

MARRIAGE LEGISLATION IN THE NEW CODE OF CANON LAW

BY

VERY REV. H. A. AYRINHAC, S.S., D.D., D.C.L.

President of St. Patrick's Seminary, Menlo Park, Cal.
Professor of Moral Theology, Pastoral Theology,
and Canon Law



NEW YORK, CINCINNATI, CHICAGO
BENZIGER BROTHERS

PRINTERS TO THE HOLY APOSTOLIC SEE

1919

ANDOVER-HARVARD
THEOLOGICAL LIBRARY
FEB 1 1919
HARVARD
DIVINITY SCHOOL

Libil Obstat. *H 45,916*

ARTHUR J. SCANLAN, S.T.D.,
Censor Librorum.

*716
Ayrinhac*

Imprimatur.

✝ JOHN CARDINAL FARLEY,
Archbishop of New York.

NEW YORK, September 23, 1918.

COPYRIGHT, 1918, BY BENSIGER BROTHERS

The law favors the privilege—that is, the liberty—of the convert. Thus, when it is doubtful whether or not the first marriage was valid, whether the conditions were fulfilled for the application of the Pauline Privilege, whether the convert has not given the other party legitimate cause for separation after baptism, the doubt is solved in favor of the convert. Again, if the validity of the marriage contracted in infidelity is impugned on the ground of want of consent, the testimony of the converted party is accepted as sufficient evidence. This is done to favor conversions, and, according to some, it is a proof that the Church could dissolve the marriage contracted in infidelity in case it would be valid. (De Smet, n. 196; Catholic Encyclopedia, Divorce.)

ARTICLE II

LIMITED DIVORCE, OR SEPARATION AS TO BED, BOARD, AND DWELLING-PLACE

1.° GENERAL PRINCIPLE

Can. 1128. *Conjuges servare debent vitae conjugalium communionem, nisi justa causa eos excuset.*

311. Married persons are bound to live together unless they have a just cause for separation.

1. Conjugal cohabitation implies community of dwelling-place, of board, of bed or bedchamber, at least habitually and as far as circumstances permit.

This is demanded by the mutual rights and duties of husband and wife and the very end of marriage. As the husband is the head of the family, the wife ought, as a rule, to follow him wherever he goes.

312. 2. Cohabitation, however, is not so essential that the bond of marriage can not exist without it or that separation may never become legitimate. Serious reasons will be required, for separation is not the normal condition, and it may lead to disorders; but occasions may arise when further cohabitation becomes unadvisable, or even unseemly and morally impossible. Cessation of married life without dissolution of marriage is then permitted. The Council of Trent maintained the discipline of the Church on this point against the attacks of Protestants. (*Sessio xxiv, c. 8; Esmein, vol. ii, p. 309.*)

313. 3. St. Paul speaks (1 Cor. vii, 5) of temporary cessation of marriage relations by mutual consent from religious motives. This belongs to the internal forum, and the law does not deal with such cases. Nor does it refer to complete and permanent separation with a view to a more perfect life; that is, the reception of Orders or entrance in religion. This also is done by mutual consent, and implies no violation of any one's rights. It is permissible as long as it does not lead to the violation of the moral law. In such cases the Church demands that when one party receives Orders or embraces the religious life the other party should also enter a religious community or at least take a vow of chastity in the world.

2.° PRINCIPAL CAUSE OF SEPARATION—ADULTERY

Can. 1129. § 1. Propter conjugis adulterium, alter conjux, manente vinculo, jus habet solvendi, etiam in perpetuum, vitae communionem, nisi in crimen consenserit, aut eidem causam dederit, vel illud expresse aut tacite condonaverit, vel ipse quoque idem crimen commiserit.

§ 2. Tacita condonatio habetur, si conjux innocens, postquam de crimine adulterii certior factus est, cum altero conjuge sponte, maritali affectu, conversatus fuerit; praesumitur vero, nisi sex intra menses conjugem adulterum expulerit vel dereliquerit, aut legitimam accusationem fecerit.

314. § 1. Adultery on the part of one of the spouses, without breaking the bond, gives to the other spouse cause for separation, even forever, unless he has himself consented to the crime, or been responsible for it, or has condoned it expressly or tacitly, or committed the same crime.

§ 2. There is tacit condonation when the innocent spouse, knowing the adultery, has freely continued to treat the guilty one with marital affection; condonation is presumed when the adulterous party has not, within six months, been sent away, or left, or duly denounced.

1. Adultery, being directly contrary to conjugal fidelity, is, of its nature, a cause for perpetual separation and the only one really special and intrinsic to marriage. (Gasparri, n. 1111.) Hence, it is the only one mentioned in the Gospel. (Matt. v, 19.) In the first centuries of the Church, there was

often a command, and the duty was imposed upon the innocent party, to separate from the party guilty of adultery. Even at present the dismissal of the guilty party might become a duty, if continued living with an adulterous husband and wife would seem to be an approval of the crime. Ordinarily no such obligation exists.

315. 2. To be a cause for separation, adultery must be formal, complete, morally certain; not attributable to the other party, partially or as accomplice, directly or indirectly; not compensated, as it were, by the adultery of the other party; not condoned tacitly or presumably. All sexual intercourse outside of married life is commonly assimilated to adultery, even the unnatural sin of sodomy.

3. The continuation of married life after acquiring the certainty that the other party has committed adultery, if it is really free, implies condonation of the crime; and it is specified here that after six months condonation is presumed.

3.° TAKING BACK THE GUILTY PARTY

Can. 1130. *Conjux innocens, sive iudicis sententia sive propria auctoritate legitime discesserit, nulla unquam obligatione tenetur conjugem adulterum rursus admittendi ad vitæ consortium; potest autem eundem admittere aut revocare, nisi ex ipsius consensu ille statum matrimonio contrarium susceperit.*

316. After a legitimate separation, whether effected by private authority or by a sentence of the judge, the innocent spouse is never

TAKING BACK THE GUILTY PARTY 307

obliged to admit again to married life the party guilty of adultery; he may, however, admit or recall her, unless, with the consent of the innocent spouse, the guilty one has embraced a state incompatible with matrimony.

1. Adultery is of itself a cause for perpetual separation; the innocent party has no further obligations to the guilty one, at least no obligations of justice. At times, charity might demand that after amendment the contrite party be taken back; perhaps in some exceptional cases reasons of common good might impose the same obligation.

317. 2. Canonists generally taught that if the innocent party would become adulterous in turn he would lose his privileges and be bound to take back the other one when the separation had been effected by private authority. If there had been an intervention of the judge, a new decision would be required to render cohabitation obligatory again. This canon states absolutely that the innocent party is free forever. Still, the principle of compensation is admitted in canon 1129, § 1.

3. The innocent spouse retains the right to demand the return of the guilty one unless he has given up his right by granting permission to the other party to enter a state incompatible with matrimony, and that permission has been taken advantage of. This last condition is now certainly necessary. If the innocent spouse refuses reconciliation, if within two years he does not invite the other one to return, if he receives Orders or embraces the religious life

permanently, he is supposed to give up his rights and leave the other party free to assume obligations which would render restoration of conjugal relations impossible. (Gasparri, n. 1114.)

4.° OTHER CAUSES FOR SEPARATION

Can. 1131. § 1. Si alter conjux sectae acatholicae nomen dederit; si prolem acatholice educaverit; si vitam crimosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero conjuge totidem legitimaе causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora.

§ 2. In omnibus his casibus, causa separationis cessante, vitae consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumve tempus, conjux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore.

318. § 1. If one of the married parties becomes affiliated with a non-Catholic sect; if he gives to the children an education which is not Catholic; if he leads a criminal and disgraceful life; if he is a grave danger to the other party's soul or body; if his cruelty renders common life too hard; such and similar causes will give the other spouse the right to withdraw by appealing to the Ordinary of the place; or even of his own authority if they are proved with certainty and there is danger in delay.

§ 2. In all these cases, when the cause for separation ceases, the married life ought to be resumed; but if the separation has been pronounced by the Ordinary for a definite or indefinite period of time, that obligation is not binding on the innocent party until it has been so declared by the judge or the time expires.

319. 1. There are other causes for separation besides adultery. The principal ones are mentioned here, by way of example, but not of complete enumeration: (a) Heresy, so often called spiritual adultery, is naturally the first one. To it is assimilated apostasy or schism. The present law demands more than a single act even of public heresy; it is joining a non-Catholic sect that constitutes the cause for separation. Apostasy, indifferentism, affiliation to a condemned society are not mentioned; nor heresy or infidelity anterior to the marriage. (b) It is not every neglect of duty to the children, but giving them an education which is not Catholic, that the law specifies as a cause for separation. (c) Great crimes were generally not considered by canonists as a sufficient cause, but they are mentioned explicitly here. (Lehmkuhl; Catholic Encyclopedia, Divorce, p. 64.) (d) Danger to soul or body must be a really grave one, which can not be avoided otherwise than by separation. Such would be "temptation to mortal sin, to the denial of the Faith, to the abuse of the marriage rights . . . ; danger to the body means any great danger to life or health, as well as other intolerable conditions, plotting against one's life,

well-grounded fear of dangerous contagion, insanity, serious and constant quarreling," etc. (Gasparri, n. 1117.)

320. 2. In all those and similar cases recourse must be had to the Ordinary that he may pronounce the separation, unless the cause be proved with certainty and there be danger in delay. Heresy, even when clearly proved, is no exception to this rule, as was held by some canonists. (The Third Plenary Council of Baltimore, n. 126, forbids having recourse to the civil courts without consulting the Ordinary. A regular trial is not required, but only the Bishop's permission, where such custom exists.—Tanquerey, *De Matrimonio*, n. 937.)

Separation in the cases now under consideration is only temporary and lasts as long as the cause lasts. It may become perpetual *de facto* if the cause lasts as long as the life of the parties. May it be made perpetual antecedently also by reason of circumstances, so that the innocent party would be free, *v.g.*, to enter a Religious Order? Canonists answered that it might, in several cases, under certain conditions. The present canon does not mention any such case. In this, separation for one of the causes mentioned here differs from separation because of adultery; it differs also in another respect, that ordinarily it ought not to be effected by private authority, whilst in case of adultery the intervention of the Ordinary is not explicitly required.

5.° EDUCATION OF CHILDREN

Can. 1132. *Instituta separatione, filii educandi sunt penes conjugem innocentem, et si alter conjugum sit acatholicus, penes conjugem catholicum, nisi in utroque casu Ordinarius pro ipsorum filiorum bono, salva semper eorundem catholica educatione, aliud decreverit.*

321. After the separation, the education of the children belongs to the innocent spouse; if one of the parties is a non-Catholic, it belongs to the Catholic; unless in either case, for the good of the children and their Catholic education being duly provided for, the Ordinary decides otherwise.

322. 1. The innocent spouse ought regularly to be favored, unless he be a non-Catholic. In the latter case the Catholic party has the preference because of his faith and also because the education of the children will, as a rule, be safer in his hands. The good of the children is what should be considered primarily and, first of all, the safety of their faith. The judge may give the children to the non-Catholic parent if he deems it to their advantage, but he has always to see that they receive a good Catholic education.

323. 2. In the preceding canons it is always question of the Ordinary, for matrimonial causes among Christians are reserved exclusively to the ecclesiastical authority. From a moral standpoint it may, however, be permitted, at times, for a Catholic to

apply to the civil court for corporal separation under certain conditions. (De Smet, n. 211.)

3. It is question not of the judge, but of the Ordinary, which implies that those matters are not necessarily decided in court after a regular trial; it may be lawful, for serious reasons, or where the custom exists, to proceed extra-judicially and be satisfied with an informal decision of the Ordinary.