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The Canonical Separation *of* Consorts

AN HISTORICAL SYNOPSIS AND COMMENTARY ON CANONS 1128-1132.

BY

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the formal trial which the writer has found concerning cases of separation, and may be the beginnings of the administrative method now admitted for certain separation grounds.

Formal trials of separation cases were conducted in pre-Code times before the S. R. Rota and the Sacred Congregation of the Council, with the latter hearing most of them in later days. Pope Pius X, in the year 1908, restored jurisdiction over them to the S. R. Rota, which tribunal is competent concerning them at the present time.

The Code of Canon Law in general gives a redaction of the Church's pre-Code doctrine concerning the separation of consorts. That teaching is substantially the same today under the Code Law (the few changes will be treated in the next part of this work), as it was under the pre-Code dispensation. The writer has thought it best, therefore, to treat of the near pre-Code Rotal decisions, and the teachings of the pre-Code jurists on separation, in the canonical commentary of this dissertation.

PART II

Canonical Commentary

CHAPTER VII

The Nature and Kinds of Separation

ARTICLE I

THE COMMUNITY OF CONJUGAL LIFE

One of the many effects of the marriage contract is that henceforth the consorts have the right and obligation in justice to a community of conjugal life. The ideal marriage is that wherein father, mother and children live together in the home, rendering help, solace and affection to one another. This mutual sharing of one spouse in the life of the other, their domestic life together, is necessary for successful marriage and family life. The Romans saw clearly this need of domesticity in marriage. The classical Roman definitions of marriage are: *Viri et mulieris coniunctio, individuam consuetudinem vitæ continens,* [1] and *Coniunctio maris et feminæ et consortium omnis vitæ, divini et humani iuris communicatio.* [2] The latter definition of marriage as a *consortio omnis vitæ* aptly signifies the nature of the life which married persons are to have in common.

There are three main elements which compose this "community of conjugal life," viz. community of bed, table and cohabitation. [3] They are not, however, the constitutive elements of it. There are others, such as the consorts' sharing in the use of their temporal goods and possessions.

1. Inst. (1. 9) 1.
2. D. (23. 2) 1.
3. Le Picard, *La Communauté de la Vie conjugale, Obligation des Epoux* (Paris: Recueil Sirey, 1930), p. 8.

But the principal aspects of marital life are community of bed, board and cohabitation.

The Code of Canon Law recognizes this threefold division. The first part of Book III *(De Rebus)* of the Code is titled *De Sacramentis.* Title VII of this part concerns the Sacrament of Matrimony. Chapter X of this Title is called *De separatione coniugum,* and is in turn divided into two Articles: Article I, *De dissolutione vinculi,* or the dissolution of the marriage bond; Article II, *De separatione tori, mensæ et habitationis,* or separation as to bed, table and cohabitation.

By the heading of the latter Article, the Code retains the traditional triple division of community of marital life into the principal parts of bed, table and cohabitation. In view of the Code's division, authors are not justified in neglecting, as some do, the *communio mensæ* for a twofold division of conjugal community into *consortium tori* and *consortium tecti.* De Smet, whom other authors follow, in this manner joins the two obligations, *mensæ et habitationis* under the general heading *consortium tecti.* [4] The threefold division of the Code should be retained by commentators of the Canons treating of the separation of spouses.

Community of marital life *quoad torum* belongs to the *ordo privatus,* and does not, as a general rule, concern the public authority of the Church. It is a *res occulta* and does not concern the Church legislating as a public society. It belongs, therefore, to the field of moral theology, rather than of Canon Law. It would concern the public authority only *per accidens,* e.g. by reason of resultant scandal in a small village where it might become public knowledge that a certain couple were not living as man and wife. [5]

It is to be noted here that separation *quoad torum* can take place whenever one of the consorts is not bound to

4. DE SMET, *Tractatus Theologico-Canonicus De Sponsalibus et Matrimonio* (4ª ed., Brugis: Beyært, 1927), n. 249, 250, pp. 220, 221.
5. LE PICARD, *op. cit.,* pp. 67, 68.

render the marriage *debitum* [6] Consorts can also separate *quoad torum* by mutual consent. To do this they should have a legitimate reason. Such separation should not take place if there is danger to either of incontinence. [7] Theologians admit that the spouses can licitly abstain from the use of their marriage rights to avoid children — provided that this be done through continence, or other licit means. If the spouses decide to observe continence, it must have the free consent of both. [8] The obligation of community of bed is satisfied if the consorts occupy the same sleeping quarters. It is not necessary that they sleep in the same bed, or even in the same room. They may occupy adjacent quarters, as long as access of one partner to the other is facilitated. [9] The reason for this requisite arises from the right and obligation which the consorts have to the *debitum conjugale* as long as either legitimately seeks it. [10]

The second marital right and obligation which is part of the community of conjugal life is that of community of board or table. Though not as important as the other two duties, it must nevertheless not be lost sight of. Community of table also belongs to the private order. It does not affect the public order, except perhaps accidently in rare instances, if the spouses do not take their repasts together. [11]

There are two questions that are comprised in this "community of board": whether the husband is bound to provide food for his wife, and, more particularly, whether he is bound to take his meals at the same table with her.

6. CAPPELLO, *Tractatus Canonico-Moralis De Sacramentis* (3 vols. in 6, Romæ: Marietti, 1935-1939, Vol. III, Partes 1 et 2, *De Matrimonio,* 4ª ed.), III, Pars 2, n. 824, pp. 343, 344.
7. SANCHEZ, *op. cit.,* III, lib. X, disp. 4, n. 5, p. 178.
8. GASPARRI, *Tractatus Canonicus De Matrimonio* (ed. nova, 2 vols., Romæ: Typis Polyglottis Vaticanis, 1932), II, n. 1108, p. 191.
9. *Ibid.,* n. 1107, p. 190: *"Et in eodem lecto cubabunt. Communio tori videtur formaliter haberi, si prouti in multis familiis in usu est, uxor et maritus habent quidem distinctum torum et cubiculum, sed cubiculum est contiguum et alteri in alterius cubiculum et torum liber et facilis est accessus; licet hic usus minus laudandus sit."*
10. DE SMET, *op. cit.,* n. 250, 251, pp. 221, 222.
11. CAPPELLO, *loc. cit.;* LE PICARD, *op. cit.,* p. 82.

As regards the first, the husband is bound to provide food for the wife, if he received dowry for her at time of marriage. Authors commonly hold he is not bound to provide sustinence for her if no dowry was paid. For the dowry was instituted for this very purpose that from it the man can sustain the burdens of marriage. When husband marries wife without dowry (as is the common case in America) or when the wife performs domestic work in place of a servant, then he is bound to provide sustinence for her, at least as he would do for a servant. He is not obliged to provide food for his wife if she has departed from the home without a just cause and is unwilling to return, or if she has committed adultery, a crime which gives the husband the right of expelling her, or if she refuses to do work which, according to her condition in life, she ought to undertake. [12]

The man should also dine at the same table with his wife. It is fitting that the wife, who is not a servant, but a companion and helpmeet, should dine at the same table and at the same time as her husband. This is not a serious obligation, and any just reason suffices for omitting it, e.g. the wife's having to get meals for a large family, the husband's working at irregular times, etc. But it would be wrong to countenance a long habit of so doing, if there were no just reason for it. [13]

Community of cohabitation, or the living together of both consorts under the same roof, is not of the essence of the marriage contract. It is now the common opinion of theologians that cohabitation refers to the integrity and perfection of marriage rather than to its substance. For without cohabitation, the spouses cannot achieve the three ends of marriage, i.e. rearing of children, mutual aid to one another, and remedy of concupiscence. Therefore a marriage

12. GASPARRI, *op. cit.*, [ed. 1932], II, n. 1107, p. 190; PAYEN, *De Matrimonio In Missionibus Ac Potissimum In Sinis Tractatus Practicus Et Casus* (3 vols., Zi-ka-wei: In Typ. T'ou-sè-wè, 1928, 1929), II, n. 2454, pp. 777, 778.

13. PAYEN, *op. cit.*, II, n. 2458, 2459, pp. 781, 782.

is valid, even if the spouses should make a pre-marital pact whereby they agree not to live together in the same house, as would be the case in a "marriage of conscience", which is a true and valid form of marriage. Cohabitation is one of the effects of marriage that can be separated from its substance. Therefore the consorts could contract valid marriages, even if they made pre-marital pact not to live in the same house even for the rest of their lives. [14]

If the parties, however, made a pact before marriage that they would never live together in the sense of permanently excluding the marriage act, their marriage would be null and void. For such an agreement would be against the primary purpose of marriage, i.e. the procreation and education of children. In this sense must be understood the following words of Sanchez: "[...] *si sit pactum de non cohabitando ad tempus, non vitiare matrimonium; secus si sit pactum, nunquam cohabitandi: quia ad essentiam matrimonii non pertinet ut omni tempore cohäbitent conjuges bene tamen mutua habitatio* [...]." [15]

ARTICLE II

THE CONSORTS' OBLIGATION TO COHABIT

The spouses are obligated to live together in the same house in virtue of the divine natural law, the divine positive law, and ecclesiastical law. [16] The precepts of these laws are now to be discussed.

14. GASPARRI, *op. cit.*, [ed. 1932], II, n. 776, 1105, pp. 7, 8, 189; CAPPELLO, *op. cit.*, III, Pars 2, n. 823, p. 342.

15. SANCHEZ, *op. cit.*, I, lib. V, disp. 10, n. 3, p. 416.

16. SANCHEZ, *op. cit.*, III, lib. IX, disp. 4, n. 2, p. 177 — *"Tenentur conjuges jure naturali ac divino simul habitare. Conclusio ab omnibus admititur. Et constat, quia non minor est obligatio cohabitandi, quam reddendi debitum, sed ex hac oritur, et ex ipsa matrim. natura,* [...] *sed hæc est ex jure naturali et divino, ergo et illa insuper."*

Cohabitation of husband and wife in the home is required by the divine natural law in order to effect the three ends or purposes of marriage. Although cohabitation of husband and wife is not absolutely necessary for the procreation of children, yet it is normally needed for their proper upbringing and training. The proper religious, moral, physical and civil education of the children demands the constant care and work of both parents. This multiple education of the child requires constant day and night parental training by word and example. Regularly this thorough training of the child requires the constant residence of its parents in the home.

The consorts must also live under the same roof if they are to render aid and help one to the other. The wife needs the strength, protection, prudence, advice and guidance of the husband. He needs her service and devotion to the domestic tasks of the household. Both need each other for understanding, consolation and strength in the performance of their daily work. The consorts cannot normally render this mutual aid and help to each other without living together.

Cohabitation is also necessary to achieve the third end of marriage, the remedy of concupiscence. Concupiscence may arise at any time demanding mutual affection of the consorts. Their constant presence in the home is the only adequate way of providing its remedy. [17]

From these three ends of marriage, it is evident that the spouses need each other, and their children need them. The divine natural law thus prescribes that the spouses must live together for a rightly ordered marital life.

Cohabitation of the consorts is also a precept of the divine positive law. The words of the Book of Genesis, which we have seen *(supra,* p. I,) directly prescribe this obligation: "Wherefore a man shall leave father and mother,

17. DE SMET, *op. cit.*, n. 251, p. 222; *Payen, op. cit.*, II, n. 2452, pp. 774-776; HEYLEN, *Tractatus De Matrimonio* (9ª ed., Mechliniæ: H. Dessain, 1945), p. 355.

and shall cleave to his wife: and they shall be two in one flesh." [18] The words of Saint Paul (cfr. *supra* p. 24) likewise indirectly enjoin cohabitation: "Do not deprive each other, except perhaps by consent, for a time, that you may give yourselves to prayer; and return together again lest Satan tempt you because you lack self-control." [19]

The Canon Law of the Church furthermore orders spouses to observe their community of conjugal life. Married persons are bound to preserve *(servare debent)* the community of conjugal life, unless a just cause excuses them from this obligation *(nisi iusta causa eos excuset).* [20]

The legislator has carefully chosen the phrase "just cause" in this Canon. A "just cause," as used in the Code, is a relative term. [21] In some Canons it means a light motive, in others a more serious one. Sometimes it refers to a personal motive, sometimes it refers to the utility or necessity of the Church. It can mean a simple motive, a reasonable cause, a grave cause, or even an urgent necessity. [22] The gravity of the just cause must be measured by the gravity of the obligation from which relief is being sought. [23] The seriousness of the "just cause" in any particular Canon must be in direct proportion to the seriousness

18. Genesis, II: 24.
19. I Cor., VII: 5.
20. Canon 1128 — *"Coniuges servare debent vitæ coniugalis communionem, nisi iusta causa eos excuset."*
21. The expression *iusta causa* is included in the following Canons: 116, 465, § 1; 466, § 3; 486; 520, § 1; 524, § 1; 537; 559, § 2; 571, § 1; 577, § 2; 696, § 1; 741; 794; 813, § 2; 869; 885; 955, § 2; 997, § 1; 998, § 1; 1009, § 2; 1017, § 3; 1039, § 1; 1097, § 2; 1108, § 3; 1119; 1124; 1128; 1171; 1245, § 1; 1263, § 3; 1265, § 2; 1274, § 1; 1312, § 1; 1313; 1344, § 2; 1344, § 3; 1384, § 1; 1395, § 3; 1429, § 1; 1444, § 1; 1487, § 1; 1530, § 1, n. 2; 1535; 1584; 1590, § 2; 1634, § 2; 1642, § 2; 1656, § 2; 1671, § 2; 1687, § 2; 1731, § 1; 1764, § 2; 1841; 1842; 2191, § 1; 2261, § 2.
22. *"On voit ainsi la complexité et la compréhension du terme* justa causa. *Cette expression désigne toutes les causes possibles, depuis le simple motif, la cause raisonnable, jusqu'à la nécessité urgente. C'est à voir d'après la gravité de la loi"* — *L'Ami du Clergé,* XLV (1928), 122.
23. *"L'explication, nous l'avons dit, nous paraît suggérée par les termes du can. 84, § 1 :* habita ratione gravitatis legis a qua dispensatur" — *ibid.*

of the obligation which that Canon prescribes. This just cause is reducible to the good of one's self or family, the good of the Church or of the State. [24]

It must be remembered that there are three principal parts to the *communio vitæ coniugalis* mentioned in Canon 1128, viz. community of bed, board and cohabitation. This is clearly enunciated by a recent Rotal decision: *Matrimonium enim secum trahit tori, mensæ, habitationis communionem.* [25] In separation cases, therefore, the gravity of the just cause for separation must be measured by the gravity of the particular part of marital community from which separation is being sought, and by the duration of the separation itself. Thus a husband would require a just reason to separate from his wife now and then as regards community of table. He would have to have a just reason, even though it might be very slight, to dine apart from his wife. He would need a more serious reason to do so over a period of, say, a year. Likewise in the matter of separation from cohabitation, the consorts must be separated only for a just cause. This just cause might be very slight in the case of a husband separating from his wife for a short time because of a business trip. If the separation were extended over a period of several months, a much more serious reason would be required.

It should be noted that the obligation to cohabitation is mutual, i.e. it binds both husband and wife. But since the husband is the head of his wife and family, a more serious obligation is imposed upon the wife. It is the husband's right to depart for a few days, for instance, for a slight reason, even against the will of his wife. He can depart for a longer time for a more serious reason, against her will; for if he has a just cause, she cannot be reasonably unwilling. In this case, if it cannot conveniently be arranged, he is not obliged to take her with him.

The wife's obligation to cohabitation is greater on

24. PAYEN, *op. cit.*, II, n. 2453, p. 776.
25. *S. R. Rotæ Dec.*, XXIV (1932), Dec. XIX, n. 2, p. 168.

account of her being subject to her husband. She cannot depart from the home, even for a few days, without the consent of her husband, unless for grave necessity. It is the right of the husband to choose their common domicile. [26] Even if the husband change his domicile, the wife is obliged to follow him unless a just cause excuses her. Such would be the case when they had made a pre-marital pact to reside in a certain place. This pact would have to be observed. She would not have to follow him in these instances: if some unforeseen grave cause led the husband to change domicile; if the husband changed domiciles out of ill will, e.g. in order to be near evil friends; if there be probable grave danger to soul or body of the wife by the change, unless the reasons for it on the husband's part were very urgent. [27]

Cohabitation of the consorts is a matter of the public order, for marriage is a social institution. [28] Whether the spouses do, or do not, live together is the concern of the public authority, the Church. Therefore separation from cohabitation is subject to the legislation of the Church as a visible society. If a married couple refuse to live together, the public good is involved. Their separation becomes of its nature a public affair and a matter concerning the external forum. In most cases the separation of spouses becomes a scandal to society. The public authority does not become concerned when the spouses separate for short periods for good reasons, as when the husband takes a business trip, or when the wife visits relatives at a distance. But long separations for trivial reasons or none at all are the concern of the Church. The injured spouse has the right to petition the public ecclesiastical authority to force the return of his partner who has departed for an unjust reason. The general rule is that the consorts cannot separate for a long period of time on their own authority, but

26. Canon 93, § 1.
27. PAYEN, *op. cit.*, II, n. 2453, pp. 776, 777.
28. LE PICARD, *op. cit.*, p. 63.

need the authorization of the Church to do so. It belongs to the sphere of the Church to decide if their reasons for separating be just and if so to permit the separation to take place. Church law permits two exceptions to this rule: the innocent consort can separate in case of the other's certain and manifest adultery, or in case of danger in delay. Outside of these two instances, to be discussed later, consorts must recur to the Ordinary for authorization to separate. The Ordinary, the ecclesiastical authority, is the judge of whether the alleged grounds for separation are sufficient or not, who will or will not permit separation accordingly. [29]

How serious does the just cause have to be before a married couple can be separated as regards cohabitation? Has the Church mitigated her former legislation by allowing spouses to separate for slight reasons as a concession to the marriage laxity of modern times?

Separation as regards cohabitation is variously defined by the authors, but there is no difference as to their meaning. Santi defines it as, *"Dissociatio illius consuetudinis vitæ individuæ, ad quam ordinatur matrimonium."* [30] Reiffenstuel's definition is: *"Legitima viri et uxoris separatio, manente vinculo matrimonii."* [31] "Legitimate separation of husband and wife, with their marriage bond remaining intact." The separation must be legitimate, i.e. according to the laws of the Church. Therefore the grounds for separation must be certain and canonical, or recognized by Canon Law as serious enough to warrant separation. Separation must take place on the authority of the Church,

29. DE SMET, *op. cit.*, n. 258-260, pp. 226-228.

30. SANTI, *Prælectiones Juris Canonici* (lib. III, 2ª ed., Ratisbonæ, Neo Eboraci, Cincinnatii: Pustet, 1892), p. 183.

31. REIFFENSTUEL, *op. cit.*, IV, tit. XIX, § 2, n. 26, p. 105. FERRARIS (*op. cit.*, III, p. 120) gives the following definition: *"Divortium quoad torum solum est separatio coniugum quoad debitum coniugale alteri licite denegandum, et manente vinculo Matrimonii valide contracti, et cohabitatione in eadem domo et mensa. Divortium quoad torum et cohabitationem simul* est *separatio et liberatio coniugum non tantum ab obligatione reddendi debitum, sed etiam habitandi in eadem domo, mensa et lecto."*

or, if by private authority, under those conditions recognized by the Church. The name "separation" derives from the Latin *separare,* which means "to disjoin, sever, separate." By separation from cohabitation the consorts separate from one another, in the sense that they no longer live in the same place of residence, in the same house, under the same roof. Such separation does not authorize either of the consorts to marry a third person, unless their marriage has been dissolved or declared null and void by the proper ecclesiastical authority, or unless it is dissolved by the death of one of them. The marriage bond, whether it is sacramental, as that between baptized consorts, or non-sacramental, between non-baptized persons, continues to remain intact.

Authors call this kind of separation by many names: *divortium semi-plenum, divortium minus plenum, divortium imperfectum, divortium quoad torum et cohabitationem, divortium a mensa et thoro, la séparation de corps et des biens,* separation from bed and board, ecclesiastical divorce, limited divorce, etc. Modern authors usually term it simply *separatio.* Some add the phrase *tori, mensæ et habitationis* after the word *separatio.* [32] Pre-Code authors generally termed it *divortium.* They gave the word *divortium* (from the Latin *divertere,* "to turn away, to diverge from") a generic meaning, and included under it *divortium quoad vinculum,* or absolute breaking of the marriage bond, and *divortium quoad torum et cohabitationem,* or separation as regards cohabitation. [33]

32. E.g. VERMEERSCH-CREUSEN, *Epitome Iuris Canonici* (3 vols., 5ª ed., Mechliniæ-Romæ; H. Dessain, Vol. I, 1933; Vols. II, III, 1934-1936), II, n. 422, 440, pp. 292, 305; Clæys BOUUÆRT-SIMENON, *Manuale Iuris Canonici* (3 vols.; Vol. 1, 5. ed., 1939; Vol. II, 2. ed., 1935; Vol. III, 5. ed., 1943; Gandæ et Leodii: Seminarium Gandavense et Leodiense), II, n. 320, 331, pp. 334, 347; REGATILLO, *Ius Sacramentarium* (2 vols., Santander: Sal Terræ, 1945), II, n. 571, 585, pp. 385, 392.

33. Cfr. FERRARIS, *op. cit.*, III, p. 120; DE ANGELIS, *Prælectiones Juris Canonici* (3 tomes, Romæ: Ex Typ. Della Pace; Parisiis: P. Lethielleux, 1877-1880), III, p. 319; REIFFENSTUEL, *op. cit.*, IV, tit. XIX, § II, n. 26, p. 105; PIRHING, *Jus Canonicum in Quinque Libros Decretalium Distributum* (ed. novissima, 5 vols. in 4, Venetiis: Ex Typ. Remondiniana, 1759), IV, tit. XIX, I, p. 97.

Sanchez (d. 1610 A.D.) says that among theologians of his time, the word *divortium* even by itself was taken to mean separation from bed and board, *et in hac acceptione communiter usurpatur apud Theologos.*[34] From the time of the Protestant Revolt, the word *divortium* came to mean absolute divorce rather than separation in the popular mind. For this reason it was gradually dropped from canonical language as signifying separation. Coscus titled his book, *De Separatione Tori Coniugalis,* and in it treated of marriages that are null and void because of impediments, *ratum non consummatum* marriages, and separation of marriages as regards cohabitation.[35] Wernz-Vidal is one of the few post-Code authors who retain the old terminology: *"Divortium est solutio matrimonii sive quoad vinculum, sive manente vinculo saltem quoad torum vel cohabitationem, sive per declarationem nullitatis."*[36] The present Code makes *separatio* the generic term, and includes in it as specific parts *dissolutio vinculi* and *separatio tori, mensæ et habitionis* (Article I and II, Chapter X, Title VII, Part I, Book III).

There is every evidence that Canon 1128 must be interpreted according to the rule of Canon 6, 2°, which says that those Canons which re-state former laws in their entirety must be interpreted in accordance with the old law, and hence the interpretations of approved authors are to be followed for the proper understanding of these Canons of the Code.[37] It would be erroneous to conclude that the Code has tempered the rigor of pre-Code legislation and interpretation on this doctrine of separation of consorts as embodied in Canon 1128.[38]

34. SANCHEZ, *op. cit.,* III, lib. X, disp. 1, n. 1, p. 320.
35. COSCUS, *De Separatione Tori Coniugalis* (Florentiæ: Ex Typ. Magnæ Ducalis Typographiæ, 1856).
36. WERNZ-VIDAL, *op. cit.,* V, n. 620, pp. 782, 783.
37. Can. 6, 2° — *"Canones qui ius vetus ex integro referunt, ex veteris iuris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus, sunt æstimandi."*
38. *"Faut-il conclure qu'on peut tempérer la rigueur de l'enseignement ancien et chercher à spiritualiser davantage les rapports des conjoints pour les accommoder aux tendances des générations nouvelles? Cette conclusion serait erronée. Les auteurs du Code ont pris soin de marquer que leur œuvre est plus une œuvre de refonte que de réforme. Entre les canons rédigés par eux et le droit précédent il y a continuité [...] Cette règle générale (du Canon 6, 2°), nous avons le droit de l'appliquer au canon 1128"* — LE PICARD, *op. cit.,* p. 22.

Most pre-Code authors do not discuss the gravity in general of the reasons for separation. They discuss each reason separately, showing under which conditions each justifies separation.[39] Coscus demands that there actually be a cause,[40] and in one place insists that the cause must be just.[41] Berardi says that separation should occur only with difficulty, and then only for reasons approved by law.[42] Sanguineti held that *causæ gravissimæ* were required for separation.[43] Sebastianelli wrote that only causes approved by law permit separation, and the spouses should not be separated easily nor for light reasons.[44] Sanchez held that by no means must an ecclesiastical judge permit young married persons to be separated because of the danger of incontinence.[45] Aichner held that separation of consorts is always an evil and can be done only in those cases determined in law and according to the form prescribed by the Church.[46]

39. Thus REIFFENSTUEL, *op. cit.,* IV, tit. XIX, § II, p. 104; SCHMALZGRUEBER, *op. cit.,* IV, Pars 2, tit. XIX, § 3, p. 423.
40. COSCUS, *op. cit.,* p. 265. — *"Quemadmodum igitur non licet uxori a marito recedere sine causa [...]"*
41. *Ibid., p. 283* — *"Secunda inter legitimas causas [...] est mutuus utriusque conjugis ex justa causa pro separatione consensus."*
42. BERARDI, *Commentaria In Jus Ecclesiasticum Universum* (2 vols., Mediolani: Laurentius Rossi, 1846, 1847), p. 161 — *"Difficiliore sane ratione quoad cohabitationem dissolvitur matrimonium, scilicet nonnisi ex causis lege probatis [...]"*
43. SANGUINETI, *Iuris Ecclesiastici Institutiones In Usum Prælectionem* (3ª ed., Romæ: Ex Typ. Polyglotto S.C. De Propaganda Fide, 1896), p. 670 — *"pro qua causæ gravissimæ requirunitur."*
44. SEBASTIANELLI, *Prælectiones Juris Canoni, (De Rebus,* 2ª ed., Romæ: Pustet, 1905), n. 164 — *"requiruntur causæ legitimæ, i.e. a lege probatæ [...] ne facile, et levibus de causis coniuges dissocientur."*
45. SANCHEZ, *op. cit.,* lib. IX, disp. 4, n. 5, p. 178 — *"Quare judex Ecclesiast. nullo modo permittere debet conjuges juvenes separatos esse ob incontinentiæ periculum."*
46. AICHNER, *Compendium Juris Ecclesiastici* (9ª ed. emendata a Theod. Friedle, Brixinæ: Typis Wegerianis, 1900), p. 704 — *"Quia vero ejusmodi separatio semper de malo est, ipsa in casibus tantum a lege ecclesiastica statutis et respective in forma a lege ecclesiastica præscripta licita est."*

The jurisprudence of the Sacred Roman Rota has been, and is, severe in the matter of separation as regards cohabitation. The reasons for this severity are aptly expressed in one decision:

> It has been the constant jurisprudence of this Sacred Tribunal and of the Sacred Congregation of the Council that great caution should be used in granting separations from bed and board, because separation is directly opposed to the very purpose and ends of marriage; it gives rise to scandal; it destroys the family; it exposes the consorts to the danger of incontinence; and it inflicts a severe loss on children, if there are any. The Most Reverend Auditors of this Tribunal are convinced therefore that they must adhere even more rigidly to this very wise jurisprudence of the Holy See, now when modern customs are tending to scuttle with facility all conjugal rights, either "per divortium plenum sive per divortium semiplenum." There is no one who does not know that if "divortium semiplenum" is easily granted, the way is made easy for "divortium plenum." For matrimony exists also as a remedy for concupiscence and, if common life is dissolved by separation, immediately it opens the door to adulterous amours and illicit associations. [47]

In its decisions after the Code, this Sacred Tribunal retains the same strictness as to the causes for separation. A recent decision states: "*Caute nihilominus huiusmodi separatio est concedenda, cum fini secundario matrimonii eadem obstet, mutuo nempe iuvamini, ac insuper incontinentiæ periculo coniuges exponat, aliisque scandalum præbere facile valeat.*" [48] In 1930, one decision says in part "[. . .] separation from bed, board and cohabitation [. . .] is a *res gravis* inasmuch as it is public, it is contrary to the obligations of marriage, and is fraught with dangers to the consorts, especially the danger of incontinence. Therefore the cause of separation, that it may be considered as legitimate, must be proportionate to these evils, i.e., it must contain an element of danger either to the soul or

47. *S. R. Rotæ Dec.*, II (1910), Dec. XXIV, n. 11. Translation by KELLY, *Separation and Civil Divorce — The Jurist*, VI (1946), p. 199.
48. *S. R. Rotæ Dec.*, XXI (1929), Dec. I, n. 2, p. 3.

body of the other party, and this danger must be so serious that the obligation ceases, which is imposed by the law binding the consorts to observe the community of conjugal life." [49]

No matter the cause alleged, it should have the following characteristics before it is a sufficient grounds for separation:

"It can be affirmed that all the causes [for separation] [. . .] must have one effect, namely, danger of grave harm to either soul or body." [50]

It would be erroneous to conclude that, because the Church allows Ordinaries to settle separation cases in an administrative manner, [51] instead of by judicial process, therefore the reasons for separation *quoad cohabitationem* do not have to be cogent. The administrative method, or extrajudicial as it is also called, is merely a more expedite way of adducing moral certitude. But the truth is to be ascertained with the same carefulness and solicitude as in strictly judicial proceedings. Therefore proof for the existence of the causes for separation is more easily ascertained by the administrative method. But the distinction between administrative and judicial, as regards separation cases, applies to the *method* of ascertaining the causes for separation, and has nothing to do with their gravity.

49. *S. R. Rotæ Dec.*, XXII (1930), Dec. XLVII, n. 2, p. 524. Translation by KELLY, *ibid., p. 201.*
50. *S. R. Rotæ Dec.*, XX (1928), Dec. XXIX, n. 2, p. 268 — *"Affirmari tamen potest, omnium istarum causarum, ex quibus ius ad divortium obtinendum oriri potest, unum esse debere effectum, gravis nempe damni sive animæ sive corporis periculum."*
51. Pont. Comm., 25 June, 1932 — AAS, XXIV (1932), 284.

ARTICLE III

THE KINDS OF SEPARATION

Separatio as regards cohabitation admits of the following divisions:

- I. *Ratione auctoritatis*
  - *privatæ*
    - *consensus mutus*
    - *propria auctoritas*
      - *propter adulterium*
      - *propter periculum moræ*
  - *publicæ*
    - *auctoritas ecclesiastica*
      - *via administrativa*
      - *processus formalis*
    - *auctoritas civilis*
      - *vi concordati cum Sancta Sede nullo concordato præveniente divortium civile*
- II. *Ratione temporis*
  - *perpetua*
  - *temporanea*
    - *ad tempus certum, seu definitum*
    - *ad tempus incertum, seu indefinitum*
- III. *Ratione libertatis*
  - *voluntaria*
  - *coacta*

The division of separation *ratione auctoritatis* will be studied in Chapter IX.

As regards the time or duration of separation, the culpable adultery of one of the consorts is a just cause

of the other's separating perpetually from his partner.[52] Adultery is the only grounds for perpetual separation; all the others are a basis for temporary separation only. This crime gives the innocent consort the right to live forever apart from the guilty one. In cases of separation for other grounds, when the reason for the separation ceases, the separation must likewise come to an end.[53] The Ordinary or ecclesiastical judge in his decree or sentence, may grant separation for other grounds besides adultery, for a certain or definite period of time, e.g. six months. He may also grant permission for the spouses to separate for an uncertain or indefinite length of time, e.g. until revocation by himself of his decree, or until cessation of the reason for which the separation was granted. In these cases, marital life must be resumed when the period of time has elapsed, when the Ordinary revokes his decree, or when the cause has ceased.[54]

A voluntary separation is that which takes place with the mutual and free consent of the consorts. A forced separation is one wherein the innocent consort avails himself of his right to separate from the guilty party, even against the latter's will. In exceptional circumstances the Ordinary or ecclesiastical judge might even force the parties to separate against the will of both. An example would be when he would force them to separate pending convalidation of their marriage.

52. Canon 1129, § 1. Cfr. *S. R. Rotæ Dec.*, XXIV (1932), Dec. XIX, n. 3, pp. 168, 169.
53. Canon 1131, § 2.
54. Clæys BOUUÆRT-SIMENON, *op. cit.*, II, n. 335, p. 351; CORONATA, *Institutiones Iuris Canonici, De Sacramentis* (3 vols., Taurini-Romæ: Marietti, 1943-1946), III, n. 666, pp. 926, 927; Cappello, *op. cit.*, III, Pars 2, n. 829, p. 351.

CHAPTER VIII

Grounds for Separation

ARTICLE I

SEPARATION GROUNDS IN GENERAL

The Code of Canon Law lists the principal grounds for the separation of consorts. It is to be noted that the Code's enumeration of them is not taxative or exclusive.[1] Ordinaries may, therefore, allow spouses to separate for other reasons besides those given in the Code. A short study of the grounds recognized as canonical by pre-Code authors will aid in evaluating the nature and kind of these canonical grounds and also of the "other causes" for separation.

Before the present Code, authors reduced the grounds of separation to five or six headings. There is not a great deal of difference in their divisions.

Coscus, an important pre-Code authority on separation, allowed consorts to separate by mutual consent. The ecclesiastical judge, he said, could also separate spouses when there existed a prohibiting impediment to their marriage until such impediment were removed. Other grounds, according to Coscus, are: lapse of one partner into heresy

1. *"Non omnes, sed præcipuæ tantum a Codice enumerantur causæ, adeo ut aliæ quoque causæ æqui ponderis dari possint, quod manifeste indicat ipse Codex, taxativam enumerationem excludens per verba: 'hæc aliaque id genus, sunt pro altero coniuge totidem legitimæ causæ discedendi' (Can. 1131, § I)" — S. R. Rotæ Dec.,* XX (1928), Dec. XXIX, n. 2, p. 268.

or Gentilism; one's soliciting the other to commit sin, or being an occasion of sin; cruelty; implacable hatred; contagious disease; adultery; habitual drunkenness; and *furor,* which meant for the author permanent or temporary insanity.[2]

Sanchez allowed separation on these grounds: adultery; heresy; apostasy. These Sanchez classes as corporal and spiritual adultery. He also admits solicitation to sin; cruelty; and insanity.[3]

Reiffenstuel, besides allowing consorts to separate by mutual consent and on grounds of adultery, sanctions the following reasons:

> *Causæ, ob quas Divortium altero invito fieri potest, sunt quinque. Videlicet I. Alterius fornicatio spiritualis, seu lapsus in hæresim, vel gentilismum. II. Periculum salutis spiritualis, seu incitatio ad peccatum. III. Sævitia. IV. Morbus contagiosus, aut aliud grave periculum corporis.*[4]

Schmalzgrueber lists mutual consent; adultery; heresy or apostasy; danger to soul or body; cruelty or insanity on the husband's part; frequent quarrels and dissensions *(molesta cohabitatio ob frequentes rixas, et jurgia).*[5]

Pirhing gives the usual "corporal and spiritual adultery"; grave danger to soul or salvation, for example, if one party tries to draw the other into sin; grave danger to life or bodily welfare; the husband's cruelty; danger to the wife of death, mutilation or severe beatings; frequent serious quarrels and discord, *quæ nimis molestam reddunt cohabitionem inter conjuges;* insanity of one that would cause grave danger to the other; leprosy and other serious contagious diseases.[6]

Berardi recognizes as grounds for separation: adultery;

2. COSCUS, *op. cit.,* pp. 263, 264.
3. SANCHEZ, *op. cit.,* III, lib. X, disp. 2-18, pp. 322-406.
4. REIFFENSTUEL, *op. cit.,* IV, tit. XIX, § II, n. 29, p. 105.
5. SCHMALZGRUEBER, *op. cit.,* IV, tit. XIX, § II, n. 98-183, pp. 405-437.
6. PIRHING, *op. cit.,* IV, tit. XIX, pp. 97-106.

defection from the faith to heresy, Judaism or paganism. These, he says, are grounds for perpetual separation. Other grounds for temporary separation are: enticement to sin; very grave *(gravissima)* fear of one partner for his life or welfare, arising from the other's dangerous disease or insanity; the plotting of one spouse against the life of the other. Berardi concludes his enumeration with this admonition: "[...] *etenim ubi de divertendo, agitur res maxime gravis est æstimanda, nec facile ob leviusculas causas eo erit deveniendum.*" [7]

Ferraris treats of the following reasons for separation: mutual consent of the consorts; "spiritual fornication," or lapse of one into heresy or Gentilism; danger to spiritual welfare; cruelty; the *votum ultramarinum* to liberate the Holy Land; contagious disease or other grave bodily danger; culpable adultery of either spouse. [8]

Wernz [9] allows perpetual separation on grounds of adultery; sodomy; bestiality; heresy and apostasy. These last two, according to Wernz, permit the ecclesiastical judge to grant perpetual separation so that, even after the conversion of the guilty party to the Faith, the innocent spouse did not have to return to marital cohabitation. If the separation occurred by private authority on these grounds, the innocent consort was obliged to return upon the other's conversion. Wernz also allowed consorts to separate perpetually by their mutual consent. Causes of temporary separation, according to Wernz, are grave danger to soul [10] or body; [11] apostasy, heresy or schism.

7. BERARDI, *op. cit.*, II, dissertatio VII, cap. 2, pp. 161-164.
8. FERRARIS, *op. cit.*, III, pp. 122-125.
9. WERNZ, *Ius Decretalium Ad Usum Prælectionum In Scholis Textus Canonici Sive Iuris Decretalium* (6 tomes in 9, Prati: Giachetti, Filii Et Soc., Romæ: Ex Typ. Polyglotta S. C. De Propaganda Fide, 1906-1914; Tom. I, 3. ed.; Tom. II, III, IV, ed. altera), IV, Pars 2, n. 707-714, pp. 656-664.
10. *Ibid.*, n. 713, p. 662: *"Pericula animæ habentur in omnibus illis casibus, quibus unus coniux alterum ad peccata mortalia contra fidem vel bonos mores committenda cum gravi periculo inducere tentat. At propter alia delicta coniugis, quæ in grave periculum animæ alterius partis non redundant, separatio non est permissa, nisi forte ad tempus correctionis causa, aut coniux innocens incidat in periculum gravis pœnæ vel diffamationis."*
11. *Ibid.*: *"Pericula corporis i.e. vitæ vel valetudinis oriuntur ex insidiis vitæ structis, sævitiis, morbis contagiosis, aliisque causis merito æquiparatis v.g. ex amentia et furore, ex malitiosa desertione sive affectata absentia, ex molesta cohabitatione ob frequentes gravesque rixas, at non ob levia quæque incommoda, ex periculo gravis pœnæ vel infamiæ incurrendæ, v.g. si una pars habeatur complex criminum alterius coniugis."*
12. GASPARRI, *Tractatus Canonicus De Matrimonio* (3. ed. emendata et aucta ac recentissimis decretis accommodata, 2 vols., Parisiis: Beauchesne et Socii, 1904), II, n. 1363, p. 325.
13. Compare WERNZ, *op. cit.*, IV, Pars 2, n. 707-715, with WERNZ-VIDAL, *op. cit.*, V, n. 639-649.
14. GASPARRI, *op. cit.*, [ed. 1932], II, n. 1171. p. 242.

Gasparri, in his pre-Code work, lists the following general reasons for separation: adultery; heresy or schism; any grave danger whatsoever; mutual consent. [12]

Modern authors make their enumeration of separation grounds conform with the Code's. It is interesting in this connection, for example, to compare the matter of separation of consorts as stated in Wernz' *Ius Decretalium* with the Code adaptation of this section in Wernz-Vidal's *Ius Canonicum.* Wernz-Vidal retains adultery as a cause of perpetual separation, as well as sodomy and bestiality, which he makes equivalent to adultery. But he rules out heresy and apostasy as grounds fer perpetual separation after ecclesiastical sentence. These he now admits as causes for temporary separation. The other grounds for temporary separation remain the same as in the pre-Code work, but Wernz-Vidal adds two from Canon 1131, § 1, viz. if one spouse educates the children as non-Catholics, or if he leads a criminal and ignominious life. It is noteworthy that Wernz-Vidal has inserted the adjective *grave* before the words *periculum animæ vel corporis,* because the above canon uses it. [13]

In the redaction of his pre-Code treatise on marriage, Gasparri lists the same four reasons contained in his first work, but likewise adds the two from the Canon: education of the children in a non-Catholic sect, and the leading of a criminal life. [14]

Modern authors follow the Code division strictly. Some add examples of other grounds which might, in certain circumstances, permit temporary separation of consorts. To the grounds enumerated in Canon 1131, § 1, Regatillo adds malicious desertion as a grounds for temporary separation. He quotes a recent decision of the S. R. Rota as foundation for his opinion. [15] Clæys Bouuært-Simenon gives as examples of the *aliaque id genus* of this Canon: *Jurgia intolerabilia et inveterata aversio seu odium quo una pars feratur in alteram.* [16] Vermeersch-Creusen says that very grave loss of temporal goods could be a temporary cause of separation. [17] Cappello also gives as grounds for temporary separation danger threatening the wife's fortune, provided that this danger can be removed in no other way. [18] Doheny suggests these as possible grounds for temporary separation: "An extremely avaricious and niggardly character which made life unbearable; an excessively extravagant tendency to squander money to the detriment of the fortune of the other consort; a primitive mode of life in the jungles of Africa or in similar incompatible surroundings might well be viewed as unbearable by a lady of noble lineage, unaccustomed to hardships." [19]

Little is to be gained from speculation about other causes which might under certain circumstances permit

15. REGATILLO, *Ius Sacramentarium* (Vol. II, *De Ordine, De Matrimonio, De Sacramentalibus,* Santander: Sal Terræ, 1946), n. 587, p. 395. Regatillo is quoting a decision of the S. R. Rota: "[...] *Inter has causas accensenda est malitiosa desertio, quæ admittitur cum alter coniux ab altero discedit vel alterum dimittit cum animo deiciendi obligationes coniugales et absque iusta causa. Ut igitur malitiosa desertio habeatur, requiruntur tria hæc: 1° discessus ab altero coniuge vel eius dimissio; 2° animus deiciendi obligationes coniugales; 3° defectus iustæ causæ. Iustæ autem desertionis causæ sunt quæ ob ipsos citatos canones 1129 et 1131 tribuunt coniugi ius separationis perpetuæ vel temporaneæ — S. R. Rotæ Dec.,* XXI (1929), Dec. LXIII, n. 4, p. 526.

16. Clæys BOUUÆRT-SIMENON, *Manuale Juris Canonici* (3 tomes, Tom. I, III, 5, ed., 1939, 1943; Tom. II,2. ed., 1935; Gandæ et Leodii: Seminarium Gandavense et Leodiense), II, n. 334, p. 350.

17. VERMEERSCH-CREUSEN, *Epitome Iuris Canonici* (5. ed., 3 vols., Mechliniæ-Romæ: H. Dessain, 1933-1936), II, n. 443, p. 307.

18. CAPPELLO, *op. cit.,* III, Pars 2, n. 829, p. 351.

19. DOHENY, *Canonical Procedure in Matrimonial Cases* (Vol. II, *Informal Procedure,* Milwaukee: Bruce, 1943), pp. 635, 636.

separation. It should be remarked that all the causes for temporary separation refer to spiritual or material danger to one of the consorts. [20] The S. R. Rota holds that all the causes, no matter what their nature, must have one effect, i.e. danger of *grave* spiritual or corporal loss. [21] Romani adds a word of caution to judges allowing spouses to separate on grounds not listed in the Code: "*Alias quoque causas canon idem innuit "id genus," quibus in æstimandis cautissime est procedendum, ne quid sanctitas conjugii, bonum familiæ ac reipublicæ, morum sacertas capiant detrimenti.*" [22]

In this connection it is well to recall the words of a recent decision of the S. R. Rota which indicate that these causes, whatever their nature, should not be light and trivial:

"It is not right that separation take place for light inconveniences, even though these are repeated, for example, incompatibility of temperament; for even more serious quarrels, arising from unusual anger and unexpected perturbation, do not exclude hope of early reconciliation; nor, *a fortiori,* for just censure and correction [...]: all these do not bring with them serious injury or grave fear to a steadfast soul." [23]

ARTICLE II

THE GROUNDS OF ADULTERY

The culpable adultery of one consort is a just cause of perpetual separation for the other spouse, and this permitted by both divine and human law. The law of nature justifies separation of the innocent from the guilty

20. HEYLEN, *Tractatus De Matrimonio* (9. ed., Mechliniæ: H. Dessain, 1945), p. 360.

21. *S. R. Rotæ Dec.,* XX (1928), Dec. XXIX, n. 2, p. 268.

22. ROMANI, *Institutiones Juris Canonici* (Vol. II, De Sacramentis, Sectio II, De Matrimonio; Romæ: Editiones "Iustitia," 1945), n. 1169, p. 798.

23. *S. R. Rotæ Dec.,* XXII (1930), Dec. XLVII, n. 4, p. 525.

partner committing this crime on the principle that *frangenti fidem fides servanda non est.*[24] The marriage contract binds the consorts by the obligation of keeping mutual faith one to the other. Adultery is a crime *per se* opposed to conjugal faith.

It has been, moreover, the constant tradition of the Church, founded on the words of Our Lord,[25] that the innocent consort can separate from his adulterous partner. Under present Code law, Canon 1129, § 1, states that, if one party be guilty of adultery, the other has the right to dissolve, even prepetually, the community of conjugal life, although the marriage bond remains intact. This right is forfeited if the innocent party consented to the sin, was the cause of it, expressly or tacitly condoned it, or committed the same sin himself.[26]

This Canon redacts in entirety the pre-Code law on this point, and therefore is to be judged according to the accepted interpretations of the approved authors.[27]

The Canon makes it certain that the right of separation on grounds of adultery is granted to innocent husband or wife respectively. Both sexes are today considered *a pari* in the matter. Therefore the opinion of some older authors that adultery was a grounds for only the husband's separation is no longer tenable. The Canon gives the innocent

24. SCHMALZGRUEBER, *op. cit.*, IV, tit. XIX, § II, n. 98, p. 406; PIRHING, *op. cit.*, IV, tit. XIX, § 1, p. 97; SANCHEZ, *op. cit.*, III, lib. X, disp. 3, n. 4, p. 324. Cfr. *Reg.* 75, R. J., in VI°.
A recent decision of the S. R. Rota writes on the subject: *"Quam ad rem animadvertere præstat solum adulterium natura sua ius coniugi innocenti tribuere a coniuge adultero divertendi in perpetuum; qui fidem siquidem frangit ius penitus admittit exigendi a coniuge innocente observantiam obligationum individuæ vitæ consuetudinis ex matrimonio manantium"* — *S. R. Rotæ Dec.*, XXI (1929), Dec. I, n. 2, p. 3.

25. Matt., V: 32; XIX: 9.

26. Canon 1129, § 1 — *"Propter coniugis adulterium, alter coniux, manente vinculo, ius habet solvendi, etiam in perpetuum, vitæ communionem, nisi in crimen consenserit, aut eidem causam dederit, vel illud expresse aut tacite condonaverit, vel ipse quoque idem crimen commiserit."*

27. *"Citatus canon ex integro ius vetus refert; quapropter æstimandus est ex veteris iuris auctoritate atque ideo ex receptis apud probatos auctores interpretationibus (can. 6, 20)"* — *S. R. Rotæ Dec.*, XXIV (1932), Dec. XIX, n. 3, p. 169.

party the *right* to separate, but does not insist that he use his right necessarily. As Sanchez remarks: *Potest ergo jure suo cedens condonare injuriam.*[28] Cappello feels that an obligation to separate might perchance exist in a case where fraternal correction or avoidance of scandal might demand that the innocent partner leave the guilty.[29]

A. MUST BE PERFECTUM ET CONSUMMATUM

The adultery which would justify perpetual separation must be *adulterium in sensu stricto,* for in this matter it is question of a spouse being deprived of his right. The sin must be adultery properly so-called, i.e. *perfectum et consummatum.* Requiritur *adulterium perfectum,* id est coitus consummatus per effusionem seminis intra vas, debitum aut indebitum, adeoque copula *per se aptą ad generationem,* sin minus ratione vasis aut speciei, saltem *ratione actus carnalis* ad exitum suum producti.[30]

From this definition it is evident that the intention to commit the sin does not suffice.[31] Nor do acts which remotely prepare the way for it, such as immodest embraces, kisses, touches and the like.[32] For these cannot be classified under the heading of adultery.

Most canonists deny in theory that *copula inchoata seu attentata* suffices for separation, i.e. *penetratio membri virilis in vas mulieris, sine effusione seminis intra vas et sine pollutione.* In the internal forum, the confessor can rely upon the word of the penitent saying that the act was not *perfectum.* But in the external forum, once carnal relations take place, the presumption is that the act was completed. Therefore, in practice, *copula inchoata* suffices

28. SANCHEZ, *op. cit.*, III, lib. X, disp. 13, n. 5, p. 377.
29. CAPPELLO, *op. cit.*, III, Pars 2, n. 829, p. 347.
30. PAYEN, *op. cit., II,* n. 2467, p. 788.
31. SANCHEZ, *op. cit.*, III, lib. X, disp. 4, n. 1, p. 325.
32. CORONATA, *Institutiones Iuris Canonici, De Sacramentis Tractatus Canonicus* (3 vols., Taurini-Romæ: Marietti, 1943, 1946), III, n. 659, p. 918; Gasparri, *op. cit.*, [ed. 1932], II, n. 1172, p. 243.

for perpetual separation, even though it was without *effusio seminis.* [33]

De copula onanistica, seu de *copula cum seminatione extra vas* mulieris, disputari potest. Non deest gravis dubitandi ratio: nam hujusmodi copula nihil aliud est nisi *copula inchoata cum pollutione solitaria;* insuper, per hunc actum carnalem, complices non fiunt vere proprieque *una caro.* Si igitur retinemus definitionem supra datam, magis consentaneum est *non habere* hanc gravem unjuriam pro sufficienti causa separationis perpetuæ. Unum tamen notandum est: "In dubio consummatio *semper præsumitur.*" [34]

B. MUST BE FORMAL AND CULPABLE

The adultery must be culpable, i.e. *formale, non materiale tantum.* It must therefore have internal consent and must not result from ignorance, deceit, error or force. For the punishment of separation presupposes guilt. [35] Adultery, therefore, committed with ignorance of an existing marriage bond would not suffice as a cause of perpetual separation, nor would the sin if committed as a result of violence. [36] There would be no guilt in a case where a spouse, believing his partner dead, married another, unless he persisted in this union after learning that his partner was alive. There would be no guilt also if the sin were committed with one whom the other thought at the time to be his own spouse. There would be no guilt if a wife were violated against her will by force. [37]

33. CAPPELLO, *op. cit.,* III, Pars 2, n. 826, p. 346: *"Rectius videtur ita distinguendum: a) si copula carnalis habita est, hæc præsumitur perfecta i.e. cum effusione seminis, nisi probetur contrarium; onus autem probandi incumbit asserenti; b) in foro interno credendum est ipsi pœnitenti; aliter in foro externo, ubi probatio modo ordinario facienda est; c) cum vero, posita copula carnali, vix probari possit in foro externo defectus effusionis seminis, inde consequitur practice, in casu, illud adulterium fere semper habendum esse tamquam verum et perfectum."*
34. PAYEN, *loc. cit.*
35. CAPPELLO, *loc. cit.*
36. *S. R. Rotæ Dec.,* XXI (1929), Dec. LXIII, n. 3, pp. 525, 526.
37. GASPARRI, *op. cit.,* [ed. 1932], II, n. 1172, p. 243; DE SMET, *op. cit.,* n. 255, p. 225; ROMANI, *op. cit.,* n. 1165, pp. 794, 795.

There is controversy among authors whether adultery committed by the wife induced by grave fear, and not by physical force, is a just cause for perpetual separation. Payen holds that more probably it is; for grave fear does not excuse from the moral guilt of the adultery and broken faith, which are the reason for separation. [38] Most commentators merely acknowledge the difficulty. [39]

C. MUST BE MORALLY CERTAIN

It must also be morally certain that the crime of adultery has been committed. On the one hand suspicions, surmises, accusations, compromising circumstances, and the like do not constitute proof of the crime. On the other hand, however, eye-witnesses are not required, since this crime by its nature is generally occult. But "violent presumptions" of the sin suffice to give the ecclesiastical judge moral certitude that the crime was committed. [40] Therefore, indirect proofs, indications and presumptions of the sin can give moral certitude as to its existence. Examples of these "violent presumptions" would be: if a wife, already suspected, were found *sola cum solo in loco ad peccandum apto.* [41] Although embraces, kisses, etc., do not constitute adultery, still, taken with other circumstances, they could give presumption of that sin. [42]

38. PAYEN, op. cit., II, n. 2468, p. 789.
39. WERNZ-VIDAL, *op cit.,* V, n. 639, footnote III, p. 842; GASPARRI, *loc. cit.* CORONATA, *loc. cit.*
40. GASPARRI, *loc. cit.*
41. SANCHEZ, *op. cit.,* III, lib. X, disp. 12, n. 43, 44, p. 374: *"Quod si roges, quando dicatur suspicio violenta sufficiens ad divortii sententiam? id deciditur, c. Litteris, De præsumpt., ibi: Solum cum sola, nudum cum nuda, in eodem lecto jacentem viderunt, multis locis secretis, et latebris ad hoc commodis, et horis electis. Respondemus quod ex huiusmodi violenta et certa suspicione fornicationis potest sententia divortii promulgari. Et docent omnes [...] Hinc inferiur dici præsumptionem violentiam, ut dicatur plene probatum adulterium, quando quis solus cum sola in loco abdito inventus est."*
42. SANCHEZ, *loc cit.:* *"Sed omnino tenendum est, non induci violentam suspicionem adulterii ex solis osculis et amplexibus, quando alia adminicula non concurrunt."*

The S. R. Rota is very cautious in arriving at moral certitude from presumptions. There are two recent cases in which separation on grounds of adultery were denied for lack of certain proof. In one case, the judges refused to admit love letters [43] as proof of adultery, especially since these were not produced in court. The wife claimed she had contracted venereal disease from her husband, but under examination she admitted she was not sure whether her husband had contracted these diseases before the marriage or not. Examination of the *actrix* by physicians disclosed that she did not have one of the diseases mentioned, although she had another. These facts did not prove adultery on the part of the husband. Statements of the plaintiff, moreover, were not substantiated by witnesses. The whole evidence rested on the word of the plaintiff herself. [44]

In another case of the same year, perpetual separation for this reason was denied on grounds of adultery (although separation *ad tempus indefinitum* was granted on grounds of malicious desertion). In spite of the serious accusations of the plaintiff, there was no real evidence of adultery. He accused his wife of leaving home, travelling with another man, and living in the same room with him for a period of four days — facts not proved by evidence.

> But if the woman had chosen this man, X, as administrator of her goods, if she received him and his wife into her own home, if she travelled with him to the city of V and there dwelled with him in the same home but in distinct rooms, if finally both departed to another place, U., and there stayed for two weeks in different inns, if finally they went to the city of T. and there remained for ten days in the same inn, but in different rooms, and asked the lawyer of the plaintiff to pay the hotel expenses of both, all these things, on one hand,

43. SANCHEZ, *op. cit.*, III, lib. X, disp. 12, n. 48, p. 375: "*De literis vero amatoriis non concordant DD.* [...] *Cæterum existimo non sufficienter probari adulterium licet, in eis mulier proprium adulterium fateatur. Quia confessio extrajudicialis, qualis est hæc, non plene probat, sed constituit indicium sufficiens ad torturam* [...]."

44. *S. R. Rotæ Dec.*, XXI (1929), Dec. I, n. 2-6, pp. 3-5.

> are not generally proven; on the other hand, even if they might be proven, they could not be accepted as certain proof of adultery. [45]

Another decision of the S. R. Rota goes more into detail on how moral certitude of the crime of adultery is to be obtained:

> [...] a judge cannot arrive at a sentence of perpetual separation, unless he is convinced with moral certitude deduced from the acts and proofs that there took place a formal, culpable and consummated crime of adultery [...] But in the external forum adultery is difficult to prove because it is wont to be committed in secret and therefore can almost never be proved directly. Wherefore, in accordance with long-standing law and teaching, that proof is sufficient which can be obtained in view of the nature of the case — the more so since the adultery is not being dealt with in a criminal trial in order to inflict punishment upon the adulterer, but only in a civil trial in order to determine a question of separation; and although this matter of the separation of consorts is called *gravis et ardua,* nevertheless authorities agree that for this effect the adultery can be proved by conjectures and presumptions: this according to *Decis. coram Ursino, 12 maii 1681, n. 3, inter Recentiores,* P. XVIII, T. II, dec. 818; cfr. likewise Coscius, *De separatione tori,* lib. II, cap. XIV, n. 7-11. But the presumptions required are termed "violent," as opposed to light or probable presumptions. Thus an example would be a presumption drawn from a certain and grave sign or fact which is directly and very closely united to the crime in question, in such a way that once the fact has taken place, we must conclude without any reasonable doubt that the adultery took place. To the point is *cap. Præterea, 27, X, De testibus,* II 20, where, concerning proof of carnal relations, Pope Celestine II declares: "If concordant testimonies *de visu,* or even *de auditu,* are had and an agreeing public opinion furnishes a violent presumption, and if the other legitimate evidence supports it, the testimonies of sworn witnesses are to be accepted. For an attentive and discreet judge (according to secured practice of civil law) will form his convictions from the arguments and testimonies which he finds more fitting the facts" (cfr. *Dig.,* XXII, 5, *De testibus,* L. 21, § 3). And likewise especially *cap Litteris,* 12, X, *De præsumptionibus,* II, 23; cfr.

45. *S. R. Rotæ Dec.*, XXI (1929), Dec. LXIII, n. 2-6, pp. 525-528.

Pirhing, in lib. II, tit. 20, n. 130; Reiffenstuel, in lib. II, tit. 23, n. 28-29, n. 66-67; in lib. IV, tit. 19, n. 95. Likewise to the question: What kind of evidence must there be concerning adultery, and what kind of proofs are required for a judge to be able to issue a sentence of separation? Engel (in lib. IV, tit. 19, *De divortiis,* n. 14) answers: "Since sins of the flesh are difficult to prove, *testes de visu* of the sin itself are not required, but conjectures and violent presumptions suffice, from which, if not physical, at least moral certitude can be deduced in such a way that one is naturally led to believe that adultery was committed [...]. These presumptions are to be gathered from circumstances of place, time and persons, as for instance, if a wife, otherwise suspect and of bad reputation, is caught alone with a man at a time and place suited for committing this sin." Thus far Engel, whom Schmalzgrueber, among others, quotes in the same title 19, book IV, n. 130.

The decision goes on to say that in cases which are difficult of proof, when other witnesses cannot be had, it is sometimes necessary to admit witnesses who would not otherwise be admitted, e.g. persons of bad reputation might be needed to testify to things happening at night, or in places of ill-repute. The decision concludes by recalling Canons 1757, § 2, and 1758, about witnesses of ill-repute. [46]

But even if the adultery did possess all the above characteristics, viz. if it were formal and culpable, consummated and morally certain, it would still not be grounds for perpetual separation unless it had the other qualifications mentioned in Canon 1129. [47]

This Canon states that if one party is guilty of adultery, the other forfeits his right to separate if he consented to the crime, was the cause of it, expressly or tacitly condoned it, or, finally, committed the same crime himself. Tacit

46. *S. R. Rotæ Dec.,* XXIV (1932), Dec. XIX, n. 4, pp. 169, 170.
47. *S. R. Rotæ Dec.,* XXI (1929), Dec. I, n. 2, p. 3: *"Ut autem adulterium sit coniugi innocenti causa iuridica et sufficiens petendi et assequendi dissociationem perpetuam quoad torum et habitationem, nedum formale et culpabile esse debet, consummatum et moraliter certum; sed insuper oportet ut iis sit conditionibus vestitum, quæ in citato canone* [1129] *referuntur."*

condonation of the crime exists where the innocent party, after having learned of the sin, has continued to live with the guilty party in marital relations. The law presumes tacit condonation unless the innocent party within six months either expels the guilty one, or departs, or brings legal accusation against the culprit.

The various points of this Canon will now be considered in detail.

D. MUST NOT BE PERMITTED

The innocent spouse loses his right of separation, first of all, if he consents to the adultery of the other. For the Church allows separation on account of the injury which the crime of adultery inflicts upon the innocent consort. The latter loses his privilege of separating if he consents to the sin, and this on the principle: *Scienti et consentienti non fit iniuria.* [48] It is true that the injury partly continues to remain, because the innocent spouse has no right to consent to the other's committing this crime. [49]

The two ways of consenting are explicit and tacit. Explicit consent is given by clear words or signs of acquiescence. A spouse tacitly consents to the sin when he knows or could easily know of it, and does not prevent it when he could do so *sine gravi incommodo.* [50] This "grave inconvenience" can easily be present, however, for the wife. [51] A consort does not consent, who knows of the crime but pretends to be ignorant of it in order to find meanwhile witnesses to observe the conduct of the guilty party and convict him of the crime. [52]

48. *Reg.* 27, R. J., in VI°.
49. PAYEN, *op. cit.,* II, n. 2468, p. 790.
50. CAPPELLO, *op. cit.,* III, Pars 2, n. 826, p. 346.
51. CORONATA, *op. cit.,* III, n. 660, p. 919.
52. GASPARRI, *op. cit.,* [ed. 1932], II, n. 1173, p. 244.

E. MUST NOT BE CAUSED

The innocent party also loses his right to separate if he directly causes the other's adultery. In this case he becomes a cooperator in the sin. Thus a man who commands, impells, or urges his wife to commit the crime, loses right of separation because of his action.

Likewise does a man who advises the sin, if he foresees that his advice will be followed and be a *causa efficax* of the sin. The same applies to a husband who places a cause that *per se* compells the other to sin, e.g. a man who, knowing the weakness of his wife, allows other men of bad reputation to frequent his house, and leaves them alone with his wife. [53]

A spouse does not lose his right to separate if he only *remotely* and *indirectly* causes the sin, provided he does not do so with the precise intention that the other, forced by necessity, commit the sin. A husband would indirectly cause the sin of his wife, if he were harsh of disposition, continuously quarrelling or cruel, and thus was the occasion of his wife's going to another man, provided he did these things without intention of inciting his wife to adultery. [54]

Does a spouse directly cause the crime of his partner if he very often denies the marriage debt to him, does not supply necessary sustinence, or unjustly expells him from the home, or himself deserts his house? The more common teaching of pre-Code and modern authors holds that such treatment is not a cause of adultery, but only an occasion of it, and that, therefore, the husband in such a case still has the right of separation, *"quia mulier nulla conditione ad adulterium induci debet."* [55] Some authors

53. PAYEN, *loc. cit.*
54. *Ibid.*
55. SCHMALZGRUEBER, *op. cit.*, IV, tit. XIX, § II, n. 106, p. 410; REIFFENSTUEL, *op. cit.*, IV, tit. XIX, § III, n. 70, p. 109; WERNZ-VIDAL, *op. cit.*, V, n. 639, footnote 113, p. 843; ROMANI, *op. cit.*, n. 1166, p. 795; Chelodi, *Ius Matrimoniale Iuxta Codicem Iuris Canonici* (3. ed., Tridenti: Libr. Edit. Tridentum, 1921), n. 161, p. 176; CAPPELLO, *op. cit.*, III, Pars 2, n. 826, p. 346.

look to the internal intention of the spouse, and allow him to separate provided he did not do these things with the precise intention that the other, forced by necessity, commit the crime. Pirhing does not allow the spouse to separate *"si tamen vir ea intentione uxorem expelleret, vel ei alimenta denegaret, ut ob necessitatem urgentem adulterium perpetraret, hic perinde esset ac si in adulterium consentiret."* [56] In his pre-Code work, Gasparri follows the same opinion: *"Item [conjux jus divortii non amittit] nec si [...] alterum ad adulterium impellat indirecte, idest negando debitum aut alimenta, vel eumdem e domo expellendo, vel cum eodem non cohabitando [...] dummodo id non fecerit ea præcise intentione, ut alter, necessitate coactus, adulterium perpetraret."* [57]

In his post-Code work, Gasparri has changed his opinion. He now refuses separation to a spouse inflicting such treatment on the other: *Hoc coniugis adulterium ius divortii alteri non tribuit in quadruplici casu: [...] b) Si alter coniux alterum ad adulterium impulerit directe vel indirecte, e.g. negans debitum aut alimenta, vel eumdem e domo expellens, vel cum eodem non cohabitans sine iusta causa, etc."* [58] Vermeersch-Creusen is another who believes that such conduct would *per se* cause the adultery of the other spouse. [59]

F. MUST NOT BE CONDONED

If the innocent partner explicitly or tacitly condones the adultery of the other, he also loses his right to separate. The condonation must be true, not fictitious, free and spontaneous, not extorted by force or fear. [60] Since separation is granted as a favor to the innocent party, he can

56. PIRHING, *op. cit.*, IV, tit. XIX, § II, n. 12, p. 99; SANCHEZ, *op. cit.*, III, lib. X, disp. 5, n. 4, p. 330.
57. GASPARRI, *op. cit.*, [ed. 1904], II, n. 1366, p. 327.
58. GASPARRI, *op. cit.*, [ed. 1932], II, n. 1173, p. 244.
59. VERMEERSCH-CREUSEN, *op. cit.*, II, n. 440, p. 306.
60. WERNZ-VIDAL, *op. cit.*, V, n. 639, footnote 114, p. 843.

freely cede this right.[61] But the signs of marital affection must be freely and knowingly given. One forgives knowingly, who, being informed of the crime, pardons the guilty one for the past offense. One forgives freely who is not compelled by force or grave fear to do so. He forgives internally who really has the inner intention of pardoning the offense.[62] Explicit condonation is given when the innocent party, by clear words or signs, indicates that the adulterer is forgiven. Tacit condonation of the crime exists where the innocent party, after having learned of the crime, has continued to live with the other in marital relations. The law presumes tacit condonation to exist where the innocent party has not, within a period of six months, expelled or left his partner, or brought legal accusation against him.[63] The period of six months is to be computed from the day the adultery becomes known to the innocent party, and not from the day of the sin's commission, or from the day when the innocent party is first able to use his right of separation. This period of time is a presumption of law which militates against an innocent party saying he did not render the marital debt to the other for that length of time, or that he did so from force or fear, or from ignorance of his right to separate. This presumption of law, however, yields to contrary proof (cfr. Canon 1826).[64]

Continued ignorance of the adultery over a period of six months is not presumed if the crime were notorious. But if the sin be occult, ignorance of it in the innocent party is to be presumed until the contrary is proved (cfr. Canon 16, § 2). If the adultery, therefore, be notorious, its knowledge is presumed in the innocent consort until he proves his ignorance.[65]

61. SANCHEZ, *op. cit.*, III, lib. X, disp. 5, n. 19, p. 333.
62. PAYEN, *op. cit.*, II, n. 2468, p. 791.
63. Canon 1129, § 2.
64. Canon 35. Cfr. CAPPELLO, *op. cit.*, III, Pars 2, n. 826, p. 347; Clæys BOUUÆRT-SIMENON, *op. cit.*, II, n. 332, p. 349; CORONATA, *op. cit.*, III, n. 660, p. 920.
65. REGATILLO, *op. cit.*, II, n. 586, p. 394.

G. MUST NOT BE COMPENSATED

If both spouses commit the sin of adultery, the crime of one is compensated by that of the other, and neither has the right of separation. This law of the Code is an application of the principle: *Paria delicta mutua compensatione tolluntur.*[66] It makes no difference if one of the partners has committed the crime only once or a few times, while the other has committed it many times, provided the crimes of both are certain and by their nature sufficient for perpetual separation.[67]

It is to be noted that compensation of adulteries is when both commit the sin *before* separation — not if one commits it before separation, and the other after. When the innocent party commits adultery after the separation, he does not violate the guilty partner's right to separate. For the guilty one has already lost right of separation when he committed the sin.[68]

Let us suppose the case of two adulterous consorts being reconcilied in their marital life, one of whom again falls into the sin. In this case the other consort who has not committed the sin after their reconciliation has the right to separate.[69]

Right of separation revives also in a case where the innocent party has condoned the other's adultery and been reconciled to him, when the latter again commits the sin.

66. Canon 2218, § 3.
67. SANCHEZ, *op. cit.*, III, lib. X, disp. 6, n. 8, p. 335: *"Non obstat compensationi adulterii mutui, si alter conjux plurima adulteria, alter vero unum solum admiserit. Quia cum uterque fregerit fidem, delicta censentur paria. Jura enim fractionis fidei, non autem numeri rationem habent."*
68. REGATILLO, *loc. cit.*: *"Compensatio adulteriorum unius et alterius datur, quando ambo coniuges adulterarunt ante separationem; non si unus ante, alter post separationem adulteravit; quia post eam adulterium alterius non violat ius compartis, quod iam amissum fuerat per primum adulterium cum separatione."*
69. SANCHEZ, *op. cit.*, III, lib. X, disp. 7, n. 1, p. 336: *"Quia reconciliatio illa matrimonii ad suum antiquum vigorem restituit, perinde ac si nullum esset usque tunc adulterium admissum. Unde fit, ut conjux postea delinquens reus divortii fiat."* Cfr. GASPARRI, *op. cit.*, [ed. 1932], II, n. 1173, p. 244.

The forgiveness applies to past sins and not to future ones. [70]

Suppose further that only one spouse has committed the sin and the innocent party has condoned the adultery. After condonation, however, the innocent party himself commits the sin. In this instance, the first adulterer has the right to separate from the second. [71]

Suppose again that both are committing the sin, but have not been reconciled. One gives up his evil ways, the other does not. Does the reformed partner have a right to a separation? It is the opinion of Sanchez that he does, provided he warns the other to amend his ways, and provided the other keeps on sinning. [72]

Vermeersh-Creusen expresses the opinion that a sin of adultery committed before the baptism of the guilty one cannot be alleged as compensation of adultery or as grounds for separation, after the sin has been removed by the Sacrament of Baptism. [73] To Sanchez, the baptism makes no difference in this case, for he says that such a one can be dismissed. Sanchez holds that the Sacrament remits the sin in the sight of God, but does not take away the offense against marital faith. [74]

Many pre-Code and modern authors hold that sodomy of one partner with a third person, and bestiality are equivalent to adultery, and therefore are grounds for perpetual separation. [75] Wernz-Vidal gives the following as reason for this opinion: *"Nam matrimonium eo tendit, ut coniuges*

70. SANCHEZ, *op. cit.*, III, lib. X, disp. 5, n. 20, p. 333.
71. SANCHEZ, *op. cit.*, III, lib. X, disp. 7, n. 1, p. 336.
72. SANCHEZ, *op. cit.*, III, lib. X, disp. 7, n. 4, p. 337: "[...] *quia monitio illa et interpellatio, qua adulter adulterium interpellat ac monet, ut corrigantur, simulque habitent, vim habet reconciliationis.*"
73. VERMEERSCH-CREUSEN, *op. cit.*, II, n. 440, p. 306.
74. SANCHEZ, *op. cit.*, III, lib. X, disp. 3, n. 5, p. 324: *"Quia baptismus remittit peccatum in ordine ad Deum, non tamen ut est viri offensa, cui fracta est fides conjugalis, ac proinde ratione hujus offensæ jus habet divortii. Sicut non obstante baptismo posset resilire innocens a quocunque alio contractu altero fidem minime servante."*
75. E.g. WERNZ-VIDAL, *op. cit.*, V, n. 639, pp. 843, 844; DE SMET, *op. cit.*, n. 255, p. 224; PAYEN, *op. cit.*, III, n. 2464, p. 435. The sin of sodomy committed by one spouse with the other would be grounds for temporary separation only.

fiant una caro. Quam fidem coniux perfecte frangit, qui bestialitatem vel sodomiam cum tertia persona exercet; nam carnem suam dividit cum alio." [76] In fact, there is a S. R. Rota decision which admits this to be the common interpretation: *"Ex communi autem interpretatione sunt causa separationis perpetuæ etiam sodomia et bestialitas."* [77]

Cappello admits that *plures* hold this opinion, but does not seem to do so himself: *"At revera adulterium proprie dictum non sunt; idcirco applicatio non occurrit."* [78] Romani likewise disagrees with the common opinion "because these sins differ *toto genere suo* from adultery, because we are bidden to interpret the law according to the proper significance of its words, [79] and because we are bound to give it a strict interpretation in odious matters." [80] According to Romani, the crimes of sodomy and bestiality would justify temporary separation, even though this might last for a long time. [81]

ARTICLE III

GROUNDS JUSTIFYING TEMPORARY SEPARATION

If one party joins an heretical sect, if he educates the children as non-Catholics, if he leads a criminal and ignominious life, if he threatens great bodily or spiritual danger to the other party, or if through cruelties or in any other

76. WERNZ-VIDAL, *loc. cit.* De Smet's reasoning is much the same: "[...] *ex alia parte, sufficit actus completus etiam sodomiticus et bestialis, vel et onanisticus; licet enim per adulterium directe intendatur normalis copula cum tertia persona instituta, huic tamen æquiparanda censetur congressus sodomiticus aut onanisticus, vel bestialitas consummata, cum in hisce habeatur divisio carnis in aliam carnem, adeoque fides conjugalis violetur non minus injuriose quam in stricte dicto adulterio*" — DE SMET, *loc. cit.*
77. *S. R. Rotæ Dec.*, XXI (1929), Dec. LXIII, n. 3, pp. 525, 526.
78. CAPPELLO, *op. cit.*, III, Pars 2, n. 826, p. 345.
79. Cfr. Canon 18.
80. Cfr. Canon 19.
81. ROMANI, *op. cit.*, n. 1165, pp. 794, 795.

way he makes community of life too difficult, the other party may legitimately leave the guilty party. [82]

It is to be noted, as was said above, that this Canon's enumeration of causes justifying temporary separation is not taxative or exclusive. For the words *haec aliaque id genus allow* other grounds of this kind.

The enumeration of reasons given in Canon 1131, § 1 can be reduced to the three-fold classification of spiritual adultery, grave danger to soul and grave danger to body. [83]

A. HERESY, SCHISM AND APOSTASY

The heresy, schism or apostasy of one of the consorts, formerly a Catholic, entitles the other Catholic spouse to a temporary separation. It seems that affiliation with an atheistic sect would also come under this heading. [84] Not, however, societies condemned by the Church, for the Canon makes no mention of them, and the Canon must be given a strict interpretation. [85]

Two things are necessary before these grounds suffice for separation: 1) abandonment of the Catholic Faith, and 2) affiliation with a non-Catholic sect, either Christian, Jew or Pagan.[86] Merely personal heresy, even if it were formal, or apostasy by indifferentism, or statements contrary to the Faith, even if these be contained in published writings, do not suffice. [87] If a spouse, therefore, were a heretic, schismatic, apostate or atheist, without becoming affiliated with any non-Catholic sect, there would be no right of

82. Canon 1131, § 1.
83. Cappello, *op. cit.*, III, Pars 2, n. 828, p. 349.
84. Pont. Comm., 30 Iulii, 1934 — AAS, XXVI (1934), 494: *"D. An ad normam Codicis iuris canonici, qui sectæ atheisticæ adscripti sunt vel fuerunt, habendi sint quoad omnes iuris effectus etiam in ordine ad sacram ordinationem et matrimonium, ad instar eorum qui sectæ acatholicæ adhærent vel adhæserunt.*
"R. Affirmative."
85. DOHENY, *op. cit.*, II, p.632. ROMANI *(op. cit.*, n. 1169, p. 797), however, includes Masonry in his general classification of non-Catholic sect.
86. WERNZ-VIDAL, *op. cit.*, V, n. 645, pp. 846, 847.
87. Clæys BOUUÆRT-SIMENON, *op. cit.*, II, n. 334, p. 350.

separation on this grounds, unless there happened to be present another grounds, e.g. grave danger of spiritual perversion for the innocent spouse or children.

Other crimes, even if they have entailed excommunication, are not legitimate reasons for separation, unless they would mean that the guilty spouse was leading a criminal and ignominious life, or unless they would cause grave danger to the soul or body of the innocent spouse. [88]

These grounds make it perfectly licit for the innocent spouse to separate, not only from the point of view of Canon Law, but also of the very law of nature, on account of the proximate danger of perversion of the other party — except in a case where these dangers could be made remote. Sometimes, out of charity in this case, the innocent one should not depart, in order that he might effect the conversion of the other. [89] Some authors feel that the above grounds are legitimate reasons for separation, even apart from danger of perversion, because of the very baseness of these crimes. [90]

Sometimes by the law of nature there is even an *obligation* to depart from the party guilty of these crimes. Such would be the case where there was a proximate danger of perversion to the Catholic's faith or that of the children, and where this danger could not, by any precautions or remedies, be made remote. [91] Such also would be the case if the cohabitation would be an occasion of grave scandal for other Catholics, and if separation were the only way of removing it. This latter would be a rare case, but the former would be more frequent. Grave danger of perversion of faith to innocent spouse and children appears to be the principal reason why the Church gives the Catholic spouse the right to separate from the other. [92]

88. PAYEN, *op. cit.*, II, n. 2483, p. 803.
89. GASPARRI, *op cit.*, (ed. 1932), II, n. 1176, p. 246.
90. PAYEN, *loc. cit.*
91. GASPARRI, *loc cit.*
92. PAYEN, *loc. cit.*

In a mixed marriage, if the non-Catholic changes his religious affiliation from one non-Catholic sect to another, there would be no grounds for separation under this heading, unless there were a source of grave danger of perversion of faith. [93]

Suppose a case where both Catholic consorts affiliate themselves with a non-Catholic sect, and one of them later returns to the Church, the other remaining in heresy or schism. Can the returned Catholic separate from the other? All canonists agree that, without doubt, he can do so, because his former heresy does not deprive him of the right to separate. [94]

It is to be noted that heresy and schism, the "spiritual adultery", are no longer grounds for *perpetual* separation as in the former pre-Code law.

Membership is an heretical sect which preceded marriage cannot be alleged as a cause of separation, unless the heretical spouse has not kept the ante-nuptial promises, e.g. educating all the children in the Catholic religion. [95] Nor can separation for these crimes take place unless the guilty partner became formally affiliated with a non-Catholic sect. But here again such a one could be dismissed for another cause admitted by the Code, e.g. non-Catholic education of the children, grave danger to the other's spiritual life, etc. [96]

B. NON-CATHOLIC EDUCATION OF OFFSPRING

A licit grounds for temporary separation is the non-Catholic education of the children brought about by one of the spouses. This conduct is licit grounds in a mixed marriage which took place with a dispensation from the impediment of mixed religion or disparity of cult. It is

93. DOHENY, *op. cit.*, II, pp. 631, 632.
94. PAYEN, *loc. cit.*
95. DE SMET, *op. cit.*, n. 255, footnote 5, p. 225.
96. CORONATA, *op. cit.*, III, n. 663, p. 922.

licit even in the marriage of two Catholics. [97] The Canon refers to the non-Catholic education of children born of the existing marriage, and not of those born by a previous union. [98]

The non-Catholic education of children is a new general classification with the present Code. Little mention is made of it by pre-Code authors, although it is implicitly contained in their grounds of "spiritual adultery."

The non-Catholic education of offspring is contrary to the natural and divine law. It goes directly against the *bonum prolis,* and indirectly against the *bonum fidei.* [99]

Non-Catholic education mentioned in the Canon includes not only religious education of the children in a non-Catholic sect, but also any such education that was against or even outside Catholic Faith or morals. It would, therefore, include one parent's rearing them in indifferentism or in no religion at all. [100]

Although the Code seems to have in mind the case of non-Catholic education already given to the children, it probably includes the case where a spouse positively intends to educate them thus, even though as yet he has not done so. [101]

Separation on this grounds is always licit — in the case of two Catholic parents, because one is neglecting his very serious obligation (Canon 1113); in the case of a mixed marriage, because the non-Catholic spouse is not observing the ante-nuptial promises (Canons 1061, 1071). In practice separation should not be brought about for this cause alone, unless the Catholic spouse has great hope that, by the separation, he can better bring about the Catholic education of the offspring. There would be an obligation of separation if it were the only and efficacious

97. PAYEN, *op. cit.*, II, n. 2484, p. 804.
98. Romani, *op. cit.*, n. 1169, p. 797.
99. Clæys BOUUÆRT-SIMENON, *op. cit.*, II, n. 334, p. 350; CAPPELLO, *op. cit.*, III, Pars 2, n. 828, p. 350.
100. ROMANI, *loc cit.*, Clæys BOUUÆRT-SIMENON, *loc. cit.*
101. CORONATA, *op. cit.*, III, n. 663, p. 922.

way by which the Catholic party could safely provide for the Catholic training of the children. However, in practice it would be very rare that separation would be the only and efficacious means of effecting the Catholic education of the offspring. This might be provided for adequately by placing the children in a Catholic school, or by the Catholic's personnally training them. [102]

C. THE LEADING OF A CRIMINAL AND IGNOMINIOUS LIFE

The Code allows separation to one spouse on account of the crimes of the other. The sin of adultery is excluded from this category, because for this reason permanent separation is permitted. On the other hand, we are here speaking of a criminal and ignominious life which would not be a grave danger to the Faith or morals of the other party. If they were such, then there would be grounds for separation *ob periculum animæ,* to be discussed below.

The question is: Is separation allowed on account of a consort's crimes (apart from his adultery or heresy), which do not cause the innocent spouse grave danger of committing mortal sin?

A criminal life would be one dedicated habitually to crime. Such a life would be, in addition, ignominious if it were publicly known, for this kind of conduct would bring disgrace upon the evil-doer and his family. [103]

It is not allowed that the innocent party separate on account of the guilty partner's crimes in themselves. For these are not against conjugal faith nor do they constitute grave danger of perversion. [104] But *per accidens* separation because of them is allowed in three instances: 1) when one consort separates for a short time in an effort to bring

102. DOHENY, *op. cit.,* II, p. 633; Payen, *loc. cit.*
103. CORONATA, *op. cit.,* III, n. 663, p. 922.
104 SANCHEZ, *op. cit.,* III, lib. X, disp. 17, n. 3, p. 397; WERNZ-VIDAL, *pp. cit.,* V, n. 645, p. 848.

about the reformation of the offender; 2) when the innocent spouse justly fears serious penalties of the civil law, e.g. danger of being convicted as an accomplice for harboring a criminal or receiving stolen goods; 3) when the innocent party has reason to fear grave infamy, public disgrace to honor, good name or family. This could easily happen if the wife were thought to be an accomplice in the crimes committed by her husband. [105]

But pre-Code authors hold that it is not allowed that a wife separate from a husband who has been condemned by the civil authorities to punishment bringing with it public disgrace. This, in itself, is also not legitimate grounds for separating according to Canon Law. [106]

The Canon here speaks of a criminal and ignominious life which is a reflection upon the innocent spouse. One offense in this regard, therefore, does not suffice for separation. There must be an *habitual* evil conduct. [107] It makes no difference whether the crimes are against civil or ecclesiastical law. Examples of these crimes are: duelling, homicide habitual robbery or theft, confirmed drunkenness, inveterate drug addiction, dissolute gambling, etc. Separation is allowed because of their consequent public disgrace upon family and lest the innocent spouse appear to connive with the criminal or participate in his crimes. In practice, these crimes often bring with them grave spiritual or physical harm to the innocent party.

D. SERIOUS DANGER TO SOUL OR BODY

If the conduct of one consort constitutes a serious menace to the spiritual welfare of the other, the latter is allowed to separate, and this in virtue of the divine, natural law. [108]

105. SANCHEZ, *op. cit.,* III, lib. X, disp. 18, n. 21, p. 402; WERNZ-VIDAL, *loc. cit.*
106. WERNZ-VIDAL, *op. cit.,* V, n. 645, footnote 136, p. 848.
107. CORONATA, *op. cit.,* III, n. 663, p. 992; ROMANI, *op. cit.,* n. 1169, p. 797; Clæys: BOUUÆRT-SIMENON, *op. cit.,* II, n. 334, p. 350.
108. PAYEN, *op. cit.,* II, n. 2486, p. 806.

Such danger, arising from in-law relations, is also included in the permission.[109] This danger is verified in a case where one consort or his relatives frequently and continually exhorts and urges the other to commit serious sin, and when the latter finds it extremely difficult to resist the enticement.[110] These conditions would be present, for example, when one spouse is abusing the marital rights by unnatural acts. An instance of this would be the impotency of one which occurred after marriage. Separation is allowed if this serious occasion of sin cannot be removed in any other way.[111] Other crimes, such as thefts, spiritism, doubts against faith, temptations against morals, etc., are included in the permission, when one partner tries to get the other to be his accomplice in them. In all cases of this kind the temptation must be serious and a grave scandal or occasion of sin to the other. If these temptations continue in spite of pleadings and remonstrances, the innocent party has a right to separate.[112]

Other sins of a consort, which do not give grave danger to the other spouse, do not constitute grounds for separation, unless for a time in order to bring about reformation of the evil-doer, or unless by them the innocent consort is placed in danger of grave punishment or serious diffamation of character.[113]

Sometimes there might even be the obligation of separating, if there arises proximate danger of sinning, and if this cannot be removed by any other means, and if the innocent partner finds it next to impossible to resist falling into sin.[114]

Serious danger to the body of a consort would be

109. *Ibid.*
110. CORONATA, *op. cit.*, III, n. 663, p. 923; CAPPELLO, *op. cit.*, III, Pars 2, n. 829, p. 350.
111. DE SMET, *op. cit.*, n. 257, pp. 225, 226.
112. GASPARRI, *op. cit.*, (ed. 1932), II, n. 1177, p. 247; ROMANI, *loc. cit.*; Clæys BOUUÆRT-SIMENON, *loc. cit.*
113. WERNZ-VIDAL, *op. cit.*, V, n. 645, p. 847.
114. PAYEN, *loc. cit.*

verified where there was actual danger of death, danger to health by injury or serious mutilation. This danger might arise from the spouse or from his companions or relatives.[115] Separation is allowed only if the danger can be sufficiently removed by no other means. These dangers might be the fault of the other consort or not, it makes no difference. Such danger would arise from the insanity of a consort, from his having contracted contagious disease, e.g. malignant leprosy, venereal disease, advanced tuberculosis or from his plotting against the life of the other. The danger to health from the venereal disease can usually be removed by separation *quoad torum* and by using hygienic precautions.[116] Other diseases, even if they are serious, are not considered sufficient cause for separation. For conjugal charity places an obligation upon the healthy spouse to care and minister to the sick one. This obligation remains even though they are separated, e.g. when an insane spouse is placed in an institution.[117]

Although separation is allowed by the natural law in order to prevent death or grave injury, yet it is obligated only in rare cases, because generally other means can be found to remove the danger. But a spouse would be under serious obligation to separate if, by remaining at home, he would expose himself, without hope of great and proportionate good, to serious danger of death or mutilation.[118]

E. CRUELTIES WHICH MAKE COMMUNITY OF CONJUGAL LIFE TOO DIFFICULT

Under the heading of cruelties come continual grave, unworthy, cruel bodily treatment, usually to the wife, which exceed the bounds of just punishment and castigation. These

115. DOHENY, *op. cit.*, II, p. 633.
116. CAPPELLO, *op. cit.*, III, Pars 2, n. 829, p. 351; DE SMET, *op. cit.*, n. 257, footnote 2, p. 226; WERNZ-VIDAL, *op. cit.*, V, n. 645, p. 847; GASPARRI, *loc. cit.*
117. CORONATA, *op. cit.*, III, n. 663, p. 923.
118. PAYEN, *op. cit.*, II, n. 2487, p. 807.

cruelties are bodily by their nature, although serious threats of them are sufficient for separation if there is just reason to fear that they will be carried out.[119] It is not necessary that the cruelties beget grave fear of death or mutilation, but even danger of severe beatings, e.g. in a case where there would be danger of causing abortion. The wife can be separated if the husband's cruelty causes her danger of grave harm.[120] Included in the category of cruelties are the following: frequent and almost continual quarrelling; implacable hatred; frequent wranglings; contentions; quarrels arising from mutual and long-standing hatred; avarice of the husband who denies his wife the necessities of life; wasting of family goods and fortune to the detriment of the rest of the family; malicious absence for a long time and without just cause; a noble wife's being forced to perform sordid tasks.[121] This is the *molesta cohabitatio* so often mentioned by pre-Code authors. It can all be reduced to serious unworthy treatment of one partner by the other.

The judge deciding cases of separation on these grounds must have regard to the character and breeding of both the offender and victim of such treatment. Thus what would be light treatment for a woman of common breeding and rugged health would constitute serious cruelty for a woman of noble birth, of good education, of sickly health or timid disposition.[122] Right of separation on these grounds arises from that natural and divine law, for the wife is her husband's companion and helpmate, not his servant or slave.

Payen holds that the right to separate is not lost even in a case where one consort by his own serious fault occasions

119. CORONATA, *loc. cit.; S. R. Rotæ Dec.*, XXII (1930), Dec. XLVII, n. 3, p. 524.
120. SANCHEZ, *op. cit.*, III, lib. X, disp. 18, n. 2, p. 399.
121. CORONATA, *loc cit.;* PAYEN, *op cit.*, II, n. 2488, p. 809.
122. *S. R. Rotæ Dec.*, XXII (1930), Dec. XLVII, n. 4, p. 525; CAPPELLO, *op. cit.*, III, Pars 2, n. 829, p. 351; *S. R. Rotæ Dec.*, XXI (1929), Dec. I, n. 16, p. 10.

the cruelties of the other, provided these cruelties exceed the limits of just punishment. Nor, he says, does the right cease even if the cruelties are mutual, for in this matter of cruelty there is no place for compensation.[123]

123. PAYEN, *op. cit.*, II, n. 2487, p. 808.