The Separation of the Spouses

cursory 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. 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. That those who belong to an atheist 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.

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

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63 Wernz-Vidal, Ist Catonicum, V, n. 645.
65 P.C.I., 30 Iul. 1934, ad 1: An ad normam Codicis Iuris canonici, qui sectae atheisticæ adscripti sunt vel fuerunt, habendi sint quoad omnes iuris effectus etiam in ordine ad sacram ordinationem et matrimonium ad eiusmodem qui sectae acatholicae adhaerent vel adhaesurunt. 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.66

The criminal life or ignominious conduct proposed as a cause for a temporary separation must connote a habitual state.67 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.68

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.69

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66 Doheny, op. cit., 11, 632-633.
67 Cappello, De Matrimonio, n. 828.
68 De Smet, De Sponsalibus et Matrimonio, n. 257; Balerini-Palmieri, Opus Theologicum Morale, VI, 509.
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.\textsuperscript{71}

That the Sacred Roman Rota continues to follow the wise counsel of Lega seems evident also from more recent cases. Frequency 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.\textsuperscript{72} 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" (\textit{odium capitale}) existed on the part of the wife. The decision, while recognizing that the wife had used opprobrious language towards


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.\textsuperscript{73} 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.\textsuperscript{74} 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

\textsuperscript{73} S. R. Rota, \textit{Separationis}, 6 aug. 1930, \textit{coram} R.P.D. Andrea Juliien, Ponente, Dec. XLVIII, n. 2: "Veniam quamvis cohabitation non sit de matrimonii essentia, separatio tamen tori, mensae et habitations, etiam temporaria, est res gravis, utpote publica, obligationi naturali contraria, ac periculis plena pro coniugibus, spectantem de continentia servanda; quapropter separationis causa, ut sit legitima, debet esse proportionata, id est continere periculum sive animarum sive corporis ut grave, ut cedat obligatio illa, qua coniuges servare vitae coniugales communem inure tenentur."—\textit{S. R. Rotae Decisiones seu Sententiae}, XXII (1938), 524.

\textsuperscript{74} Weruz, \textit{Ius Decretalium} (3 ed., 6 vols. in 10, Prati, 1913–1915), IV, n. 713; Schmaizgruber, \textit{Ius Ecclesiasticum Universum}, Lib. IV, tit. XIX, nn. 141–145; Gasparrini, \textit{De Matrimonio} (3 ed., 2 vols., Parisis, 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 impecunious hatred;\textsuperscript{16} malicious desertion, done without justification but at the same time with the intention of not returning;\textsuperscript{17} the persistent and constant practice of onanism and other irreligious and immoral acts on the part of one of the parties.\textsuperscript{18}

**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 permanent 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 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.\textsuperscript{19} 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.\textsuperscript{20}

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,\textsuperscript{21}

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\textsuperscript{19} Canon 1960.

\textsuperscript{20} Canon 1016.

\textsuperscript{21} 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, reals: "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. A scornful 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. 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, or the parties must appear before the civil judge with the express permission of the Church.

das Verfahren bezüglich der Trennung der Ehre von Tisch und Bett den staatlichen Gerichten zustehet—AAS, XXVI (1934), 277.

82 Canons 1130; 1131, §1.

83 Coniux innocens, sive iudicis sententia sive propria auctoritate legitime diessert, nulla unquam obligatione tenetur coniugis adulteri nolens rursus ad vitae consortium: . . .


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. 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.

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. 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.


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

87 Wernz-Vidal, Ius Canonicum, V, n. 642.
As long as such an ecclesiastical sanction is lacking, the alleged adultery 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.88

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 lictly 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.89

88 "At quaeritur num possit, si adulterium est certum, sed occultum. Communion et probabilito facta ut movet, saltem pro foro conscientiae, contra S. Thomam in 4, dist. 35, q. 1, a. 3, alias quo, quia causa tribuaus ius divortii indubia est, ac proinde coniux innocens discedere prohibetur in hoc causae tantum lege caritatis ad evitandum scandalum, aut diffamationem coniugis culpabiles: sed lex caritatis non obligat cum magnis incommendis, quod hic in casibus numquam non aderit. Diximus saltem in foro conscientiae, quia in foro externo ex causa adulterii nec notorii nec legitimi probati coniugis dissolvi conagem recipere a iudice compeellendus est, ne mali coniugibus praebatur ansi innocentem compartem dimissione vel recessu iniuste vexantur."—Caspari, De Matrimonio, II, n. 1175; Wernz-Vidal, Ius Canonicum, V, n. 64.

89 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.90 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.91

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, it has left the determination of the degree of certainty to those who interpret the
law, the Code specifically does permit a temporary departure on private authority then only when the cause is evident. 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.

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, 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. 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. 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.

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 official is, if he is to use the administrative process, requires a

92 "... si de eis certo constet ..."—canon 1131, §1.
93 "... Periculum autem in mors esse censetur si sine gravi animae, corporis aut bonorum temporali sui danno recurri non possit ad Ordinarioc loci et eius sententia expectari, quia, e.g., aucta furiosia subito evasit; quia morbus contagious etiam vi legis civilis segregationem statim requirit; si rixae et odi subito proruperint; si coniux contigum armata manu minutus sit etc. etc."—De Sacramenti, III, p. 925.
94 P.C.I., 25 iun. 1922—AAS, XXIV (1932), 284; Doheny, Canonical Procedure in Matrimonial Cases, II, 642.
95 Doheny, op. cit., II, 642-643.
96 Canon 1667; 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.87

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.88

The question of private authority in relation to the separation of spouses has been the subject of rather extensive canonical commentary.89 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.90 In the first of these letters, "Porro,"91 Pope

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87 Doheny, op. cit., II, 644.
88 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.—Reiffenstuel, Ius Canonicum Universum, Lib. IV, tit. XIX, nn. 14, 15.
90 Cf. supra, pp.
91 "Porro de comite Pontini, qui filiam B. de sancto Valerico uxorem suam absque iudicio ecclesiae dirixit propter ea, quia eam cognatam suisse uxorius defunctae proposit, haece prudenter tua cognoscat, quod, si etiam parentela esset publica et notoria, absque iudicio ecclesiae abs separari non potuit quare ipsum ad eam recipiendam, quae petit restitutionem ipsius, districte completas. . . ."—c. 3, X, de divorciis, IV, 19.
92 " . . . respondimus, quod, si nosterium est, mulierem ipsam adulterium commississe, ad eam recipiendam praefatus vir cogi non debet, nisi constaret ipsum cum alia adulterium commississe."—c. 4, X, de diversiis, IV, 19.
Domicile of Wife Unlawfully Separated from Her Husband

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.

In replying to these arguments, Schmalzgruereb 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 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.

Schmalzgruereb 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,

and he permitted such a departure at least in the forum of conscience and provided that scandal was not given. 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 cuties. 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, Schmalzgruereb 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.

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

104 "... ex quorum sententia, ut coniux innocens ab adultero possit diverserere, necessarium est judicium ecclesiae. Fundatur (1) textu c. porro (c. 3, X, de divorciis, IV, 19) ubi diserte negatur coniugum separationem absque iudicio ecclesiae fieri posse, etiam cum parentela, sive consanguinitatis publica et notoria est. (2) Can. saeculares (c. I, C. XXXIII, q. 2) ubi excommunicari jubentur viri, qui uxores suas sine iudicio ecclesiae dimittunt. (3) Quia sic recedentes sibi ius dicunt in propria causa contra 1, unicus, C. ne quis in sua causa etc. (C.351). (4) Divortium est poena nocentis, quam ius ipso facto non imponit, sed iudicium remittit imponentem. (5) Matrimonium est ecclesiae authoritate celebratum; igitur authoritate ecclesiae et non ipsorum coniugum dissolvit debit."—Schmalzgruereb, op. cit., Lib. IV, tit. XIX, n. 109.

105 Ibid., n. 110.

106 Ibid., n. 111.

107 Ibid., n. 112.

108 "Quod si vero adulterium alterius publice occultum sit, sed innocenti privatim certo cognitum, maior est controversia ... sed communem etiam hoc casu permittit innocent ut propria autoritate possit recedere, saltem pro foro conscientiae et secluso scandal. 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 servat."—op. cit., loc. cit.

109 "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 privat solas possessione, sive usu communis thor, et commodis obsequi coniugalis, per secundam vero deicitur ipsa proprietate, quod cum multis maioris sit praedicit, merito ad separationem hanc decernendam exigitur iudicium et autoritas ecclesiae."—Ibid., n. 114.
The Separation of the Spouses

The Code today speaks of a legitimate separation, of a legitimate accusation, of a legitimate departure and of legitimate causes. These phrases seem to imply something more than the simple consideration of licitness in an act of separation or departure. The Instruction 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, considered an ecclesiastical juridical sentence or decree

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

116 De Matrimonii Sacrameno, Lib. X, disp. XII, nn. 12, 25.

117 Cf. canon 93, §§1, 2.

118 Cf. canon 1130.

119 Cf. canon 1131, §1.


121 Sartori apud Enchridios canonicum (a. 1935 pag. 24 ad can. 93) addit sequentem rationem: ‘qua non est legitime (idei per iudicem ecclesiasticum) a vtero separata, etsi legitime discedisset protipa tantum auctoritate.’ —Cf. Torre, Instructio servanda a tribunali diocesano in pertractandis causis de nullitate matrimoniorum a Sacra Congregatione de Disciplina Sacramentorum edita (Neapoli: M. D’Auria, 1937), p. 12.

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. Schmalzgruber 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.

In reply to the final argument against the adequacy of private authority in relation to a separation for the cause of adultery, Schmalzgruber seemed to concede that for the external forum the authority of the Church was requisite. 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 and Sanchez upheld the licitness of a separa-
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 lícit, but void of juridical effect.122

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 infantis egressus potest quasi-domicilium proprium obtinere; item uxor a viro legitime non separata, legitime autem separata etiam domicilio...."

"Art. 6—Sec. 2. Uxor, a viro perpetuo aut ad tempus indefinitum separata legitime, i.e., per sententiam iudicialem competentis tribunalis ecclesiastici, vel etiam civilis a S. Sede, vi concordati, recognitam, aut per Ordinarii decretum, non sequitur domicilium vii, ideoque conveniri debet vel coram Ordinario loci in quo nuptiae initia sunt, vel coram Ordinario sui domicili vel quasi-domicili."

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

122 Ius Sacramentarium, II, n. 588.
123 AAS, XXVIII (1936), 313-361, at p. 316.

The separation of the spouses

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 "legitime" 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.124

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 "legitime" 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.125

Malicious desertion,126 therefore, reflects an instance wherein

124 "Uxor a viro legitime non separata, necessario retinet domicilium viri sui; dicetur legitime, nempe ad normam iuris, nec requiratur separatio facta iudicis auctoritate (quae non semper postulatur), dummodo uxor demonstrare valeat suam separationem; . . . "—Commentarium in Codicem Iuris Canonicorum (8 vols. in 5, Taurinorum Augustae: Marietti, 1920-1930), II (De Personis, 1922), p. 20.
125 "Ursum uxor, a viro malitioso deserta, posit, ad normam can. 93, §2, obtinere proprium ac distinctum domicilium. Resp. Negative, nisi a iudice ecclesiastico obinuerit separationem perpetuam, aut ad tempus indefinitum."—AAS, XIV (1922), 536.
126 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.

Vermeyers-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. 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.

Michels 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.\(^{128}\) The reason actions; 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. Rota Decisiones seu Sententiae, V (1919), 219; S. R. Rota, Separationis, 6 dec. 1929, coram R.P.D. F. Morano, Ponente, Dec. LXI, n. 4—S. R. Rota Decisiones seu Sententiae, XXI (1937), 528.\(^{127}\) "Ut separatio uxorii legitima esse censeatur, opus est ut intercesserit sententia iudicis ecclesiasticorum pertinentis separationem perpetuam vel temporariam, saltem extra casus in quibus ipsi cc. 1130-1131 legitima pronuntiant uxorii separationem, etiam quae propria auctoritate sit facta. Quare, si uxorii deseruerit, haec quidem licite separatim vivit, non autem legitime, per se, sine iudicis sententia.―Epitome Iuris Canonicorum (3 vols., Vol. I, 6, ed., 1937; Vol. II, 5, ed., 1934; Vol. III, 5, ed. 1936; Mechliniae-Romeae: H. Dessain.), I, n. 212, ad 4.

\(^{128}\) "Antea communiter docebatur desertionem malitiosam esse ex se signed by Michels 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 Michels 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, legitima separationis causam, idque ad proprium domicilium acquirendum sufficientem. Nunc vero statutum uxorii malitiosa deserunt, etsi licite vivat a viro separata (quia causa separationis non est ipsa imputabilis), per se non habet legitime, seu ad normam iuris, separatam, nisi interveniat iudicis ecclesiastici sententia; quod si sit ad normam can. 93, §2, logice concluditur talem uxoriam 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 definita, requiritur ecclesiasticus iudicis sententia, est quia ex can 1960 "causae matrimoniale inter baptismatos iure proprio et exclusivo ad iudicem ecclesiasticum spectat." Quapropter separatio a iudice civilis pronuntiata habetur illegitima et ad domicilium ecclesiasticum distinctum permittendum inepta, nisi sane causarum separationis praonuntiato ex explicata Ecclesie concessione tuerit iudicio civilis permissa vel ex legitima consuetudine tolerata."—Principia Generalia De Personis in Ecclesia (Lublin, Universitas Cathlica, 1932), p. 137.
The Separation of the Spouses

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." 109

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. 111 The writer has already on a previous


111 "Nec minus certa verificatur, iuxta unanimum Doctorum sententiam," [Michiels here cites Vermeersch-Creusen, Toson, Coronata, Cappello, Ojetti, and Costello] "si, manente vinculo matrimoniali, ad normam can. 1129, 1130, vitae comumuo fuerit legitime soluta proper adulterum ab alteruro conjuce commissum nec ab altero cordonatum aut compensatum; in hoc casu enim 'conjuex innocens, sive judicis sententia sive propria auctoritate legitime discesserit, nulla unquam obligatione tenetur conjugem adulterum rursus admitteri ad vitae consortium,' ideoque nihil obstat, quominus uxor non
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. 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

modo innocens sed et culpabilis idemque a viro expulsa intentionem in alio loco perpetuo manendi moveat.”—Principia Generalia de Personis in Ecclesia, pp. 135–136.

133 Cf. supra, p. 82.
135 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) 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. 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.

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139 Cf. supra, p. 78.

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Sacraments has not issued any correction or supplement which would indicate the intention was otherwise than is apparent on the record.\textsuperscript{138}

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,\textsuperscript{139} 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 \textit{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 \textit{licitly} from her husband for the cause of 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 "\textit{Provida Mater}".\textsuperscript{140}

In treating ex professo of procedure in informal trials, and upon citing canons 1129–1132 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."\textsuperscript{141}

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, \textit{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 \textit{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 \textit{et etiam propria auctoritate},

\textsuperscript{138} Cf. S. C. de Sacramentis, \textit{Decretum}, 20 dec. 1940—\textit{AAS}, XXXIII (1941), 363; S. C. de Sacramentis, \textit{Decretum}, 3 maii 1946—\textit{AAS}, XXXVIII (1946), 285. In both of these decrees the particular article being discussed was confirmed without change.

\textsuperscript{139} "\textit{Domicilium voluntarum habere possunt: . . . (3) uxores maritis legite separatae (cc. 1129-1131) per sententiam vel decretum separationis perpeteneo seu indefinittae; aut propria auctoritate ob adulterium (c. 1130), non auctoritate propria ob causas c. 1131; nam ob adulterium permititur innoventi separatio perpetu; non ob alias causas . . .}"—\textit{Institutiones Iuris Canonici} (2 vols., Santanda: Sal Terrae, 1941-1942), I, 112.

\textsuperscript{140} "Effectus separationis propria auctoritate factae—Haec habet effectum \textit{mere nonalem}, in ordine ad quitem conscientiae. Selicet in casibus supra indicatis coniux innocens licite discidet. At valore iuridico caret, nempe quoad effectus iuris. Sic quamvis uxor innocens ob adulterium mariti se separet licite in perpetuum & ob \textit{propria} \textit{auctoritate} tamen nequit acquirere domicilium propium; sed necessario retinet mariti domicilium. Separatio legita, qua iuxta c. 93, §2, posset uxor acquirere domicilium propium, definitur a C. Sacram. loc. cit. art. 6, §2 quae fit \textit{per sententium iudicat aut per Ordinariorum decreton in perpetuum vol ad tempus indefinitum.}"—\textit{Ius Sacramentarium}, II, 398.

\textsuperscript{141} 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 propría 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.”

In very similar 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 inquisitio sive propría auctoritate legitime discerserit.’ 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.”

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.”

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

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142 Doheny, Canonical Procedure in Matrimonial Cases, II, 649-650.
143 Canonical Procedure in Matrimonial Cases, I, 24-25.
144 Bouscaren-Ellis, Canon Law, A Text and Commentary (Milwaukee: The Bruce Publishing Company, 1946), 81-82.
DOMICILE OF WIFE UNLAWFULLY SEPARATED FROM HER HUSBAND

A HISTORICAL SYNOPSIS AND CANONICAL COMMENTARY

BY

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# Table of Contents

<table>
<thead>
<tr>
<th>Introduction</th>
<th>xi</th>
</tr>
</thead>
</table>

**A Historical Synopsis**

**Chapter I**

<table>
<thead>
<tr>
<th>Roman Law</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article A. Domicile in Roman Law</td>
<td>3</td>
</tr>
<tr>
<td>Section 1. Nature of Domicile in Roman Law</td>
<td>3</td>
</tr>
<tr>
<td>Section 2. Necessary Domicile in Roman Law</td>
<td>4</td>
</tr>
<tr>
<td>Article B. Divorce in Roman Law</td>
<td>6</td>
</tr>
</tbody>
</table>

**Chapter II**

<table>
<thead>
<tr>
<th>Divorce in Canon Law</th>
<th>9</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article A. &quot;Divortium Perfectum&quot;</td>
<td>9</td>
</tr>
<tr>
<td>Article B. &quot;Divortium Imperfectum&quot;</td>
<td>11</td>
</tr>
</tbody>
</table>

**Chapter III**

<table>
<thead>
<tr>
<th>Domicile as a Determinant of Ecclesiastical Juridical Competency Till the Council of Trent</th>
<th>18</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article A. From the Beginning to the &quot;Decree of Gratian&quot;</td>
<td>18</td>
</tr>
<tr>
<td>Article B. From the &quot;Decree of Gratian&quot; to the Council of Trent</td>
<td>21</td>
</tr>
<tr>
<td>Section 1. Civil Jurists of Bologna</td>
<td>21</td>
</tr>
<tr>
<td>Section 2. Decretals of Pope Gregory IX</td>
<td>22</td>
</tr>
<tr>
<td>Section 3. Glossators and Commentators on the Decretals</td>
<td>23</td>
</tr>
<tr>
<td>Section 4. Legal Domicile of the Wife in Canon Law</td>
<td>25</td>
</tr>
</tbody>
</table>

**Chapter IV**

<table>
<thead>
<tr>
<th>Domicile as a Juridical Factor From the Council of Trent to the Enactment of the Code of Canon Law</th>
<th>29</th>
</tr>
</thead>
</table>
ARTICLE A. LEGAL DOMICILE OF THE WIFE
Section 1. Nature of This Legal Domicile
Section 2. Determination of the Wife's Proper Forum
ARTICLE B. QUASI-DOMICILE OF THE WIFE
CANONICAL COMMENTARY
CHAPTER V
THE SEPARATION OF THE SPOUSES
ARTICLE A. PRELIMINARY NOTIONS
Section 1. The Unity and Indissolubility of the Marriage Contract Confirmed by the Church
Section 2. Community of the Marital Life
(a) The Nature of This Community of Life
(b) The Obligations to Preserve This Community of Life
ARTICLE B. THE DEFINITION AND DIVISIONS OF IMPERFECT DIVORCE
Section 1. The Definition of Imperfect Divorce
Section 2. The Divisions of Imperfect Divorce
ARTICLE C. UNLAWFUL SEPARATION IN CONSEQUENCE OF A DEFICIENT CAUSE
Section 1. Conditions Necessary for a Separation Because of Adultery
(a) Positive Conditions
1. The Adultery Must Be Morally Certain
2. The Adulterous Act Must Be Complete and Consummated
3. The Adultery Must Be a Formal Sin
(b) Negative Conditions
1. The Partner in Marriage Must Not Have Given Any Approval for the Crime
2. The Partner in Marriage Must Not Have Provoked the Crime
3. The Partner in Marriage Must Not Have Condoned the Crime
4. The Partner in Marriage Must Not have Neutralized the Effect of the Crime

ARTICLE D. UNLAWFUL SEPARATION FOR LACK OF AN ADEQUATE AUTHORIZATION
Section 1. Permanent Separation
Section 2. Temporary Separation
Section 3. Separation by Private Authority
ARTICLE E. CONCEPT OF THE EXPRESSION "LEGITE NON SEPARATA"

CHAPTER VI
THE LEGAL DOMICILE OF THE WIFE AS A JURIDICAL FACTOR FROM THE ENACTMENT OF THE CODE OF CANON LAW TO THE PRESENT DAY
ARTICLE A. THE CANONICAL LEGAL DOMICILE
Section 1. The Nature, Acquisition, and Loss of Legal Domicile
Section 2. The Legal Domicile of the Wife
ARTICLE B. THE GENERAL JURIDICAL EFFECTS OF THE WIFE'S LEGAL DOMICILE
Section 1. In Relation to the General Norms of the Code
Section 2. In Relation to the Reception of the Sacraments
Section 3. In Relation to Ecclesiastical Burial
Section 4. In Relation to the Competent Forum
Section 5. In Relation to Delicts and Penalties
ARTICLE C. THE LEGAL DOMICILE OF THE WIFE AS A JURIDICAL FACTOR IN THE DETERMINATION OF JUDICIAL COMPETENCE IN MATRIMONIAL CASES
Section 1. Malicious Desertion by the Husband and Its Effect on the Legal Domicile of the Wife
Section 2. A Decision of the Supreme Tribunal of the Apostolic Signatura
Section 3. The Competent Forum When Only One of the Parties is a Catholic
Section 4. A Summary of Possible Cases