciti amplexus."—S. R. *Rotae Decisiones seu Sententiae*, II (1913), 244.

when he pointed to the necessity of adhering to the jurisprudence of the Holy See in view of the definite breakdown in morals and the change in the customs of our times.<sup>71</sup>

That the Sacred Roman Rota continues to follow the wise counsel of Lega seems evident also from more recent cases. Frequent quarrels, in themselves, are not regarded by the Holy See as a "just cause" even for a temporary separation, as is clearly seen from a decision of the Rota in the year 1928.<sup>72</sup> In this case the alleged cause in modern parlance would have been termed "incompatibility of temperament," and would no doubt have supported a "divorce" decree in almost any modern civil tribunal. The married life of the elderly couple had been marked by frequent quarrels and almost continual unhappiness. It was the contention of the petitioner that "implacable hatred" (*odium capitale*) existed on the part of the wife. The decision, while recognizing that the wife had used opprobrious language towards

<sup>71</sup> *Ibid.*, n. 13: "Considerare non praetermiserunt R[everendissimi] D[octores] quod perpendet E[minentissimus] Gennari, *Consult. Moral.*, cons. LXVII, pag. 312, nempe Theologos hodiernos aliquantis per discessisse a rigore antiquioris iurisprudentiae, docentes fas esse coniugibus quacumque ex legitima causa se ad invicem separare, abrupta in aliquod tempus mutua cohabitatione non in perpetuum, cauto dumtaxat ne subsit incontinentiae periculum." . . . "Nam, e contra, leves iniurias, saevitias aut ipsam characterum incompatibilitatem inter sponso non haberi uti causas sufficientes ad eosdem dissociandos, definitum est a S[acra] C[ongregatione] C[oncilio] in una Sedunen., diei 2 novembris 1851, et aliis innumeris, quas recolat Pallottini, Coll. tom. XIII, v. *matrim.* §23, n. 199, ad notam."—S. R. *Rotae Decisiones seu Sententiae*, II (1913), 244-245.

<sup>72</sup> S. R. Rota, *Separationis*, 30 iun. 1928, *coram* R.P.D. Josepho Florazak, Decano, Dec. XIX, n. 2: "Affirmari tamen potest, omnium istarum causarum, ex quibus ius ad divortium obtinendum oriri potest, unum esse debere effectum, gravis nempe damni sive animae sive corporis periculum. Non sufficit timor cuiuscumque periculi, necessarium est ut malum quod timetur sit grave ac tale quale ad metum viri constantis requiritur. Ex his sequitur, non satis esse minas, nisi qui minatur solitus sit eas exsequi, praeertim habito sive minitantis sive metuentis sexu, indole, ingenio, necnon minandi modo. Quod si de odio agatur, requiritur odium capitale ac implacabile: et leves iniuriae, verba probrosa aut ipsa characterum inter sponso incompatibilitas, quae molestam cohabitationem faciant, non possunt haberi uti causae sufficientes ad eosdem dissociandos."—S. R. *Rotae Decisiones seu Sententiae*, XX (1936), 268-269.

her husband, declared that the use of such language did not prove the existence of "implacable hatred," but only proved her anger towards him because of his conduct. The Sacred Rota declared that the frequent quarrels were due to avarice rather than "implacable hatred," and refused to grant a temporary separation inasmuch as a "just cause" was not present.

The Sacred Roman Rota expressed the same teaching in another case decided in the year 1930.<sup>73</sup> In this decision the Sacred Roman Rota, recognizing that cohabitation was not of the essence of marriage, pointed out that separation from bed, board and cohabitation, even if temporary, is a grave matter. Such separation by its nature is public, contrary to the marriage obligations, and filled with dangers to the consorts, especially the danger of incontinence. The Sacred Roman Rota in this decision gave a norm for determining whether or not an alleged cause for a separation is legitimate. The cause, the Rota said, must be proportionate to the evils that result from the separation, i.e., the cause must contain an element of danger either to the soul or the body of the other party, and this danger must be so serious that there is an end of the obligation imposed by the law which binds the consorts to observe the community of conjugal life.

This norm of judging the legitimacy of the alleged cause is in harmony with the teachings of most of the authors who wrote before the enactment of the Code of Canon Law.<sup>74</sup> These authors agreed that all causes for a temporary separation must include the element of danger to the spiritual or bodily welfare of the other

<sup>73</sup> S. R. Rota, *Separationis*, 6 aug. 1930, *coram* R.P.D. Andrea Jullien, Ponente, Dec. XLVII, n. 2: "Verum, quamvis cohabitatio non sit de matrimonii essentia, separatio tamen tori, mensae et habitationis, etiam temporaria, est res gravis, utpote publica, obligationi naturali contraria, ac periculis plena pro coniugibus, specietenus de continentia servanda; quapropter separationis causa, ut sit legitima, debet esse proportionata, id est continere periculum sive animae sive corporis ita grave, ut cedat obligatio illa, qua coniuges servare vitae coniugalis communionem iure tenentur."—S. R. *Rotae Decisiones seu Sententiae*, XXII (1938), 524.

<sup>74</sup> Wernz, *Ius Decretalium* (3. ed., 6 vols. in 10, Prati, 1913-1915), IV, n. 713; Schmalzgrueber, *Ius Ecclesiasticum Universum*, Lib. IV, tit. XIX, nn. 141-145; Gasparri, *De Matrimonio* (3. ed., 2 vols., Parisiis, 1904), II, n. 761. (This is the sole instance in which this particular edition is cited by the writer.)

party if they are to be regarded as sufficient causes for a temporary separation.

In addition to the causes specifically mentioned in the law, the Sacred Roman Rota has recognized among others the following as justifying causes for a temporary separation: the mental abnormality of one of the parties if it be conjoined with implacable hatred;<sup>75</sup> malicious desertion, done without justification but at the same time with the intention of not returning;<sup>76</sup> the persistent and constant practice of onanism and other irreligious and immoral acts on the part of one of the parties.<sup>77</sup>

#### SUMMARY

The Church recognizes that a conditional right to a perpetual or a temporary separation exists in law, but, mindful of the primary obligation, namely, the preservation of the conjugal life, the Church is loath to sanction a separation unless the alleged cause either makes the legitimate concession of the right imperative by reason of a greater evil to be expected from a denial of such a separation, or is such as to demonstrate a violent disregard by one of the parties of the mutual condition supporting the conjugal life, which disregard seriously endangers the moral or physical welfare of the innocent spouse. Mindful of its mission and the fundamental notion of the family, the Church interprets strictly the right of separation; sanctions a perpetual separation for a single reason only, adultery, and a permanent departure on private authority for that single cause only when the cause is notorious and the requisite conditions on the part of the innocent spouse are fulfilled; and sanctions a temporary separation for several causes which endanger the moral or the physical welfare of the innocent spouse, but on private authority only if there is certainty regarding

<sup>75</sup> S. R. Rota, *Separationis quoad thorum et cohabitationem*, 20 aprilii 1912, *coram* R.P.D. Michaeli Lega, Decano, Dec. XVI, nn. 11-12—S. R. *Rotae Decisiones seu Sententiae*, IV (1917), 199-201.

<sup>76</sup> S. R. Rota, *Separationis*, 17 mart. 1913, *coram* R.P.D. Antonio Perathoner, Ponente, Dec. XIX, nn. 17-18—S. R. *Rotae Decisiones seu Sententiae*, V (1919), 225.

<sup>77</sup> S. R. Rota, *Separationis*, 4 febr. 1925, *coram* R.P.D. Iosepho Florczak, Ponente, Dec. VI, nn. 6-10—S. R. *Rotae Decisiones seu Sententiae*, XVII (1935), 39-47.

the sufficiency of the cause and if at the same time there is serious danger in the delaying of the separation.

#### ARTICLE D. UNLAWFUL SEPARATION FOR LACK OF AN ADEQUATE AUTHORIZATION

The present canonical discipline imposes no obligation on the innocent spouse to leave, to dismiss, or to bring action against the offending party, nor is there any canonical restriction against the innocent party's instituting a reconciliation. There may be instances wherein a moral obligation of departure exists by force of the natural law for the spiritual welfare of the spouse or of the children.

The separation spoken of here is the result of exercising a right claimed to have been given by the law. The consequent separation may change the canonical status of the innocent party, and therefore the separation to be juridically effective must, in addition to the presence of the requisite "just cause," have been sanctioned by or at least have the approbation of qualified ecclesiastical authority.

The legitimate authority with respect to matrimonial cases between baptized persons is properly and exclusively the Church.<sup>78</sup> The contract of marriage between baptized persons is governed not only by the divine law but also by the canon law, but with relation to the civil effects of the marriage contract the competency of the civil power is recognized by the Church.<sup>79</sup>

Even the temporary interruption as well as the perpetual cessation of the conjugal life by way of a separation of the parties, though not affecting the bond of marriage, can in no way be specifically considered a merely civil effect over which the State has any native authority. The Church may authorize the civil power to grant a sentence of temporal or of perpetual separation,<sup>80</sup>

<sup>78</sup> Canon 1960.

<sup>79</sup> Canon 1016.

<sup>80</sup> Cf. Art. 34 of the Concordat with Italy in the year 1929: "Quanto alle cause di separazione personale, la Santa Sede consente che siano giudicate dall' autorità giudiziaria civile."—AAS, XXI (1929), 291; cf. also the Concordat with Austria under date of June 5, 1933, where in the *Zusatzprotokoll*, Art. VII, 2, reads: "Der Heilige Stuhl willigt ein, dass

but it suffices to note here that the civil power, if acting without ecclesiastical approval, may not legitimately sanction a separation of baptized persons. The matter of the granting of a separation between baptized persons belongs primarily to the Church as interpreting the divine law or as giving effect to her canonical prescriptions.

As has been seen in the foregoing Article, the Church does not authorize the institution of a separation, either temporary or perpetual, except for certain "just causes." Likewise the immediate legitimate authorizing agency is designated in the law of the Church.<sup>81</sup> A scorning of the requisite agency, or also any action taken by an agency when the action lies beyond the scope of the agency's power necessarily marks any resulting separation as unlawful for lack of an adequate competence in the authority which sanctioned the separation.

#### SECTION 1. PERMANENT SEPARATION

Canon 1130, treating directly of the obligation of a reconciliation following a separation in consequence of adultery committed by one of the spouses, recognizes parenthetically that the innocent spouse may have lawfully departed either as a result of the sentence of a judge or on the initiative of his or her own authority.<sup>82</sup> If the sentence or decree is that of a competent ecclesiastical judge, then the presence of the authority of the Church is evident; if the sentence is that of a civil judge, then if the pronouncement is to be canonically valid and lawful, the judge must act with authority that is shared with him in virtue of a concordat with the Holy See through which the Church has previously sanctioned his intervention,<sup>83</sup> or the parties must appear before the civil judge with the express permission of the Church.<sup>84</sup>

das Verfahren bezüglich der Trennung der Ehe von Tisch und Bett den staatlichen Gerichten zusteht."—*AAS*, XXVI (1934), 277.

<sup>81</sup> Canons 1130; 1131, §1.

<sup>82</sup> *Coniux innocens, sive iudicis sententia sive propria auctoritate legitime discesserit, nulla umquam obligatione tenetur coniugum adulterum rursus admittendi ad vitae consortium; . . .*

<sup>83</sup> Cf. S. C. Sacramentis, instr. "*Provida Mater*," Art. VI, §2—*AAS*, XXVIII (1936), 316.

<sup>84</sup> Cf. Kelly, "Separation and Civil Divorce"—*The Jurist*, VI (1946), 209.

Therefore, in either case the authority of the Church is recognized, and without such a public ecclesiastical authorization the subsequent separation would not constitute in law a legitimate separation.

Augustine (1872–1943) was authority for the statement that a civil court may indeed give a sentence of temporary divorce or separation, but that such a sentence had no other effect than that of private separation, unless the episcopal court accepted the evidence and the verdict of the civil court and made them its own.<sup>85</sup> The juridical effect of a separation undertaken on private authority will be treated later in this Article. For the present it may be noted briefly that the sphere in which such authority may be exercised in relation to a lawful departure is extremely limited. In relation to a permanent separation as sanctioned by the Church, a departure effected on private authority is conditioned on a single cause, namely that of adultery, which must be certain as opposed to doubtful or only probable, and *notorious* as opposed to occult.<sup>86</sup>

When the crime of adultery is not certain and notorious, a continued absence following upon a departure instituted solely on private authority is unlawful. This is true for the reason that as long as the right of departure remains doubtful the accused spouse is unjustly deprived of a right, the right to cohabitation, which as a certain and established right commands respect and honor until there is conclusive proof that the right has been sacrificed or lost.<sup>87</sup> Therefore, as long as the act of adultery remains doubtful, a special ecclesiastical sanction for the separation must be sought if the continued absence is to be a legitimate one. If the adultery is certain and truly notorious, the innocent spouse may provisionally depart on his or her own authority, but even in this case, in view of a possible deception regarding the notoriety of the crime, the intervention of ecclesiastical authority is strongly advised in order that the separation may have definitive effect.

<sup>85</sup> *A Commentary on the New Code of Canon Law*, V, 377.

<sup>86</sup> Gasparri, *De Matrimonio*, II, n. 1175; Chelodi, *Ius Matrimoniale*, n. 161; Coronata, *De Sacramentis*, III, 921; Cappello, *De Matrimonio*, n. 827.

<sup>87</sup> Wernz-Vidal, *Ius Canonicum*, V, n. 642.

As long as such an ecclesiastical sanction is lacking the alleged adulterer may at any time seek redress before an ecclesiastical court. In this regard the separation instituted solely on private authority is termed "provisional."

Lastly, if the alleged adultery is certain but occult, then there exists undoubtedly a right to institute a separation, but again the intervention of ecclesiastical authority is advised in order that every scandal may be forestalled and in order that any possible future conflict between the internal and the external forums may be prevented. Such a conflict would occur should the innocent spouse be constrained by ecclesiastical authority to return to the community of life from which a lawful departure had previously been effected on the initiation of the spouse's private authority.<sup>88</sup>

Hence it seems that, though the right to institute a permanent departure solely on private authority for the reason that adultery has been committed by the marriage partner is sanctioned in the common law of the Church, for all practical purposes it is restricted in its exercise to the internal forum, so that if a separation is to have canonical recognition in the external forum there is need of a direct ecclesiastical sanction. Thus a wife who departs licitly in consequence of the notorious adultery of her husband may for that cause licitly continue the separation, but so long as the Church has not juridically sanctioned the separation, she must be regarded as *legitime non separata*, and hence she retains her husband's domicile, and can at most establish a quasi-domicile of her own.<sup>89</sup>

<sup>88</sup> "At quaeritur num possit, si adulterium est certum, sed occultum. Communior et probabilior sententia affirmat, saltem pro foro conscientiae, contra S. Thomam in 4, dist. 35, q. 1, a. 3, aliosque, quia causa tribuens ius divortii indubia est, ac proinde coniux innocens discedere prohibebitur in hoc casu tantum lege caritatis ad evitandum scandalum, aut diffamationem coniugis culpabilis: sed lex caritatis non obligat cum magno incommodo, quod hisce in casibus numquam non aderit. Diximus *saltem in foro conscientiae*, quia in foro externo ex causa adulterii nec notorii nec legitime probati coniux dimissum coniugem recipere a iudice compellendus est, ne malis coniugibus praebatur ansa innocentem compartem dimissione vel recessu iniuste vexandi."—Gasparri, *De Matrimonio*, II, n. 1175; Wernz-Vidal, *Ius Canonicum*, V, n. 642.

<sup>89</sup> Canon 93, §2.

## SECTION 2. TEMPORARY SEPARATION

Canon 1131, §1, upon the recitation of the causes which may justify a temporary cessation of the conjugal life, establishes the proper authorities who may sanction such a departure.<sup>90</sup> The authority is quite generally vested in the local ordinary, but under specified conditions also in the innocent spouse.

The temporary nature of the separation sanctioned in canon 1131, §1, is evident from the second paragraph of this canon wherein the obligation of the restoration of the conjugal life is made mandatory when the cause for the departure has ceased. But if the separation was decreed by the local ordinary for a certain or indefinite period of time, the innocent spouse is not under any obligation to return to the conjugal community of life except in obedience to a decree of the ordinary or upon the lapse of the time determined by the ordinary.<sup>91</sup>

Regarding the temporary departure instituted on private authority it is to be noted that two conditions must be realized before this authority may even be exercised. On the part of the alleged cause, the same must be certain, and simultaneously, a delay in the departure must be fraught with serious danger. Should either of these conditions be unrealized, then any departure and subsequent absence for any of the reasons alleged as sufficient under canon 1131, §2, would be unlawful, since the separation would exist as a departure not canonically authorized. Such a departure undertaken without a sufficient authorization would lack the same canonical effects that attend a separation when it is duly sanctioned by the competent ecclesiastical authority.

While the Code of Canon Law does not expressly state what degree of certainty is required regarding a crime of adultery if the latter is to justify a perpetual separation, but has left the determination of the degree of certainty to those who interpret the

<sup>90</sup> "... haec causae alicue id genus, sunt pro altero coniuge totidem legitimae causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis constet, et periculum sit in mora."

<sup>91</sup> "In omnibus his casibus, causa separationis cessante, vitae consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumque tempus, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore."—canon 1132, §2.

law, the Code specifically does permit a temporary departure on private authority then only when the cause is evident.<sup>92</sup> Here again, as in the case wherein one must judge concerning the sufficiency of the alleged cause for a permanent separation, one is confronted with a potential multitude of instances or cases which may extend from the perfectly obvious case which justifies a departure to the extremely questionable case which renders the right of departure very doubtful. Hence no attempt will be made in this work to determine a closed category of "certainly justifying circumstances." It is proposed by the writer, however, that, as the circumstances must be objective, so also must the judgment regarding these circumstances be objective; and that, as the rights which are due are owed in justice, so the judgment on the suspension of these rights must likewise be founded in justice, and hence may not be based on prejudice, partiality, or subjective emotions. Thus it seems reasonable to require for the sake of stability and justice that the temporary departure instituted on private authority be confirmed by the competent public authority before it can become entitled to recognition as a "legitimate" separation before the law.

As to the second condition, namely, the serious danger resulting from any delay, Coronata states that such a danger is recognized as being present if it is solely at the expense of grave harm for soul, body, or temporal goods that a recourse can be interposed with the local ordinary and his decision awaited.<sup>93</sup>

Since the requirement contemplates a "grave" danger, it seems reasonable to postulate that the danger be present, that it be objective, that of its nature it be of serious import to the threatened party, and that the aggressor be capable of executing the evil threatened. While threats that are not being executed, fears that are purely subjective, and harm that may be visited on another,

<sup>92</sup> ". . . si de eis certo constet . . ."—canon 1131, §1.

<sup>93</sup> "Periculum autem in mora esse censetur si sine gravi animae, corporis aut bonorum temporalium damno recurri non possit ad Ordinarium loci et eius sententia expectari, quia, e.g., amentia furiosa subito evasit; quia morbus contagiosus etiam vi legis civilis segregationem statim requirit; si rixae et odia subdito proruperint; si coniux coniugem armata manu minatus sit etc. etc."—*De Sacramentis*, III, p. 925.

will perhaps justify a departure from the contemplated danger, they hardly seem to justify a continued absence apart from an immediate ecclesiastical sanction.

An objection could be raised regarding the necessity of having recourse to the local ordinary on the score that a delay in obtaining a hearing prompted the lawgiver to empower the individual spouse to make the decision. This may be a valid objection in relation to the case wherein private authority deems it necessary to exercise the right of an immediate departure, but it does not carry weight for the case of a continued absence, since in cases of this nature the Church sanctions the use of the informal process, in which the time element may readily be reduced to a minimum.

In the examination of the nature, merits, and problems incident to petitions for a separation, ecclesiastical authorities, usually the local ordinary or his delegate may employ either of two different processes.<sup>94</sup> One process is administrative, the other judicial. The causes mentioned in canon 1131, §1, are ordinarily decided according to the administrative process, though the Sacred Roman Rota has indicated reasons which suggest the use of the judicial process even in cases of temporary separation.<sup>95</sup> Usually it belongs to the local ordinary to determine whether a particular case of separation is to be adjudicated in an administrative or in a judicial process. The consorts may, at times, for valid reasons request a judicial trial, even in those cases envisaged in canon 1131, §1.<sup>96</sup>

It is to be noted that, if the administrative process is used, the question of competency is to be determined by canon 201 rather than by canon 1964, and that the local ordinary may delegate someone else to decide the case. Unless forbidden expressly, the vicar general is competent to decide cases of separation through the administrative process by virtue of his office, while the *officialis*, if he is to use the administrative process, requires a

<sup>94</sup> P.C.I., 25 iun. 1922—*AAS*, XXIV (1932), 284; Doheny, *Canonical Procedure in Matrimonial Cases*, II, 642.

<sup>95</sup> Doheny, *op. cit.*, II, 642-643.

<sup>96</sup> Canon 1687; Doheny, *op. cit.*, II, 643.

special mandate of the bishop or of the vicar general since he is not competent simply by reason of his office.<sup>97</sup>

### SECTION 3. SEPARATION BY PRIVATE AUTHORITY

It is not proposed here to treat in detail the subject of the separation of spouses on their own private authority, but it is necessary to determine what, if any, juridical effects flow from such a separation. By the term "private separation," or a separation undertaken on private authority, is meant a discontinuance of the mutual cohabitation as a result of the decision of one of the spouses to depart from the other, or of the expulsion of one by the other apart from the sanction of public ecclesiastical authority. It is presumed here that at the time of departure or expulsion there is present a cause which in law would justify a judicial sentence or decree of perpetual separation in consequence of a notorious adultery.<sup>98</sup>

The question of private authority in relation to the separation of spouses has been the subject of rather extensive canonical commentary.<sup>99</sup> A difference of opinion on this question originated in consequence of the seemingly contradictory decretal letters of Pope Alexander III (1159-1181), which letters were referred to previously.<sup>100</sup> In the first of these letters, "*Porro*,"<sup>101</sup> Pope

<sup>97</sup> Doheny, *op. cit.*, II, 644.

<sup>98</sup> Temporary separation is not considered in connection with this question, since obviously a spouse departing for a cause which justifies such a separation is bound to return when the cause no longer exists, and therefore could not have the intention necessary for establishing a domicile. Cf. canon 1132, §2. Likewise the situation of certain nullity is not considered, since it seems certain that in such a case an ecclesiastical sanction is necessary before a legitimate separation could be established.—Cf. Reiffenstuel, *Ius Canonicum Universum*, Lib. IV, tit. XIX, nn. 14, 15.

<sup>99</sup> Cf. Sanchez, *De Matrimonii Sacramento*, Lib. X, disp. XII, nn. 10-38; Reiffenstuel, *op. cit.*, Lib. IV, tit. XIX, nn. 89-100; Schmalzgrueber, *Ius Ecclesiasticum Universum*, Lib. IV, tit. XIX, nn. 108-115; Wernz-Vidal, *Ius Canonicum*, V, 782-783; Coronata, *De Sacramentis*, III, 920, 924.

<sup>100</sup> Cf. *supra*, pp.

<sup>101</sup> "Porro de comite Pontini, qui filiam B. de sancto Valerico uxorem suam absque iudicio ecclesiae dimisit propterea, quia eam cognatam fuisse uxoris defunctae proponit, haec prudentia tua cognoscat, quod, si etiam parentela esset publica et notoria, absque iudicio ecclesiae ab ea separari non

Alexander had ordered the restoring of a wife to her husband who had dismissed her because of an alleged diriment impediment of affinity. In the second decretal letter, "*Significasti*,"<sup>102</sup> it was denied that a husband, who had dismissed his adulterous wife whose crime was notorious, could be forced to receive her again into his home. Later commentaries harmonized the apparent difference of the effect of private authority in these two letters by pointing out that in the first letter there was question of the bond of marriage, and that in the second letter there was no question of the bond; also, that in the second letter mere possession had been denied to the wife by her husband, while in the first letter, property, a more fundamental right had been denied.<sup>103</sup> When it was a question that concerned the bond, the Church had exclusive jurisdiction; the presumption in such a case stood in favor of the bond until the existence or the validity of the bond was disproved.

After having commented on these two letters of Pope Alexander III, Schmalzgrueber proposed the following question: May the innocent spouse depart on his own authority from a spouse who has been guilty of a single adulterous act? He prefaced his reply by outlining the arguments of the proponents of the negative opinion, which opinion contended that the judgment of the Church was requisite before a departure was permissible.

The proponents of the negative opinion contended: (1) that such a departure on private authority had been expressly disallowed by Pope Alexander III in the decretal letter "*Porro*"; (2) that formerly a penalty of excommunication had been imposed on husbands who dismissed their wives without awaiting the judgment of the Church; (3) that one who thus dismissed his wife acted contrary to the legal maxim that no one was permitted to be a judge in his own cause; (4) that divorce was a penalty for the guilty person, which penalty the law did not impose *ipso facto*,

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potuit, quare ipsum ad eam recipiendam, quae petit restitutionem ipsius, districte compellas. . . ." c. 3, X, *de divortiiis*, IV, 19.

<sup>102</sup> ". . . respondemus, quod, si notorium est, mulierem ipsam adulterium commisisse, ad eam recipiendam praefatus vir cogi non debet, nisi constaret, ipsum cum alia adulterium commisisse."—c. 4, X, *de divortiiis*, IV, 19.

<sup>103</sup> Schmalzgrueber, *op. cit.*, Lib. IV, tit. XIX, n. 114.



but reserved its infliction to public judicial authority; and (5) that since the celebration of marriage was under the authority of the Church, it belonged to the same authority, and not to that of the spouses, to dissolve the contract or to release the parties from its obligations.<sup>104</sup>

In replying to these arguments, Schmalzgrueber<sup>105</sup> noted the necessity of making this distinction, namely, either the commission of the adultery was known with certainty, or its commission was doubtful or only suspected. A doubt or a suspicion regarding the commission of adultery was not an adequate basis upon which to justify a separation on private authority. Moral certainty or a violent presumption was the minimum requirement for depriving a spouse of rightful possession. A further distinction<sup>106</sup> was made, namely, that if there was certainty regarding the commission of the crime, then the crime would be either notorious or occult, but certainly known to the innocent spouse. If the crime was notorious, whether in fact or in law, the innocent party was justified in separating, being released from the duty of rendering the marital debt and from the duty to cohabit with the guilty spouse. But if the crime was occult, yet certainly known to the innocent spouse, the authors were not in agreement as to the right of the innocent spouse to depart on her own authority.<sup>107</sup>

Schmalzgrueber stated that the more common opinion permitted a departure on private authority even in the case wherein the adultery was occult but certainly known to the innocent spouse,

<sup>104</sup> ". . . ex quorum sententia, ut coniux innocens ab adultero possit divertere, necessarium est iudicium ecclesiae. Fundatur (1) textu c. porro (c. 3, X, de divortis, IV, 19) ubi diserte negatur coniugum separationem absque iudicio ecclesiae fieri posse, etiam cum parentela, sive consanguinitas publica, et notoria est. (2) Can. saeculares (c. 1, C. XXXIII, q. 2) ubi excommunicari iubentur viri, qui uxores suas sine iudicio ecclesiae dimittunt. (3) Quia sic recedentes sibi ius dicunt in propria causa—contra 1. unic. C. ne quis in sua causa etc. (C.[3.5]). (4) Divortium est poena nocentis, quam ius ipso facto non imponit, sed iudicii remittit imponendam. (5) Matrimonium est ecclesiae auctoritate celebratum; igitur auctoritate ecclesiae et non ipsorum coniugum dissolvi debet."—Schmalzgrueber, *op. cit.*, Lib. IV, tit. XIX, n. 109.

<sup>105</sup> *Ibid.*, n. 110.

<sup>106</sup> *Ibid.*, n. 111.

<sup>107</sup> *Ibid.*, n. 112.

and he permitted such a departure at least in the forum of conscience and provided that scandal was not given.<sup>108</sup> He reasoned that the duties of the marriage contract are conditioned on the fidelity of the conjugal faith, which when broken released the innocent spouse from her duties. The right of departure was not based on the notoriety of the crime, but upon its actual commission. If the commission of the adultery was known with certainty, the right could be exercised. The limitation of the right of departure to the forum of conscience was necessary, for, if the cause of departure was neither notorious nor legitimately proved, the innocent spouse might be judicially compelled to return to the marriage partner.

Having proposed these arguments, Schmalzgrueber answered directly the arguments of those who denied that there was any right of departure on private authority. He denied the existence of any parity between the crime of adultery as a cause for departure and the alleged existence of a diriment impediment, e.g., consanguinity, as such a cause. A departure in consequence of adultery was a denial of possession only, while a departure because of the alleged existence of a diriment impediment was a denial of a fundamental right, property, which resulted in greater prejudice, and consequently necessitated a judicial determination of the existence of the impediment.<sup>109</sup>

He furthermore contended that the excommunication imposed on husbands who dismissed their wives was not applicable to the question, since the excommunication recorded by Gratian applied

<sup>108</sup> "Quod si vero adulterium alterius publice occultum sit, sed innocenti privatim certo cognitum, maior est controversia . . . sed communior etiam hoc casu permittit innocenti ut propria auctoritate possit recedere, saltem pro foro conscientiae et secluso scandalo. Ratio est, quia matrimonium ex natura sua non aliter obligat ad thorum et redditionem debiti coniugalis, quam sub conditione, si etiam alter coniux fidem coniugalem servet."—*op. cit.*, *loc. cit.*

<sup>109</sup> "Negatur paritas inter separationem matrimonii, quae fit ex causa adulterii, et inter eam, quae fit ex causa impedimenti consanguinitatis, vel alterius impedimenti dirimentis: per *primam* coniux privatur sola possessione, sive usu communis thori, et commodis obsequii coniugalis, per secundam vero deicitur ipsa proprietate, quod cum multis maioris sit praeiudicii, merito ad separationem hanc decernendam exigitur iudicium et auctoritas ecclesiae."—*Ibid.*, n. 114.

to those who dismissed their spouses without a grave cause and for ulterior motives.<sup>110</sup> A departure on private authority, he contended, did not violate the rule which forbade one to judge his own cause, but rather the departure was the exercise of a right given in the law.<sup>111</sup> Likewise the divorce instituted by the innocent party, as also the denial of the marital debt, was not properly a penalty; but rather, these factors reflected the exercise of a right allowed by the very nature of the marital contract, and it was sufficient for the exercise of the right that the innocent party knew that the conjugal faith had been broken.<sup>112</sup>

In reply to the final argument against the adequacy of private authority in relation to a separation for the cause of adultery, Schmalzgrueber seemed to concede that for the *external forum* the authority of the Church was requisite.<sup>113</sup> For the *internal forum*, however, he reasoned that the nature of the contract was to be considered, for through the contract the duties of mutual cohabitation and of rendering the marital debt on the part of one of the spouses were conditioned on the observance of the conjugal faith by the other. His concession for the external forum points perhaps to the conclusion that all his foregoing arguments were meant as so many justifying reasons for the internal forum only.

Reiffenstuel<sup>114</sup> and Sanchez<sup>115</sup> upheld the *licitness* of a separa-

<sup>110</sup> "In textu illo (c. 1, C. XXXIII, q. 2) non agitur de eo, qui uxorem suam dimisit ex causa adulterii, cuius notitiam certam habet; sed de eo, qui illam dimisit sine ulla graviore culpa, aut probabili causa, animo ad illicita consortia accedendi."—*Ibid.*, n. 114, nota 2.

<sup>111</sup> "Innocens discussu illo non tam sibi ius dicit, quam utitur iure, sibi ex natura matrimonii certo competente, et nulla lege adempta."—*Ibid.*, n. 114, nota 3.

<sup>112</sup> "Divortium non est proprie poena, sed quasi conditio inhibita in ipso matrimonii contractu, quae cum sit in favorem innocentis, satis est, ut innocens, adulterii conscius adulterum iure exigendi privet."—*Ibid.*, n. 114, nota 4.

<sup>113</sup> "Conceditur sequela pro foro externo, in interno spectatur natura contractus matrimonialis, qui ad debitum reddendum, et cohabitationem mutuam non obligat, nisi sub conditione servatae fidei ab altero coniuge."—*Ibid.*, n. 114, nota 5.

<sup>114</sup> "Si adulterium notorium est, v.g., quia maritus aliam impregnavit idque in iudicio probatum, vel ab eodem confessum sit, aut si uxor, absente

tion instituted under the circumstances considered here. It appears that these commentators all were considering the question from the moral rather than from the legal point of view. In substance they seemed to say that it was licit for the innocent spouse to depart when the adultery was notorious; licit also when the adultery was occult but certainly known to the innocent spouse, and that the latter was true at least for the forum of conscience and provided that no scandal was given. Schmalzgrueber through his concession of the necessity of ecclesiastical juridical authority for the separation indicated that he knew of no definite prescription of the Church on the matter, and conceded that if there were such a prescription then the innocent spouse even in the case of notorious adultery would be required to comply with the prescription.

The Code today speaks of a *legitimate* separation,<sup>116</sup> of a *legitimate* accusation,<sup>117</sup> of a *legitimate* departure<sup>118</sup> and of *legitimate* causes.<sup>119</sup> These phrases seem to imply something more than the simple consideration of licitness in an act of separation or departure. The Instruction<sup>120</sup> of the Sacred Congregation of the Sacraments offers the strongest indications to the same effect. Therein, at least when there is question of an alleged nullity of the marriage, private authority is not recognized as an adequate basis for establishing a legitimate separation. Sartori, as noted by Torre,<sup>121</sup> considered an ecclesiastical juridical sentence or decree

vel impotente viro, ab alio impregnata est, in utroque foro est *licitum* propria auctoritate divortium facere."—*Ius Canonicum Universum*, Lib. IV, tit. XIX, n. 89.

<sup>115</sup> *De Matrimonii Sacramento*, Lib. X, disp. XII, nn. 12, 25.

<sup>116</sup> Cf. canon 93, §§1, 2.

<sup>117</sup> Cf. canon 1129, §2.

<sup>118</sup> Cf. canon 1130.

<sup>119</sup> Cf. canon 1131, §1.

<sup>120</sup> S. C. de Sacramentis, instr. "*Provida Mater*," Art. 6, §1—AAS, XXVIII (1936), 314.

<sup>121</sup> "Sartori apud Enchiridion canonicum (a. 1935 pag. 24 ad can. 93) addit sequentem rationem 'quia non est legitime (idest per iudicem ecclesiasticum) a viro separata, etsi legitime discesserit proptia tantum auctoritate.'"—Cf. Torre, *Instructio servanda a tribunalibus dioecesanis in pertractandis causis de nullitate matrimoniorum a Sacra Congregatione de Disciplina Sacramentorum edita* (Neapoli: M. D'Auria, 1937), p. 12.

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a requisite for the constitution of a legitimate separation. And Sartori, an auditor of the Sacred Roman Rota, had expressed this opinion before the issuance of the Instruction "*Provida Mater*" of the Sacred Congregation of the Sacraments. Regatillo is of the opinion that a private separation can have only a *moral* effect, and terms the innocent party's departure licit, but void of *juridical* effect.<sup>122</sup>

## ARTICLE E. CONCEPT OF THE EXPRESSION "LEGITIME NON SEPARATA"

Having treated of unlawful separation in consequence of a deficient cause and for a lack of an adequate authorization, the writer now considers the meaning and the juridical extension of the phrase "*legitime non separata*" as occurring specifically in canon 93, and by way of clarification in Section two of Article Six of the Instruction "*Provida Mater*," issued by the Sacred Congregation of the Sacraments under date of August 15, 1936.

"Can. 93.—§1. Uxor, a viro legitime non separata, necessario retinet domicilium viri sui; . . .

§2. Minor infantia egressus potest quasi-domicilium proprium obtinere; item uxor a viro legitime non separata, legitime autem separata etiam domicilium."

"Art. 6—Sec. 2. Uxor, a viro perpetuo aut ad tempus indefinitum separata legitime, i.e., per sententiam iudicalem competentis tribunalis ecclesiastici, vel etiam civilis a S. Sede, vi concordati, recognitam, aut per Ordinarii decretum, non sequitur domicilium viri, ideoque conveniri debet vel coram Ordinario loci in quo nuptiae initiae sunt, vel coram Ordinario sui domicilii vel quasi-domicilii."<sup>123</sup>

In the law legitimacy or "non-legitimacy" of a separation determines whether or not the wife so separated may or may not establish her own independent voluntary domicile. By virtue of canon 93, §1, a wife not legitimately separated from her husband necessarily retains the domicile of her husband, although if she is so separated she can establish her own proper quasi-domicile; by

<sup>122</sup> *Ius Sacramentarium*, II, n. 588.

<sup>123</sup> *AAS*, XXVIII (1936), 313-361, at p. 316.

reason of canon 93, §2, a wife legitimately separated from her husband can acquire a voluntary domicile independently of her husband. The question presents itself: What is meant by a legitimate separation in ecclesiastical jurisprudence?

A valid distinction seems warranted between the terms "legitimate" and "licit," when these words are employed to describe a state of separation. Cocchi, writing shortly after the promulgation of the Code of Canon Law, in commenting on canon 93 stated briefly that a legitimate separation is one conformable to the norm of law; and that it is not required that the separation have been effected through the authority of a judge which is not invariably demanded, provided of course that the wife can conclusively prove her separation.<sup>124</sup>

The presence or absence of official juridical authority was, then, from the time of the promulgation of the Code of Canon Law recognized as an element which might affect the nature of the separation effected, for it is said specifically that there may be cases wherein judicial authority is not requisite. However, very shortly thereafter it was recognized that a distinction must be made between "licit" and "legitimate" in relation to separation.

In an official response by the Pontifical Commission for the Interpretation of the Canons of the Code of Canon Law under date of July 14, 1922, it was established that a wife maliciously deserted by her husband could not establish her own proper domicile unless a separation, either perpetual or for an indefinite period of time, had been obtained from an ecclesiastical judge.<sup>125</sup>

Malicious desertion,<sup>126</sup> therefore, reflects an instance wherein

<sup>124</sup> "*Uxor a viro legitime non separata, necessario retinet domicilium viri sui; dicitur legitime, nempe ad normam iuris, nec requiritur separatio facta iudicis auctoritate (quae non semper postulatur), dummodo uxor demonstrare valeat suam separationem; . . .*"—*Commentarium in Codicem Iuris Canonici* (8 vols. in 5, Taurinorum Augustae: Marietti, 1920-1930), II (*De Personis*, 1922), p. 20.

<sup>125</sup> "Utrum uxor, a viro malitiose deserta, possit, ad normam can. 93, §2, obtinere proprium ac distinctum domicilium. Resp. Negative, nisi a iudice ecclesiastico obtinuerit separationem perpetuam, aut ad tempus indefinitum."—*AAS*, XIV (1922), 526.

<sup>126</sup> The essential elements of malicious desertion are: (a) departure or dismissal of the spouse; (b) the intention of not fulfilling conjugal obliga-

the wife may be away from her husband licitly, i.e., without moral culpability on her part, and that even permanently, and yet the resulting separation is in law not such that intrinsically it could be characterized as a legitimate separation from which a determination of voluntary domicile might follow.

Vermeersch-Creusen recognize that the intervention of a juridical ecclesiastical authority is the controlling element of a legitimate separation when the effected separation is based upon a cause insufficient in itself to allow a legitimate separation to become effected on the initiative of private authority.<sup>127</sup> Separation consequent upon malicious desertion by the husband, while licit on the part of the wife, is not in and of itself a "legitimate" separation until juridical ecclesiastical authority has intervened and established the true sufficiency of the cause. In other words, truly malicious desertion merits in the common law to rank as a legitimate cause for a separation, but before the state of "legitimate" separation may be said to exist as deriving from this cause, ecclesiastical authority must examine the circumstances which attend the cause as alleged. The cause in itself (*per se*) is not sufficient; private authority cannot declare the resultant state "legitimate" before the law.

Michiels notes that previous to the year 1922 the common teaching was that a malicious desertion in and of itself constituted a cause for the establishing of a legitimate separation and therefore proved sufficient for the acquiring of a proper domicile distinct from that of the deserting husband.<sup>128</sup> The reason as-

tions; and (c) the absence of a just cause. Cf. S. R. Rota, *Separationis*, 17 mart. 1913, *coram* R.P.D. A. Perathoner, Ponente, Dec. XIX, n. 6—S. R. Rotae *Decisiones seu Sententiae*, V (1919), 219; S. R. Rota, *Separationis*, 6 dec. 1929, *coram* R.P.D. F. Morano, Ponente, Dec. LXIII, n. 4—S. R. Rotae *Decisiones seu Sententiae*, XXI (1937), 528.

<sup>127</sup> "Ut separatio uxoris legitima esse censeatur, opus est ut intercesserit sententia iudicis ecclesiastici permittentis separationem perpetuam vel temporariam, saltem extra casus in quibus ipsi cc. 1130–1131 legitimam pronuntiant uxoris separationem, etiam quae propria auctoritate sit facta. Quare, si vir uxorem deseruerit, haec quidem *licite* separatim vivit, non autem legitime, per se, sine iudicis sententia."—*Epitome Iuris Canonici* (3 vols., Vol. I, 6. ed., 1937; Vol. II, 5. ed., 1934; Vol. III, 5. ed., 1936; Mechliniae-Romae: H. Dessain), I, n. 212, ad 4.

<sup>128</sup> "Antea communiter docebatur desertionem malitiosam esse ex se

signed by Michiels for the necessity of the ecclesiastical pronouncement is to be found in canon 1960, whereby matrimonial causes between baptized persons are reserved to the judgment of the Church. He points out that a separation authorized by the civil authority without ecclesiastical approval would be *illegitimate* (*italics supplied*), and inept as a condition in consequence of which a distinct ecclesiastical domicile could be formed by the beneficiary of the civil decree or sentence of separation.

The writer submits that the phrase "*legitime non separata*" is not necessarily to be translated as "illegitimately separated," as Michiels seems to imply when he points to the example of a separation effected by civil authority. When such a circumstance intervenes in a case, then contempt for ecclesiastical authority is usually verified, and assuredly the action is illegitimate and unlawful. However, in the event that a husband deserts his wife, the latter may have foregone all action before public authority the while she continues to live apart from her husband licitly. But in that supposition she is constituted in the state contemplated in canon 93, §1, as "*legitime non separata*." Accordingly she is capable of establishing her own quasi-domicile, but lacks all capacity for establishing her own domicile as distinct from her husband's.

Ojetti (1862–1932) argued that an adulterous wife upon being expelled by her husband is, from the moment of the expulsion,

*legitimae separationis causam, ideoque ad proprium domicilium acquirendum sufficientem. Nunc vero statuitur uxorem malitiose desertam, etsi licite vivat a viro separata (quā causa separationis non est ipsi imputabilis), per se non haberi legitime, seu ad normam iuris, separatam, nisi interveniat iudicis ecclesiastici sententia; quod si ita sit ad normam can. 93, §2, logice concluditur talem uxorem non posse sibi acquirere domicilium proprium, nisi sententia iudicis pronuntiaverit separationem perpetuam aut saltem ad tempus indefinitum. Ratio cur in hoc casu, sicut in quacumque separationis causa judicialiter definienda, requiratur ecclesiastici iudicis sententia, est quia ex can 1960 'causae matrimoniales inter baptizatos jure proprio et exclusivo ad iudicem ecclesiasticum spectant.'*" Quapropter separatio a iudice civili pronuntiata habetur illegitima et ad domicilium ecclesiasticum distinctum permittendum inepta, nisi sane causarum separationis pronuntiatio ex explicita Ecclesiae concessione fuerit iudicio civili permissa vel ex legitima consuetudine tolerata."—*Principia Generalia De Personis In Ecclesia* (Lublin, Universitas Catholica, 1932), p. 137.

"legitimately" separated in the sense of canon 93, §2, so that she may immediately establish a separate voluntary domicile.<sup>129</sup> He based his argument on this that the necessary domicile of the wife results from the necessity of leading a life in common with her husband and of being subject to his authority. When this obligation and subjection have become neutralized, then the reason for the necessary domicile no longer operates.

But it may be answered that such a situation does not necessarily establish a status of "legitimate separation," since the same elements are verified in the case of a truly malicious desertion of the husband. It is to be recalled that in the case of a malicious desertion the deserter has the intention of terminating the common life, and thus no more actual subjection obtains in the case of malicious desertion than in the case of expulsion for adultery. Yet, it is certain that a malicious desertion does not immediately establish for the deserted wife the status of a "mulier legitime separata."

For other cases which may justify a "legitimate" separation of the spouses there does not exist any definite authoritative pronouncement such as has been given with reference to a malicious

<sup>129</sup> "A viro legitime non separata.—Nam tunc, quum abrumpi possit, etiam in perpetuum aliquando, vel saltem ad tempus, durante causa separationis, vitae communio, coniuges iam non cohabitant. At nota, dici hic uxorem a viro legitime non separatam. Quid autem haec important? Num innuitur ad hunc effectum habendum, necessarium semper esse interventum iudicis, an contra significatur, id faciendum quidem esse ex concessione a lege facta, non tamen necessario interveniente iudice? Aliis verbis, si uxorem, ex. gr., ob adulterium vir expulerit propria auctoritate, ut fieri posse patet ex can. 1129, §2, 1130, uxor adulter amittitne statim domicilium mariti? Et videtur affirmative respondendum, tum quia domicilium hoc necessarium resultat ex necessitate communis vitae ducendae, ut dictum est, cum ex eo, quod mulier subdita est viro eique subiicitur; ex quibus deducitur ipsam vere ibi constituisse centrum suae vitae et sedem suorum negotiorum. Porro separatione legitime instituta subiectio illa de facto abrumpitur, et domicilium mariti non potest amplius pro uxore (et vicissim) constituere centrum vitae et sedes negotiorum. Ad id non obtinet, quando mulier a viro malitiose deseritur; tunc enim necesse est, ut mulier, si velit, ob hanc rationem petat et obtineat sententiam separationis perpetuae seu ad tempus indefinitum, cui non aequivalet malitiosa desertio viri."—*Commentarium in Codicem Iuris Canonici* (4 vols., Romae: apud sedes Universitatis Gregoriana, 1927-1931), II (1928), 53-54.

desertion as a similar cause. The authors, however, in their commentaries on the canons that treat of the necessary domicile of the wife, undertake to show what constitutes a "legitimate" separation. The commentators in general are in agreement on this point, namely, that there must intervene a sentence of an ecclesiastical judge which permits a temporary or a perpetual separation, at least outside the cases, as the commentators claim, "in which canons 1130 and 1131 pronounce the separation of a wife 'legitimate,' even though the separation is made on private authority."<sup>130</sup>

According to Michiels there is common agreement among the authors that a permanent separation may be effected on private authority in consequence of adultery committed by one of the spouses, and automatically upon the exercise of the right of departure or expulsion there is constituted the status of "legitimate separation" such as will permit the establishment of a voluntary domicile. But his reasoning is more from the point of view of the requirements relative to domicile than with reference to separation, inasmuch as the community of life has legitimately been discontinued, so that no obligation of a return to it on the part of the culpable spouse any longer exists in the law. Therefore, so he concludes, not only the innocent but also the culpable spouse may have the intention of remaining perpetually in a place, by which statement he seems to imply the capacity for the establishing of a domicile.<sup>131</sup> The writer has already on a previous

<sup>130</sup> Cf. Vermeersch-Creusen, *Epitome Iuris Canonici*, I, n. 212; Wernz-Vidal (*Ius Canonicum*, II [3. ed., 1943], 15), who merely repeat the doctrine of Vermeersch-Creusen, and counsel recourse to the local ordinary. Cf. also Michiels, *op. cit.*, p. 135; Cappello, *De Matrimonio*, nn. 827-828; Coronata, *Institutiones Iuris Canonici* (5 vols., Vol. I-IV, 2. ed., 1939-1945; Vol. V, 1936, Taurini, Romae: Marietti), I (2. ed., 1939), n. 126 (hereafter cited *Institutiones*); Ojetti, *Commentarium in Codicem Iuris Canonici*, II, 53.

<sup>131</sup> "Nec minus certe verificatur, juxta unanimem Doctorum sententiam," [Michiels here cites Vermeersch-Creusen, Toso, Coronata, Cappello, Ojetti, and Costello] "si, manente vinculo matrimoniali, ad normam can. 1129, 1130, vitae communio fuerit legitime soluta propter adulterium ab alterutro conjugum commissum nec ab altero condonatum aut compensatum; in hoc casu enim 'conjugus innocens, sive iudicis sententia sive propria auctoritate legitime discesserit, nulla umquam obligatione tenetur conjugem adulterum rursus admittendi ad vitae consortium,' ideoque nihil obstat, quominus uxor non

page<sup>132</sup> indicated his non-acceptance of this doctrine when he considered Ojetti's like doctrine that favored the potential establishment of a domicile on the part of the culpable party when permanently expelled because of adultery. On the other hand, there is no settled uniform opinion among the authors regarding the consequent status that attaches to a separation undertaken on private authority for a cause which in the law suffices for a temporary separation only.<sup>133</sup>

However, the very questions in point are whether the departure on private authority as sanctioned in law for the cases of a perpetual and indefinitely protracted period of separation, and the absence of any reconciliation as the result of the continued cleavage of the community of life, attach the note of stability to the separation contemplated in the notion of a "legitimate" separation as reflected in the phrase "legitime separata." It is true that, once there has been established a legal status of legitimate separation, the conditions for the acquisition of a voluntary domicile may obviously be present. But the precise point is the "legitimacy" in law of the status resulting from a separation undertaken on private authority, even when the departure was sanctioned in law. Before the official response of the year 1922 was given, the authors had concluded that a malicious desertion resulted in a status of legitimate separation. The Pontifical Commission for the Interpretation of the Canons of the Code gave no reasons for its declaration that the sentence of an ecclesiastical judge was requisite before a separate voluntary domicile could be established, which was tantamount to saying that no one is "legitimately" separated in law in consequence of a malicious desertion until that cause for separation had been juridically examined by ecclesiastical authority.

In a case wherein adultery is the reason for separation the innocent spouse is said to be released from the obligation of community of life, inasmuch as through the exercise on private

modo innocens sed et culpabilis ideoque, a viro expulsa intentionem in alio loco perpetuo manendi foveat."—*Principia Generalia de Personis in Ecclesia*, pp. 135-136.

<sup>132</sup> Cf. *supra*, p. 82.

<sup>133</sup> Cf. Michiels, *op. cit.*, pp. 136-137.

authority of the right of departure or expulsion, such a spouse manifests an intention to discontinue the conjugal life so that the obligation of cohabitation is no longer binding. In law the act of malicious desertion likewise implies the same intention permanently to discontinue the common life, and consequently it could seem that the obligation of cohabitation incumbent on the deserted spouse should likewise no longer be binding. Yet, the act of malicious desertion, readily as capable of notoriety as the act of adultery, needs to be proved judicially before a status of "legitimate" separation exists, while adultery, according to the authors, may furnish the basis for a "legitimate" separation though the latter be undertaken solely on private authority.

It is not claimed by the writer that there is a parity between desertion and adultery as causes for the separation of consorts, for by reason of their very natures there does exist a fundamental difference between these two factors. But in relation to their possible ultimate effects there does seem to be such a similarity between these two factors that for the establishing of a status in law the same end seems attainable solely through the use of the same means. Hence a judicial confirmation of the cause, if it be adultery, seems requisite even as a similar confirmation is necessary when the cause is that of malicious desertion.

It is the general rule, it is true, that what is notorious no longer requires proof.<sup>134</sup> Now, an act of malicious desertion can very readily be a notorious act. Still the Official Interpretation has made no exceptions. Accordingly such a cause regardless of its notoriety, does not automatically establish the status connoted by the phrase "*legitime separata*," which would permit the deserted spouse to establish an independent voluntary domicile. Could it be that the Pontifical Commission for the Interpretation of the Canons of the Code, in its response in relation to the act of malicious desertion, indicated that any separation when undertaken on private authority, also when such a separation was undertaken licitly, does not in itself and apart from an ecclesiastical confirmation constitute a "legitimate" separation in the law? Furthermore, could it be that any separation when undertaken licitly on the sole initiative of private authority can at most result in a

<sup>134</sup> Cf. canon 1747, 1o.

status connoted by the phrase "*legitime non separata*," and will consequently permit the maliciously deserted wife no further option than that of establishing a voluntary quasi-domicile of her own? An affirmative seems indicated as the proper answer for both of the queries.

The writer proposes that the judicial pronouncement, though it simply confirms the separation which is legitimate *de facto* inasmuch as it was licitly instituted on private authority in full accordance with the provisions in the law, imparts to that separation the benefit of a public authoritative sanction. Although the matter does not thereby become a judicially closed issue (*res iudicata*)<sup>135</sup> yet the presumption of law thenceforth stands in favor of the one for whom the sentence or the decree was given. Previously to the confirmatory judicial pronouncement the innocent spouse could have been held to prove the legitimacy of the separation, even though the act of departure or of expulsion was fully justified in the law. With the making of the ecclesiastical pronouncement there attaches to the effected separation a note of legal stability, so much to be desired when matters of status are at issue. The question regarding the duty of the resumption of a community of life thenceforth is governed directly by the judicial decision; for its proper determination as an inoperative factor it no longer depends respectively on the cessation or on the continuance of the cause for which the separation was instituted. The separation, once a judicial pronouncement is made, becomes legitimate *de iure* and thus stands qualified with full recognition as a public act.

The Instruction of the Congregation of the Sacraments of August 15, 1936, has been specifically mentioned in connection with this question.<sup>136</sup> In this Instruction a wife is said to be separated *legitimately* from her husband either through a judicial sentence of a competent ecclesiastical tribunal, or even of a civil tribunal if recognized by the Holy See in virtue of concordat law, or finally as the result of a decree issued by the local ordinary.

<sup>135</sup> P.C.I., 8 apr. 1941: "An causae separationis coniugum recensendae sint inter causas nunquam transeuntes in rem iudicatam, de quibus in canonibus 1903 et 1989." Resp. "Affirmative."—*AAS*, XXXIII (1941), 173.

<sup>136</sup> Cf. *supra*, p. 78.

A separation undertaken on private authority is not set down by the Congregation of the Sacraments as a *legitimate* separation. Accordingly the question may be asked: Does the Instruction enumerate all the sources of a legitimate separation, so that a separation undertaken on private authority may not be considered in law as *legitimate* separation?

The purpose of the Instruction was to furnish norms of procedure to be observed by diocesan tribunals in the conducting of cases concerning an alleged nullity in marriages.<sup>137</sup> The specific clause regarding the legitimately separated wife is contained in the First Title of the Instruction, wherein there are set forth the norms which determine the competency of the forum as deriving from the consideration of domicile. The Instruction was issued by the Sacred Congregation of the Sacraments, not as by an agency duly authorized to make official interpretations of the Code of Canon Law, but as by an administrative authority whose regulations served the purpose of a more clearly indicated adaptation of the norms already in existence. Therefore, in the light of the purpose and origin of the Instruction, it does not seem that the Instruction alone can settle the question regarding the efficacy of private authority in the matter of establishing a legitimate separation.

It appears, however, that the Congregation of the Sacraments did intend to enumerate all the authoritative sources through which a proper sanction for a legitimate separation might ensue as a factor sufficient to establish a domicile, upon which consideration the competency of a tribunal might be based when the nullity of a marriage was to be considered. The sources of authorization are not enumerated after the manner of examples; rather, they are specifically named as the sources from which the sanction for a legitimate separation may issue. The Sacred Congregation of the

<sup>137</sup> The following is found in the introduction to the Instruction "*Provida Mater*" now under discussion: "In hisce regulis iudices ipsi et tribunalium administri praecipuos canones de processibus agentes accurate apteque dispositos reperient, necnon brevem facilemque eorundem explanationem, ex iurisprudencia praesertim erutam atque ex Normis S. R. Rotae, quo plenus ipsis iidem Codicis canones, quibus derogatum non est, sint perspecti, eosque expeditius singulis aptare possint matrimonialibus causis."—*AAS*, XXVIII (1936), 314.

Sacraments has not issued any correction or supplement which would indicate the intention was otherwise than is apparent on the record.<sup>138</sup>

At least one author has been influenced by the Instruction to change his opinion in regard to the sufficiency of private authority in the matter of establishing that type of separation which is requisite for giving the wife the necessary status to establish a domicile. Regatillo, when writing in the year 1941,<sup>139</sup> stated that a voluntary domicile could be acquired by a wife who was legitimately separated from her husband in consequence of a sentence or of a decree of perpetual or indefinite duration, or also by a wife who undertook the separation on her own private authority if the cause for the separation was adultery (citing canon 1130), but not by the wife who acted on her own private authority in view of any of the causes mentioned in canon 1131. His reason was the following: perpetual separation is permitted to the innocent spouse when the other spouse has committed adultery, but perpetual separation is not permitted for the causes listed in canon 1131, and consequently in connection with the latter there would be missing the note of perpetuity contemplated in the notion of domicile.

When he wrote in the year 1946, Regatillo in treating of the effects of a separation effected on private authority stated that this separation has merely moral effect for the purpose of quieting conscience, so that in those cases wherein a departure is permitted on private authority the innocent party acts *licitly*, and that the departure lacks value so far as juridical effects are concerned. He stated further that, although the innocent party on her own authority separates licitly from her husband for the cause of

<sup>138</sup> Cf. S. C. de Sacramentis, *Decretum*, 20 dec. 1940—AAS, XXXIII (1941), 363; S. C. de Sacramentis, *Decretum*, 3 maii 1946—AAS, XXXVIII (1946), 285. In both of these decrees the particular article being discussed was confirmed without change.

<sup>139</sup> "Domicilium voluntarium habere possunt: . . . (3) uxores a maritis legitime separatae (cc. 1129–1131) per sententiam vel decretum separationis perpetuae seu indefinitae; aut propria auctoritate ob adulterium (c. 1130), non auctoritate propria ob causas c. 1131; nam ob adulterium permittitur innocenti separatio perpetua; non ob alias causas . . ."—*Institutiones Iuris Canonici* (2 vols., Santanda: Sal Terrae, 1941–1942), I, 112.

adultery, even in perpetuity, she is not able to acquire her own domicile, but necessarily retains the domicile of her husband. His authority for this doctrine is the pronouncement of the Congregation of the Sacraments in its definition of a "legitimate separation" as given in the Instruction "*Provida Mater*."<sup>140</sup>

In treating ex professo of procedure in informal trials, and upon citing canons 1128–1132 and the Article of the Instruction here considered, Doheny states:

"By the term 'legitimate separation' is understood one that is granted by a decree of the Ordinary, by a judicial sentence of a competent ecclesiastical tribunal, or even of a civil tribunal where such judgment is recognized in virtue of a concordat of the Holy See."<sup>141</sup>

This he states in dealing with the determination of competency of the forum in the adjudication of informal or summary cases.

But in treating of the canonical procedure in separation cases in his article concerning the domicile of the legally separated wife he states:

"It is indeed regrettable that Article 6, §2, of the Instruction, *Provida*, seems to imply that the only two legitimate means of separation are by judicial sentence or by a decree of the Ordinary. Such is not the case. Canons 1129 and 1130 clearly grant to the innocent consort the right of perpetual separation *propria auctoritate*, at least when the crime of adultery is morally certain and either public or notorious. Similarly, Canon 1131, §1, allows the innocent consort the right of temporary separation as an exceptional means *et etiam propria auctoritate*,

<sup>140</sup> "Effectus separationis propria auctoritate factae—Haec habet effectum *mere morale*, in ordine ad quietem conscientiae. Scilicet in casibus supra indicatis coniux innocens *licite* discedit. At valore iuridico caret, nempe quoad effectus iuris. Sic quamvis uxor innocens ob adulterium mariti se separet licite in perpetuum ab eo *propria* [propria] *auctoritate* tamen nequit acquirere domicilium proprium; sed necessario retinet mariti domicilium. Separatio legitima, qua iuxta c. 93, §2, potest uxor acquirere domicilium proprium, definitur a C. Sacram. loc. cit. art. 6, §2 quae fit *per sententiam iudicis aut per Ordinarii decretum in perpetuum vel ad tempus indefinitum*."—*Ius Sacramentarium*, II, 398.

<sup>141</sup> *Canonical Procedure in Matrimonial Cases*, II, 147.



provided there is certainty as to the guilt of the other consort and there is danger in delay."

"It follows logically from the authoritative texts of canons 1130 and 1131, §1, that those innocent consorts who have separated *propria auctoritate*, from their guilty consorts in accordance with the laws of the Church are lawfully separated. Hence, they benefit from the special provisions of the law. Thus wives lawfully separated from their husbands, either permanently or for an indefinite period of time, may acquire their own domicile or quasi-domicile."<sup>142</sup>

In very similiar language the same author in his work treating of Formal Judicial Procedure remarks:

"A slight discrepancy appears between the text of Canon 1130 and Article 6, §2. The *Instruction* seems to imply that the only two legitimate means of separation are by judicial sentence or by a decree of the Ordinary; whereas Canon 1130 clearly states: 'Coniux innocens, sive iudicis sententia sive propria auctoritate legitime discesserit.' This clear provision of the Code is in no wise abrogated by Article 6, §2, and hence the innocent party still retains the right to separate legitimately on his or her own authority on account of the adultery of the other party."<sup>143</sup>

The definition of legitimate separation has inclined Bouscaren-Ellis to exclude the agency of private authority as a means of obtaining such a legitimate separation as would enable the wife to establish a domicile.

"What of a wife who leaves her husband because of adultery on his part? Since such separation is contemplated and allowed by law (c. 1130), some affirm that the woman is legally separated and acquires a domicile; but this has never been officially recognized, and we incline to the contrary opinion."<sup>144</sup>

The writer believes that a legitimate separation is to be dis-

<sup>142</sup> Doheny, *Canonical Procedure in Matrimonial Cases*, II, 649-650.

<sup>143</sup> *Canonical Procedure in Matrimonial Cases*, I, 24-25.

<sup>144</sup> Bouscaren-Ellis, *Canon Law, A Text and Commentary* (Milwaukee: The Bruce Publishing Company, 1946), 81-82.

tinguished from a legitimate departure. The former is based on a sufficient cause and at the same time on the instituting of the separation by the proper public authority; the latter, i.e., a legitimate departure, is based on a sufficient cause, on the innocence of the one departing, and on the instituting of the departure on private authority. An unlawful departure on private authority results from the fact that the cause for such departure was not an adequate one in itself, or that the requisite attending circumstances for the certification of the cause and of danger in delay were not verified. A legitimate departure, in the opinion of the writer, does not bestow a legal status which enables the wife to establish her own domicile.

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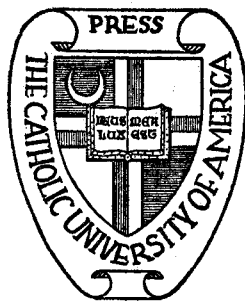
DOMICILE OF WIFE UNLAWFULLY  
SEPARATED FROM HER HUSBAND

A HISTORICAL SYNOPSIS AND CANONICAL  
COMMENTARY

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A DISSERTATION

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