CHAPTER XXVI

THE PROPER CANONICAL PROCEDURE IN SEPARATION CASES

I. THE IMPORTANCE OF THE ROLE OF THE PROMOTOR IUSTITIAE IN SEPARATION CASES

The importance of the office of the Promotor Iustitiae cannot be overemphasized in cases of separation. The reasons for this are many. First of all, the bond of marriage is not in jeopardy. Hence, the office of the Defensor Vinculi is greatly reduced in importance in such cases. Secondly, the public good is particularly at stake in separation cases. The proper protection of society demands that the obligation of conjugal cohabitation be sacredly safeguarded. Society at large, the consorts themselves as well as their children would suffer untold harm if separations were not carefully restricted. The dangers of modern life are so numerous and insidious that the public good would be harmed and public morals would become decadent if consorts were permitted to separate without just reasons. One of the important duties of the Promotor Iustitiae is to see that separations are restricted to the minimum.

The importance of the functions of the Promotor Iustitiae in separation cases is clearly recognized by the Tribunal of the S. R. Rota. Thus Article 27 §1 of the Normae states: "In causis contentiosis Ponentis est ferre iudicium de eo utrum bonum publicum in discrimen vocari possit necne, nisi interventus Promotoris Ius-

3 On July 5, 1910, Cardinal Legga, then Dean of the S. R. Rota, issued a masterly sentence in which he stressed the doctrine and uniform legislation of the Church dealing with the importance of conjugal cohabitation as necessary for the public good. S. R. Rotae Dec., II (1910), 338-247; vide etiam: S. R. Rotae Dec., XXII (1930), 524.
SEPARATION OF CONSORTS

Some authors seem to have deduced from the Reply of the Pontifical Code Commission of June 25, 1932, that the administrative process is to be considered the ordinary form of procedure for all cases of separation. This conclusion seems hardly warranted. The Pontifical Code Commission specifically refers to the causes enumerated in and envisaged by Canon 1131 § 1. Hence, the Reply is not to be viewed as directly applicable to Canon 1129 and the cases involving adultery. It is readily conceded that some cases involving adultery might be considered in the administrative process; but it should not be too readily concluded that this process is to be considered the ordinary, necessary, and usual procedure in cases of adultery. There is a great difference between Canon 1129 and Canon 1131. Canon 1129 envisages primarily the right of permanent separation, whereas Canon 1131 § 1 refers to causes authorizing only temporary separation.

The decision whether a particular case of separation is to be adjudicated in administrative or judicial process usually rests with the Ordinary. At times, however, the consorts may, for valid reasons, request a judicial trial, even in cases envisaged in Canon 1131 § 1, authorizing only temporary separation. Or it may also happen that a judicial process is required by the terms of a Concordat in order that the sentence authorizing separation may have full effect in civil law.

I. THE ADMINISTRATIVE PROCESS

Usually, cases involving the question of temporary separation are reviewed in administrative process. This is clear from a reply of the Pontifical Code Commission. The query proposed was: "Whether the separation of consorts in the cases mentioned in Canon 1131 § 1 should be decided in the administrative form." To which the reply was: "In the affirmative, unless the Ordinary should decide otherwise ex officio or at the instance of the parties." "Whether in causes of the separation of consorts, mentioned in

II. THE PROPER LEGAL PROCESS TO BE EMPLOYED IN ADJUDICATING CASES OF SEPARATION

Two different processes may be employed by the ecclesiastical authorities examining the nature, merits, and problems of separation cases. One process is administrative, the other is judicial. Ordinarily, cases of separation involving the causes mentioned in Canon 1131 § 1 are decided in administrative process. The Ordinary may likewise decide that other cases of separation are to be handled in an administrative manner.

7 AAS, XXIV (1932), 284. For a masterly exposition of the law indicating the reasons which suggest the use of the judicial process even in cases of temporary separation, cf. S. R. Rota Decc., XVII (1925), 40-41.
8 Can. 1687.
Canon 1131 § 1, the same form is to be observed in the second instance as in the first.” To which the reply was: “In the affirmative.”

When cases involving separation are reviewed in administrative process, it is to be remembered that competency is determined, not by the enactments of Canon 1964, but rather by the rulings of Canon 201 which states: “§ 1. The power of jurisdiction may be directly exercised over all subjects. . . . § 3. Unless it is otherwise evident from the nature of the matter or from the law, the voluntary or non-judicial power of jurisdiction may be exercised even in favor of one's self or outside of one's territory or in favor of a subject outside of one's territory.”

If the Bishop does not personally decide the cases of separation, he may delegate another ecclesiastic to act in his stead. Frequently, Bishops find it practical and convenient to delegate the Officialis for such cases, even when these are adjudicated in the administrative process. In such administrative cases the Officialis acts as the Bishop's delegate, and not in virtue of any powers of his own office.

The Vicar General is competent to decide these cases in administrative process, unless he has been forbidden to do so by a special mandate of the Bishop. He may even delegate this power to some other ecclesiastic.

The Officialis is not empowered, in virtue of his office, to decide cases of separation when they are handled in administrative process. For this, he must have special delegation either from the Bishop or from the Vicar General.

The presence of the Defensor Vinculi is not required when separation cases are decided in the administrative process, because the marriage bond is not in jeopardy. However, it is highly advisable

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10 For the distinction between judicial and non-judicial jurisdiction, cf. Canonical Procedure, I, 141-143.

11 Can. 368.

12 Can. 1167.

in most cases of this type that both he and the Promotor Iustitiae should be summoned.

During the course of the administrative process either one or both of the consorts have the right to request that the case be remanded to the tribunal for judicial trial. The Ordinary is empowered to grant or reject the request. However, such a request, if it is well founded, may not be rejected except for good reasons and in accordance with the norms of proper procedure. The rejection should be embodied in a formal decree.

When the case is completed, the decision of the Ordinary is embodied in a formal decree, granting or refusing permission for separation. The decision should then be communicated to the consorts. The decree should clearly state whether the separation is to be permanent or temporary. And here it must be recalled, that only cases of adultery or equivalent crimes authorize permanent separation.

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.

At times it may happen that the authorities reviewing the case in an administrative manner in second instance may decide, for good reasons, that the question should be adjudged in judicial process. In such an event, the case would be sent back to the collegiate court of first instance for formal trial. This could be done, it appears, in a manner similar to that suggested in Canon 1992 and in Article 230 of the Instruction, Provida. This remandment of the case to the collegiate court of first instance would be done by means of a formal decree, wherein the reasons for the action would be briefly stated.

13 Can. 1868 § 2.

14 The distinction between recourse and appeal is discussed in Canonical Procedure, I, 351.

15 AAS., XXIV (1932), 284.

II. THE JUDICIAL PROCESS

It is unquestionably certain that the administrative process is the usual and ordinary method for deciding cases of temporary separation. It is not equally certain that this same process should ever become the usual and ordinary means of adjudging cases involving permanent separation.

The permanent severance of conjugal cohabitation is a tremendously important matter and has far-reaching effects upon the lives of the consorts and of the children concerned. Hence, there are cases at times that well deserve the most formal and thorough consideration within the power of the Church.

The Ordinary is usually free to determine whether cases involving perpetual separation are to be adjudged in administrative or judicial process. In making his decisions he should realize that certain cases, particularly when important personages are concerned and when the issues are complicated, require formal judicial procedure. The practice and the jurisprudence of the S. R. Rota prove that the judicial process is frequently employed in such cases.

Moreover, the very wording of Canon 1130, *sive indicis sententia*, and the text of Article 6 § 2 of the Instruction, *Provida: per sententiam iudicialem competentis tribunalis ecclesiastic* i, seem to connote judicial procedure.

A final consideration is that the existence of adultery is very difficult to prove. This fact is fully attested by the experience and from the jurisprudence of the S. R. Rota. The safeguards and formalities of judicial procedure tend to protect the rights of both consorts involved in the suit, to an eminent degree.

As the reply of the Pontifical Code Commission of June 25, 1932, indicates, the judicial process may be decided upon by the Ordinary either *ex officio* or at the instance of the consorts. As soon as this choice is made, the question of competency must be determined according to the rulings of Canon 1964 and other regulations governing formal, judicial procedure.

The "Officialis" is empowered in virtue of his office to adjudge the case in judicial process unless the Bishop has expressly reserved to himself all cases of separation. The Vicar General is not authorized to adjudge such cases in formal trial.

Since the bond of marriage is not in jeopardy in cases involving separation, one judge would be sufficient to constitute the tribunal. However, the practice of the S. R. Rota suggests that a regular tribunal of three judges be constituted. In fact, there is a case on record where eleven Auditors of the S. R. Rota constituted the tribunal adjudging a case which involved only temporary separation.

As in other judicial processes, the consorts are free to lodge an appeal to the court of second instance against the sentence of the tribunal of first instance. From the tribunal of second instance the appeal would be to the Tribunal of the S. R. Rota or to the S. Congregation of the Holy Office if one consort were a non-Catholic.

In its sentence, the ecclesiastical tribunal has the right, as enunciated in Canon 1961, to decide incidental matters pertaining merely to the civil effects of the matrimonial union, such as the personal or professional properties of the consorts.
division of property, alimony, questions of support of the wife and children, and the like. However, the court should take due cognizance of the enactments of civil law in deciding matters pertaining to the civil effects of the matrimonial contract so as to avoid complications and difficulties.

If the tribunal decides that sufficient reasons exist authorizing separation, adequate provisions should be taken to insure the Catholic education and proper care of the children, in accordance with the rulings of Canon 1132. This Canon states that “after the separation is arranged, the educational rearing of the children is to be entrusted to the innocent consort. If one of the consorts is a non-Catholic, this right belongs to the Catholic consort, unless in either case the Ordinary decides otherwise for the good of the children, while always safeguarding their Catholic education.”

III. SEPARATION CASES ARE CONSIDERED AS NEVER IRREVOCABLY ADJUDGED

Canon 1903 states that “causes concerning the status of persons never become irrevocably adjudged (nunquam transseunt in rem iudicatam). However, two concordant sentences in these cases produce the effect that further litigation in court is not admitted, unless new and important arguments or documents are furnished.” In referring to appeals, Canon 1989 enacts that “since the sentences in matrimonial cases never become irrevocably adjudged (nunquam transseunt in rem iudicatam), the cases may always be reconsidered if new arguments are forthcoming, safeguarding the rulings of Canon 1903.”

Some theologians hold that certain cases of permanent separation became irrevocably adjudged in virtue of the sentence of the ecclesiastical judge.26 Such an opinion is no longer tenable in view of the clear decision of the Pontifical Code Commission which specifically stated on April 8, 1941, that the causes of separation are to be reckoned among those causes which never become irrevocably adjudged, as referred to in Canons 1903 and 1989.27

IV. DOMICILE OF THE LEGALLY SEPARATED WIFE

Article 6 § 2 of the Instruction, Provida, gives the norms for determining the domicile or quasi-domicile of a wife who has been lawfully separated from her husband. “A wife who is lawfully separated from her husband either perpetually or for an indefinite time does not follow the domicile of the husband and hence should be cited either before the Ordinary of the place where the marriage was celebrated or before the Ordinary of her own domicile or quasi-domicile. By the term lawful separation is understood that separation granted by a judicial sentence of a competent ecclesiastical tribunal or even of a civil tribunal where such judgment is recognized in virtue of a concordat of the Holy See or by a decree of the Ordinary.”

It is important to note that Article 6 § 2 does not use the term temporary separation, but with studied carefulness employs the words ad tempus indefinitum. Presumably, the reason for this nice distinction is that if the sentence of separation specified a definite period of time, it would not permit the wife to have the intention of remaining permanently in the same place in order to enable her to acquire her own domicile. This is but another reason why temporary separations should be granted for an indefinite period of time rather than for a definite period.

It is indeed regrettable that Article 6 § 2 of the Instruction, Provida, seems to imply that the only two legitimate means of separation are by judicial sentence or by a decree of the Ordinary. Such is not the case. Canons 1129 and 1130 clearly grant to the innocent consort the right of perpetual separation propria auctoritate, at least when the crime of adultery is morally certain and either public or notorious.28 Similarly, Canon 1131 § 1 allows the innocent consort the right of temporary separation as an exceptional means et etiam propria auctoritate, provided there is certainty as to the guilt of the other consort and that there is danger in delay.

It follows logically from the authoritative texts of Canons 1130 and 1131 § 1 that those innocent consorts who have separated, propria auctoritate, from their guilty consorts in accordance with

26 Actnam, Theologia Moralis, II, n. 934, p. 623.
the laws of the Church are lawfully separated. Hence, they benefit from the special provisions of law. Thus, wives lawfully separated from their husbands, either permanently or for an indefinite period of time, may acquire their own domicile or quasi-domicile.

V. ECCLESIASTICAL PERMISSION REQUIRED FOR CIVIL SEPARATION OR DIVORCE

Before beginning a suit in the civil courts for separation, Catholics must consult, beforehand, the proper ecclesiastical authorities, even though they previously received from the Church a decree or sentence authorizing separation. This is obligatory, under pain of ecclesiastical sanctions, in virtue of Decree, n. 126 of the III Plenary Council of Baltimore, which states in part: "... Auctoritate Ecclesiastica, tribunalia civilia ad cautelam ad obtinendam separationem a thoruo et mensa. Quod si quis attentaverit, sciat se gravem reatum incurrere et pro Episcopi judicio puniendum esse."

As the Decree indicates, the penalty is ferendae sententiae and is to be determined by the Bishop in proportion to the gravity of the delinquency. In most States, some sort of decree of separation or divorce would be necessary to insure recognition of the civil effects of the separation and to safeguard property rights of the separated parties.

When the consorts are granted permission by the proper ecclesiastical authorities to enter a civil suit for separation or divorce, they should ordinarily be informed or warned of the grave penalty of excommunication incurred, latae sententiae, by those who attempt marriage after a civil divorce. Thus, Decree n. 124 of the III Plenary Council of Baltimore enacts: "Ad haec crimina compescenda poenam excommunicationis statuimus, Ordinario reservatam, ipso facto incurrandum ab eis, qui postquam divortium civili obtinuerint, matrimonium ausi fuerint attendant."  

Besides being excommunicated, they would become ipso facto infames, as indicated in Canon 2356. This Canon states that "bigamists, that is, those who, while being bound by the matrimonial bond, attempt another marriage, even though this be but a civil ceremony, are ipso facto infames. And if, disregarding the warning of the Ordinary, they continue to live in the unlawful union, they are to be excommunicated or punished by personal interdict according to the gravity of their guilt."

Such persons would require a dispensation of the Holy See in order to be exonerated from the penalty of the infamy of law. This is emphasized in Canon 2295 which states in part that "in-famy of law ceases only upon dispensation from the Apostolic See."

VI. RECONCILIATION OF SEPARATED CONSORTS AND THE RESTORATION OF CONJUGAL COHABITATION

I. RESTORATION OF CONJUGAL COHABITATION IN CASES OF PERMANENT SEPARATION

An innocent consort, lawfully and permanently separated because of the certain and notorious crime of adultery of the guilty consort, has no obligation in justice to resume conjugal life at any time. Even if the guilty consort is truly penitent and amends his way of life, there is still no obligation in justice on the part of the innocent party. On the other hand, the innocent consort is free to receive or even to recall the guilty party to conjugal cohabitation. And there is no need of any judicial sentence or of any ecclesiastical permission for the restoration of conjugal life, even if the separation had been granted by judicial sentence or decree. If the innocent consort recalls the guilty party, the latter is bound to return to conjugal life and can even be forced by judicial sentence to do so. 29

The case may arise where the innocent consort falls into the sin of adultery after the separation. If the innocent party had separated propria auctoritate, there is an obligation to resume conjugal cohabitation. If the separation was affected by judicial sentence, it appears that there is likewise a strict obligation to resume conjugal cohabitation, at least after the formerly innocent consort is ordered to do so by judicial sentence. 30

29 Can. 1560, 1°; 1653 § 3; 1698; Schmalzgruber, Jus Ecclesiasticum, IV, 4, 19, nn. 118–123.
30 Gasparri, De Matrimonio, III, n. 1173, p. 245; Payen, De Matrimonio, III, n. 2476, p. 796; Aertens, Theologia Moralis, III, n. 934, f. 623.
II. RESTORATION OF CONJUGAL COHABITATION IN CASES OF TEMPORARY SEPARATION

In dealing with cases of temporary separation Canon 1131 § 2 states that “in all these cases, conjugal cohabitation should be resumed just as soon as the cause for separation ceases. However, if the separation has been pronounced by the Ordinary either for a definite or indefinite period of time, the innocent party is not obliged to return except upon the expiration of the designated time or in view of a decree of the Ordinary.”

If the innocent party has departed temporarily, propria auctoritate, there is a strict obligation to resume conjugal cohabitation just as soon as the cause of separation ceases. Likewise, upon the expiration of the time designated for the separation, the innocent consort is obliged to return.

If the separation has been granted for an indefinite period of time by a judicial sentence or by a decree of the Ordinary, the innocent party may await a subsequent decree of the Ordinary in which the return to conjugal cohabitation is ordered. This decree can be very simple and brief and need not recount the detailed history of the case.

III. RECONCILIATION AFTER CIVIL DIVORCE

If the separated parties have received a decree of divorce, the laws of most States would require that a new marriage license be obtained before conjugal cohabitation could be legally resumed. When a marriage license is granted, the laws of most States further require that there be a marriage ceremony before the parties may legally begin conjugal cohabitation. Moreover, the pastor or some other priest would be required by State law to fill out a form declaring that he had officially witnessed the marriage ceremony of the parties. This would obviously require some sort of ceremony in order to fulfill the requirements of the civil law.