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THE CANONICAL PROCEDURE IN SEPARATION CASES

A HISTORICAL SYNOPSIS AND A COMMENTARY

BY

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A DISSERTATION

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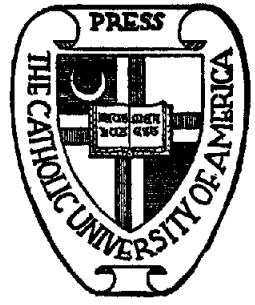

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FOREWORD

IN these words: *"Coniuges servare debent vitae coniugalis communicationem, nisi iusta causa eos excuset,"* [1] the Code of Canon Law adverts to the obligation of the married partners to live together in a common life, but at the same time signalizes the realization that because of human weakness they may at times, unfortunately, find this impossible. In the latter instance, the provision is made for a separation from this community of life, with the marriage bond, nevertheless, remaining intact.

The purpose of this dissertation, then, is to present a historical synopsis and canonical commentary of the ecclesiastical law relative to the procedural norms to be observed in these cases. The type of separation in question is what is known, not as *"separatio a tora et mensa,"* but as, *"quoad cohabitationem."* The former is more of a private matter and is often settled in the forum of conscience, but the latter affects the public good because of the interruption of family life and especially because of the impossibility relative to the fulfilling of the primary end of marriage as resulting from this disruption of the common life. Consequently, the public authority of the Church must be invoked, and this is accomplished through its procedural law.

Since the ascertainment of the proper processual regulations for these cases is the topic of this work, reference to the nature, causes and doctrine of canonical separation as such is for the most part omitted. Such reference occurs only where it serves to integrate the discussion. The treatment given here, therefore, is concerned fundamentally with the judicial and administrative processes which are proper to these suits. The inclusion of the concluding chapter, which treats of canonical separation and civil action, although not an integral part of the procedure for these cases, was thought advisable because of the intimate connection of this problem with every decree of ecclesiastical separation.

The writer takes this opportunity to express his gratitude to His

[1] Canon 1128.

By way of summary it may be noted that, despite the provisions for a shorter process, the formal judicial procedure remained the legal norm in this period. The summary procedure in separation cases gradually began to share the benefits of the shortened process allowed to other marriage cases and soon became very general. The more informal or administrative procedure gradually developed from the need and necessity felt in mission lands for a more expeditious treatment. By force of custom in many places, it soon appeared to have the tolerance, at least, of the ecclesiastical authority.

PART II

CANONICAL COMMENTARY

CHAPTER IV

THE NATURE OF THE PROPER CANONICAL PROCESS IN SEPARATION CASES

Article 1. Preliminary Notions

The art of concise yet exact expression, so characteristic of the eminent compilers of the Code of Canon Law, reaches a full demonstration in the Code's affirmation of the unity and indissolubility of marriage. Summarizing centuries of legislation and canonical writings, the law today is succinct but accurate in defining the essential properties of the great social sacrament.[1] To emphasize the important property of unity and its accompanying element of the common life, the Code of Canon Law again in brief form, but very clearly, reminds the married partners of their mutual obligations which arise from the exchange of marital consent. It states: *"Coniuges servare debent vitae coniugalis communicationem, nisi iusta causa excuset."*[2] This obligation is based on the natural law, since the ends of marriage could not otherwise be properly attained. Even the positive divine law enjoins this community of life, that the union might be fruitful and successful, with regard both to its sacramental purposes and to the consorts themselves.[3] Not indeed of minor import is this obligation. Gasparri pointed out that it is founded in the virtue of justice as a result of the mutually exchanged

[1] Canon 1013, §2: Essentiales matrimonii proprietates sunt unitas ac indissolubilitas quae in matrimonio christiano peculiarem obtinent firmitatem ratione sacramenti.

[2] Canon 1128.

[3] "Wherefore a man shall leave father and mother, and shall cleave to his wife: and they shall be two in one flesh."—Gen., II:24.

marital consent,[4] and the common law demonstrates the gravity of this responsibility in demanding a just cause for a separation.

In interpreting the phrase, "just cause," found so often in the law, no absolute norm can be stated; rather, each canon wherein it is contained must be judged on its own merits. Who is to judge when it is a matter of conjugal separation? Since marriage is a social institution, the private judgment of the consorts surely does not suffice as a general norm. There is need of a higher authority. Inasmuch as cohabitation is so intimately connected with the integrity of the sacrament,[5] any breach of this mutual obligation pertains to the public good.[6] It is for this reason that the public authority of the Church must be invoked whether it be through its procedural norms or through a permission granted in the law itself. Especially important is this today when married life is considered by so many as a private matter, to be continued or disrupted at the will of the parties.

Regularly, a canonical separation, i.e., a separation from bed, board and cohabitation is subject to a hearing before the Church if it is to be final.[7] It results in either the complete cessation or at least a temporary interruption of the common life of the consorts, with the marriage bond of course remaining intact. Consequently, it is subject to the jurisdiction of the Church and is to be treated according to its processual regulations.[8] Before proceeding with the study

[4] *Tractatus Canonicus de Matrimonio,* ed. nova ad mentem Codicis Iuris Canonici, 2 vols., Romae: Typis Polyglottis Vaticanis, 1932, II, n. 1102 (hereafter referred to as *De Matrimonio*).

[5] S.R.R., *Separationis,* 3 ian. 1929, coram R.P.D. Henrico Quattrocolo, dec. I, n. 2—*Decisiones,* XXI (1929), 3; Cappello, *Tractatus Canonico-Moralis De Sacramentis* (5 vols., Vol. V, 5. ed., Romae: Marietti, 1947), V, nn. 827-828 (hereafter referred to as *De Sacramentis*); Gasparri, *loc. cit.*

[6] S.R.R., *Separationis quoad Thorum et Mensam,* 5 iul. 1910, coram R.mo P.D. Michaeli Lega, Decano, dec. XXIV, n. 11—*Decisiones,* II (1910), 243; S.R.R., *Separationis,* 6 aug. 1930, coram R.P.D. Andrea Jullien, dec. XLVII, n. 2—*Decisiones,* XXII (1930), 524; *Normae S.R.Rotae Tribunalis,* 29 iun. 1934, Art. 27—*AAS,* XXVI (1934), 457.

[7] Canon 1960.

[8] Noval, *Commentarium Codicis Iuris Canonici,* Liber IV, *De Processibus,* Pars I, *De Iudiciis* (Augustae Taurinorum—Romae: Marietti, 1920), p. 557 (hereafter referred to as *De Iudiciis*).

of these procedural norms, and with a view to understanding better the ecclesiastical law relative to this institute, the writer deems it feasible at this point to present in outline form some of the notions used in its treatment.

The first distinction to note is that between a temporary and a permanent separation. The Church has ever recognized the sin of marital infidelity to be a just cause for a permanent separation on the part of the innocent spouse. It repeats this cause, founded in the divine law,[9] and presents it as the only legitimate reason for a perpetual separation provided it was not caused or condoned in any way by the aggrieved consort.[10]

Besides this historical ground, the Church recognizes other reasons for the discontinuance of the common life,[11] but only as a temporary measure.[12] Notwithstanding the fact that this temporary parting may be for a determinate or indeterminate time, it is of a temporary nature and never to be considered permanent, despite the possibility of the latter resulting in such. In addition to these notions, certain authors distinguish a legitimate separation and a

[9] Matt., V:32.

[10] Canon 1129, § 1: Propter coniugis adulterium, alter coniux, manente vinculo, ius 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 coniux innocens, postquam de crimine adulterii centior factus est, cum altero coniuge sponte, maritali affectu, conversatus fuerit; praesumitur vero, nisi sex intra menses coniugem adulterum expulerit vel dereliquerit, aut legitimam accusationem fecerit.

[11] Con. Trident., sess. XXIV, *de matrimonio,* canon 8.

[12] Canon 1131, § 1: Si alter coniux sectae acatholicae nomen dederit; si prolem acatholicae educaverit; si vitam criminosam et ignominiosam ducat; si grave seu animae seu coporis periculum alteri fecessat: si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero coniuge totidem legitimae 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, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore.

legitimate departure.[13] An awareness of this difference is important when the institute of separation *propria auctoritate* is examined.

Article 2. The Authority for Separation

To understand fully the procedural norms to be observed in the canonical separation of the spouses, one must necessarily for an integral treatment determine the proper authority for the effecting of such a state, and give consideration especially to the canonically known institute of separation by the private authority of an aggrieved consort. This is important inasmuch as a separation juridically sanctioned by the Church bears with it certain canonical effects. Noteworthy among these is the fact that such a legal separation is a determinant for an independent domicile on the part of the wife, who would normally have as a necessary domicile that of her husband.[14] As a consequence, the establishment of jurisdiction both judicial and voluntary will be affected.

There has ever been much discussion and controversy among the authors on this matter as has been seen in the preceding historical synopsis. Since the law is not absolutely definite, this controversy continues today, especially in the light of a reply of the Pontifical Commission for the Authentic Interpretation of the Code of Canon

[13] Gibbons, *Domicile of Wife Unlawfully Separated from her Husband,* The Catholic University of America Canon Law Studies, n. 249 (Washington, D. C.: The Catholic University of America Press, 1947), p. 77; Hines, *De Coniugum Separatione ac de Civili Divortio in Iure Canonico et in Iure Civili Statuum Foederatorum Americae Septentrionalis* (Pontificium Institutum Utriusque Iuris, Theses ad Lauream, n. 62 (Romae: Officium Libri Catholici, 1949), p. 4 (hereafter referred to as *De Coniugum Separatione*); Regatillo, *Ius Sacramentarium* (2 vols., Santander: Sal Terrae, 1945-1946), II, n. 588; Torr *Processus Matrimonialis,* p. 14; Sartori, *Enchiridion Canonicum* (8. ed., Romae Pontificium Athenaeum Antonianum, 1947), p. 13, ad canon 93.

[14] Canon 93, § 1: Uxor, a viro legitime non separata, necessario retine domicilium viri sui; amens, domicilium curatoris; minor, domicilium illius cui potestati subiicitur.

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

It is immaterial whether the wife is the innocent or guilty spouse; once the legitimate separation takes place, the canonical effects follow—Forbes, *The Canonical Separation of Consorts,* Universitas Catholica Ottaviensis, Series

Law,[15] and of the Instruction issued by the Sacred Congregation of the Sacraments under the date of August 15, 1936.[16] Although some authors have changed their opinions as held in the past on this institute in view of the foregoing authoritative declarations, the question is far from officially settled, nor is there now any closer agreement among the authors than there was in the past.

No canonist would deny that it is regularly left to the public authority of the Church, namely the ordinary of the diocese, to render a decision whether or not in a particular case a just cause for separation is present. To the same authority it is left to decide if this separation is to be perpetual or temporary, and, if it be the latter, for a determinant or an indeterminate period of time.[17] Such unanimity is not present in any discussion of the institute of separation *propria auctoritate* as it is delineated in Canons 1130 and 1131.

Canonica—Tom. 15 (Ottawa, Ontario: The University of Ottawa Press, 1948), p. 233.

[15] P.C.I., 14 iul. 1922:—"Utrum uxor, a viro malitiose deserta, possit, ad normam canon 93, § 2, obtinere proprium ac distinctum domicilium. Resp. Negative, nisi a iudice ecclesiastico obtinuerit separationem perpetuam, aut ad tempus indefinitum."—*AAS,* XIV (1922), 526.

[16] S.C. de Sacramentis, instr. 15 aug. 1936:—

Art. 6, § 1: Uxor, etsi a viro malitiose deserta, eum convenire debet vel coram Ordinario loci in quo matrimonium celebratum est, vel coram Ordinario domicilii vel quasi-domicilii viri ipsius.

§ 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 viri, ideoque conveniri debet vel coram Ordinario loci in quo nuptiae initae sunt, vel coram Ordinario sui domicilii vel quasi-domicilii.

§ 3: Uxor catholica, etsi a viro non legitime separata, virum acatholicum convenire potest vel coram Ordinario proprii ac distincti quasi-domicilii, vel coram Ordinario domicilii viri (Comm. Pont., 14 iulii 1922 ad canon 93 et 1964).—*AAS,* XXVIII (1936), 313-370 (hereafter referred to as *Instructio*).

[17] Canons 1129; 1130; 1131; Vermeersch-Creusen, *Epitome Iuris Canonici* (3 vols., Vol. I, 7. ed., 1949; Vol. II, 6. ed., 1940; Vol. III, 6. ed., 1946, Mechliniae-Romae: H. Dessain), I, 181; Wernz-Vidal, *Ius Canonicim,* II, n. 12; Cappello, *De Sacramentis,* V, n. 827-828; Coronata, *Institutiones Iuris Canonici* (2. ed., 5 vols., Taurini: Marietti, 1939-1947), I, n. 126, ftn. 7: Ojetti, *Commentarium in Codicem Iuris Canonici* (4 vols., Romae: apud Aedes Universitatis Gregorianae, 1927-1931), II, 53.

The matter constitutes a moot point with many divergent opinions, all of considerable merit.

The Code of Canon Law envisages two distinct classes of cases wherein an innocent consort may separate from his guilty partner on his or her own initiative. It states that adultery on the part of one consort grants to the innocent spouse the right to dissolve the community of life, even perpetually, although the bond of marriage remains intact.[18] A temporary separation is the subject of Canon 1131. Here again the same term, *"propria auctoritate,"* is found, but with a qualification. The law permits a temporary separation at the behest of the innocent consort, provided that the grounds outlined in this canon are certainly present, but a condition is added. There must be a state of emergency or some danger in delay, whether physical or moral.

Surely this permission at first sight is to be considered a concession of a remarkable order. Having seen the importance of the common life of the consorts in the Church's exalted doctrine of marriage, all must admit that a great freedom is bestowed here. Because it is an exception to the usual norm, it demands study, and fortunately it has been given much by many esteemed authors.

In this matter there are three outstanding opinions, each supported by authors of merit. Each has been argued well by its proponents and given much attention. However, inasmuch as the law is not absolutely clear, until such time that the Holy See promulgates further authoritative information, each opinion enjoys, so it seems, a parity of probability and may be followed in practice.

Forbes, in his well executed work, presents as the common opinion the view that accords an aggrieved consort who separates according to the law on his or her own authority[19] the capacity of acquiring the canonical effects deriving from a legitimate separation. Most important of these is an independent domicile for the separated wife.[20] This may operate whether the separation is a permanent one

[18] Canons 1129; 1130. A fuller study of the necessary qualifications for a canonically recognized sin of unfaithfulness will be treated in the article on judicial exceptions (cf. infra, p. 92).

[19] Canon 1129; 1130; 1131.

[20] *The Canonical Separation of Consorts,* p. 233.

because of the other spouse's certain and manifest adultery, or a temporary separation based on the causes treated in Canon 1131.[21] In this latter case it is also necessary that the cause be certain and that there be a danger in delay to the innocent spouse. The intervention of the ordinary according to this view is not necessary for the party's attaining of the canonical effects of a legitimate separation. Therefore a wife who is so separated from her husband may acquire her own independent domicile.[22] Although Forbes concludes that this is still the common interpretation of Canon 93, § 2 and Canons 1129, 1130 and 1131, he does so with a certain reserve. In practice, despite the statement of this opinion, he would recommend a decree of the ordinary to obviate any doubt regarding competency in judicial acts.[23]

A more rigid opinion is well presented by Gibbons, who expressly treated the subject of the domicile of the unlawfully separated wife. Viewing the matter in the light of the opinion as proposed by Ragatillo,[24] he distinguishes a legitimate separation from a legitimate

[21] Vermeersch-Creusen, *Epitome Iuris Canonici,* I, 181; Ojetti, *Commentarium in Codicem Iuris Canonici,* II, 54; Oesterle, *Praelectiones Iuris Canonici,* Vol. I (Romae: Collegium S. Anselmi, 1931), p. 55; Berutti, *Institutiones Iuris Canonici* (5 vols., Vol. II, Taurini-Romae: Marietti, 1943), II, 13; Wernz-Vidal, *Ius Canonicum,* II, n. 12, ftn. 9; Cocchi, *Commentarium in Codicem Iuris Canonici* (8 vols., in 5, Vol. II, 4. ed., Taurinorum Augustae: Marietti, 1937), II, 23; Cappello, *Summa Iuris Canonici,* I, p. 160, n. 194; Costello, *Domicile and Quasi-Domicile,* The Catholic University of America Canon Law Studies, n. 60 (Washington, D. C.: The Catholic University of America, 1930), pp. 163, 164; Toso, *Ad Codicem Iuris Canonici . . . Commentaria Minora* (5 vols. in 2, Vol. II, *De Personis,* Tom. I, Taurini-Romae, 1922), II, 20; Doheny, *Canonical Procedure in Matrimonial Cases* (2 vols., Vol. I, *Formal Judicial Procedure,* 2. ed., 1947, Vol. II, Informal Procedure, 1943, Milwaukee: Bruce Publishing Co.), II, 649, 650; Beste, *Introductio in Codicem* (Collegeville, Minn.: St. John's Abbey Press, 1938), p. 139.

[22] Forbes, *op. cit.,* p. 234.

[23] *Op. cit.,* p. 237. This is a general recommendation of authors who favor this opinion.

[24] "Effectus separationis propria auctoritate factae—Haec habet effectum *mere moralem,* in ordine ad quietem conscientiae. Scilicet in casibus supra indicatis coniux innocens *licite* discedit. At valore iuridico caret, nempe quoad effectus iuris. [. . .]. Separatio legitima, qua iuxta c. 93 § 2, potest uxor acquirere domicilium proprium, definitur a C. Sacram, loc. cit. art. 6 § 2

departure. The former is a juridical separation with its accompanying canonical effects, permanent or temporary as the case may be, having been decreed in an antecedent canonical procedure before the ecclesiastical authority.[25] The legitimate departure, on the other hand, connotes a juridical state, but devoid of the canonical or juridical effects of the above mentioned authoritatively adjudicated separation. This is the separation *propria auctoritate* of Canons 1129-1131. In this instance, provided that the conditions of a certain cause and a certain urgency in delay are present, should it not be a case of adultery,[26] the aggrieved consort may depart from his or her guilty partner and licitly continue this state of separation. However, until the time that the Church has juridically sanctioned this departure by means of an authoritative sentence or decree, it is not a legitimate separation. The wife in such a case is considered *"legitime non separata"* in the sense of Canon 93, § 2. As a consequence, she retains the domicile of her husband. She can do no more than establish a quasi-domicile of her own.[27]

Kelly and Hines, in treating the separation that is effected *propria auctoritate,* grant it canonical recognition, but demand exactly the same conditions whether it be a permanent separation because of adultery or a temporary separation. In such cases, they demand a certainty of cause, which all would concede, but place the

quae fit *per sententiam iudicis aut per Ordinarii decretum in perpetuum vel ad tempus indefinitum."—Ius Sacramentarium,* II, 398.

[25] *Domicile of Wife Unlawfully Separated from Her Husband,* p. 45.

[26] Canon 1131.

[27] Gibbons, *op. cit.,* p. 90, Gibbons is supported in this view by Regatillo (*Ius Sacramentarium,* II, n. 588), Bouscaren-Ellis (*Canon Law* [Milwaukee: Bruce, 1947], pp. 81, 82), Sartori (*Enchiridion Canonicum,* p. 13, ad Canon 93), Benedetti (*Ordo Iudicialis super Nullitate Matrimonii Instruendi* [ed. nov. Taurini: Marietti, 1938], p. 15), Torre (*Processus Matrimonialis,* p. 14), Toso, "Commentarium ad resp.P.C.I. 14 iulii 1922 ad Canon 93, § 2," *Ius Pontificum* [Romae 1921 - 1940], II [1922], 84) and Doheny (*Canonical Procedure in Matrimonial Cases,* I, p. 31). It is noteworthy that Toso and Doheny in earlier works favored the more lenient opinion stated above, while Regatillo in his earlier *Institutiones Iuris Canonici* (2 vols., Santander: Sal Terrae, 1941-1942), I, 112, although permitting separation *propria auctoritate* in cases of adultery, allowed it only as a provisional measure in cases of a temporary separation.

further requirement of danger in delay in all instances. This last condition, therefore, would even be necessary in cases of certain adultery. They substantiate this position by comparing Canons 1130 and 1131. They note that since Canon 1131 demands the condition of danger in delay in addition to a certain cause, this element must also be present in separations effected *propria auctoritate* for adultery. The reason: if this condition of emergency is necessary for temporary separations, it must also be demanded in perpetual separations, which by comparison are of much greater significance.[28] In treating the canonical effects of separation, both authors favor denying to the separated wife her own domicile prior to an ecclesiastical hearing. They do not, however, espouse this opinion as heartily and forceably as Gibbons.[29]

Another opinion distinguishes the two types of separation effected *propria auctoritate.* It allows the canonical effects immediately to a separation effected because of certain adultery, but in the case of temporary separation it demands an authoritative review of the case if the effects are to follow. This is the correct interpretation of this institute in the opinion of the writer. This preference is not based on an endeavor to reach an arbitrary norm between the two opinions as stated above, but it is stated as the position which retains the spirit of the law most faithfully.

The common opinion of the authors in the period before the promulgation of the Code of Canon Law, as has been noted in the brief historical synopsis presented earlier, embraced this interpretation. For a spouse to separate on his or her own initiative because of a certain sin of marital infidelity perpetrated by the other consort was considered entirely legitimate. No further authoritative decree was needed inasmuch as the right was already granted in the evangelical law.[30] Any sentence by the ecclesiastical authority was considered unnecessary and superfluous.[31]

[28] Hines, *De Coniugum Separatione,* p. 19; Kelly, "Separation and Civil Divorce," *The Jurist,* VI (1946), 203; idem, "Divorce—Some Practical Canonical Considerations," *The Jurist,* IX (1949), 196.

[29] Hines, *op. cit.,* p. 47; Kelly, *op. cit.,* p. 204; idem, *loc. cit.*

[30] Matt., V:32.

[31] Sanchez, Lib. X, disp. XII, n. 12; Pirhing *Ius Canonicum,* Lib. IV, tit. XIX, n. 16; Reiffenstuel, Lib. IV, tit. XIX, n. 89; Schmalzgrueber, Lib. IV,

In the matter of temporary separations, the earlier writers postulated as today a just cause and danger in delay. As long as these conditions were present they did not compel an aggrieved consort to risk physical and moral danger in awaiting an authoritative judgment. Rather, such a consort was permitted to depart on his or her own authority to escape any possible harm. This separation was considered an emergency measure, and necessitated subsequent action in the ecclesiastical forum to be legitimate. Consequently, it is termed a *discessus* rather than a *separatio*. Once it had been adjudicated before the Church, the separation was legal and final.[32]

In examining the recent legislation on the institute of separation effected *propria auctoritate*, as contained in canons 1129-1131, it is difficult to find any real departure or developments in this institute from the interpretation of the pre-Code authors. Moreover, it does not seem presumptuous to assert that the incorporation of this institute in the present legislation is actually an acceptance of the common opinion of the earlier authors. As a consequence of this it seems that this interpretation should be preferred today. Inasmuch as the responses of the Holy See on the matter of independent domicile of the wife use the terms perpetually or for an indeterminate period of time, this view is quite reasonable. Since a separation for adultery is perpetual, there is no problem of the intention to remain perpetually in some place to obtain a domicile. In the matter of a temporary separation resulting *propria auctoritate*, the temporal element never clearly relates to a definite or an indefinite period of time. Therefore, the only sensible solution for the avoidance of arbitrary decisions by separated spouses is to demand an ecclesiastical review in every case of temporary separation for the obtaining of the canonical effects.

Although in comparison with the above mentioned common opinion this view might be called that of the minority, nevertheless, there are not lacking authors of merit who favor this view. Although in

tit. IX, n. 11; Feije, *De Impedimentis*, p. 465; Gasparri, *De Matrimonio*, 3. ed., II, n. 1368.

[32] Sanchez, Lib. X, disp. XII, n. 7; Schmalzgrueber, Lib. IV, tit. XIX, n. 112; Feije, *De Impedimentis*, p. 465; Gasparri, *De Matrimonio*, 3. ed., II, n. 1368; Wernz, *Ius Decretalium*, IV, n. 711.

number these do not constitute a formidable array of authors, yet they are not to be summarily dismissed.[33]

By way of summary, then, it is the opinion of the writer that a separation instituted *propria auctoritate* by an aggrieved consort because of a certain and manifest sin of adultery perpetrated by the other spouse obtains legal recognition. As a result, he or she benefits from all the canonical effects of a canonical separation. In this instance the wife would be legitimately separated and therefore capable of acquiring her own domicile. The element of danger in delay is not necessary in this case, since the very nature of such a separation is not that of an emergency measure, but essentially is of a peremptory and decisive character.

In the matter of temporary separations, i. e., such as are undertaken not on the grounds of adultery, the distressed spouse may lawfully depart provided there is present a certain just cause and the exigency of danger in delay, but is not to be considered as legitimately separated. To achieve a canonical sanction for such a state of separation, it is necessary that the case be presented to the ecclesiastical authority for review. Antecedent to this authoritative recognition, the innocent consort is to be considered as having legitimately departed, and subsequent to it, the status becomes one of legitimate separation. In the latter instance the juridical effects would be obtained and a wife so separated could acquire a legal status that permits her to establish a voluntary domicile.

Article 3. The Nature of the Process

The Code of Canon Law in the canons which refer to separation is merely demonstrative of the type of procedure to be observed in

[33] Coronata, *Institutiones Iuris Canonici*, I, n. 126, ftn. 7; Noldin-Schmitt, *Summa Theologiae Moralis* (3 vols., Vol. III, 26. ed., Oeniponte-Lipsiae: Rauch, 1940), III, nn. 666, 667; Merkelbach, *Summa Theologiae Moralis* (3 vols., Vol. III, 5. ed., De Brouwer: Desclée, 1947), III, n. 969; Manucci, "Annotazioni ad alcune ultime risposte della Commissione per la interpretazione autentica del Codice, Canon 93," *Il Monitore Ecclesiastico* (Romae: Desclée, 1876—), Vol. XXXIV (1922), 339, 340; Kinane, "Regarding the Acquisition of Domicile," *Irish Ecclesiastical Record* (Dublin: Browne and Nolan, 1864—), 5. series, XX (1922), 408, 409; Chelodi-Ciprotti, *Ius Canonicum de Matrimonio* (5. ed., Vicenza: Società Anonima, 1947), n. 162 (hereafter referred to as *De Matrimonio*).

invoking the public authority of the Church for the settlement of separation cases. The law is concerned primarily with an exposition of the nature and a description of the causes for separation, it mentions the procedure in merely an incidental fashion. In the legislation for permanent separations on the grounds of adultery, there is found the following brief phrase: *"iudicis sententia,"* [34] when there is question of a temporary separation pleaded on grounds other than adultery, this phrase is used: *"auctoritate ordinarii loci"* and *"ex decreto Ordinarii."* [35]

At first reading the canons give the impression that a sentence of an ecclesiastical judge subsequent to a full judicial procedure is the norm in cases of separation pleaded on the grounds of adultery. Cases tried on the grounds mentioned in Canon 1131 are to be settled in the administrative fashion by a decree of the ordinary.

However, considered in the light of the law as it was before the present Code of Canon Law, when the judicial process was the ordinary form in all cases of separation, with the administrative process not much more than tolerated,[36] one may readily conclude that this norm still exists.[37] The latter method is of course received with a greater degree of acceptance today than in the earlier law, as a result of the response in 1932 of the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law, which prescribed the use of the administrative process in the cases of temporary separation contemplated in canon 1131, § 1, unless the ordinary, either *"ex officio"* or at the instance of the parties, decided otherwise.[38]

[34] Canon 1130: Coniux innocens sive *iudicis sententia* sive propria auctoritate legitime discesserit, nulla unquam obligatione tenetur coniugem adulterum rursus admittendi ad vitae consortium; potest autem eundem admittere aut revocare, nisi ex ipsius consensu ille statum matrimonio contrarium susceperit.

[35] Canon 1131. *Instructio,* Art. 6, § 2.

[36] Wernz, *Ius Decretalium,* IV, n. 714; Roberti, "De Separatione Coniugis," *Apollinaris* (Romae, 1928—), V (1932), 295.

[37] Wernz-Vidal, *Ius Canonicum,* V, p. 848.

[38] P.C.I. 25 iun. 1932—"D. An separatio coniugum ob causas, de quibus in Canone 1131, § 1, forma administrative decernenda sit. R. Affirmative, nisi ab ordinario aliter statuatur ex officio vel ad instantiam partium.—*AAS,* XXIV (1932), 284.

There are those who in this same response find a basis for holding that the administrative method is now the ordinary form for hearing all separation cases. This is the conclusion of Cappello. He reasons that if the consorts may separate on their own authority,[39] *a fortiori,* the ordinary may regularly decide such cases in the administrative fashion, omitting as a rule the formal judicial process. His argument is based on the fact that canon 1131 omits all mention of an ecclesiastical judge. Furthermore note must be taken of the loss of time and of the greater expense involved in the formal process. He does concede, however, that this is not a necessary rule for at the instance of the parties or even on his own initiative, in keeping with the above mentioned reply, the ordinary may employ the formal process and thus may depart from the ordinary norm.[40]

Both of these opinions seem to be too comprehensive and general. It is true, as Wernz-Vidal state, that the judicial process was the ordinary method before the Code of Canon Law, but at the same time the administrative method had developed more by common usage than through positive legislation and was therefore merely tolerated. The present law, as found especially in Canon 1131, is much too positive to confine this latter method to such a quasi-recognized state today. Rather, it seems that in conjunction with the above mentioned authoritative interpretation, Canon 1131 has raised the administrative method to a much higher level of acceptance. It is now a valid, legal method, equal in status with the judicial form.

The proper conclusion from Canons 1130 and 1131 and the authentic interpretation of the latter is that the two methods share in a parity of legal recognition, and each may be called an ordinary method for the type of case being treated; the judicial process for a permanent suit of separation pleaded on the ground of adultery and the administrative method for cases based on other causes.[41]

[39] Canons 1130; 1131.

[40] Cappello, *De Sacramentis,* V, 827; Sartori, *Enchiridion Canonicum,* p. 233 ad Canon 1131, § 1.

[41] Forbes, *The Canonical Separation of the Consorts,* p. 193; Chrétien, *De Matrimonio* (Metis: Hocquard, 1937), n. 278; Chelodi-Ciprotti, *De Matrimonio,* nn. 161, 162; Jemolo, *Il Matrimonio nel Diritto Canonico* (Milano: Vollardi.

It is to be noted that the response of the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law was concerned with Canon 1131, with no mention having been made of Canon 1130. Keeping in mind the provisions of Canon 1130 a treatment of separation because of adultery, and of Canon 1131, which deals with temporary separation for other causes, the acceptable conclusion seems to be that the administrative method could serve as the ordinary process in the cases contemplated in Canon 1131, and the judicial process as the ordinary procedure for the cases of permanent separation on the grounds of adultery.

This view seems confirmed by even a cursory study of the decisions rendered by the Sacred Roman Rota. There it is seen how difficult the proof of adultery is in the ordinary case, and in consequence there arises the necessity of employing presumptions in order to arrive at a moral certitude. Although comparatively few cases of separation have been heard before this august tribunal since its reconstitution in 1908, nevertheless those that have come before it reflect a good directive norm for judges. Of the thirteen separation suits reviewed from 1908 to 1940, eight were concerned with permanent separations because of adultery. In each case the separation was denied because of insufficient proof. Needless to say, this is ample testimony of the usual difficulty anyone encounters in seeking to prove the fact of adultery and therefore points to the need of detailed consideration.[42]

Moreover, adultery is the only ground for perpetual separation,

1947), n. 178; Roberti, "De Separatione Coniugum," *Apollinaris,* V (1932), 295; Regatillo, *Ius Sacramentarium,* II, nn. 586, 587.

[42] S.R.R., *Separationis,* 3 ian. 1929, coram R.P.D. Henrico Quattrocolo, dec. I—*Decisiones,* XXI (1929), 1; S.R.R., *Separationis,* 6 dec. 1929, coram R.P.D. Francisco Morano, dec. LXIII—*Decisiones,* XXI (1929), 524; S.R.R. *Separationis,* 6 aug. 1930, coram R.P.D. Andrea Jullien, dec. XLVII—*Decisiones,* XXII (1930), 523; S.R.R., *Separationis,* 8 ian. 1937, coram R.P.D. Ioanne Teodori, dec. I—*Decisiones,* XXIX (1937), 1; S.R.R., *Separationis,* 30 maii 1938, coram R.P.D. Arcturo Wynen, dec. XXXIII—*Decisiones,* XXX (1938), 310; S.R.R., *Separationis,* 5 aug. 1938, coram R.P.D. Ioanne Teodori, dec. LVII—*Decisiones,* XXX (1938), 518; S.R.R., *Separationis,* 16 febr. 1940, coram R.P.D. Arcturo Wynen, dec. XII—*Decisiones,* XXXII (1940), 114; S.R.R., *Separationis,* 2 mart. 1940, coram R.P.D. Alberto Canestri, dec. XIX—*Decisiones,* XXXII (1940), 196.

and such a complete cessation of the common life postulates a prolonged and complete deliberation and judgment as a rule. It is such a violent rupture of the integrity of marriage that the common good demands mature consideration, the latter being more readily attained as a general rule through the use of the formal judicial process.[43]

The cases of temporary separation pleaded on the grounds mentioned in Canon 1131 do not generally have this quality of finality and difficulty in proof. They are only causes of separation if they make the common life too difficult. Here the ordinary can issue a decree allowing a temporary separation, and by means of a subsequent decree can demand a resumption of the marital life upon the cessation of the motive cause. Arguing from the possible proofs afforded in these grounds, and keeping in mind the temporary nature of the separation, one can easily discern why the administrative process is the ordinary procedure for these cases.[44]

To accept this view does not necessarily imply that the two processes are so mutually exclusive that they may not be utilized in both permanent and temporary separations. The authentic interpretation of canon 1131, § 1, provides for the use of the judicial process in cases of temporary separation either at the personal initiative of the ordinary or at the instance of the parties. Similarly there seems to be no objection in practice to using the informal administrative process for cases of permanent separation pleaded on the grounds of adultery. In the latter case, of course, the sin should be obvious or provable with great ease. Here the argument of the obvious advantages of the shorter process in the matter of time and expense shows merit.[45]

There is good legal basis for not restricting the use of either process exclusively to its own particular type of case. To confine the scope of the phrase *"auctoritate Ordinarii"* solely to the administrative process is not tenable. The ordinary's authority is both administrative and judicial; this phrase, then, includes both types of

[43] Forbes, *The Canonical Separation of Consorts,* p. 193; Doheny, *Canonical Procedure in Matrimonial Cases,* II, 646.

[44] Doheny, *loc. cit.*

[45] Canons 1747, § 1, 1°; 2197; 1750.

jurisdiction. Because of this the judicial process can readily be employed in cases of temporary separation.[46]

Article 4. The Determination of the Process

It is quite clear from the response of the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law that the ordinary is the authority to determine what process is to be utilized in the adjudication of separation suits. It allows the administrative process to be used in the cases of temporary separation delineated in canon 1131, § 1 unless the ordinary either *ex officio* or at the instance of the parties determines otherwise.[47]

There is no problem involved when the question concerns a permanent separation because of adultery. The ordinary process for these cases is judicial. The question does arise, however, with regard to the ordinary's position in determining the employment of the judicial process in cases of temporary separation. Surely, if the public good demands it or a just cause warrants it, such as the social or even the political prominence of the parties, or the welfare of the offspring or even the advantage of the parties themselves, the ordinary may order the judicial process *ex officio*. This would merely be a fulfillment of his official solicitude for the souls under his care.[48]

If either party requests a judicial hearing of the case, the above mentioned authoritative response directs the ordinary to acquiesce. Can the ordinary deny such a request? It seems that he cannot.[49] The basis for this statement lies in the concession granted in the law that every right may be enforced by means of a corresponding

[46] S.R.R. *Separationis*, 4 febr. 1925, coram R.P.D. Iosepho Florczak, dec. VII—*Decisiones*, XVII (1925), 41.

[47] P.C.I., 25 iun. 1932—*AAS*, XXIV (1932), 284.

[48] Roberti, "De Separatione Coniugum," *Apollinaris*, V (1932), 295; Regatillo, *Ius Sacramentarium*, II, n. 587.

[49] Roberti, ibid., p. 296; Cappello, "De Separatione Coniugum," *Periodica de Religiosis et Missionariis*, Brugis, 1905 - 1919; from 1920: *Periodica de Re Canonica et Morali utilia praesertim Religiosis et Missionariis*, Brugis, 1920-1927: *Periodica de Re Morali, Canonica, Liturgica*, Brugis (1927 - 1936) et Romae (1937—), XXI (1932), 286 (hereafter referred to as *Periodica*); idem, *De Sacramentis*, V, 827; Regatillo, *loc. cit.*; Hines, *De Separatione Coniugum*, p. 40.

action in Court, unless the contrary is explicitly stated.[50] As far as the innocent party is concerned, the right he may petition to vindicate is expressed in Canons 1129, § 1, and 1131. Moreover, even the defendant may request the employment of the judicial process. This is quite clear from the phrase *"ad instantium partium"* in the authoritative interpretation of Canon 1131, § 1. In this case, however the legal institute utilized would be of the nature of a judicial exception: the means by which a defendant is legally qualified to retard or elide an action instituted against him.[51] He has a right to the common life from the marital contract, and a consequent right therefore to defend himself by whatever judicial weapons are at hand in opposition to a separation action brought against him.[52]

It is of interest to note here that the delegate of the ordinary may fulfill this office of determining the proper procedure in hearing separation suits. It is nothing more than the exercise of ordinary jurisdiction, which may be simply delegated.[53] It is not necessarily a form of judicial jurisdiction, since it is not the exercising of a judicial office. Rather, it is directing the employment of the ordinary's judicial jurisdiction. Moreover, whichever process is used, the objective validity of the process is not endangered nor even involved in the judgment of the ordinary or his delegate to utilize either procedure.[54] In practice, therefore, the delegation of this discretionary office by the ordinary to his delegate who may normally hear the preliminary statement in separation cases, in the light of convenience and economy of curial activity, is perfectly legitimate and juridically sound.

[50] Canon 1667—Quodlibet ius non solum actione munitur, nisi aliud expresse cautum sit, sed etiam exceptione, quae semper competit et est suapte natura perpetua.

[51] Roberti, *De Processibus* (2 vols., Vol. I, 2. ed., Romae: Apud Custodiam Librariam Pontificii Instituti Utriusque Iuris, 1941), I, 728.

[52] Canon 1667; Regatillo, *loc. cit.*

[53] Canon 199, § 1.

[54] Regatillo, *op. cit.*, II, n. 587, ter.

CHAPTER V

THE JUDICIAL PROCESS

THE ordinary canonical procedure observed in diocesan courts for contentious cases is the general norm to be followed in the adjudication of separation suits.[1] Since the usual matrimonial case is one in which there may follow a declaration of nullity, there are naturally to be noted for separation cases certain rules which do not concern the bond. As a consequence, to forestall a needlessly long treatment, the writer proposes here simply to deal with those regulations which are peculiar to separation cases.

ARTICLE 1. ORGANIZATION OF THE COURT

A. Competency

As in all marriage cases, the general rule for competency in separation cases is based on territorial limits. The competent judge is the judge of the place in which the marriage was contracted or in which the defendant maintains a domicile or quasi-domicile. In the event that one party is not a Catholic, then the competent tribunal is that of the place where the Catholic party has a domicile or quasi-domicile.[2]

The determination of competency on the basis of domicile and quasi-domicile is especially important in separation cases as a result of the unfortunate fact that the parties are often actually separated prior to the pleading of the case before the ecclesiastical authority. In such an instance, the discussion of separation effected *propria auctoritate*, as presented in the previous chapter, should be kept in mind. It can very readily happen that either spouse will initiate an action to restore the common life or to have certain canonical effects declared in the ecclesiastical forum. To limit a lawful separation to an authorized declaration of the ecclesiastical tribunal or to

[1] Cappello, *De Sacramentis*, V, 830.

[2] Canon 1964; *Instructio*, Art. 3, § 1.

a decree of the ordinary would seem rather peremptory in view of the disputed nature of this matter. Because of the lack of agreement among authors and in view of the absence of absolute authoritative interpretation, it is the opinion of the writer that a diocesan tribunal may determine its competency in a given case on the grounds of domicile or quasi-domicile, in the light of either opinion as noted in the foregoing chapter. There would certainly be no question of the validity of such a decision,[3] and, so it seems not even of licitness.

In an effort to avoid needless repetition, the writer will at this point deal exclusively with actions presented by spouses who are lawfully or unlawfully separated. Those who favor either view on the institute of separation undertaken *propria auctoritate* may in practice simply reduce their opinion to either one of these two alternatives. Needless to say, in a case wherein there is no question of an antecedent separation effected *propria auctoritate*, the determining rule would be the general norm of canon 1964, with the added note that the wife has as a necessary domicile that of her husband.[4] In such a case, therefore, the domicile of the defendant would always be the domicile of the husband.

In a given instance wherein the spouses are not lawfully separated, the judge determining competency on the basis of domicile or quasi-domicile would utilize the following alternatives. If the husband is the plaintiff, the judge of his domicile or of the wife's quasi-domicile will be competent. If the husband is lacking a domicile, then his wife may be cited before the judge of his quasi-domicile.[5] When the wife is the plaintiff, she has the alternative of citing him before the court either of his domicile or of his quasi-domicile. If she is a Catholic and the husband not a Catholic, then according to canon 1964 she can cite him before the judge of her own quasi-domicile or of his domicile.[6]

[3] Canons 1559, § 2; 1680; 1892; *Instructio*, Art. 207.

[4] Canon 93, § 1.

[5] *Instructio*, Art. 7:—Uxor, a viro non legitime separata quae proprium quasi-domicilium habeat, conveniri potest etiam coram Ordinario domicilii viri, non autem quasi-domicilii eiusdem viri, nisi in casu quo hic domicilio careat.

[6] P.C.I., 14 iul. 1922:—"Utrum actrix catholica, a viro non legitime separata, quae proprium ac distinctum quasi-domicilium habet, virum acatholicum

In a suit pleaded by a consort who is lawfully separated the following holds true. Should the husband present the case, then the competent court is that of the wife's domicile or quasi-domicile.[7] Should the wife bring the suit, then the husband may be cited in the court either of his domicile or also of his quasi-domicile. It is important to note that in the instance of lawful separation the wife may only procure a domicile if the separation is perpetual or has been granted for an indefinite period of time. This is clear from the wording of the *Instructio* which uses the phrase: *"perpetuo aut ad tempus indefinitum separata legitime."* Doubtless the reason for such a distinction is that a legitimate separation given by a decree stating a particular period of time would not allow the wife to have the necessary intention to remain permanently in one place to acquire a domicile.[8]

Since quasi-domicile is so common a determinant of competency in separation cases, and also in view of the nature of these suits, special emphasis is to be placed on the directives of the Sacred Congregation of the Sacraments regarding cases tried in the forum of quasi-domicile.[9] This regulation is mentioned here because of the ordinary probatory nature of a separation suit. Since witnesses are regularly close relatives and intimates, and inasmuch as documentary proof is usually not available, then it is to be expected that parties would attempt to obscure the objective truth by pleading their case before a remote tribunal of quasi-domicile. The court

in causa matrimoniali, ad normam Canon 1964, convenire potest tantum coram Ordinario proprii ac distincti quasi-domicilii; an vero etiam coram Ordinario domicilii viri. Resp. Cum uxor in casu habeat proprium ac distinctum quasi-domicilium, et sequatur domicilium viri, potest virum convenire coram alterutro Ordinario."—*AAS*, XIV (1922), 530; *Instructio*, art. 6, § 3.

[7] Canon 93; *Instructio*, art. 6, § 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 viri, ideoque conveniri debet vel coram Ordinario loci in quo nuptiae initae sunt, vel coram Ordinario sui domicilii vel quasi-domicilii.

[8] Canon 92, § 1: Doheny, *Canonical Procedure in Matrimonial Cases*, I, 31.

[9] S. C. de Sacramentis, instr. 23 dec. 1929—*AAS*, XXII (1930), 168-171; *Instructio*, art. 5.

in question would then ascertain the truth only by overcoming numerous hindrances and could possibly become the inadvertent cause of the inflicting of injustice.

B. The Judge

Separation suits pleaded in the judicial process would naturally be heard before the *officialis* who, by the nature of his office as the diocesan judge, has the power to adjudicate such cases.[10] This rule, of course, would not apply should the bishop expressly reserve these cases as a class, or one special case, to his personal judgment.[11] The Vicar General, although competent for acting when these cases are treated administratively, would be incompetent here unless he were specially designated by the bishop for such action.[12]

A major departure from the ordinary manner of hearing marriage cases is the fact that separation suits do not require a tribunal of three judges. The provisions of canon 1576, § 1, 1°, demand three judges for matrimonial trials in all instances of *"causae contensiosae de vinculo* [. . .] *matrimonii* [. . .]." In a separation case the bond of marriage is not attacked, and despite the importance of such a case, inasmuch as the common life is in jeopardy, one judge would suffice to constitute the tribunal.[13] Granted that the practice of the Sacred Roman Rota demonstrates that in all cases of separation heard since its revival in 1908 a tribunal of three judges has been constituted, there is no obligation for a diocesan court to imitate this practice. Should a diocese be capable of furnishing competent personnel to constitute such a tribunal with ease, it would be a highly admirable undertaking. The importance of mature judgment and complete consideration in separation cases cannot be too much emphasized. Moved by the significance attaching to such cases, an ordinary, by acting in imitation of the practice of the Sacred

[10] Canons 1572; 1573; Roberti, *De Processibus*, p. 257, n. 96.

[11] Canon 1573, § 2.

[12] Canons 1573, § 1; 1892, § 1; *Instructio*, art. 3, § 2.

[13] *Instructio*, art. 13, § 1; Roberti, *De Processibus*, p. 289, n. 11; Torre, *Processus Matrimonialis*, p. 18; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 282; Wernz-Vidal, *Ius Canonicum*, V, n. 694.

Roman Rota would find such a procedure entirely within the law, as is clear from canon 1576, § 2.[14]

The Code of Canon Law also provides another method of hearing these cases before an individual judge. It allows a single judge who is conducting a trial to employ two *assessores* or consultors. These are to be selected from among the synodal judges.[15] Although they do not exercise any jurisdiction and the judge remains free to pass judgment as he sees fit, nevertheless their presence might well provide a great assistance to the jurist when he adjudicates separation suits.[16]

To employ well qualified laymen as aides in an effort to stem the present tide of broken marriages, although apparently helpful, would not be in keeping with the proper conduct of an ecclesiastical tribunal. According to specific regulation from the Holy See, the consultors may not be lay people.[17]

Worthy of mention here is the ever increasing practice in this country of constituting a board of experienced priests and canonists for the exclusive hearing of separation cases. In consequence of the unfortunate frequency of divorce in American society, Catholics, despite their training in matters relating to the sanctity of marriage, are greatly influenced by the extant usage. This factor as well as the concomitant problem of the requisite ecclesiastical permission for a civil separation or divorce, has naturally been of great concern to ordinaries. The erection of these boards has developed from their solicitude. Although this practice will be treated at greater length

[14] Loci Ordinarius tribunali collegiali trium vel quinque iudicum cognitionem committere potest etiam aliarum causarum, idque praesertim faciat quando de causis agitur quae, attentis temporis, loci et personarum adiunctis et materia iudicii, difficilioris et maioris momenti videantur; Wernz-Vidal, *op. cit.*, VI, n. 89. If such a practice is followed, it is to be noted that a tribunal of three or five judges must also be employed in the court of second instance. —Canon 1596; Roberti, *De Processibus*, p. 290.

[15] Canon 1575.

[16] Roberti, *op. cit.*, p. 274; Wernz-Vidal, *op. cit.*, VI, n. 90; Noval, *De Iudiciis*, p. 64; Vaughan, *Constitutions for Diocesan Courts*, The Catholic University of America Canon Law Studies, n. 210 (Washington, D. C.: The Catholic University of America Press, 1944), pp. 36, 37.

[17] S.C.C., 14 dec. 1918—*AAS*, XI (1919), 128.

when the administrative process is considered, a few points have suitable place here.

The employment of the judicial process is not to be considered a rarity in the adjudication of separation cases. This has been demonstrated in the foregoing chapter. Accordingly there arises a question concerning the position of such a board of experts when the judicial process is used. The solution lies in the observance of certain canonical formalities as necessary for correct legal action. It is possible for the members of this board to judge separation cases as a tribunal or for the individual members to act as single judges, but not to render a judicial decision as mere administrative delegates. An endowment of judicial jurisdiction is necessary.

The very nature of the office of the *officialis* demonstrates that he is to be considered the judge of the diocese.[18] When a tribunal of three or more judges is constituted, he is the presiding judge.[19] Should the number of cases cause him to be overburdened, the law provides for the appointment of *vice-officiales* who can aid him in his work.[20] Therefore, in the event that a particular expert or board of experts be delegated by the bishop for the administrative hearing of separation cases,[21] such an expert or board of experts are not empowered to judge in the judicial process apart from being duly deputed. The individual judge who hears the case, or the one presiding over the tribunal, must be appointed as a *vice-officialis* by the bishop.[22] The remaining judges of the tribunal, or *assessores*, as the case may be, should be constituted synodal or pro-synodal judges according to the prescriptions of the law.[23] The *officialis* cannot be said to have the power to depute members of such an administrative board to handle all or even one case in the judicial fashion. Admittedly by virtue of his office he enjoys ordinary power,[24] but it is

[18] Canon 1573.

[19] Canon 1577, § 2; *Instructio*, art. 14, §.

[20] Canon 1573, § 3.

[21] Canon 199, § 1.

[22] Canons 1573; 1577, § 2.

[23] Canons 1574, § 1; 1575.

[24] Canon 1573, § 1; Capello, *Summa Iuris Canonici*, III, n. 93; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, 16; Wernz-Vidal, *Ius Canonicum*, VI, n. 86; Roberti, *De Processibus*, p. 267; Coronata, *Institutiones Iuris Canonici*,

also quite clear that he is not an ordinary.[25] Any delegation of his power, therefore, although not expressly prohibited in the law, is highly questionable.[26]

C. The Promoter of Justice

In all marriage cases wherein the sacred bond is endangered, the law requires the intervention of the *defensor vinculi*. This demand holds whether it is a case concerned with the validity of the bond,[27] or a question of a papal dispensation dissolving a *ratum non consummatum* union.[28] Separation suits, however, since they concern the unity of conjugal life or the integrity of marriage, are not of a vincular nature. They do not require, therefore, the intervention of this official. In comparing the nature of these cases and the essential character of his office, one cannot conclude that there is any legal prescription to summon him; in fact, his presence would be superfluous.[29] Should a judge make his presence obligatory, the citation would seem to have no canonical basis and its juridic strength would seem reduced to the level of a mere request.[30] This statement gains special recognition in view of the canonical provision, although not expressly stated in the law for separation cases, that the promoter of justice intervene in these suits.

III, n. 1116; Dugan, *The Judiciary Department of the Diocesan Curia,* The Catholic University of America Canon Law Studies, n. 26 (Washington, D. C.: The Catholic University of America, 1925), p. 38.

[25] Canons 198, § 1; 1946, § 2; Coronata, *loc. cit.*; Tobin, *De Officiali Curiae Dioecesanae* (Romae: Apud Aedes Pontificae Universitatis Gregorianae, 1936), p. 159.

[26] "At, quamvis in codice non habeatur expressa prohibitio, officium non potest aliis delegari, quia datur industria personae (c. 199, § 2), nisi agatur de articulo non iurisdictionali (c. 199, § 4)."—Roberti, *op. cit.*, p. 268; Tobin, *op. cit.*, p. 175.

[27] Canon 1588.

[28] S. C. de Sacramentis, *Regulae servandae in processibus super matrimonio rato et non consummato,* 7 maii 1923, n. 27—*AAS,* XV (1923), 396.

[29] Roberti, *op. cit.*, p. 335; Gasparri, *De Matrimonio,* II, n. 1251, Cappello, *Summa Iuris Canonici,* III, n. 90; Wernz-Vidal, *Ius Canonicum,* V, n. 694; Glynn, *The Promoter of Justice,* The Catholic University of America Canon Law Studies, n. 101 (Washington, D. C.: The Catholic University of America, 1936) p. 198.

[30] Roberti, *op. cit.*, p. 336, Cappello, *loc. cit.*

All marriage cases pertain to the public good. This is especially true of separation cases. This is apparent from the intimate connection of conjugal cohabitation with the welfare of society. The Church has ever insisted upon the importance of this aspect of marriage as necessary for the public weal.[31] Moreover, right reason even unaided by any authoritative direction must necessarily conclude that the unity of conjugal life is indispensable for a healthy society. Furthermore, it is a historically evident fact that general marital instability has been a common companion if not efficacious cause for a decadent social economy.

The natural representative of the public good in the diocesan curia is the promoter of justice. It is his duty to see to it that the interests of justice are served, that the common good is safeguarded and that the souls committed to the care of the ordinary are protected from any immediate or possible danger of scandal.[32] It is only a practical and reasonable conclusion, therefore, that his presence be required in suits wherein cohabitation, an obligation founded in public order, is endangered and jeopardized.[33]

One might argue that the absence of any express provision in the common procedural law for the summoning of the promoter of justice in separation cases might permit a judge to dispense with him at will. This position is hardly tenable in view of the increasing ecclesiastical jurisprudence demanding his intervention in separation proceedings. The *Normae* of the Sacred Roman Rota expressly require his presence in causes of separation. These suits are specifically included in the generic list of causes in which the public good is necessarily concerned. This matter is not simply one of recommendation; rather, the promoter of justice has an official duty to

[31] S.R.R., *Separationis quoad Thorum et Mensam,* 5 iul. 1910, coram R.mo P.D. Michaeli Lega, Decano, dec. XXIV, n. 11—*Decisiones,* II (1910), 243.

[32] Canon 1586; Glynn, *op. cit.*, p. 85; Stitt, *De Promotore Iustitiae eiusque Munere in Curia Dioecesana* (Romae: Apud Ed. Scientifica Internazionale, 1939), n. 97 (hereafter cited as *De Promotore Iustitiae*) Wernz-Vidal, *op. cit.*, VI, n. 116.

[33] Glynn, *op. cit.*, p. 87; Stitt, *op. cit.*, p. 125; Le Picard, *La Communauté de la Vie Conjugale* (Paris: Recueil Sirey, 1930), pp. 45, 243; Roberti, *De Processibus,* p. 329.

intervene in these cases and his intervention is to be considered necessary by the judge.[34]

It is quite difficult to list completely all the various phases of the activity of this official in exercising his office in a separation suit. The circumstances in any particular case will determine the governing norm to be followed. It will suffice to say that he should prepare interrogatories and offer exceptions after the manner of the *defensor vinculi* in the ordinary marriage case. Inasmuch as the promoter of justice is the guardian and defender of the public weal, it is his obligation to make certain that a separation is granted only according to the norms of canons 1128-1132. He must be alert to any attempted fraud or deceit perpetrated by the parties, and in general he must strive to oppose, as much as possible, the separation of the spouses, always however in line with the objective truth. In this endeavor he should be present at the examination of the parties and the witnesses, should object to witnesses if it is in order, should prepare his briefs and opinions, as well as strive to prevent any harm to the public good which might result from a cursory and arbitrary decree of separation.[35]

Article 2. Introductory Stage of the Trial

A. The Parties

Today, as in the earlier law, the innocent party has the exclusive

[34] Normae S.R.R. Tribunalis, art. 27, § 1:—In causis contensiosis Ponentis est ferre iudicium de eo utrum bonum publicum in discrimen vocari possit necne, nisi interventus Promotoris iustitiae ex natura rei evidenter necessarius dicendus sit, ut in causis impedimenti ad matrimonium contrahendum, separationis inter coniuges [. . .] etc.

§ 2:—Si in praecedentibus instantiis intervenerit Promotor iustitiae, huius interventus praesumitur necessarius.—*AAS*, XXVI (1934), 457. This norm was not a new departure in 1934; but it bespeaks simply the jurisprudence of the Rota to cite the promoter of justice in separation cases. An example may be found in the list of Rotal decisions published in 1926. In the cause, *Alexandrina Armenorum*, the name of the promoter of justice in the case is expressly mentioned.—*AAS*, XVIII (1926), 97.

[35] Glynn, *op. cit.*, pp. 200, 201; De Guise, *Le Promoteur de la Justice dans les Causes Matrimoniales*, Universitas Catholica Ottaviensis, Series Canonica, n. 8 (Ottawa, Ontario: Les Editions de l'Universitate D'Ottawa, 1944), pp. 142, 246; Stitt, *loc. cit.*

right to initiate against the guilty consort an action for separation.[36] The present law, however, is more distinct in expressing the essential parity of the spouses in their right to act as plaintiff in a separation suit. In the pre-Code law, it was noted, this concession was merely implied, and a clearer statement had to be sought in the glossators and the Decretalists. It is no longer possible to hold that the husband alone to the exclusion of a like right for the wife, may dismiss an unfaithful or otherwise guilty partner in marital life. The statements in the present law using such terms as, *"coniux innocens"* and *"alter coniux"* are clearly demonstrative of an equal right for both partners in married life to plead a case before the ecclesiastical tribunal.[37]

The law does not oblige the aggrieved consort to separate or to remain separated. There is no legal compulsion for the injured spouse to dismiss or to leave the guilty one unless an obligation arise from some other title.[38] In this category would be the obligation to safeguard one's physical or moral well-being, to secure the welfare of the children, to forestall the emergence of scandal and to achieve the fulfillment of fraternal correction.[39] These obligations would naturally be apparent from each particular case wherein the danger might be present. The moral force of such obligations again depends upon the relative gravity of the existing evils, and is solved through the application of the principles of moral theology concerned with each type of obligation.

Although the aggrieved party alone has the right to petition a suit of separation on the grounds mentioned in Canons 1129-1131,[40]

[36] Canons 1130; 1131; Canon 1971, § 1:—Habiles ad accusandum sunt: 1°—Coniuges, in omnibus causis separationis et nullitatis, nisi ipsi fuerint impedimenti causa; Wernz-Vidal, *Ius Canonicum*, V, n. 698.

[37] Canons 1129, 1130, 1131; Cappello, *De Sacramentis*, V, n. 826, ftn. 9.

[38] The optional nature of separation can be seen from the words *"ius habet solvendi"* of Canon 1129, *"potest autem eundem admittere aut revocare"* of Canon 1130, and *"legitimae causae discedendi"* of Canon 1131.

[39] S.R.R. *Separationis*, 4 febr. 1925, coram R.P.D. Iosepho Florczak, dec. VII, n. 6—*Decisiones*, XVII (1925), 44, 45; Cappello, *op. cit.*, V, n. 827; Forbes, *The Canonical Separation of Consorts*, p. 167; Iorio, *Theologia Moralis* (3 vols., Vol. II, 3. ed., Neapoli: D'Auria, 1947), n. 993.

[40] Canon 1971, § 1, 1°.

as will be pointed out in the subsequent section, this does not forbid the other consort from initiating every action whatsoever. His action, however, would not be for a separation but he could, at a later date, plead a suit for the restoration of the common life when the cause has ceased or the duration of time as decreed by the ecclesiastical authority has elapsed.[41] He may also enter suits that have a relation to a separation cause but do not grant him the benefits which are exclusively the right of the innocent consort. This is apparent from an examination of the available judicial actions recognized in the law and delineated in Canons 1667-1705.

B. *Actions and Exceptions*

In view of the fact that a separation suit is not concerned with dissolving the bond of marriage but with the enforcement of the right stated in the law, namely to live apart because of a canonically just cause, there is opportunity to employ more and varied actions and exceptions than in the ordinary matrimonial cause. One may initiate a judicial action not only for a decree of separation but also for the determination of the individual canonical effects. There is also place for court actions that seek to re-establish the unity of conjugal life, or to declare unlawful a separation already instituted. Corresponding to these actions there are many exceptions which the defendant may employ to protect his own rights.

The common action in this matter is a petition for canonical recognition of the right to separation from an errant consort for a just cause. This action may look to a permanent or a temporary separation, and in the latter case for a determinate or an indeterminate period of time.

In the matter of a just cause, it is noteworthy that although adultery is the only cause for a permanent separation,[42] the causes for a temporary separation as enumerated in Canon 1131, § 1, are not to be considered an exhaustive list. This is apparent from the phrase *"haec aliaque id genus,"* which follows the demonstrative enumerations of causes in the canon. The law is here emphasizing

[41] Cappello, *op. cit.*, V, n. 829, 4.

[42] Canons 1129, 1130.

types of causes rather than offering a particular description of every possible reason. It is considered helpful, therefore, to consider causes for temporary separation under the general classification of: (a) spiritual unfaithfulness; (b) grave moral danger, and (c) grave physical harm.[43]

The innocent consort is bound to re-establish the common life when the cause for the separation has ceased. If the ordinary has decreed the separation, then the resumption of cohabitation is to take place upon the lapse of time stated in that decree, or when the ordinary, by a later decree, directs it.[44] Should the innocent party not co-operate, the former defendant may institute an *actio de spolio* to vindicate his right to cohabitation.[45] At this point he is the aggrieved party since the lapse of time or the decree of the ordinary enjoining the resumption of common life returns the right lost through a previous delinquency. Similarly, the adulterous partner who has lost his right to cohabitation may institute judicial action to restore the common life when the formerly innocent spouse has committed the same sin. If the originally innocent partner separated *propria auctoritate,* this action is especially applicable. It also has place if the decree was issued by the ecclesiastical authority, for by compensating the crime of his consort, the former plaintiff although not bound to return on his own initiative, invites the duty to return upon favorable recognition of his consort's action.[46]

There even seems to be a possibility in these cases to employ an

[43] S.R.R., *Separationis,* 30 iun. 1928, coram R.P.D. Iosepho Florczak, dec. XXIX, n. 2—*Decisiones,* XX (1928), 268; S.R.R., *Separationis,* 6 dec. 1929, coram R.P.D. Francisco Morano, dec. LXIII, n. 4—*Decisiones,* XXI (1929), 526; S.R.R., *Separationis,* 6 aug. 1930, coram R.P.D. Andrea Jullien, dec. XLVII, n. 2—*Decisiones,* XXII (1930), 524; Forbes, *The Canonical Separation of Consorts,* p. 166; Cappello, *De Sacramentis,* V, n. 828; Wernz-Vidal, *Ius Canonicum,* V, n. 645; Gasparri, *De Matrimonio,* II, n. 1177.

[44] Canon 1131, § 2.

[45] Canons 1560, 1°; 1698, § 1; Doheny, *Canonical Procedure in Matrimonial Cases,* II, p. 629.

[46] Gasparri, *op. cit.,* n. 1173; Payen, *De Matrimonio in Missionibus ac Potissimum in Sinis Tractatus Practicus et Casus* (2. ed., 3 vols., Zi-ka-wei; Typographia T'ou-Sé Wé, 1935-1936), II, n. 2476 (hereafter referred to as *De Matrimonio*); Doheny, *op. cit.,* p. 651 This against Regatillo, *Ius Sacramentarium,* II, n. 586; (cf. infra, p. 142).

action *ex novi operis nuntiatione*.[47] This could be applied in the case where the alleged consort, antecedent to an ecclesiastical decree, undertakes a civil action for a separation, separate maintenance or even divorce and alimony. The other spouse might initiate this action to halt the new enterprise to protect his own rights and property until the case has been settled in the ecclesiastical forum. In this case the *actio ex novi operis nuntiatione* is preferable to a *suspensio exercitii iuris*.[48] The latter action contains the notion of suspending the exercise of a right, but no Catholic has a right to plead a marriage case in the civil courts since Christian marriage for whatever judgment needs to be rendered must look exclusively to the ecclesiastical authority.[49] Although authors for the most part limit the action *ex novi operis nuntiatione* to the halting of a new physical enterprise,[50] pre-Code authors gave it a broader scope [51] and Noval granted its use with reference even to moral works.[52] Arguing from Canon 6, 4°, namely that in the event of a doubt the older law is to be preferred, one cannot discern any prohibition against its employment in this circumstance.

Since the married persons have a right to mutual cohabitation, one might argue that a *suspensio exercitii iuris* would have usefulness in the case where the separation suit is pending, and the plaintiff desires to reside apart to avoid exposure to physical or moral harm. There is provision for such a case in the ordinary marriage process concerning the bond.[53] In separation suits this need not be utilized. The law has already made provision for such an emergency measure to protect the innocent consort in the institute of separation *propria auctoritate*.[54]

The exceptions applicable in separation cases again are more numerous than in other marriage cases. This is especially notable in

[47] Canon 1676.

[48] Canon 1672, § 2.

[49] Canons 1960, 1961; Gasparri, *op. cit.*, n. 1305.

[50] Roberti, *De Processibus*, p. 668; Coronata, *Institutiones Iuris Canonici*, III, n. 1207; Wernz-Vidal, *Ius Canonicum*, VI, n. 287.

[51] Cf. Lega, *De Iudiciis Ecclesiasticis*, I, n. 239.

[52] *De Iudiciis*, n. 322.

[53] *Instructio*, art. 63.

[54] Canons 1130; 1131, § 1.

regard to cases pleaded on adultery, since the law determines the necessary conditions of this sin quite completely. The absence of some essential property or condition can be employed by the defendant as an exception in the suit. Without entering upon an exhaustive analysis of the conditions postulated before this sin can be canonically recognized as such, it is sufficient to point out here the following possible exceptions.[55]

The exception that the alleged sin of unfaithfulness was not an *adulterium in sensu stricto* is perhaps the most common and so the mere intention of sin, or immodest or indiscreet conduct, although most dangerous and unbecoming, does not constitute this particular delict.[56] Similarly, the absence of culpability may be proposed as an exception by the defendant. If internal consent was lacking and the act occurred as the result of ignorance, error, deceit or force, no formal guilt would be present.[57] Marital separation is a penalty inflicted upon the errant consort,[58] and therefore as any penalty it presupposes moral guilt.[59]

Another exception is the express or tacit consent of the aggrieved party to the sin of adultery perpetrated by the other spouse.[60] Because of the former's consent to the unfaithfulness, the right to separate is forfeited.[61]

If the plaintiff caused the defendant to be unfaithful, the right to separate is lost and this fact may be used as an exception.[62] For

[55] Informative treatments on adultery as a cause for permanent separation may be found in Cappello, *De Sacramentis*, V, n. 826, 827; Wernz-Vidal, *Ius Canonicum*, V, n. 639; Doheny, *Canonical Procedure in Matrimonial Cases*, II, 620; Forbes, *The Canonical Separation of Consorts*, pp. 151-165; Hines, *De Coniugum Separatione*, pp. 22-27; Gasparri, *De Matrimonio*, II, nn. 1172-1174.

[56] Gasparri, *op. cit.*, II, n. 1172; Cappello presents a full treatment of *adulterium perfectum and consummatum*. cf., *op. cit.*, V, n. 826.

[57] S.R.R., *Separationis*, 6 dec. 1929, coram R.P.D. Francisco Morano, dec. LXIII, n. 3—*Decisiones*, XXI (1929), 526.

[58] *Dictum Gratiani* ad c. 4, C. XXXIII, q. 2.

[59] Cappello, *loc. cit.*

[60] Canon 1129, § 1.

[61] "Scienti et consentienti non fit iniuria"—Reg. 27, R.J. in VI°.

[62] Canon 1129, § 1.

this exception to be valid, the cause must be efficacious and proximate, not merely a remote influence or an occasion of sinning.[63]

Somewhat similar to the exception deriving from the plaintiff's consent for the defendant's act of adultery is that which derives from an act of condonation. This exception would hold when the plaintiff had surrendered the right to separate by expressly or tacitly condoning the unfaithfulness of the other consort.[64] Inasmuch as the aggrieved spouse is not obligated to separate, he may freely forfeit the right by condoning the other's act of adultery. Canon 1129, § 1, distinguishes express and tacit condonation. Naturally, express condonation, if clearly stated in words or similar signs, is of unmistakable import. The law, however, explains the meaning of tacit condonation and describes the presumption of law granted to it. If the innocent party, cognizant of the other's unfaithfulness, continued to live with the erring consort with *affectio maritalis,* tacit condonation exists. If the innocent spouse has not dismissed, left or instituted a separation suit against the guilty one within a period of six months, the law grants the presumption of tacit condonation.[65] It is clear from the words: *"postquam de crimine adulterii certior factus est,"* that the lapse of time is to be computed as a *tempus utile* and as beginning from the time that the aggrieved consort became aware of the breach of marital faith.[66] There would be an additional presumption against the innocent party should the adultery be notorious.[67]

Canon 1129, § 1, also leaves room for the defendant's employment of an exception based on the fact of a reciprocal compensation deriving from the plaintiff's act of adultery. This has the effect that a sin of adultery perpetrated by one spouse is compensated through

[63] Payen, *De Matrimonio,* II, n. 2459; Chelodi-Ciproti, *De Matrimonio,* n 161; Doheny, *Canonical Procedure in Matrimonial Cases,* II, 626; Wernz-Vidal, *Ius Canonicum,* V, n. 639.

[64] Canon 1129, § 1.

[65] Canon 1129, § 2.

[66] Canon 35.

[67] Canon 16, § 2:—Ignorantia vel error circa legem aut poenam aut circa factum proprium aut circa factum notorium generatim non presumitur; [. . .]. Both are presumptions of law and therefore admit of contrary proof whether direct or indirect—Canon 1826; Regatillo, *Ius Sacramentarium,* II, n. 586.

a like sin or cancelled out by the same sin of the other. Both parties by their mutual delicts surrender the right to separate.[68] There is no essential difference because of the number of acts. Thus many acts by one spouse would be compensated through one act by the other.[69] If the sin of adultery was committed by the original plaintiff after a sentence of separation was granted, then, according to many, the consideration of reciprocal compensation would not be available as an exception to the defendant. This view is based on the premise that through the unfavorable sentence the original defendant lost his right to cohabitation.[70] Gasparri pointed out that under the aforementioned conditions the fact of reciprocal compensation intervenes if the innocent party has separated *propria auctoritate,* but that the available remedy at law is a suit for the restoration of the common life rather than the raising of an exception against the plaintiff.[71] The latter view seems more acceptable in the light of the recent authentic interpretation that separation cases are to be considered never irrevocably judged according to Canons 1903 and 1989.[72]

[68] "Paria delicta mutua compensatione tolluntur" - c. 6, X, *de adulteriis et stupris,* V, 16. Canon 2218, § 3:—Mutua iniuria compensatur, nisi una pars propter maiorem iniuriae ab eadem illatae gravitatem damnari debeat, deminuta, si casus ferat, poena. It is commonly held that other external sins against marital fidelity may be considered as the equivalent of adultery and therefore be the basis of a compensation. Thus the Roman Rota has stated: *"Ex communi autem interpretatione sunt causa separationis perpetuae etiam sodomia et bestialitas."*—S.R.R. *Separationis,* 6 dec. 1929, coram R.P.D. Francisco Morano, dec. LXIII, n. 3—*Decisiones,* XXI (1929), 525, 526; Wernz-Vidal, *op. cit.,* V, n. 629; De Smet, *Tractatus Theologico - canonicus de Sponsalibus et Matrimonio* (4. ed., Brugis: Car. Beyaert, 1927), n. 225; Payen, *De Matrimonio,* II, n. 2464; this against Cappello, *De Sacramentis,* V, n. 826.

[69] Doheny, *Canonical Procedure in Matrimonial Cases,* II, 628; Forbes, *The Canonical Separation of Consorts,* p. 163; Gasparri, *De Matrimonio,* II, n. 1173.

[70] Regatillo, *Ius Sacramentarium,* II, n. 586; Forbes, *op. cit.,* p. 163.

[71] *Op. cit.,* II, n. 1173; Payen, *De Matrimonio,* II, n. 2476. The earlier authors favored this view—Reiffenstuel, Lib. IV, tit. XIX, n. 81; Schmalzgrueber, Lib. IV, tit. XIX, n. 135; Santi, *Praelectiones Iuris Canonici,* Lib. IV, tit. XIX, n. 55.

[72] 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." R. "Affirmative."—*AAS,* XXXIII (1941), 173.

Applicable in separation cases pleaded on the ground of adultery as well as for other causes is the *exceptio spolii*. Since spoliation would be present when one is unlawfully deprived of the quasi-possession of a right,[73] the defendant may raise the exception, and claim he is not bound to answer in the suit until the right to cohabitation is restored. To use this exception, the defendant must, of course, prove that the other partner has unlawfully separated *propria auctoritate* either before or during the pending suit.[74]

In the matter of temporary separations, the exceptions that can be employed are not as clearly evident. Since the causes may be multiple, only a general statement of exceptions is possible. A good suggestion to be kept in mind is the fact that separation actually deprives a partner of a right, the right to cohabitation; the causes outlined in Canon 1131, § 1, therefore, are subject to strict interpretation.[75] As an example, the mere failure to practice one's faith is not the equivalent of affiliation with a non-Catholic sect, and one so accused might use this as an exception.[76] The same holds true with reference to serious moral or physical dangers. These considerations are subject to a strict interpretation for the same reason, and the dangers must in addition be continuous in character. One or two isolated incidents would not be sufficient, nor would mere imaginings of cruelty as a result of normal conjugal disputes and arguments. The whole tenor of Canon 1131, § 1 emphasizes habitual and repeated delinquencies. A well founded and substantial denial of these is, therefore, a useful exception for the defendant.[77]

C. The *Libellus* and *Litis Contestatio*

The *supplex libellus* in separation suits will be for the most part the same as that in the ordinary matrimonial case. It will be drawn up therefore in conformity with Canons 1706-1710 and articles 55-60

[73] Roberti, *De Processibus*, p. 721.

[74] Canon 1699, § 2; Coyle, *Judicial Exceptions*, p. 110.

[75] Canon 19:—Leges quae [. . .] aut liberum iurium exercitium coarctant, [. . .], strictae subsunt interpretationi.

[76] Canon 1325, § 2; Doheny, *Canonical Procedure in Matrimonial Cases*, II, 631.

[77] S.R.R., *Separationis*, 30 iun. 1928, coram R.P.D Iosepho Florczak, dec. XXIX, n. 2—*Decisiones*, XX (1928), 268.

of the *Instructio*. Without treating these legal enactments as such, one may opportunely emphasize at this point as peculiar to separation cases the following considerations.

The plaintiff should clearly state the precise nature of the cause or causes upon which the separation is pleaded.[78] Long narrations of conjugal disputes and vicissitudes are not to be included. These complaints are irrelevant here and should be reduced to a statement of some certain cause. If at all, they should have place in the subsequent probatory stage.[79] Since parties are not necessarily separated in fact when the *libellus* is presented, special note should be taken of the actual residence of the parties. Furthermore, if the plaintiff has separated *propria auctoritate*, the reason and the exact time should be stated since this factor may affect the determination of competency[80] and be of instrumental aid for the decision regarding the presence or the absence of condonation in adultery cases.

In petitioning the separation, the party should also specify the period of time for which the separation is desired. Since adultery alone suffices to allow a perpetual separation, the judge will be faced with the problem of determining the warrant in the length of time asked for in each case. When such causes as apostasy and insanity are proffered it is not excessive to request a separation for an indefinite period of time. The period to be set is not so apparent in other cases. To make the judge's office somewhat less burdensome, a statement in the *libellus* describing the intention of the petitioning party, will aid him to adjust this request to the merits of the case as the cause proceeds.

Moreover, since *praesumptiones hominis* are applicable in separation cases, especially in the matter of infidelity, the general facts and indications upon which the presumptions rest should be indicated. Any proofs by documents and witnesses will follow the ordinary matrimonial procedural norms.[81]

Mention of the effects of the separation such as the custody of children, the support of the separated wife, etc., should also be in-

[78] Canon 1708, § 2°; *Instructio*, art. 57, 2°

[79] *Instructio*, art. 57, 3°.

[80] *Instructio*, art. 57, 4°.

[81] *Instructio*, art. 59.

cluded. In view of the present lack of civil recognition in the United States of ecclesiastical decrees, civil action normally follows the sentence of the court. It is feasible, therefore, that a petition to initiate civil action be incorporated in the *libellus*. Important also is a specific designation of the type of action required. Circumstances are not standard in this matter and the petitioner should explicitly mention whether a separation, separate maintenance, divorce and alimony or merely support is desired. Cognizant of this request, the judge may better be able to decide in favor or against the necessary permission by studiously weighing this request throughout the subsequent stages of the trial.

Noteworthy also is the fact that the rejection of the *libellus* does not mean that the separation was refused. In such a case the plaintiff could resort to the tribunal of second instance to define the question of rejection.[82] If the Court sustains the plaintiff's plea the tribunal of first instance must hear the case and pass a sentence of permitting or forbidding the separation.[83]

Particular emphasis should be placed on the provisions of the *Instructio* for the reconciliation of the spouses. The estrangement already extant between the consorts will only be aggravated by the bitterness or by the antipathy which usually accompanies the probatory stage of a separation suit. It is indicated then, for the judge to make every attempt at reconciliation before the trial gets underway. There does not seem to be any special time for this, although it should be done before or during the *litis contestatio*. Nor is this a light recommendation to the judge; it is apparent from the instructions of the Sacred Congregation of the Sacraments that, whenever a valid marriage or one easily validated is being treated, attempts at reconciliation are to be made whenever possible.[84] In keeping with this notion of reconciliation, every effort should be made to acquaint the defendant with the cause in the citation [85] and

[82] Canon 1703, § 3; *Instructio*, art. 66.

[83] Regatillo, *Ius Sacramentarium*, II, n. 587.

[84] S. C. de Sacramentis, *Regulae servandae in processibus super matrimonio rato et non consummato*, 7 maii 1923, n. 10—*AAS*, XIV (1923), 394; *Instructio*, art. 65.

[85] Canon 1711, § 1; *Instructio*, art. 74, 76.

to have the defendant make a personal appearance in court. This is not only necessary if reconciliation is to be possible at all, but it would obviate any danger of an attempted alienation of affection suit against the ecclesiastical authority by the party defendant.

Article 3. Probatory Stage of the Trial

A. *Proofs*

In view of the evident danger of collusion between the parties in cases concerning the bond of marriage, the general sources for the obtaining of legal proof are of a more limited character than in the ordinary trial.[86] Although separation suits are marriage cases, nevertheless because of their singular nature the ordinary rules governing the probatory stage of a trial may be employed with less restraint. As a consequence of this, the provisions of Canon 1747.[87] may be employed more freely than in the ordinary marriage trial which permits of only the first two sections of this canon.[88] Facts which are *notoria notorietate facti* are common proofs in these suits. Newspaper accounts and otherwise publicly known evidence of a spouse's infidelity, cruelty, apostasy or other delict may be accepted at times as so well substantiated that further legal proof is not necessary. Similarly, there is the possibility of accepting in these cases the judicial confession of the defendant, made in court according to Canon 1750, with less restriction than in a trial concerning the bond of marriage. Such a confession could not be accepted as *notoria notorietate iuris* in the sense of Canon 2197, 2°, as is evident from Canon 1751,[89] and from the omission of this institute in the provision

[86] Canons 1974 - 1975.

[87] Non indigent probatione:

1° Facta notoria ad normam Canon 2197, nn. 2, 3;

2° Quae ipsa lege praesumuntur;

3° Facta ab uno ex contendentibus asserta et ab altero admissa, nisi a iure vel a iudice probatio nihilominus exigatur.

[88] Instructio, art. 93.

[89] Si agatur de negotio aliquo privato *et in causa non sit bonum publicum*, confessio iudicialis unius partis, dummodo libere, et considerate facta, relevat alteram ab onere probandi.

of the *Instructio* that repeats all but the third section of Canon 1747 containing the law on judicial confessions.[90]

It is senseless to deny that separation cases pertain to the public good as do other marriage cases, and are therefore unaffected by the conditions set in Canon 1751. One cannot argue that a separation suit partakes of the nature of a penalty that further distinguishes it from other marriage cases, and that in consequence there accrue to separation suits all the advantages that can derive from a judicial confession. Despite the truth of the penal aspect of separation, one must keep in mind that criminal cases likewise pertain to the public good,[91] and the ecclesiastical law, as distinguished from modern civil practice, does not regularly permit a judicial confession of the defendant to free the plaintiff from the burden of proof.

It does not seem, however, that judicial confessions are to be accorded no credibility whatsoever in separation suits. Separation does partake of the nature of a penalty and is inflicted upon a delinquent spouse as a consequence of his misbehavior. Because of this, it is to be expected that the danger of collusion and perjury, which is so common in other matrimonial cases in which the parties may seek to be relieved of the bond of marriage, is not normally present. Moreover, the moral stigma that attaches to such assertions, when one considers the grave nature of the causes for separation, usually favors the confessing party's credibility. Naturally there is ever the danger of perjured assertions, but the law invokes due provisions and safeguards against these through its demand of further proof whenever either the law itself or the judge orders it.[92] In marriage trials as such further proof is demanded,[93] but the nature of a separation suit appears to mitigate this condition somewhat. Since admissions or confessions are to the detriment of the confessing party in other similar or comparable circumstances, this view gains certain strength. Canon 1947 allows the ordinary in some criminal trials, upon the confession of the delinquent, to dismiss him with a rebuke or penance instead of instituting criminal proceedings.

[90] Art. 93.
[91] Coronata, *Institutiones Iuris Canonici*, III, n. 1277.
[92] Canon 1747, 3°.
[93] *Instructio*, art. 117.

Wherefore, a judge in a separation suit, if he be presented with a canonically recognized confession of the defendant, might accord it a greater degree of acceptance than in the ordinary marriage case. It remains his office of course, as well as that of the promoter of justice, to weigh such a confession so that the judge may exact whatever additional proof he may feel to be serviceable and helpful.

Despite the importance of the defendant's confession or admission of his delinquency which the plaintiff pleads as the cause of separation, he is not obliged to answer incriminating questions. His acknowledgment of transgressions before the court must be voluntary, for he is justified in refusing to answer interrogations that would incriminate him.[94] This does not mean the promoter of justice must omit all questions pertaining to the defendant's admission of his delict as leading and offensive questions. This does not seem to be the meaning of Canon 1775.[95] Rather, such questions are most relevant to these cases and are permissible at the discretion of the judge. If the party refuses to answer questions of this nature, it is the office of the judge to estimate whether the refusal is justified or can be considered as an admission of guilt.[96]

B. Presumptions

Of special import in separation cases is the invoking of presumptions for the ascertainment of the alleged facts. The law distinguishes two chief types of presumption. The first is the legal presumption (*praesumptio iuris*) the other a personal presumption (*praesumptio hominis*).[97] Legal presumptions are further divided into *praesumptiones iuris simpliciter* and *praesumptiones iuris et de iure*.[98] The latter may not be impugned directly while the *prae-*

[94] Canon 1743, § 1; *Instructio*, art. 111.
[95] Interrogationes breves sunto, non plura simul complectentes, non captiosae, non subdolae, non suggerentes responsionem, remotae a cuiusvis offensione et pertinentes ad causam quae agitur.
[96] Canon 1743, § 2; *Instructio*, art. 112. The matter of extra-judicial confessions is accorded the same consideration as in other marriage cases.—*Instructio*, art. 113.
[97] Canon 1825, § 1.
[98] Canon 1825, § 2.

sumptio iuris simpliciter admits of direct contrary proof. A personal presumption or *praesumptio hominis* is deduced by the judge himself and varies in force with the circumstances.

The outstanding presumptions employed in separation suits are the following. The innocent party in a separation case is presumed by law to be cognizant of the notorious acts of the other spouse.[99] There is an additional *praesumptio iuris* stated in Canon 1129, § 2, to the effect that a tacit condonation is present when the innocent party, aware of the other's infidelity, continues cohabitation with *"affectio maritalis"* for a period of six months. Since both are *praesumptiones iuris simpliciter,* although they relieve from the burden of proof the party offering them, nevertheless they yield to contrary evidence.[100] Substantial evidence that the innocent spouse lived with the errant consort for a period of six months in order to procure definite testimony in anticipation of the present suit would serve to directly impugn the presumption of condonation.

The judge too may deduce a presumption, although not of the law, since it has its origin not in the law but in the mind of the judge in consequence of some certain or determinate fact in the case.[101] Presumptions enjoy more or less value in proportion to their nature as temerarious, probable or violent presumptions.[102] Light presumptions should be dismissed, probable presumptions offer partial proof, and violent presumptions full proof.[103] In conflict, presumptions of law prevail over personal presumptions and the latter regarding special facts supersede presumptions concerning generalities.[104]

Personal presumptions of the judge are particularly pertinent to

[99] Canon 16, § 2.

[100] Regatillo, *Ius Sacramentarium,* II, n. 586.

[101] Canon 1828.

[102] Coronata, *Institutiones Iuris Canonici,* III, n. 1356; Wernz-Vidal, *Ius Canonicum,* VI, n. 517.

[103] Reiffenstuel, Lib. II, tit. XXIII, n. 29-31; Coronata, *op. cit.* III, n. 1358; Wernz-Vidal, *op. cit.,* VI, n. 520; Vermeersch-Creusen, *Epitome Iuris Canonici,* III, 206.

[104] Reiffenstuel, Lib. II, tit. XXIII, nn. 80, 92; Wernz-Vidal, *loc. cit.,* Coronata, *loc. cit.*

separation cases pleaded because of adultery. A study of the jurisprudence of the Sacred Roman Rota in judging these cases clearly establishes them as suitable evidence. Most cases of this nature reviewed before this Roman Tribunal contain references to the difficulty in establishing strict proof of this sin in consequence of the rarity of witnesses *de visu.*[105] Even if eye witnesses are proposed, then because of the extraordinary and unexpected nature of their testimony, they should be rejected as incredible or at least suspect. Such testimony would be so rarely true that one might almost call the attitude of a court a jurisprudential presumption against it. As a consequence, in the absence of testimonial proof, the court must refer to conjectures and violent presumptions from which a moral certitude of the fact may be induced.[106]

The classic norm for the use of presumptions in these cases is taken from a separation suit settled by Pope Alexander III. The testimony that the delinquents were seen: *"solus cum sola, nudus cum nuda, in eodem loco iacentes* [. . .] *in multis secretis locis, et latebris ad hoc commodis, et horis electis,"* moved the Pontiff to regard this testimony as a sufficient presumption for the fact of infidelity.[107] The decisions of the Sacred Roman Rota continue to use this papal example as a norm today, but also present some general norms. This august Tribunal has often demonstrated the use of presumptions as suitable evidence. The presumptions should arise from particular acts and circumstances that have a peculiar

[105] S.R.R., *Separationis,* 4 febr. 1925, coram R.P.D. Iosepho Florczak, dec. VI, n. 4: "Ast crimen adulterii in foro externo non potest facile evinci, quia, in genere, clam perpetratur et directe fere nunquam probari potest."—*Decisiones,* XVII (1925), 42; S.R.R., *Separationis,* 3 ian. 1929, coram R.P.D. Henrico Quattrocolo, dec. I, n. 5—*Decisiones,* XXI (1929), 4; S.R.R., *Separationis,* 8 ian. 1937 coram R.P.D. Ioanne Teodori, dec. I, n. 6—*Decisiones,* XIX (1937), 4; S.R.R., *Separationis,* 2 mart. 1940, coram R.P.D. Alberto Canestri, dec. XIX, n. 4—*Decisiones,* XXXII (1940), 198.

[106] S.R.R., *Separationis,* 4 febr. 1925, coram R.P.D. Iosepho Florczak, dec. VII, n. 1: "Si testis deponeret, directe de visu copulae, esset falsus, seu de falso suspectus, [. . .]. Hinc res demonstranda est per coniecturas et praesumptiones violentas ex quibus saltem moralis certitudo de adulterio commisso inducatur."—*Decisiones,* XVII (1925), 42.

[107] C. 12, X, *de praesumptionibus,* II, 23.

relationship to the fact of infidelity. Mere suspicions, whether they be probable or not, although not peremptorily dismissed, are insufficient. The facts and circumstances brought forward as testimony must be so naturally connected with marital unfaithfulness that the court must accept them as violent presumptions and as sufficient to give rise in the mind of the judge to a moral certitude. The damage and injustice that results from an unlawful separation demand a proportionate uncontestable proof. Violent presumptions furnish that proof.[108]

In formulating presumptions, then, the judge must seriously weigh all the circumstantial evidence offered, the character and probity of the witness who supplies the information, as well as the circumstances of the alleged delinquents, since all are essential in ascertaining the fact of infidelity. His personal views, opinions and suspicions are not the equivalent of presumptions. He must substantiate certain and specific facts which are so directly related to the alleged delict that they are undeniably a basis for a violent presumption.[109]

[108] S.R.R., *Separationis*, 4 febr. 1925, coram R.P.D. Iosepho Florczak, dec. VI, n. 4: "Hinc, quoad adulterium, etsi non levia habeantur indicia, certitudo tamen partrati criminis non habetur; sed constat procul dubio graves haberi in casu causas quae separationem quoad habitationem, mensam et thorum, ad tempus indeterminatum postulant, ut damna et mala et familia removentur."—*Decisiones*, XVII (1925), 42; S.R.R. *Separationis*, 6 dec. 1929, coram R.P.D. Francisco Morano, dec. I, n. 3: "Cum vero adulterium sit crimen quod generatim patratur in occulto, eius probatio fieri solet per praesumptiones violentas, nempe per coniecturas ex factis quae non nisi in casu adulterii contingere solent."—*Decisiones*, XXI (1929), 525; S.R.R., *Separationis*, 30 maii 1938, coram R.P.D. Arcturo Wynen, dec. XXXIII, n. 2: ". . . tamen adulterium probari potest per testes, qui referunt de actis adulterio proximis vel de circumstantiis quae violentam praesumptionem de patrato crimine gignunt, v.g. de facto quod maritus cum alia muliere in eodem lecto inventus sit. Non vero sufficiunt suspiciones plus minusve probabiles. Quoniam culpa non moraliter certa, sed dumtaxat probabilis, non sufficit ad privandum aliquem hominem certo iure ad vitae coniugalis communionem."—*Decisiones*, XXXIII (1938), 310; Gasparri, *De Matrimonio*, II, n. 1172; Cappello, *De Sacramentis*, V, n. 826.

[109] Canon 1828; *Instructio*, art. 173.

Article 4. Concluding Stages of the Trial

A. The Sentence

Upon the presentation of all the testimony and proofs, the examination of the advocate's briefs and the animadversions of the promoter of justice, the judge must strive to procure a moral certitude about the existence of the alleged cause for a canonical separation.[110] His prudent conscience is to be his guide in the evaluating of these proofs unless the law explicitly grants some special efficacy to some particular proof. Witnesses recognized in the law as *"omni exceptione maiores"* are included in this category.[111] Often in separation suits, relatives or intimates of the parties, armed with incontestable character references, testify as eye witnesses to the alleged cause. This is especially applicable in cases of grave physical or spiritual harm. Their testimony is given a special preference by the law and the judge may accept it as beyond challenge. Similarly, the presumptions treated in the foregoing article are considered as most efficacious.[112]

As in all cases of doubt, the judge who cannot arrive at a moral certitude necessary for a sentence is obliged to pronounce that the plaintiff's right has not been established and the defendant retains the right to cohabitation.[113] This is clear enough in a suit for canonical separation. Another problem arises when the situation is reversed. The case may very well be pleaded for the restoring of cohabitation after a separation has been pronounced but the cause is alleged to have ceased. In a similar fashion a suit may be presented as an *"actio de spolio,"* wherein the plaintiff wishes the already instituted separation to be declared unlawful and cohabitation to be restored. Does the same rule apply here, and is the doubtful judge obliged to declare the right to cohabitation not established, thus permitting the separation to continue? It seems not. Canon 1014 states that marriage enjoys the favor of the law and in doubt the marriage is to be considered valid until the contrary is proved. In a suit attacking the marriage bond, therefore, the validity of the

[110] Canon 1869, §§ 1, 2.
[111] Canon 1791.
[112] Canon 1826.
[113] Canon 1869, § 4.

bond is a *causa favorabilis* and in doubt it is favored.[114] One might argue that Canon 1014 is limited to the bond of marriage and that on the contrary the right to conjugal unity is treated as the subject of any contentious case. This position is unwarranted. Despite the law's lack of explicit mention of cohabitation as a *causa favorabilis,* the whole ecclesiastical legal history on this institute favors its inclusion. There is no exhaustive list of favored causes in the law; [115] as a consequence, the community of conjugal life cannot be denied this privilege by such elimination. On the other hand as proof for its legal preference, there is a scholarly sentence by Cardinal Lega (+ 1935), then Dean of the Sacred Roman Rota, in which he clearly demonstrates that conjugal unity must be considered a favored cause. The sentence stated: *"omnia iura clamant ut coniugale consortium non disiungatur, nisi invicte comprobatur, adesse causam canonicam separationis."* [116] Although not in the sense of a law, it is clear from this statement studied in the light of Canon 1128 [117] that the community of conjugal life is to be considered a *causa favorabilis* whenever a judge is faced with a positive doubt and unable to arrive at the necessary moral certitude.

Since separation cases require only a single judge, he alone frames the sentence.[118] Should a tribunal of three or even five judges try the case, the drafting of the sentence will follow the norms set in Canons 1871-1872 and article 198 of the *Instructio.* It is quite possible that a judge in his paternal desire to attempt a reconciliation might procrastinate in rendering the decision and thus hope for a restoration of the common life in the intervening period. This would be unlawful and the aggrieved party who has the right to separate

[114] Canon 1869, § 4.

[115] Wernz-Vidal, *Ius Canonicum,* VI, n. 589.

[116] S.R.R., *Separationis quoad Thorum et Mensam,* 5 iul. 1910, coram R.mo P.D. Michaeli Lega, Decano, dec. XXIV, n. 11—*Decisiones* II (1910), 244.

[117] Coniuges servare debent vitae coniugalis communicationem, nisi iusta causa eos excuset.

[118] Canon 1872.

according to Canons 1129-1131, once the presence of a just cause is proved, could have recourse to the bishop or to the Sacred Congregation of the Sacraments, as the case may direct, for the protection of this right.[119]

From the several cases of separation reviewed before the Sacred Roman Rota between the years 1908 and 1940, suitable norms for framing sentences may be found. According to the practice of the Rota the sentence is to be rendered with the invocation of the Divine Name at the beginning. Then there is a list of the court personnel, a mention of the parties and a statement of the specific facts in the case. The decisions of the Rota especially in adultery cases present a general outline of the delicts alleged as committed by the respondent in a more or less narrative form. At the conclusion of this narration the doubt as formulated by the Tribunal is stated, usually: *"An locus sit separationi coniugum a toro, mensa et cohabitatione, in casu."* This is followed by a statement of the law on canonical separation, as a rule it is Canons 1129 and 1130 for perpetual separations, and Canon 1131 for those of a temporary nature, with a commentary on the more salient legal aspects of the case at hand. Next there is an exposition of the relation between the law and the facts of the case simply entitled: *In facto.*[120] Here are expressed not only the accusations of the plaintiff accompanied with a summary of the testimonial proof, but also the exceptions of the defendant; likewise the judicial or extra-judicial confessions and legal as well as personal presumptions are duly delineated and accordingly valuated. The deductions of the Tribunal are then set down with a clear presentation of the reasons why the plea has been accepted or rejected. A good example is the following, taken from a case pleaded by a husband on the grounds of his wife's infidelity:—

"1° adulterium uxoris certo probatum non esse;

[119] Canon 1625, § 1.

[120] Canons 1605, § 1; 1871; § 2; 1873, § 1, 3°, indicate that the motives *in facto* are to precede those *in iure.* The Sacred Roman Rota, however, in common practice uses the reverse form. Either order may be used, although the long experience of the Rota has doubtless proved its own method as the most practical.

2° probatum esse, etsi non plenissime, huius adulterii condonationem ex parte viri;

3° graves et violentas presumptiones adesso de mariti adulterio." [121]

Any other statements necessary to complete the case in addition to an analysis and appraisal of the advocate's and promoter of justice's brief are given. The sentence is then concluded with a response to the earlier stated *dubium*, e. g. *"Negative, seu non esse locum separationi coniugum a toro, mensa et cohabitatione, in casu."* [122] Should the facts warrant a favorable decision then the sentence would read: *"Affirmative, seu constare de legitima separationis causa ad tempus indefinitum iuxta uxoris instantiam."* [123] A decision must be given for each *dubium*, if more than one has been considered.[124] This is demonstrated in a decision of the Rota where two *dubia* were proposed; the one concerned a permanent separation because of adultery, and the other a temporary separation because of mutual physical harm to the parties. It reads: *"Locum non esse separationi perpetuae ex causa adulterii, utpote compensati; locum esse separationi ad tempus indeterminatum ob iniurias, et quidem culpa utriusque coniugis, in casu.*[125]

The length of time of the granted separation is always noted in the sentence and should be clearly stated. When the sentence grants a separation perpetually or for an indefinite time there is no difficulty, but other temporary separations require accurate terminology to preclude all misunderstanding. If the time is not definitely stated or the period ends upon the cessation of the cause, a clear enunciation of each should be made. The two sentences are not synonymous, and any lack of clarity may lead to ambiguity. Similarly, temporary separations given for a definite period of time

[121] S.R.R., *Separationis*, 8 ian. 1937, coram R.P.D. Ioanne Teodori, dec. I, n. 7—*Decisiones* XXIX (1937), 4.

[122] *Loc. cit.*

[123] S.R.R., *Separationis*, 17 martii 1913, coram R.P.D. Antonio Parathoner, dec. XIX, n. 18—*Decisiones*, V (1913), 225.

[124] Canon 1873, § 1, 1°.

[125] S.R.R., *Separationis*, 2 martii 1940, coram R.P.D. Alberti Canestri, dec. XIX, n. 10—*Decisiones*, XXXII (1940), 202.

should state accurately just how long the right of separation may last. If a positive statement of months, or years, as the case may call for, is issued, there will be no danger of subsequent harm to either of the parties at the hand of the judge.[126]

In these cases the judge has a certain discretionary authority which he lacks in cases of perpetual separation. The latter leave room for but one sentence but temporary separations are ruled by circumstances. The judge should issue a sentence, then, according to a due proportion between the established just cause and the gravity of the obligation of maintaining conjugal unity. The period of time stated in the sentence should be an expression of this suitable adjustment arrived at upon prudent deliberation and judgment.

Since permission for civil action is usually petitioned with a separation action; mention of this should be made in the sentence or at least in a corollary thereto. Such permission is usually necessary in view of the complete absence of civil recognition of ecclesiastical sentences. One cannot deny that the ecclesiastical judge may decide matters relating to the so-called civil effects of marriage such as property settlements and payments of alimony. Although these matters may not be explicitly *res spirituales* as are the separation suits themselves, nevertheless, they pertain to it most intimately *ex connexione causarum*, and the ecclesiastical judge is canonically competent to adjudicate them.[127] Be this as it may, the diocesan judge is still faced with the problem of civil recognition of his sentence as requisite for the protection of the parties. This necessitates a grant of permission to the parties to seek it. The types of civil action and the conditions requisite for a grant of permission will be treated in a later chapter. It will suffice here to say that whatever permission the judge issues in this regard is not of his own official

[126] Canon 1873, § 1, 2°:—Sententia debet determinare (saltem quatenus fas sit et materia patiatur), quid pars damnata dare, facere, praestare, aut pati debeat, aut a quo abstinere; itemque quo modo, loco vel tempore obligatio implenda sit.

[127] Canon 1553, § 1, 1°:—Ecclesia iure proprio et exclusivo cognoscit de causis quae respiciunt res spirituales et spiritualibus adnexas.

Canon 1961:—Causae de effectibus matrimonii mere civilibus, si principaliter agantur, pertinent ad civilem magistratum ad normam Canon 1016; sed si incidenter et accessorie, possunt etiam a iudice ecclesiastico ex propria potestate cognosci ac definiri.

authority. The Code is silent on this matter and there remain only the directions of the Roman Congregations as guiding norm. A response of the Sacred Congregation of the Holy Office clearly states that the granting of such a permission belongs to the bishop.[128] The judge, therefore, must be delegated to issue any permission for civil action. In the absence of such a commission, a separate decree from the ordinary or his delegate is a necessary requisite.

B. Publication of the Sentence

The best procedure for the publishing of the sentence would seem to be the summoning of the parties to hear it solemnly read by the judge sitting in court.[129] This method is preferable to having them read it at the Curia or receive it by registered mail.[130] These alternate methods would suffice, but the more solemn form would be more appropriate in this type of suit. By solemnly reading the sentence to both parties, if it is at all possible, the judge has an opportunity to advise them of the significance of his decision. Thus he can explain the effects of the separation according to the particular nature of the case and, if it is a temporary separation, point out the conditions for future reconciliation.[131] Moreover, if permission has been granted for civil action, he might use this opportunity to administer the required oath. It is prescribed that the consorts affirm on their oath that any action in the civil courts is a necessary and unavoidable formality. In addition they must swear that they are cognizant of their always intact bond of marriage, and that whatever action they have permission to plead is for the purpose of determining the civil effects of their separation and not for the purpose of dissolving their marriage. This oath should upon its recording be kept in the acts of the case.[132]

[128] S.C.S. Off., 22 maii et 19 dec. 1860, n. 4: ". . . posse tolerari ut catholici in eo foro actoris et advocati partes agant, dummodo adsint iustae separationis causae iudicio Episcopi, . . ."—*Collectanea*, II, n. 2272.

[129] Canon 1877; *Instructio*, art. 204, § 1.

[130] *Loc. cit.*

[131] Canon 1873, § 1, 2°.

[132] S.C.S. Off., 6 aug. 1906: Gasparri, *De Matrimonio*, II, n. 1324. This response directs the oath to be taken before the ordinary or his delegate; the judge, then, should receive additional delegation to administer it.

COROLLARY: Some Salient Points on the Juridical Effects of a Canonical Separation

Although by a canonical sentence of separation the consorts are relieved of their obligation of sharing bed, board and cohabitation, the other rights and duties from their still undissolved bond of marriage remain intact. They are still husband and wife and, should God have blessed their union with children, parents.[133] As a consequence, the matter of support of the separated wife and the custody of children are of paramount importance.

The complete absence in this country of civil recognition of an ecclesiastical judge's sentence has been noted above. His determination of these matters in his sentence might therefore seem futile and especially so with regard to the support of the separated wife. Moreover, in the absence of any canonical regulation on this point of support, authors generally refer the matter to the civil courts according to Canons 1016 and 1961.[134] If no civil action is to take place and the judge should be obliged to determine this question in his sentence, relative norms may be found in the Decretal Law.[135] Since dowry is no longer an important factor in marriage, especially in this country, these regulations may seem obsolete. However, inasmuch as they were prescribed with the justice and equity of ecclesiastical law at the time, their spirit, if not their letter, would be a good criterion for the judge to follow.

The unfortunate yet so important effect of a separation action is the proper determination of the custody of children. Here the law is clear and express; despite the necessity of civil recognition, which may be to the contrary, the ecclesiastical judge must attempt the observance of these provisions as far as possible. Canon 1132 grants the guardianship of the children to the innocent party as a general rule. In most cases there would be little conflict with the civil courts in this instance in view of a similar practice there. However, the universal law of the Church, concerned as always

[133] Wernz-Vidal, *Ius Canonicum*, V, n. 647.

[134] Wernz-Vidal, *loc. cit.*; Hines, *De Coniugum Separatione*, p. 46; Forbes, *The Canonical Separation of Consorts*, p. 240.

[135] C. 1-8, X, *de donationibus inter virum et uxorem, et de dote post divortium restituenda*, IV, 20.

with the preservation of the faith, states an exception to this rule in the case of mixed religion. Here the Catholic party is preferred as the custodian of the children according to the obvious presumption that their Catholic rearing will be better safeguarded. The law is not impractical by stating this as an ironclad rule. It bestows an additional discretionary power upon the ordinary for obvious reasons. Where the circumstances clearly demonstrate that the dubious character of the Catholic party would make such a ruling impractical if not dangerous, the ordinary, according to his own prudent judgment, will grant the children's custody to whichever consort he deems most suitable for the protection of their spiritual and physical welfare.[136]

The civil courts may not always agree with the ordinary's decision, but this conflict cannot always be avoided. However, in most instances, since both authorities are concerned with the children's best interests, although the ordinary must place paramount importance on their Catholic education, a conflict between the two judgments would not ordinarily exist.

Adultery is the one and sole cause for a permanent separation; consequently there is no provision in the law for subsequent reconciliation unless the innocent spouse desires it[137] or, by the commission of the same delict, has given the other spouse occasion for an action to restore the common life.[138]

The general theme of this matter is that the guilty partner has lost the right to the community of marital life, while the innocent party retains it and may demand its resumption at will. Wherefore, even after a sentence of separation, the guilty partner would

[136] Canon 1132: Instituta separatione, filii educandi sunt penes coniugem innocentem, et si alter coniugum sit acatholicus, penes coniugem catholicum, nisi in utroque casu Ordinarius pro ipsorum filiorum bono, salva semper eorundem catholica educatione, aliud decreverit. Cf. Wernz-Vidal, *loc. cit.*; Hines, *op. cit.*, p. 45; Forbes, *op. cit.*, pp. 237 - 241.

[137] Canon 1130: Coniux innocens, sive iudicis sententia sive propria auctoritate legitime discesserit, nulla unquam obligatione tenetur coniugem adulterum rursus admittendi ad vitae consortium; potest autem eundem admittere aut revocare, nisi ex ipsius consensu ille statum matrimonio contrarium susceperit.

[138] Gasparri, *De Matrimonio*, II, n. 1103.

be bound to return upon the summons of the innocent consort. The only circumstance in which this would not be compulsory is the embracing of the clerical or religious state by the guilty one with the other's consent. This life by its nature is contrary to the married state and therefore obviates any reconciliation.

Provision for reconciliation in cases of temporary separation is found in Canon 1131, § 2.[139] Here it is stated that, once the cause which permitted the separation has elapsed the common life is to be restored. This applies immediately if one has departed *propria auctoritate*.[140] However, in the light of the phraseology of the remainder of Canon 1131, § 2, which provides that if the separation was pronounced by the ordinary for a definite or indefinite period of time, the innocent party is not obliged to return unless the ordinary decrees it or the time as specified in the sentence has elapsed, a question can arise here. Perhaps the ordinary has decreed the separation "until the cause ceases." Is the innocent party obliged to return upon the cessation of the motive cause? It definitely seems so. Canon 1131, § 2, permits only a delay in the reconciliation when the ordinary has decreed the separation for a definite or an indefinite period of time. In this case the ordinary has decreed the separation, but although it is for an indefinite period of time since it is until the cause ceases, nevertheless, the express mention of this element earlier in the canon is the legislation for this point and the innocent party therefore is bound to return upon the cessation of the cause. His right to separation has ceased and his continued state of separation has no longer any canonical sanction.[141]

In issuing his decree of reconciliation, the diocesan judge will do well to acquaint himself with the ecclesiastical jurisprudence on this phase of canonical separation. Not only modern authors but even the older authors and decisions of authoritative sources direct caution and thorough consideration of both sides of the question. They

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

[140] Cappello, *De Sacramentis*, V, n. 829.

[141] Cappello, *loc. cit.*; Forbes, *The Canonical Separation of Consorts*, p. 229.

note that in all too many cases the guilty partner may on the surface make extreme promises and even by exemplary conduct unjustifiably procure a restoration of his marital rights. It is pointed out that the innocent party is not to be compelled or forced to accept the guilty spouse back to the common life when there is a very real suspicion of deceitful and hypocritical correction. This is especially true in cases of separation granted on the grounds of cruelty. It is quite possible that a brutal husband especially will seek to delude a judge into becoming convinced that a reform has been effected. At the same time the wife, victim of his past rages, would be equally convinced of his hypocrisy and feigned veneer of virtue. A general conclusion, established as a general criterion, is that the innocent spouse should not be forced to return or receive back an errant partner unless there are obvious signs of conversion and good faith. There should not only be no very profound doubt in the mind of the judge when he seeks to effect this marital reunion but if the case warrants them, then sufficient guarantees should also be demanded as testimony of a corrected life and as security to the hesitating innocent consort.[142]

Article 5. The Appeal and the Court of Second Instance

The heterogeneous nature of a separation suit is perhaps most clearly shown in the appellate stage of the action. Since it is a cause *"de statu personarum,"* it is similar to the ordinary matrimonial case concerning the bond and partakes in the same privilege of never becoming an adjudged case.[143] Marriage cases *de vinculo,* however, require a mandatory appeal by the defender of the bond when the first sentence favors the nullity of the marriage.[144] The nature

[142] S.C.C., *Firmana,* 16 maii 1789—*Thesaurus Resolutionum S.C.C.,* LVII, 100; S.C.C., *Nullius S. Martini,* 28 iul 1804—*Fontes,* n. 3920; *Austrian Instruction,* Sec. 208—*Collectio Lacensis,* V, col. 1311; Sanchez, Lib. X, disp. XVIII, n. 2; Schmalzgrueber, Lib. IV, tit. XIX, nn. 143, 163; Wernz, *Ius Decretalium,* IV, n. 713, III; Gasparri, *De Matrimonio,* 3. ed., n. 1371; Wernz-Vidal, *Ius Canonicum,* V, n. 645, ftn. 130; Forbes, *loc. cit.*

[143] Canon 1903; 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. R. Affirmative."—*AAS,* XXXIII (1941), 173.

[144] Canon 1986.

of these suits also necessitates two concordant sentences before the parties are considered free to enter upon a new marriage.[145] These requirements are not stated in separation cases. Like any ordinary contentious suit, the sentence of the first instance stands, unless the party aggrieved by it appeals to a higher tribunal.

The court of second instance will be the ordinary tribunal in which an appeal is lodged against the sentence of the lower court unless the party wishes to use his right of appeal to the Sacred Roman Rota.[146] Here, too, a single judge suffices to hear separation suits since the appellate tribunal is constituted in the same manner as the court of the first instance.[147] However, should the ordinary of the lower court constitute a collegiate tribunal of three or even five judges to hear the suit, the same number of jurists are required in the appellate stage. Three judges, although a collegiate tribunal, would not suffice to review the sentence of a court composed of five judges. The higher court must comprise a number of judges not fewer in number than that employed in the lower court.[148]

If only one judge in the appellate court reviews the sentence of a collegiate tribunal of first instance, such a decision would be at least illicit according to Canon 1596, but seemingly valid. This view is supported by a decision of the Sacred Roman Rota in 1930. The case involved property rights and the tribunal of first instance was composed of three judges, but only one judge reviewed the decision in the appellate court. The Rota declared the latter's sentence valid but illicit according to Canon 1596.[149] The reason is that Canon 1576, § 1, although demanding a collegiate tribunal in

[145] Canon 1987.

[146] Canon 1599.

[147] Canon 1595; Noval, *De Iudiciis,* n. 158; Coronata, *Institutiones Iuris Canonici,* III, n. 1131. It is necessary that the judicial process be used in the appellate tribunal if it was followed in the lower court: P.C.I., 2 iunii 1932: "An in causis separationis coniugum de quibus in canone 1131, § 1, in secundo gradu eadem servanda sit forma ac in primo gradu. R. Affirmative."—*AAS,* XXIV (1932), 284.

[148] Canon 1596: Si collegialiter causa in prima instantia cognita fuerit, etiam in gradu appellationis collegialiter nec a minore iudicium numero definiri debet.

[149] S.R.R., *Proprietatis,* 11 aug. 1930, coram R.P.D. Francisco Parrillo, dec. LII, n. 6—*Decisiones,* XXII (1930), 586.

the first instance for marriage cases *de vinculo,* does not demand it for separation cases and the like which do not concern the bond of marriage or of sacred ordination.[150]

There is no restriction in the law, however, for the converse. Thus a sentence of one judge in the lower court can be heard by a collegiate tribunal in the appellate instance. Canon 1596 makes no restriction in this regard, but is concerned with forbidding action on appeal through fewer judges than the number used in the lower court.[151] Moreover, the practice of the Rota sanctions this assertion. All cases of separation tried before this tribunal have been reviewed by a collegiate tribunal of three judges and there is even one decision given by a tribunal of eleven judges.[152]

Worthy of note among the standard court personnel is the presence of the promoter of justice in the court of second instance.[153] Since his presence was proved to be necessary in the lower court it is also necessary in the appellate stage of the trial in due consequence of the constitution of the latter court in the same manner as the court of first instance.[154] His duties, of course, will be the same.[155]

The right to appeal, as in all cases, falls to the party who feels himself aggrieved by the sentence. Thus the invoking of a legal redress in a separation suit is the right of the party who has lost the suit and of the promoter of justice, should the circumstances warrant it.[156] As has been noted, the promoter of justice plays a very important rôle in these cases. It is somewhat similar to the office

[150] Kay, *Competence in Matrimonial Procedure,* The Catholic University of America Canon Law Studies, n. 53 (Washington, D. C.: The Catholic University of America, 1929), p. 105; Coronata, *Interpretatio Authentica Codicis Iuris Canonici* (2. ed., Torino: Marietti, 1948), p. 267 ad Canon 1596.

[151] Noval, *De Iudiciis,* n. 159.

[152] S.R.R., *Separationis quoad Thorum et Cohabitationem,* 20 apr. 1912, coram R.mo.P.D. Michaeli Lega, Decano, dec. XVI—*Decisiones,* IV (1912), 203.

[153] Canon 1586.

[154] Canon 1595.

[155] Glynn, *The Promoter of Justice,* p. 310.

[156] Canon 1879: Pars quae aliqua sententia se gravatam putat, itemque promotor iustitiae et defensor vinculi in causis in quibus interfuerunt, ius habent a sententia appellandi, idest provocandi ab inferiore iudice qui sententiam tulit, ad superiorem, salvo praescripto Canon 1880.

of the defender of the bond in matrimonial cases *de vinculo.* Although the promoter of justice does not have a rôle that makes it mandatory for him to appeal an unfavorable decision in every case;[157] nevertheless, as guardian of the public weal, he must in virtue of his office seek legal redress against a sentence which in his opinion places the public good in jeopardy. His position is somewhat the same here as that of the defender of the bond after two concordant sentences in favor of the nullity of the marriage.[158] Wherefore, whenever he considers the sentence of the lower court which has allowed the separation to be unwarranted and to endanger the public good, he has not only the right but also the duty to appeal the case.[159]

The filing of the appeal, the transfer of the acts and the other ordinary formalities are observed according to the general law on these matters. Worthy of note is the fact that separation cases only require a *causa gravis* for the admission of new proofs in this instance since they never become adjudged cases.[160]

There is some doubt as to the application of article 219, § 2, of the *Instructio* to separation cases in the appellate stage. According to the prescriptions of this norm, if a new basis for nullity arises during the course of the appellate proceedings and if it is admitted by the tribunal without objection from anyone, the decision on this point may be pronounced, but as related to a case heard in first instance.[161] It may happen in a separation suit that the fact of adultery has not been proved in the first instance, and that accordingly a negative sentence was given. The plaintiff seeks redress and in the appellate stage alleges another sin of infidelity by the defendant in the period intervening between the two suits or com-

[157] Glynn, *op. cit.,* p. 307; Stitt, *De Promotore Iustitiae,* n. 138.

[158] Canon 1987; *Instructio,* art. 221.

[159] Canon 1879; Glynn, *op. cit.,* pp. 304, 305; Augustine, *A Commentary on the New Code of Canon Law* (2. ed., 8 vols., St. Louis - London: Herder, 1918 - 1922), VII, 318; Stitt, *loc. cit.*

[160] Augustine, *op. cit.,* VII, 234; Regatillo, *Ius Sacramentarium,* II, n. 658; Muñiz, *Procédimientos Eclesiasticos,* (3 vols., Vol. III, 2. ed., Sevilla, 1926), III, n. 298.

[161] Si vero novum hoc nullitatis caput afferatur in gradu appellationis, illudque nemine contradicente a collegio admittatur, de eo iudicandum est tanquam in prima instantia.

mitted prior to the initial suit but never presented as evidence in the court of first instance. Can the judge of the appellate court adjudicate this new delict and base his sentence upon it? Regatillo is of the opinion that the above mentioned article 219, § 2, of the *Instructio* may be utilized in this case and the newly alleged infidelity may be judged by the court of appeal but sitting as the court of first instance. He takes note, indeed of Canon 1891, § 1,[162] but excepts such an instance as this by reason of the above cited article as applicable to separation cases.[163]

A further question can arise in the case when the appellate court in judging a suit for permanent separation on the grounds of adultery finds that this action is not sustained, but that there is evidence to allow a temporary separation. Would the same rule apply? It seems not. Here there is not only a new ground for separation but an entirely different judicial action, since permanent and temporary separations are quite distinct.[164]

Although he does not treat this express case, it seems that Regatillo's view does not apply here. He speaks of the same action for a permanent separation on the grounds of adultery but in his hypothesis the fact of infidelity unproven in the first instance is now proven in the appellate stage but because of a different act. The overall action is still the same, while in a temporary separation the very nature of the action is different and not just its specific identity. They are distinct causes and would therefore expressly come under the provision of Canon 1891, § 1. Regatillo's treatment of article 219, § 2, of the *Instructio* later in his work, where he mentions his earlier reference to separation cases as included under this article, also seems to confine the discussion entirely to causes tried on the ground of adultery and not to extend to cases distinguishable on the basis of their permanent and temporary nature.[165]

[162] In gradu appellationis non potest admitti nova petendi causa, ne per modum quidem utilis *cumulationis*; ideoque litis contestatio in eo tantum versari potest ut prior sententia vel confirmetur, vel reformetur sive ex toto sive ex parte.

[163] *Ius Sacramentarium*, II, n. 587, ter, e.

[164] Canon 1891, § 1; Wernz-Vidal, *Ius Canonicum*, VII, n. 613; Coronata, *Institutiones Iuris Canonici*, III, n. 1413.

[165] *Op. cit.*, II, n. 657.

CHAPTER VI

THE ADMINISTRATIVE PROCESS

In the brief historical synopsis presented in the earlier section of this work, it was noted that the administrative hearing of separation cases developed by custom rather than by direct authoritative legislation. During the post-Tridentine period especially, doubtless as the result of the increasing development of secularism, Catholics were naturally influenced by the current laxity in regard to the sacredness of marriage. As a result, petitions for separations became more numerous than in the earlier ages of faith. Moreover, this was a period of great missionary activity, and aside from continental Europe most of the countries of the world were still mission territories. Diocesan tribunals were for the most part unequipped to handle separation cases with dispatch in a formal judicial manner; as a consequence, a custom arose by which the bishop or the parish priest reviewed a petition and decreed a separation without any formal process.[1] This was especially true for cases of temporary separation.[2] Although not a designated legal method at the time, such treatment of separation cases was tolerated by the ecclesiastical authority as a substitute for the formal judicial process, the ordinary procedure for these suits.[3]

In this period before the Code of Canon Law, there was not always a clear distinction between what is known today as the administrative method and a summary judicial procedure somewhat comparable to the process now outlined in Canons 1990-1992. In fact, the summary judicial process was accepted then with a greater degree of recognition than the administrative method;[4] but the law of the Code of Canon Law, as expressed in Canon 1131 and its recent authoritative interpretation,[5] has altered this situation. Today,

[1] Smith, *The Marriage Process in the United States*, nn. 79, 80.

[2] *Loc. cit.*

[3] S.C.C., *Monacen*, 23 ian. 1875 - *Thesaurus Resolutionum S.C.C.*, CXXXIV, 103; S.C.C., 31 iul. 1869 - *AAS*, V (1869), 3, 11; Bouix, *De Judiciis*, II, 441; Feije, *De Impedimentis*, p. 491; Wernz, *Ius Decretalium*, IV, n. 714.

[4] Wernz, *loc. cit.*

[5] P.C.I., 24 iul. 1932—*AAS*, XXIV (1932), 284.

the formal judicial procedure and the administrative process are equal in status, with the summary process, in the opinion of the writer, now completely unwarranted for separation suits.

Cappello and Vidal (+ 1938) state that the summary process may still be employed. Cappello described it thus: ". . . *quatenus citentur partes, colligantur probationes iisque mature perpensis legitima feratur pronuntiatio, ceteris omissis iuris sollemnitatibus.*" [6] Vidal merely mentioned the fact of a summary process, but through a comparison of texts, it is obvious that his treatment, both in text and sources cited, is identical with the earlier commentary of Wernz on the decretal law.[7]

There seems to be no reason for including this summary process among the procedures for separation suits today. Surely these cases cannot be said to receive mention in Canon 1990, since the seven diriment impediments stated there as permitting the summary process present an exhaustive list.[8] Moreover, any necessity for another shortened process as a substitute for the longer and more expensive formal trial, the only reason for its existence, is unwarranted today with the authoritative acceptance of the administrative method. To prescribe it would only lead to needless duplication and unnecessary additional formalities. As has been noted above, the formal judicial process is the ordinary method of hearing suits of permanent separation and the administrative process, those involving a temporary separation,[9] although in certain circumstances the two procedures may be interchanged. Should a sin of infidelity be apparent enough not to warrant the full judicial process, a briefer procedure would be most practical in its obvious facility, but separation cases already have a shortened process in the administrative method, which is equal to any of the advantages of a summary judicial process. To make any provision for the latter today is unreasonable and unwarranted.

[6] *De Sacramentis*, V, 826.

[7] *Ius Canonicum*, V, n. 646; Wernz, *Ius Decretalium*, IV, n. 714.

[8] P.C.I., 6 dec. 1943: I. Utrum casus excepti canonis 1990 sint taxative, an demonstrative enunciati. R. Affirmative ad primam partem; Negative ad secundam—*AAS*, XXXVI (1944), 94.

[9] Cf. *supra*, p. 107 ff.

Article 1. Nature and Character of the Administrative Process

In the absence of any prescribed formalities in the Code of Canon Law for the administrative hearing of separation suits, any treatment of this method must depend on an analysis of the requirements for such a case, along with a consideration of acceptable practical norms derived from the customary method of proceeding in diocesan curias. Although the hearing of a case in the administrative manner is quite informal and relatively brief, nevertheless such treatment does not minimize or lessen in any degree the gravity of the case or the caution to be exercised in all separation suits. These cases by their nature are intimately concerned with the public good and therefore all are of equal importance, despite the process employed in their adjudication. The ordinary should exercise no less diligence in these cases than in other administrative procedures such as the pauline privilege and the process for a dispensation from a *ratum non consummatum* union.[10] Cases of this latter type are accorded the most scrupulous care and attention; yet, as a decision of the Sacred Roman Rota testifies, separation cases are of greater import since the validity of the marriage is certain and uncontested and there is no question of a dissolution of the bond.[11] An even greater observance of caution is necessary, therefore, in hearing separation suits than in other processes concerned with dissolving the bond of marriage.

Although the administrative process in separation cases approximates in some aspects other informal hearings, it must be noted that this is a purely non-judicial process and many familiar properties of other informal procedures are not necessary.[12] So the judicial characteristics of summary cases according to Canons 1990-1992 are not prescribed, nor are the judicial formalities as found in other administrative proceedings, as in a ratified and not consummated mar-

[10] Forbes, *The Canonical Separation of Consorts*, p. 195; Hines, *De Coniugum Separatione*, p. 42.

[11] S.R.R., *Separationis quoad Thorum et Mensam*, 5 iul. 1910, coram R.mo.P.D. Michaeli Lega, Decano, dec. XXIV, n. 11—*Decisiones*, II (1910), 243.

[12] Regatillo, *Ius Sacramentarium*, II, n. 587, ter.

riage case. These cases necessitate special procedural formalities as a result of directives issued by the Holy See, formalities not found in purely administrative cases such as separation suits.

The description to be presented here of the administrative process will endeavor to avoid purely arbitrary and unfounded recommendations and suggestions; rather, it will attempt to analyze the nature of the suit, and to submit whatever processual regulations appear most congruous with correct canonical practice and legitimate custom, as far as this last may be determined. Certain characteristics are governed completely by explicit canonical provisions, while other stages of the process may only be inferred or recommendably deduced from similar procedures and common curial methods. Moreover, authoritative sources are lacking for the most part, and recourse must be made to the treatment of canonical writers; even these, since the procedure for separation is merely incidental to their work, treat it in brief fashion.[13]

Despite the absence of the judicial formalities and of the safeguards for truth as found in the formal process, no less moral certitude is necessary in the ecclesiastical authority's mind to decide a separation case in the administrative manner. The shorter process is allowed, not because the subject is unimportant, but because of the convenience it affords when proof is more readily obtainable. Although it is not proper to carry the proportion too far, one may compare this shorter process to the judicial summary procedure of vincular cases. This brief process of Canons 1990-1992 is gratifying to all concerned because it expedites the case so swiftly and without complication. Nevertheless, it demands the same serious and important consideration as the formal process in its quest for truth. The ordinary still acts as a judge in these cases and he cannot render a decision without previously establishing a firm certitude, gleaned from incontestable documentary proof and testimony. Moreover, that important official in marriage litigations, the defender of the

[13] The most complete treatment is given in Forbes, *The Canonical Separation of Consorts*, pp. 194 - 199; briefer accounts may be found in Kelly, "Separation and Civil Divorce," *The Jurist*, VI (1946), 208; Hines, *De Coniugum Separatione*, p. 42; Doheny, *Canonical Procedure in Matrimonial Cases*, II, 643 - 646.

bond, must intervene, and, if he prudently thinks the necessary moral certitude concerning the presence of the asserted diriment impediment is not had, he is obliged to appeal to the court of second instance. The requirements for this process are few, but still very important, for any marriage once celebrated enjoys the favor of the law. It must, then, be considered valid, until its nullity is definitely demonstrated.

A like comparison should be observed in separation suits. The administrative process is brief and uninvolved, yet it is still concerned with the integrity of marriage, and should therefore incorporate the essential properties of the formal case which its gravity warrants. These important requirements may be summarized in the following definition, which seems to the writer to incorporate the necessary elements of the procedure to be observed in separation cases heard in the administrative fashion. Upon the presence of a canonical just cause as stated in Canon 1131, § 1, or upon clear proof of the sin of infidelity as described in Canon 1129, the ordinary or his delegate, having interviewed the parties and examined whatever testimony and documentary proof is available, and omitting the usual formalities of a solemn trial, may decree a temporary or, in the case of adultery, a permanent separation, having first, however, consulted the promoter of justice to learn his view after he examines the case. The reasons for arriving at this description of the process will now be explained.

Article 2. The Proper Authority for the Administrative Hearing of Separation Cases

It is clear from the phraseology of Canon 1131 [14] that the local ordinary is the proper authority for the administrative hearing of separation suits. His jurisdiction is divided into judicial and voluntary power. The basis of this distinction is not the nature or source of his power, but the form in which the jurisdiction is exercised.[15]

[14] § 1: ". . . auctoritate Ordinarii loci,"; § 2: ". . . sed si separatio ab Ordinario pronuntiata fuerit [. . .] ex decreto Ordinarii. . . ."

[15] Coronata, *Institutiones Iuris Canonici*, II, n. 282; Wernz-Vidal, *Ius Canonicum*, II, . 375; Roberti, *De Processibus*, I, n. 43.

Because of this twofold authority special attention must be paid to the ordinary's source of competency in this process. It is clear that the lack of any judicial form in the administrative process for separation cases confines them to the exercise of the ordinary's voluntary jurisdiction. This power may again be divided into legislative administrative and punitive jurisdiction. Its employment in this instance is administrative; it is part of the governing power of the ordinary.[16]

The ordinary's competency then must be determined according to Canon 201,[17] and not Canon 1964. Therefore the ordinary of the place where the marriage was contracted or of the domicile of the respondent is not competent to hear these cases on that basis; he must be the ordinary of domicile or quasi-domicile of either party, or, if either lacks a domicile or a quasi-domicile anywhere, the ordinary of the territory in which they are actually residing.[18] Worthy of mention here also is that the wife not legitimately separated necessarily retains the domicile of her husband, although she may acquire her own quasi-domicile.[19]

[16] Regatillo, *Ius Sacramentarium,* II, n. 587, ter.

[17] § 1: Potestas iurisdictionis potest in solos subditos directe exerceri.

§ 2: Iudicialis potestas tam ordinaria quam delegata exerceri nequit in proprium commodum aut extra territorium, salvis praescriptis Canon 401, § 1, 881, § 2, et 1637.

§ 3: Nisi aliud ex rerum natura aut ex iure constet, potestatem iurisdictionis voluntariam seu non-iudicialem quis exercere potest etiam in proprium commodum, aut extra territorium existens, aut in subditum e territorio absentem.

[18] Canon 94; Most writers on this subject do not distinguish the state of the *vagus* and the *peregrinus*. They merely state that the competent ordinary is the ordinary of the place where either party has a domicile or a quasi-domicile, or the ordinary of the place where either party is actually staying. Thus: Forbes, *The Canonical Separation of Consorts,* p. 194; Kelly, "Separation and Civil Divorce," *The Jurist,* VI (1946), 208; Hines, *De Coniugum Separatione,* p. 42. If both spouses have a domicile or a quasi-domicile and are actually in another place and so referred to as *peregrini,* the ordinary of the place where they are actually staying is not competent to hear their case. They would not be his subjects (Canons 91; 94; 201, § 1). These cases are not exceptions to the general rule which is stated in Canon 14, § 1, 1, and such a case would have to be referred to the ordinary of domicile or quasi-domicile, who can exercise his power over his subjects even when they are outside his territory (Canon 201, § 3).

[19] Canon 93.

Since Canon 1131 mentions the ordinary of the place and not the bishop exclusively, besides the bishop the vicar general may hear these cases in administrative procedure without any express delegation.[20] Should the Bishop reserve their hearing to himself alone, then the vicar general could not act; but these cases do not necessitate any special mandate for the vicar general to be competent.[21]

Although the officialis has ordinary power,[22] he is not an ordinary in the sense of Canon 198 and is therefore not competent by virtue of his office to review these cases in the administrative procedure. His power is judicial, and he is not empowered to exercise non-judicial jurisdiction unless he be duly deputed with this voluntary power by the ordinary of the place. He would then act as any other delegated priest, as a delegate of the ordinary.

The bishop or the vicar general are free to delegate any priest they desire to exercise the administrative process in these cases, since in the law there is no prohibition of this delegation.[23] However, in keeping with the grave nature of separation cases, it would not be prudent for the ordinary to be so excessive with his delegations that the administrative hearing of separation cases becomes a matter of minor moment. It is true that, in this country, a custom existed before the promulgation of the Code of Canon Law for the parish priest to review petitions and to decree a separation in the administrative fashion.[24] In view of the very positive statement of Canon 1131 which demands the permission of the ordinary of the place for intervention, and in the light of the ecclesiastical jurisprudence relative to the gravity of these cases, it is quite clear that this custom no longer has place. Moreover, were the bishop to delegate every priest or pastor to hear these cases, it seems that the whole purpose of the law would be frustrated, and the firm attitude of the Church on the integrity of marriage could in consequence be considered a matter of small importance. The history of this institute demon-

[20] Canon 198.

[21] Canons 368, § 1.

[22] Canon 1573, § 1.

[23] Canon 199, § 1; Canon 1131; Kearney, *The Principles of Delegation,* The Catholic University of America Canon Law Studies, n. 55 (Washington, D. C.: The Catholic University of America, 1929), p. 79.

[24] Smith, *The Marriage Process in the United States,* n. 79, 80.

strates its grave significance. Excessive delegation would only serve to destroy a sacred tradition.

One method of conducting the hearing of these cases administratively is the erection of central boards for the exclusive hearing of separation cases, and of their companion problems, petition for civil action. In some American dioceses, as a result of the overburdening number of separation cases brought about by the current unfavorable influence of secularism upon the sacrament of marriage, bishops have found the erection of these delegated boards quite helpful. Usually they are set up as collegiate boards and sometimes individual members are delegated as single agents to reach a settlement. Where the geographic extent of the diocese makes it possible, these boards may operate from the diocesan curia, or, if the extent of the territory is so large that one central office would be difficult of approach for many of the faithful, similar boards are erected in several or even all of the individual deaneries. These delegated priests are concerned exclusively, as far as marriage cases are considered, with canonical separation. They use the later outlined process in securing testimony and attempt by whatever means are at hand to effect a reconciliation of the parties in their effort to stem the advancing tide of broken marriages. Their principal work is, of course, to act as the delegates of the bishop in awarding or refusing a separation.

The employment of this method is quite canonically feasible. There is no danger of minimizing the gravity of separation cases by excessive delegation, since the members of the boards are chosen for their prudence and canonical erudition. Moreover, this method has rather the opposite effect in stressing the importance of these cases, and potentially serves as a positive influence against the marital abuses which face the Church in the United States of America today.

As far as the matter of delegation is concerned, attention must be paid to the manner in which the jurisdiction is deputed to these boards that their operation may be valid. If the ordinary expressly delegates these groups to act as a collegiate board in reviewing separation petitions, they must proceed as a moral unit in rendering a decision. It is not necessary that their consent be unanimous; it

suffices that there be a majority vote of the members.[25] The ordinary may also when constituting such a board distinctly delegate each member. The priests making up the board then enjoy their delegation severally as well as cumulatively (*in solidum facta*) and each delegate is equally competent to decide separation cases.[26] Since the administrative process in separation cases involves an exercise of voluntary jurisdiction, a presumption as stated in the law in cases of doubt concerning the manner of delegation is of interest. Non-judicial jurisdiction is in any case of doubt presumed to be held severally rather than in a collegiate manner.[27] Therefore, in the absence of any proof that points to a contrary intention of the ordinary, members of these boards must be presumed to enjoy their delegated jurisdiction as individuals severally, and not only as a group united together.

Article 3. The Process

Mention has already been made regarding the dearth of canonical literature on the administrative hearing of separation cases. The writer has endeavored therefore to inquire among several curias of the country to ascertain a legitimate and practical method of conducting these cases. What is to follow is an attempt to demonstrate as faithfully as possible the salient features of their practical processual suggestions.[28]

A. *Introductory and Probatory Stages of the Process*

The initial element of the administrative process is the submitting of a petition to separate by the aggrieved party. This should state the name, address, religion and other pertinent facts of the petitioner's personal history. It should also identify the other spouse in such a way as to permit his being interviewed by the ordinary for his own defense. In addition, the petition should state, in a general

[25] Canons 205, § 3; 1577, § 1; Kearney, *op. cit.*, p. 109.

[26] Canon 205, §§ 1, 2; Kearney, *op. cit.*, p. 108.

[27] *Loc. cit.*

[28] Not only the information presented here but also the interrogatories contained in the appendices are the result of this inquiry.

manner at least, the canonical causes alleged as grounds for the separation. The names and the address of at least two witnesses to the asserted delinquency should also be mentioned. It would be proper that there be appended a concluding paragraph in which a declaration of intention would be contained. Therein the petitioner could state his recognition of the sacramental and indissoluble nature of his marriage, that he is cognizant of the impossibility of another marriage and of the actual occasion of sin in any attempted courtship. This declaration could then conclude with an expression of intention to co-operate whenever future reconciliation becomes feasible.

Attached to this petition or on a separate enclosure, a more complete statement of the case should be given. This can be achieved through the use of prepared interrogatories similar to those presented in the appendix to this work. A questionnaire should be so prepared that it will normally serve to determine the following important facts: the length and general character of the conjugal relationship to date; the present marital situation of each spouse, i.e., whether cohabitation has ceased or still continues; whether either has attempted another marriage, and a complete history of all former separations. The number and age of the children should be given as well as any pertinent information regarding their custody and education. Then a clear and detailed exposition of the canonical cause or causes should be presented with reference made to any available documentary proof that would advantageously serve the ordinary in the framing of his decision.

Since the other spouse has a right to defend himself from any accusations made against him, an attempt must always be made to interview him. This can be achieved by a personal interview or through a prepared interrogatory similar to that presented to the petitioner. In addition to containing the ordinary preliminary questions, the respondent's questionnaire should inform him of the canonical cause for separation asserted by the petitioner and whatever other information is deemed necessary to enable him to formulate a defense. The respondent should also be permitted to offer whatever proof he wishes and to suggest the names and addresses of witnesses who might substantiate his claim.

Inasmuch as the intrinsic nature of these cases demands that every attempt be made at a possible reconciliation, attention should be given to the mind of each spouse on this matter. Forearmed with a knowledge of their mutual dispositions, the ordinary would be better prepared to discuss the resumption of common life with a greater assurance of success.

Similarly prepared interrogatories may be presented to the witnesses proposed by each party. Besides questions eliciting the pertinent personal information customarily prefacing these forms to establish identity, this interrogatory should contain questions especially relevant to proving or disproving the alleged cause. The witness should be questioned regarding the source of his knowledge, and his familiarity with the petitioner's request for a separation and his personal reasons why it should be granted or refused. After this preliminary interrogation, he may be informed of the cause the petitioner has proposed and then be requested to give whatever information he possesses that could serve to prove the objective fact. The witness should also be requested to give his opinion on the possibility of reconciliation whether at the present or some later date. Since these people are usually relatives or intimate friends of the parties, their knowledge of the personalities involved may very often be the sole basis afforded the ordinary to attempt a restoration of the common life.

In the procurement of information, not only from the parties but also from the witnesses, the aid and intervention of the parish priest should be employed as much as possible. Besides an allotted space for his signature when he acts as a notary, space should also be provided on the prepared forms for the pastor's opinions both with regard to the credibility of the deponent as well as his opinion of the merits of the case itself. His statements should contain not only an expression of opinion on the advisability of the separation but any pertinent information he may possess regarding the history of the marriage and the possibilities of reconciliation. Many dioceses even have specially prepared forms for the testimony of the priest to aid him in presenting his information as completely as possible.

As a result of the very large number of parishioners in so many parishes in our country today, the personal knowledge of a pastor

or of his assistants concerning many members of his flock is unfortunately at a practical minimum. To assume an intimate knowledge on their part of the implications of every separation case presented from their territory would be expecting the physically impossible. As a consequence, the parochial clergy can do no more than act as notaries of the depositions sworn before them. The enlistment of the services of other priests who have a more intimate knowledge of the case at hand is the practical solution of the difficulty. It seems feasible then to request the parties to present the names of any priests who may know them quite well, and who could be of assistance to the ordinary in deciding the existence of a just cause, as well as in serving effectively in attempts to reconcile the parties. There is no violation of parochial rights in the employing of this practice [29] and its obvious advantages are a strong recommendation for its use.

Since the causes mentioned in Canon 1131, § 1, often have a physical or psychological basis, it is the practice of many curias to employ the services of well qualified medical men and psychiatrists in an effort to forestall separations by removing the grounds for them. Although their opinion would be necessary in a case where the cause of insanity was alleged, nevertheless, their important office could very often be useful in other cases in which it would possess a more positive nature in working toward the reconciliation of the parties. It would be at the discretion of the ordinary or of his delegate to request their help and co-operation in any particular case, and it is a practice that would certainly have canonical foundation.[30]

The testimony and proofs offered in the administrative process should be accepted and rejected with no less scruple than evidence in a formal trial. There have already been pointed out the elements which are necessary for a just separation and the means of acceptable proof. These should be the criteria in whatever process the case is reviewed. Moral certitude is necessary for a decision in all cases.[31]

In the matter of evidence in the administrative process, the principal problem appears to be the legality of employing a presumption

[29] Cf. Canon 462.

[30] Cf. Canon 1792.

[31] Forbes, *The Canonical Separation of Consorts*, p. 195.

when the ordinary decides to hear by this method a separation petition pleaded on the grounds of adultery. Although the ordinary process for these cases is the judicial trial, nevertheless, as was noted earlier [32] the shorter administrative process may be employed when it is a question of an easily proved delict of infidelity. Since presumptions are the usual elements of proof in matters of adultery, the question arises concerning their acceptance in the administrative process. May they be considered, or must the case, in the absence of more direct proof, be remanded by the ordinary to a judicial trial? Surely the ordinary would be acting within his competence by demanding the formal procedure, since he would be merely employing the ordinary process for these cases. Such action, however, does not seem absolutely necessary.

The evidence in these cases rarely exceeds the limits of a violent presumption. This is the normal proof.[33] Moreover, as authors demonstrate, violent presumptions offer full proof of what is alleged.[34] It is for this reason that they are acceptable even in the administrative process; otherwise, this method could rarely be employed for permanent separations. Probable presumptions in offering only partial proof are, of course, insufficient in themselves. Should they be the sole evidence proposed and the ordinary be unable to arrive at the necessary moral certitude, then he must place the case on the judicial calendar. These probable presumptions are acceptable as means of proof, but the safeguards of the formal process seem necessary to guarantee a proper appraisal of their merit. Violent presumptions based on acts proximate to the delict of infidelity are the normal proofs; doubts and uncertainties can hardly be firmly founded as contradictions to them. Their use then seems perfectly acceptable in the administrative process.

The employment of presumptions in the administrative hearing of cases of temporary separation is perfectly admissible. They are acceptable canonical methods of proof, and since these cases have the administrative method as their ordinary process, the use of pre-

[32] Cf. *supra*, p. 77.

[33] Cf. *supra*, pp. 101-104.

[34] Coronata, *Institutiones Iuris Canonici*, III, n. 1356; Wernz-Vidal, *Ius Canonicum*, VI, n. 520; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, 206.

sumptions is entirely legitimate. Their employment here would observe the ordinary canonical practice in the matter.[35]

B. *The Promoter of Justice*

Although the administrative process is brief and informal, the intrinsic gravity of the case is by no means diminished by its use. Whether a separation is granted after the observance of full judicial formalities or upon briefer consideration, cases in which it is granted are always cases of separation and must be accorded equally thorough consideration. It is only reasonable, then, since conjugal integrity concerns the public good,[36] that the office of the promoter of justice must find application even in the administrative hearing of a separation case. In placing the requirement for his presence in these suits, authors do not distinguish the method of procedure; they simply demand his intervention whenever marital cohabitation, a matter of the public good, is endangered and jeopardized.[37]

To require his presence only in a formal trial and not in administrative hearings is hardly congruous with the intrinsic nature of the case when one considers similar canonical institutes. In the summary process of Canons 1990-1992 and the procedure investigating a *ratum non consummatum* marriage petition, the full processual formalities are omitted; nevertheless, the defender of the bond must always intervene.[38] The administrative treatment of separation cases is similar in its absence of formality. However, just as informal cases concerning the bond remain suits *de vinculo* and require the intervention of the defender of the bond, so this brief separation hearing is a matter of the public good equally with a formal trial, and requires the office of the promoter of justice.[39]

[35] Canons 1825 - 1828.

[36] Normae S.R.R. Tribunalis, art. 27, § 1, 2—*AAS*, XXVI (1934), 457.

[37] Glynn, *The Promoter of Justice*, p. 87; Stitt, *De Promotore Iustitiae*, p. 125; Le Picard, *Le Communaute de la Vie Conjugale*, pp. 45, 243.

[38] Canons 1990 - 1992; S.C. de Sacramentis, *Regulae servandae in processibus super matrimonio rato et non consummato*, 7 maii 1923, n. 27—*AAS*, XV (1923), 398.

[39] Forbes, *The Canonical Separation of Consorts*, p. 196; Doheny, *The Canonical Procedure in Matrimonial Cases*, II, 645.

His office will naturally concern itself with guarding the public welfare from injury caused by groundless separations. Not that his presence is necessary at every stage of the process, but he should serve as the consultant to the ordinary before the decree permitting or rejecting the separation is issued. To fulfill this charge, it would be sufficient for him to review the evidence obtained from the parties and witnesses and give an expression of his opinion on the merits of the case.

If there is any element of doubt in the entire process, it appears imperative for the promoter of justice to demand more evidence. If this is not forthcoming and he feels a formal trial is necessary because of the circumstances, it seems that he has the right and even the obligation to present his opinion and petition a judicial trial from the ordinary. Although in the response issued by the Holy See regarding the process to be used in separation cases, he is not mentioned as one who can petition a formal trial,[40] it appears quite congruous with the nature of his office that he should do so whenever he feels a judicial procedure will better safeguard the public good.

C. *The Decree of Separation*

Since the administrative hearing of separation cases is an exercise of the governing jurisdiction of the ordinary,[41] his decision in the case should be incorporated in a formal decree.[42] Besides the usual formalities specifying the title and the number of the case, the date of the precept and the identification of the litigants, elements necessary for any such document, the decree of the ordinary should clearly grant or refuse the petition of separation. If the separation is allowed, the decree must state explicitly whether it is to be permanent

[40] P.C.I., 24 iun. 1932—*AAS*, XXIV (1932), 284.

[41] Regatillo, *Ius Sacramentarium*, II, n. 587, ter.

[42] Canon 1868, § 2; "Decretum [. . .] diverso sensu adhibetur. Hoc nomine designantur [. . .] acta gubernationis Episcoporum et aliorum qui auctoritate publica gaudent in Ecclesia. Hoc ultimo sensu intellecta, decreta sunt decisiones latae in casu particulari, vi potestatis, non legislativae vel iudiciariae, sed gubernativae et executivae, et possunt vocari praecepta data communitati vel singulis quibus vel lex executioni mandatur, vel quid novi et specialis iniungitur." —Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici*, Vol. II, *de Legibus Ecclesiasticis* (Mechlinae: H. Dessain, 1930), n. 371, 2°.

or temporary and, if the latter, whether it is for an indeterminate or a determinate period of time.[43]

If the separation is temporary, some provision should be made for future reconciliation. The time for this may be given as a future date, as that coinciding with the lapse of the cause or as specified in some similar statement; that method is to be adopted which, in the discretion of the ordinary, the circumstances warrant. Some brief statement regarding the indissolubility of marriage, to call attention to the fact that this decree does not provide opportunity for any future marriage, seems appropriate.

By attaching it to this decree, the ordinary may express whatever permission he wishes to allow in the matter of civil action. If this method is followed, special emphasis must be placed on the impossibility of the contracting of a future marriage and even of the indiscretion of any courtship in view of its nature as a very real occasion of sin. Moreover, the oath of the petitioner attesting to a sincere intention to be freed sofely of the obligations arising from the marriage contract in the civil forum is required.[44] The oath should be appended to the decree of separation if both the decree and the permission for civil action are contained in the one document.

The decree should be signed by the ordinary or by his delegate and notarized in the usual manner. Moreover, the oath of the party mentioned above should also contain not only the signature of the deponent but also the signature of two witnesses.[45]

Since the decree of separation and the provisions for civil action are essentially distinct matters, the ordinary may use separate documents to express his will regarding them. After granting a canonical separation he may wish to consider at greater length the causes presented for civil action. To do this would be most appropriate when one considers the gravity of his decision; for this reason at least, a separate decree permitting or refusing the petition for civil action may be executed. If this procedure is observed, for the avoidance of needless confusion, then the decree of permission should be incorporated in the file of the separation proceedings.

[43] Doheny, *op. cit.*, II, 645; Forbes, *op. cit.*, p. 197.
[44] Forbes, *op. cit.*, p. 251.
[45] S.C.S. Off., 6 aug. 1906—Gasparri, *De Matrimonio*, II, n. 1324.

Article 4. Legal Redress Against the Decree of the Ordinary

Since the appellate stage of a separation case must be conducted according to the same method as that used in the first instance, the legal remedy employed as redress against the decree of the ordinary must also be administrative.[46] In the place of appeal which is judicial, the form of redress allowed in these cases is its extra-judicial counterpart, administrative recourse. This may be described as a plea made to a competent superior against the extra-judicial acts of a lesser superior with the view of obtaining a more favorable decision.[47] Unlike judicial appeal, which proceeds under many legal limitations,[48] administrative recourse is much more informal and not strictly regulated by similar requirements of time, form and place. It need not be interposed before the ordinary against whom the redress is sought nor is there required any special format. A simple appeal to the Holy See in letter form suffices. This letter should state the names and the addresses of the parties, the name of the ordinary who issued the decree in the case, and, most important, the reasons why the party regards the decree of the ordinary unjust and injurious.[49]

Although competent to receive judicial appeals from the tribunals of suffragan dioceses or other designated courts of first instance, the Metropolitan is not the higher superior to receive an administrative recourse against the decree of a suffragan bishop.[50] A cursory reading of the authoritative interpretation mentioned above might lead one to conclude erroneously that the ordinary of the court of second

[46] P.C.I., 2 iun. 1922: An in causis separationis coniugum de quibus in Canone 1131, § 1, in secundo gradu eadem servanda sit forma ac in primo gradu. R. Affirmative.—*AAS*, XXIV (1932), 284.
[47] "Recursus dicitur provocatio a Superiore inferioris gradus ad Superiorem gradus altioris. Recursus datur ab actibus positis in ordine administrativo"—Roberti, *De Delictis et Poenis*, Vol. I—pars 1, *De Delictis in Genere* (2. ed., Romae: Libraria Pontificii Instituti Utriusque Iuris, 1938), n. 288; Beste, *Introductio in Codicem*, p. 773.
[48] Canons 1879; 1880; 1881; 1882, § 1; 1889, § 2.
[49] McClunn, *Administrative Recourse*, The Catholic University of America Canon Law Studies, n. 240 (Washington, D. C.: The Catholic University of America Press, 1946), pp. 37, 38.
[50] Canons 274, 7°; 1594, § 1; 1601.

instance should receive this redress but consider it in an administrative manner. This is the interpretation presented by Doheny [51] and he refers to Cappello as an authority in agreement. Actually there is no basis for concord in the two treatments. Cappello's article is a commentary on the authoritative interpretation that Doheny refers to. He does state, and correctly, that appeal from a sentence of a separation case heard judicially would be to the tribunal of the Metropolitan, but he clearly demonstrates that recourse would follow the rules for that particular remedy and be directed to the Sacred Congregation of the Sacraments.[52] This is the correct procedure in matters of administrative redress.

The reply of the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law was not demonstrating an exception to the general law on administrative recourse. It merely pointed out that whatever process is used in the first instance must also be employed in the appellate stage. Whether this latter instance should be the court of the Metropolitan, if the process is judicial, or the Holy See, if the administrative method is used, is not directly mentioned, since there is no necessity of mentioning this distinction in view of the law's clarity on the subject.

The Roman Pontiff alone, not the Metropolitan, has jurisdiction over the extra-judicial acts of ordinaries.[53] It is only when the law explicitly grants certain rights to Metropolitans that they can

[51] "A consort has the right of recourse against the decision granted in the administrative process. In the second instance the case would be reviewed and decided in the administrative manner, as indicated in the reply of the Pontifical Code Commission of June 25, 1932. If the consorts seek recourse from the decree of the Ordinary of second instance, the case would be remanded to the Sacred Congregation of the Sacraments."—*Canonical Procedure in Matrimonial Cases,* II, 645.

[52] "Itaque si causa separationis in primo gradu ordine *iudiciali* cognita ac definita fuerit, verae appellationi locus erit, de qua videre debebit iudex ad quem, normis processualibus adamussim servatis. Si causa separationis in primo gradu disceptata ac soluta fuerit forma *administrativa,* locus non erit appellationi proprie dictae, sed recursui, et sequendae erunt leges propriae recursus (cfr. Canon 1601, 1880, 6°). Igitur appellatio fiet ad iudicem superiorem (Metropolitam, S.R. Rotam, etc.), recursus ad S. Congregationem de Sacramentis."—"De Separatione Coniugum," *Periodica,* XXI (1932), 288.

[53] Canons 218, § 1; 327, § 1.

exercise jurisdiction over other ordinaries.[54] There is no mention of any exception in the matter of administrative recourse; in fact, the law clearly states that such recourse must be made to the Sacred Congregations,[55] which in turn act in the name and by the authority of the Roman Pontiff. In separation cases the Sacred Congregation of the Sacraments is competent, since these are matters that are linked with the Sacrament of Marriage.[56] If one of the parties is a non-Catholic, the recourse is made to the Sacred Congregation of the Holy Office.[57]

Since most curias handle the administrative hearing of separation cases through delegates of the bishop, mention should be made of another possibility of recourse against the delegate's decree. Forbes would have such recourse directed to the Sacred Congregations as a general rule in accordance with Canon 1601; however, if the ordinary should delegate his power in such wise as to reserve the right to review a negative decision before it becomes final, and even in the instance when this limitation is not mentioned, Forbes is of the opinion that the ordinary could receive a petition to review the acts of his delegate in those cases, and even reverse his decision. This author argues well that such a step does not strictly constitute the making of recourse. It is more a plea for the rehearsing of the facts in the case by the same judicial authority in the person of the ordinary. If the ordinary should reverse the decision of his delegate, then his decree has full judicial effect. If the ordinary confirms his delegate's act, the way for recourse to the Holy See is still open.[58]

[54] Canons 274, 1°, 5°; 432, § 2; 1610, § 3; 1709, § 3; 1710.

[55] Canon 1601: Contra Ordinariorum decreta non datur appellatio seu recursus ad Sacram Rotam; sed de eiusmodi recursibus exclusive cognoscunt Sacrae Congregationes; P.C.I., 22 maii 1923: Utrum ad normam Canon 1552-1601 institui possit actio iudicialis contra Ordinariorum decreta, acta, dispositiones, quae ad regimen seu administrationem dioecesis spectent, ex. gr. provisionem beneficiorum, officiorum, etc., aut recusationem seu denegationem collationis beneficii, officii, etc. R. Negative.—*AAS,* XVI (1924), 251.

[56] Canon 249, § 3.

[57] Canon 247, § 3.

[58] *The Canonical Separation of Consorts,* p. 198. This view is supported by McClunn, *Administrative Recourse,* p. 30; Cappello, *Praxis Processualis* (Tourini-Romae: Marietti, 1940), n. 4.