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The Canonical Separation *of* Consorts

AN HISTORICAL SYNOPSIS AND COMMENTARY ON CANONS 1128-1132.

BY

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CHAPTER IX

Authority for Separation

ARTICLE I

SEPARATION BY PRIVATE AUTHORITY

A. Separation by Mutual Consent

In pre-Code law perpetual separation by mutual consent of the consorts was permitted if both entered Religion, or if one entered Religion and the other, *senex et de incontinentia non suspecta,* either received Holy Orders, or took a vow of chastity in some religious congregation or took the same vow but remained in the world.

Sometimes the Church in practice mitigated this rule by allowing a young man, after the solemn profession of his wife, to receive Sacred Orders; or a young wife, after the religious profession of her husband, to make a private vow of chastity and remain in the world; or even a wife advanced in years, after the Ordination of her husband, to make a private vow of chastity and remain in the world. [1]

This right of the consorts to separate by mutual consent for the purpose of embracing a higher life is still recognized by the Code. But under Code law certain dispensations are necessary, which are granted only in exceptional cases. [2] A spouse cannot now enter religion or receive Sacred Orders, unless he has the consent of the other spouse, and has

1. De Smet, *op. cit.*, n. 266, pp. 230, 231.
2. Wernz-Vidal, *op. cit.*, V. n. 641, pp. 844, 845.

obtained dispensation from the Holy See. Canon 542, 1°, declares that a married person, *durante matrimonio,* is invalidly admitted to novitiate, and therefore, according to Canon 572, § 1, 3°, the profession of such a one would likewise be invalid. Canon 987, 2°, states that married men are *simpliciter impediti* from the reception of Holy Orders. If such a one should receive Major Orders without a dispensation issued by the Holy See, even though he were in good faith, he is prohibited from the exercise of the Orders recevied (Canon 132, § 3). It is possible in exceptional cases to obtain dispensation from these laws for the reception of Major Orders, since the last Canon itself mentions this possibility. [3]

In this connection, it is to be noted that the innocent party who has been legitimately separated from his adulterous spouse enjoys the same right to enter religion or receive Sacred Orders, even against the will of the adulterer — provided the proper dispensation has been obtained from the Holy See. The adulterous spouse does not enjoy this right unless he has obtained the expressed or tacit consent of the innocent party. [4]

Can the consorts separate permanently or temporarily by mutual consent, apart from the desire to embrace a higher state of life?

Absence from the home does not necessarily imply separation as regards cohabitation. One partner can absent himself with the other's permission, expressed or presumed, without any intervention of the public authority. The husband, as we have seen (cfr. *supra* p.159), can be absent with reasonable cause for a short time, even without his wife's consent, e.g., on account of his business.

Absence, however, under certain conditions can amount to real separation, e.g., when one partner goes to a distant place without intention to return, and the other refuses to

3. De Smet, *op cit.*, n. 258, p. 226.
4. Canon 1130. Cfr. Wernz-Vidal, *loc. cit.*

follow. In a case of this kind, the norms regulating separation must be followed, and recourse to the public authority must be taken. The spouse who has left home is to be treated as the one instituting the separation, the one remaining at home to be considered as abandoned. The latter will be culpable or not, according as he is obliged to follow his consort or not. [5]

All canonists agree that there are many just reasons which would allow the spouses to separate by mutual consent for a time. They give as examples: a husband who has been called to military duty, who has to leave his home because of business or study for a short time without being obliged to have his wife follow him. [6] Brief absences are allowed by mutual consent, either expressed or presumed, on account of occupation, and on account of proportionate good to be derived from such absentation. Longer absences can be admitted for reasons proportionately more serious. [7] Mitigating reasons for longer absences would be present in cases where there were no children at home needing the care and presence of both father and mother, where the spouses are advanced in years and there is no danger of incontinence, or if younger in age, their virtue is strong enough to resist temptations in this regard which might be occasioned by their being apart, and, finally, where there would be no scandal arising from the absence. In cases of this kind, the public good would not be necessarily involved, and one consort could separate from the other for a longer period without permission of the public authority.

Completely different, however, is the case of two consorts who have separated perpetually or even temporily by mutual consent on account of slight reasons, such as incompatibility of temperament or dislike of one another. Separation is not allowed them for these reasons.

5. DE SMET, *op. cit.*, n. 264, p. 230.
6. SANCHEZ, *op. cit.*, III, lib. IX, disp. 4, n. 13, pp. 178, 179; VERMEERSCH-CREUSEN, *op. cit.*, II, n. 439, p. 305; PAYEN, *op. cit.*, II, n. 2457, p. 780; CAPPELLO, *op. cit.*, III, Pars 2, n. 825, p. 344.
7. Clæys BOUUÆRT-SIMENON, *op. cit.*, II, n. 331, p. 347.

There is an important decision of the S.R. Rota, issued by Cardinal Lega as Dean, [8] which takes to task several modern moral theologians for their lax stand in permitting spouses to remain separated when they have done so for light reasons. After noting that Cardinal Gennari likewise takes them to task in his work, *Consult. Moral.*, cons. LXVII, page 312, the decision states: "[...] certain modern theologians have somewhat departed from the rigor of the old jurispudence in teaching that it is right for consorts to disrupt for any legitimate cause their mutual cohabitation for a certain period of time, however not perpetually, provided only that there be no danger of incontinence; thus Gury, *Comp.* tom.II, n. 761; Lehmkuhl, *Theol. mor.*, tom. II, n. 711; Scavani, *Theol. mor.*, tom. III, n. 860 edit. XIV; Del Vecchio, *Inst. theol. mor.*, tom. II, n. 1062; further these last two Doctors assert that those who have separated of their own accord because of marriage unhappily entered or differing temperaments, should not readily be disturbed for so doing, if nothing stands in the way. And here precisely this opinion differs from the rigor of the sacred canons above related, because it admits that the spouses by private counsel and because of incompatible temperaments can separate even perpetually. For, on the contrary, that light injuries and cruelties, or mere incompatibility of temperament of the spouses cannot be held as sufficient reason for their separating has been defined by the Sacred Congregation of the Council in one instance, *Sedunen.*, 2 November 1851, and in many others, which Pallottini cites, *Coll., tom.* XIII, v. *matrim.*, § 23, n. 119 *ad notam.*" [9]

8. *S. R. Rotæ Dec.*, II (1910), Dec. XXIV, pp. 238-247.
9. *Ibid.*, n. 13: "*Considerare non prætermiserunt RR. DD. quod perpendet Emus Gennari* Consult. Moral. *cons. LXVII pag. 312, nempe Theologos hodiernos aliquantisper discessisse a rigore antiquioris iurisprudentiae, docentes fas esse coniugibus quacumque ex legitima causa se ad invicem separare, abrupta in aliquod tempus mutua cohabitatione non in perpetuum, cauto dumtaxat ne subsit incontinentiae periculum; ita Gury,* Comp. *tom. II, n. 761: Lehmkuhl,* Theol. mor. *Tom. II, n. 711; Scavini,* Theol. mor., *tom. III, n. 860 edit. XIV; Del Vecchio* Inst. theol. mor. *tom. II n. 1062; immo hi duo postremi Doctores autumant, eos qui causa matrimonii infeliciter initi vel discrepantis indolis, privato consilio se separarunt, non*

Gury [10] and Lehmkul, [11] the first two theologians mentioned, insisting on the principle that the consorts are permitted to renounce their right, teach that spouses can separate temporarily (not perpetually) by mutual consent for any just reason, provided there be no danger of incontinence. Scavini-Del Vecchio holds that, once a couple has already separated by their own authority because their marriage is unhappy or because they are of discordant temperaments, they are not to be disquieted by pastor or confessor for so doing, provided nothing else stands in the way of the separation. [12]

Even Gennari himself, in spite of taking the above

facile esse inquietandos, si aliud non obstet. Et in hoc præcipue discrepat hæc sententia a rigore ss. canonum iam relatorum, quia admittitur sponsos privato consilio *et ob incompatibilitatem characterum, se posse separare etiam in perpetuum. Nam, e contrario,* leves *iniurias et sævitias, aut ipsam meram characterum incompatibilitatem inter sponsos non haberi posse uti causas sufficientes ad eosdem dissociandos, definitum est a Sacra Congregatione Concilii in una Sedunen., diei 2 novembris 1851, et aliis innumeris, quas recolit Pallottini,* Coll., *tom. XIII, v.* matrim., § *23, n. 119 ad notam."* Cfr. LE PICARD, *op. cit.*, § 17, pp. 152-166, for a very thorough treatment of these opinions and of this decision of the S. R. Rota.

10. GURY, *Compendium Theologiæ Moralis* (6. ed. accomodatum a Henrico Dumas, 2 Tomes, Lugduni: Delhomme, Briguet — Parisiis: Lecoffre, 1899), II, n. 761, p. 336 : "Mutuus consensus, *scilicet uterque conjux simul possunt juri proprio renuntiare quoad torum, sive ad tempus sive in perpetuum, dummodo absit incontinentiæ periculum. Item separari possunt etiam quoad habitationem sive ad tempus negotiorum causa, sive in perpetuum ob vitae perfectioris desiderium; v. gr., ad Religionem ingrediendam, vel sacros Ordines suscipiendos."*

11. LEHMKUHL, *Theologia Moralis* (10. ed., 2 vols., Friburgi Brisgoviæ: Herder, 1902), II, n. 711, p. 507: *"Longe facilius ad tempus separatio a toro seu continentia mutuo consensu suscipi potest, quam in perpetuum. Nam ne possunt quidem mutuo consensu sese separare, si alteruter periculum incontinentiæ incurrit. Etiam aliæ rationes gravis momenti, quamvis ad temporalia bona spectent, ut negotiatio etc., separationem temporaneam justam reddunt."*

12. *"Plus précis est l'enseignement de Scavini* (t. III, n. 860, ed. XIV), *reproduit par Del Vecchio* (t. II, n. 1062): '3. Mutuus consensus. *Si separatio sit ad tempus, remoto scandalo et incontinentiæ periculo, licet; sed in perpetuum ordinarie permitti non solet, nisi ambo ingrediantur Religionem; aut saltem nisi, altero Religionem profitente, aut sacros ordines suscipiente, compars ad minimum castitatem voveat* [. . .] *Sed semper in casu, quo absit omne incontinentiæ periculum, proles non indigeat parentum cura, et fiat sine scandalo. Dixi* ordinarie: *nam qui causa matrimonii infeliciter initi, vel discrepantis indolis privato consilio se separarunt, non facile sunt inquietendi, si aliud non obstat.'"* This passage is a direct quotation from GENNARI, *Consultations de Morale, de Droit canonique et de Liturgie (traduit de l'italien par A. Boudinhon,* 3 parts in 5 vols., Paris: P. Lethielleux, 1907), Part I, Vol. I, cons. 67, n. 8, p. 385.

authors to task for laxity, admits light reasons as justifying separation by concluding that "temporary separation by mutual consent is generally licit for every just reason." "We can see," he says, "a just reason in every serious utility, both of the spiritual and of the temporal order; by consequence, apart from love of continence, *the desire of peace and tranquillity among consorts of irreconcilable temperaments,* the need of going to another place for business or commerce, and other similar causes suffice for justifying temporary separation." [13]

These authors, in admitting separation by mutual consent for reasons of desire of peace and irreconcilability of temperament, have lost sight of the exigencies of the public good. Marriage is not a private affair which allows the spouses mutually to renounce their right and duty of cohabitation. It is a public concern that consorts live together.

The Rotal judges are much more strict than the above moral theologians. Licitness of separation is not the rule, according to their decision, it can be only the exception. "Wherefore," the decision states, "it has been the constant jurisprudence of this Sacred Tribunal and of the Sacred Congregation of the Council that one must proceed with extreme caution in permitting separation, because indeed separation is directly opposed to the end of marriage (which is *coniunctio maris et feminæ, individuae vitæ consuetudinem retinens*), it begets scandal, destroys the family, exposes the spouses to danger of incontinence, and is prejudicial to the children, if there are any."

The Rotal judges declare that one can more easily

13. GENNARI, *loc. cit.*, p. 386 : *"De tout ce qui précède on peut donc conclure que la séparation temporaire des époux, faite de leur mutuel consentement, est généralement permise pour toute juste raison. Et on peut voir une juste raison dans toute utilité sérieuse, tant de l'ordre spirituel que de l'ordre temporel ; par conséquent, outre l'amour de la continence, le désir de la paix et de la tranquillité chez des conjoints de caractères irréconciliables, la nécessité de se rendre en un autre lieu pour des affaires ou pour le commerce, et d'autres causes semblables suffisent à justifier la séparation temporaire des époux."*

dissolve a *ratum non-consummatum* marriage than one can decree in favor of separation of consorts. For, the decision goes on, in case of doubt about the validity of marriage, especially if the doubt concerns facts, one can be less demanding for proof of nullity than one can be in the matter of separation. "[...] in the causes of separation, since the validity of the marriage is certain and uncontested, all laws demand that the conjugal life be not disrupted, unless it be proved invincibly that there is present a canonical cause for the separation." [14]

"[...] Everyone knows how, by easy concession of separation, the way is easily and even necessarily made smooth for complete divorce. For marriage was instituted as a remedy for concupiscence; therefore once marital life is dissolved even by separation, immediately adulterous loves and illicit relationships creep in." [15]

By way of exception and for canonical reasons, the decision concludes, temporary separation can be permitted. Adultery is the only case in which the innocent party has the right to separate perpetually from the other. Other causes are *per se* temporary in the sense that, once the dangers are removed, conjugal life must be restored and

14. *S. R. Rotæ Dec., loc. cit.*, n. 11: "*Quare constans iurisprudentia fuit et huius S.O. et S.C. Concilii caute admodum procedendum esse ad indulgendam thori separationem, quippe quod separatio opponatur directe fini ipsius matrimonii (quod est coniunctio maris et feminæ, individual vitæ consuetudinem retinens) scandalum gignit, familiam pessumdat, periculo incontinentiæ coniuges exponit, prolemque, si quæ sit, damnis afficit [...] et in citate Ceneten., perpensum fuit, non posse argui a rationibus quibus concedere præstat dispensationem a matrimonio rato et non consummato, ad rationes, quibus movendus est iudex ad decernendam thori separationem. Imo etiam in dubio utrum matrimonium validum sit, maxime in dubio facti, facilior admiti potest probatio, sive per testes, sive per documenta, ad effectum evincendi nullitatem; dum e contrario in causa separationis thori, cum certa sit et incontroversa validitas matrimonii, omnia iura clamant ut coniugale consortium non disiungatur, nisi invict comprobetur, adesse causam canonicam separationis.*"

15. *Ibid.*, n. 12 "[...] *Et nemo non scit quomodo, per divortii semipleni facilem concessionem, via sternatur facilis et veluti necessaria ad divortium plenum. Nam matrimonium datus est etiam in remedium conpleni facilem concessionem, via sternatur facilis et veluti necessaria ad cupiscentiæ: dissoluto itaque semiplene maritali consortio, statim irrepunt adulterini amores et illicit amplexus.*"

the ecclesiastical judge must intervene in order that it be restored. [16]

There is another decision of the S. R. Rota, issued three years after the preceding, which refers to separation by mutual consent. If a spouse consents to the separation, this decision declares, the separation is not injust; that is to say, the separation does not deprive him of a right, the use of which he has already renounced. The separation then does not constitute a case of malicious desertion giving evidence of hostile feelings. But from this fact that the separation does not admit of injustice towards the other party, it does not follow that such separation is licit. "As a general rule," the decision states, "it is not allowed that the consorts separate by mutual consent, and this kind of mutual consent does not give legitimate reason for decreeing separation." [17]

The foregoing eloquent decisions of the S. R. Rota insist that separations should not take place for a slight or trivial reason, that separation is the exception, not the rule. According to them, it is clear that temporary separation of consorts by mutual consent is possible in exceptional cases for just reasons, viz. causes serious in proportion to the obligation of cohabitation and to the duration of the separation.

In any case of temporary separation by mutual consent,

16. *Ibid.*, n. 8: "[...] *RR. PP. AA. considerarunt decernendam esse separationem perpetuam a thoro et mensa, seu a cohabitatione, ob causam adulterii, quoties separatio petatur a parte innocente; et hic est solus casus quo petens separationem ius habeat ad perpetuo se separandum ab altero coniuge [...]*"

Ibid., n. 9: "*At, quamvis adulterii causa sit unica ratio ab separationem de iure perpetuam, tamen aliæ subsunt causæ semipleni divortii, et est de fide [...]*"

Ibid., n. 10: "[...] *At istæ sunt causæ separationis* per se temporaneæ, [...] *In aliis causis separatio decernenda est temporanea, eo sensu ut, si, remotis periculis, iterum instaurari possit vita coniugalis, Iudex ecclesiasticus suum officium interponere debeat ut consortium coniugale redintegretur.*"

17. *S. R. Rotæ Dec.*, V (1913), Dec. XIX, n. 9: "*Qui consensus si adesset, viri derelictio malitiosa dici non posset, quamvis regulariter non licet coniugibus mutuo consensu discedere, neque eiusmodi mutuus consensus legitimam separationis decernendæ causam subministrat.*"

each of the following conditions must be verified; 1° that there be no harm to the education of the children; 2° that there be no danger of incontinence to either spouse; 3° that there be no public scandal.[18]

The first condition would be fulfilled in a case where there were no children born of the marriage, or, if there were, they are no longer under parental care. The second condition would be fulfilled in a case where the separation was to be of very short duration, or, if it were for a longer time, the consorts were advanced in years or both of exceptional virtue. De Smet considers as *senex et de incontinentia non suspecta* a woman of fifty years of age and a man of sixty.[19] The third condition, that of the avoidance of public scandal, would be with more difficulty realized. For every case of separation of consorts is a bad example, which directly bears prejudice to society. This last is the hardest condition of all to fulfill. Gasparri says that scandal is *generally* present in these cases.[20] For a young married couple, the second condition, danger of incontinence, is always present.

When these conditions are taken together, it is easy to see that temporary separation of consorts will not be the rule, but the exception, and will be legitimate in rare instances. Slight reasons, such as incompatibility of temperament, dislike of one spouse for the other, small quarrels and mental cruelties are not sufficiently grave to justify even short separation of spouses.

Payen holds that perpetual separation by mutual consent is allowed to the consorts for a good of the higher order (not for any other reason), provided the above three conditions are fulfilled. According to him, this case of perpetual

18. GENNARI, loc. cit., n. 9, p. 386; PAYEN, *op. cit.*, II, n. 2457, p. 779; GASPARRI, *op. cit.* [ed. 1932], II, n. 1178, p. 248; CAPPELLO, *op. cit.*, III, Pars 2, n. 825, p. 344.

19. DE SMET, *op cit.*, n. 266, p. 230, footnote 1.

20. GASPARRI, *loc. cit.*

separation for spiritual reasons would be *rarissimus*, because *rarissime* would the three conditions be satisfied.[21]

Even in every case of temporary separation, these conditions must be satisfied. The pastor or confessor in his advice to parishioner or penitent must determine if they are verified or not. If they are not fulfilled, he must insist upon the reunion of the spouses. Thus if the husband's business keeps him away from home, the priest must advise that the wife accompany her husband if at all possible.[22] If the parties insist upon separating in spite of the urgent admonitions of the priest, he must demand that they present their case to the public authority, the Ordinary of the diocese, whose office it is to determine whether or not there is a just and canonical reason for their separation.

B. SEPARATION INSTITUDED BY ONE CONSORT

The general rule of the Church is that neither consort may institute separation as regards cohabitation on his own authority without intervention of the public authority, the Ordinary. The reason for this is, as we have seen, that the matter of separation of consorts concerns the public good and order, and therefore, cases of separation must be decided by the public authority, the Ordinary.[23]

The Code of Canon Law permits an innocent consort to separate on his own authority in two exceptional cases. Canon 1129, § 1,[24] states that if one consort is guilty of adultery, the other has the right to dissolve even perpetually the community of conjugal life, although the marriage bond

21. PAYEN, *loc. cit.*

22. CAPPELLO, *loc. cit.*, p. 345.

23. DE SMET, *op. cit.*, n. 260, pp. 227, 228; WERNZ-VIDAL, *op. cit.*, V, n. 646, p. 848: "*Separatio a toro et cohabitatione etiam mere temporanæ, sed diuturna, cum sit res publica et naturæ matrimonii contraria, non obstante iusta et proportionata causa sine interventione Ordinarii loci propria auctoritate fieri nequit, nisi* præter *certitudinem causæ periculum sit in mora.*"

24. Canon 1129, § 1: "[...] ius habet solvendi, *etiam in perpetuum, vitæ communionem* [...]"

remains intact. Furthermore the tenor of Canon 1130 [25] and of Canon 1129, § 2, [26] evidently presupposes that the innocent party can separate from his adulterous spouse of his own accord. Canon 1131, § 1, [27] in determining the causes for temporary separation, adds that these are legitimate causes of separation on authority of the Ordinary, or even on one's own authority if the reason for separation is certain and there is danger in delay.

The Legislator by these Canons is making an extraordinary concession to protect the innocent consort from injury. The invoking of the right of separation in these two cases is left to the judgment of the innocent spouse. There is great danger attached to the exercise of this right. The aggrieved partner is liable to institute separation for non-canonical causes and without the required certainty. This is especially likely in the case of separation *propria auctoritate* on account of the other's adultery. This crime must have all the characteristics mentioned above (Chapter VIII, Article II, pp. 183-198) before separation on this grounds is lawful. The innocent party, in making subjective judgment about the crime, might act on suspicions and conjectures instead of valid proofs and presumptions, on doubts and fancies, instead of certainty.

1. The Grounds of Adultery

Before the innocent spouse can separate by his own authority because of the adultery of the other partner, this crime must be morally certain and notorious, or at least certainly public, i.e., such that can be certainly proved in the external forum. The right of separation for the

25. Canon 1130: "*Coniux innocens, sive iudicis sententia sive* propria auctoritate *legitime discesserit, nulla unquam obligatione tenetur coniugem adulterum rursus admittendi ad vitæ consortium* [...]"

26. Canon 1129, § 2: "*Tacita condonatio habetur, si coniux innocens, postquam de crimine adulterii certior factus est, cum altero coniuge sponte, maritali affectu,* conversatus fuerit [...]"

27. Canon 1131, § 1: "[...] etiam propria auctoritate, *si de eis certo constet, et periculum sit in mora.*"

innocent party arises from the law of Christ and from the very nature of the marriage contract, so that the sentence of the ecclesiastical judge merely declares that the fact of the adultery is verified. This declaration is not necessary when the adultery is certain and notorious, and the innocent party is allowed to separate on his own authority when these conditions are present. All authors agree that the law allows separation to the innocent spouse in this case. [28]

If the adultery of the other party is only doubtful, i.e., if it is only probable or if there are only suspicions of it, the innocent partner is not allowed to separate perpetually of his own accord. In a case of this kind, recourse must be had to the ecclesiastical judge, and his sentence awaited. For the other consort cannot be deprived of his certain right to cohabitation on account of a doubtful cause. [29]

Suppose a case in which the innocent party is morally certain of the adultery of his consort, but the adultery itself is occult, i.e., cannot be proved in the external forum. Is the innocent one allowed to separate of his own accord? Authors are divided in their answers to this question. Most of them hold that it is more probable that the innocent one can depart legitimately in the internal forum of conscience, provided there be no scandal. The reasons they give are that marriage of its nature obliges the spouses *sub conditione,* i.e., on condition that they keep marital faith one to the other. The right of separating, these authors say, is founded on the crime of adultery itself, not on any accidental publicity it may or may not have. Therefore, they conclude, the innocent party can separate whenever he is morally certain that the crime took place, even though

28. WERNZ-VIDAL, *op. cit.,* V, n. 642, p. 845; GASPARRI, *op. cit.,* [ed. 1932], II, n. 1175, p. 246; CAPPELLO, *op. cit.,* III Pars 2, n. 827, pp. 347, 348; ROMANI, *op. cit.,* n. 1167, p. 796; VERMEERSCH-CREUSEN, *op. cit.,* II, n. 441, p. 306; DE SMET, *op. cit.,* n. 260, p. 228.

29. CORONATA, *op. cit.,* III, n. 661, p. 921; CAPPELLO, *loc. cit.,* p. 348; WERNZ-VIDAL, *loc. cit.*

it is occult — provided the separation does not cause public scandal.[30]

The other opinion denies the right of separation to the innocent spouse when the adultery of the other is morally certain but occult. For separation of consorts as regards cohabitation always concerns the external forum, even apart from the fact that there may not be any scandal present in an individual case.[31] This opinion seems better to the writer, since almost never would the condition of lack of scandal be verified in a case of separation as regards cohabitation. Moreover, if the innocent party has actually separated on account of his partner's certain but occult adultery, the guilty party can demand restauration of his marital life from the ecclesiastical judge. Since the crime is occult, the judge in every case would have to grant restoration. For the judge, finding the adultery not proved, would order the consorts to resume their marital life. According to the first opinion, there would be an inevitable conflict between the internal and the external forum, for the Legislator would be granting right of separation in the internal forum, which would not exist in the external.[32] Since separation *propria auctoritate* on this grounds is a concession of the Legislator in the first place, it would seem best that he grant the permission only on grounds of certain and notorious or public adultery, which can be

30. SCHMALZGRUEBER (*op. cit.*, IV, Pars 2, tit. XIX, n. 112, p. 414) gives the following reasons for this opinion: "[...] *sed communior etiam hoc casu permittit innocenti, ut propria authoritate possit recedere, saltem pro foro conscientiæ, et secluso scandalo* [...] *Ratio est, quia matrimonium ex natura sua non aliter obligat ad thorum, et redditionem debiti conjugalis, quam sub conditione, si etiam alter conjux fidem conjugalem servet* [...] *nam jus divertendi non ex publicitate, sed ex delicto nascitur, et ubi publicitas requiritur ad faciendum divortium, id requiritur duntaxat ad vitandum scandalum, unde hoc cessante, sufficiet, si de adulterio innocenti quomodocunque certo moraliter constet.*" Cfr. also REIFFENSTUEL, *op. cit.*, IV, tit. XIX, § 3, n. 91, p. 110; SANCHEZ, *op. cit.*, III, lib. X, disp. 12, n. 31, p. 371; GASPARRI, *op. cit.* [ed. 1932], II, n. 1175, p. 246.

31. DE SMET, *op. cit.*, n. 260, footnote 5, p. 228: "*Vix intelligitur quomodo a nonnullis Auctoribus dicatur posse, in casu adulterii certi sed occulti, separationem propria auctoritate institui in foro conscientiæ: separatio enim semper interest fori externi.*" Cfr. also LE PICARD, *op. cit.*, § 18, pp. 168-190.

32. WERNZ-VIDAL, *op. cit.*, V. n. 642, pp. 845, 846.

proved with certainty in the external forum. In this way, the Legislator will be denying right of separation on grounds of occult adultery, and the conflict between the two *fora* will be obviated. Separation *a toro* will always remain a remedy for the innocent party in the case of occult adultery.[33] It is to be noted that the proponents of the former opinion warn about the danger of scandal that follows the putting into practice of their opinion. Payen repeats the warning of Schmalzgrueber: Plerumque aderit scandalum. Itaque separationi propria auctoritate institutæ "*vix locus est* extra casum quo *conjugium* est occultum."[34] The Code of Canon Law does not settle the controversy, and therefore, either opinion may be followed in practice. We must admit the fact that the more common opinion of pre-Code and post-Code authors favors permitting the innocent spouse to separate on the other's certain but occult sin of adultery.

The authors warn against the dangers latent in *any* separation *propria auctoritate* on grounds of adultery.[35] There is serious danger of abuse when an innocent spouse invokes his right to separate of his own accord. The separation would be illicit, if there were not the necessary moral certainty about the existence of the crime. Since it is a question of subjective judgment, there is danger that the separating spouse may act rashly on suspicions or probabilities only, as we have said, and not on proofs or valid presumptions. The crime, besides being morally certain, must be *perfectum* and *consummatum*, formal and culpable, not permitted, nor caused, nor condoned, nor compensated by the separating consort.[36] It is extremely difficult for the interested party to make an objective judgment as to the existence of these conditions. Then there is the difficulty of proving before the ecclesiastical judge that the crime is

33. CAPPELLO, *op. cit.*, III, Pars 2, n. 827, p. 348.

34. PAYEN, *op. cit.*, II, n. 2473, p. 795.

35. DE SMET, *op. cit.*, n. 260, p. 228; CAPPELLO, *op. cit.*, III, Pars 2, n. 827, p. 348; WERNZ-VIDAL, *op. cit.*, V, n. 642, p. 845: DOHENY, *op. cit.*, II, p. 637.

36. Canon 1129.

notorious or public. Lack of proof of the crime may bring about forced reconciliation of the parties upon suit of the guilty consort.

2. *Danger in Delay*

To protect the innocent consort from injury, the Code of Canon Law permits him to separate from his partner on his own initiative on the grounds for temporary separation mentioned in Canon 1131, § 1, provided the reason for separation is certain and there is danger in delay. The first condition for this kind of private separation is that there be present one of the legitimate causes mentioned in the Canon, or another cause similar to them (cfr. Chapter VIII, Articles I and III, pp. 176, 200). The second condition is that there be danger in delay, and that, therefore, the innocent consort cannot, without probable danger of grave harm, await the sentence of the ecclesiastical judge or decree of the Ordinary. Danger of delay is considered by canonists to be verified when the innocent spouse cannot, without grave loss to soul, body, or even temporal goods, recur to the Ordinary or await his judgment in the case. Examples of grave loss would be: sudden and dangerous insanity of one consort, sudden contagious disease of one partner, grave quarrels and hatred suddenly arisen, one spouse's being armed with weapons and threatening the other's life. In these and similar circumstances, the innocent spouse may legitimately separate from the other of his own accord. [37]

37. PAYEN, *op. cit.*, II, n. 2489, p. 810; BLAT, *Commentarium Textus Codicis Iuris Canonici*, Liber III, Pars I, De Sacramentis, 2 ed., Romæ: Ex Typ. Pontificia In Instituto Pii IX, 1924), n. 543, p. 692; CORONATA, *op. cit.*, III, n. 664, pp. 924, 925; ROMANI, *op. cit.*, n. 1170, p. 798.

ARTICLE II

SEPARATION BY AUTHORITY OF THE ORDINARY

It is as a general rule, the office of the public authority of the Church, the Ordinary or ecclesiastical judge, to determine whether or not in a particular case of separation of consorts there is present a legitimate cause for separation, and to decide whether the grounds warrant perpetual separation or temporary for a definite or indefinite length of time. The Church has jurisdiction over these cases when both consorts are baptized. Even if one of them is not baptized, as may be the case in mixed marriages, the decision of the Church has full juridic effect, since it directly affects the baptized party, and only indirectly the non-baptized person. The Church is also competent in causes of separation between baptized non-Catholic consorts who have contracted marriage privately without canonical form. [38] Finally the Church can, if need be, decide incidentally also concerning the merely civil effects of marriage, e.g., alimony, temporal possessions of the spouses, support of the wife, custody of the children. [39]

In deciding cases of separation, the public authority, i.e., the Ordinary of the diocese, has the choice of two procedures; the administrative and the strictly judicial. Ordinarily when a case is being tried on one of the reasons for temporary separation mentioned in Canon 1131, § 1, the administrative method, according to a recent response of the Pontifical Code Commission, is to be used unless the Ordinary by himself or at the instance of the parties determines otherwise. [40]

38. Canon 1099, § 2.
39. Canon 1961.
40. Pont. Comm., 25 Iunii 1932 — AAS, XXIV (1932), 284: "*D. An separatio coniugum ob causas, de quibus in canone 1131 § I, forma administrative decernenda sit.*
"*R. Affirmative, nisi ab Ordinario aliter statuatur ex officio vel ad instantiam partium.*"

The reason for the question to the Commission is that the Code of Canon Law, when speaking about the grounds of adultery, uses the words iudicis sententia *sive propria auctoritate* (Canon 1130). But when speaking of the other grounds mentioned in Canon 1131, § 1, uses the words *auctoritate Ordinarii loci,* and in § 2 of the same Canon says "*sed si separatio* ab Ordinario pronuntiata fuerit, [...] *coniux ad id non obligatur, nisi* ex decreto Ordinarii [...]" Therefore these Canons seem to determine that separation cases being tried on grounds of adultery should be conducted according to the judicial process and decided by judicial sentence; while those being tried on other grounds should be conducted according to the administrative method and decided by a decree of the Ordinary.

From the response of the Pontifical Code Commission, Cappello seems to conclude that *all* cases of separation, no matter the grounds, are regularly to be settled according to the administrative method. [41] He argues that if the Code (Canons 1130, 1131) allows spouses to separate on their own authority, then *a fortiori* it must be said that the Ordinary can settle separation cases administratively without using the formal procedure. He argues further that Canon 1131 does not speak of the ecclesiastical judge, but only of the Ordinary, i.e. *auctoritate Ordinarii loci.* Added reasons for his opinion are the heavy expenses of a formal trial and its slower process. [42]

From the response of the Code Commission, it can be concluded only that cases of temporary separation are generally to be tried administratively, unless the Ordinary of himself or at instance of the parties decides otherwise. The reason the Commission allows the administrative method for trying the grounds mentioned in Canon 1131, § 1,

41. CAPPELLO, *op. cit.,* III, Pars 2, n. 830, p. 353: "*Quæ responsio ita intelligenda est, ut causæ separationis coniugum regulariter forma administrativa, non autem iudiciali, dirimantur.*"
42. CAPPELLO, *loc. cit.* This section is a word for word reproduction of the author's earlier article contained in *Periodica,* XXI (1932), 286.

is evident from the very nature of these grounds. [43] For they do not always give reason for separation, but only when, all things considered, they are grievous enough to make conjugal life impossible. In weighing these reasons and in deciding on their merits, judgment is left to the Ordinary who can persuade the consorts to remain together. Furthermore in these cases, the separation is temporary, lasting until the grounds cease to exist. Lastly these grounds of their nature are not so difficult of proof.

It seems to be the mind of the Legislator that cases being tried on grounds of adultery be regularly conducted by formal trial, since Canon 1130 in speaking of this crime uses the words *iudicis sententia.* Adultery, moreover, is a much more serious grounds, being a cause of perpetual separation. Proof of this sin is especially difficult to obtain. The existence of this grounds is often not easily discernible, for its proof many times rests upon presumptions. Then too the required conditions annexed to the crime can best be uncovered in the more thorough formal process.

Does this mean that if the Ordinary settled a separation case on grounds of adultery by the administrative method, his decree would be invalid? None of the authors hold such decree to be invalid, especially if the adultery were certain and notorious. An example would be a case where one of the consorts has contracted a bigamous union or attempted remarriage after a civil divorce. "*Non indigent probatione: 1° Facta notoria, ad normam can. 2197, n. 2, 3.*" [44] Moreover, not too much emphasis is to be placed on the fact that Canon 1130 uses the words *iudicis sententia.* The Code itself is not always consistent in its use of the phrase, sometimes using the words *per iudicis sententiam,* and in the same instance admitting of a decision *per decretum.* [45]

43. *Apoll.,* V. (1932), 294-296. Cfr. also DOHENY, *op. cit.,* II, p. 643.
44. Canon 1747, 1°.
45. Thus Canons, 214,1993. Cfr. REGATILLO, *op. cit.,* II n. 587*ter,* p. 397.

The Pontifical Code Commission recommends a formal trial in certain cases being heard on the grounds for temporary separation mentioned in Canon 1131, § 1. The Ordinary should not deny the request of the parties asking for the formal procedure. In fact, Cappello says the Ordinary in this case *non potest.* [46] The Ordinary of himself might also decide for the judicial process in a case where the public good might seem to require it. Thus he might feel that the complicated nature of a case or the eminence of the parties concerned would make the administrative method inadequate. The formal process for these cases might also be enjoined in virtue of a Concordat between the civil authority and the Holy See. [47]

A. THE ADMINISTRATIVE METHOD

If the Ordinary should decide that a cause of either perpetual or temporary separation is to be conducted in an administrative way, his competency is determined according to Canon 201. [48] The competent Ordinary, therefore, is the one of the place where either of the parties has a domicile or quasi-domicile, or of the place where either is actually staying. [49]

Besides the Bishop, the Vicar General is competent to decide separation cases administratively, because he is considered among Ordinaries of place — unless he has been forbidden by special mandate of the Bishop to handle

46. *"Partes procul dubio petere valent ministerium iudicis ad ius suum persequendum, ut in quocumque negotio. Nam omne ius actione communitur, nisi aliud expresse cautum sit, ad normam can. 1687. Iudex autem petitum ministerium denegare non potest."* — CAPPELLO, *loc. cit.*
47. *Apoll.*, V (1932), 294-296.
48. Canon 201. — § 1. *"Potestas iurisdictionis potest in solos subditos directe exerceri.* [...] § 3. *"Nisi aliud ex rerum natura aut ex iure constet, potestatem iurisdictionis voluntariam seu non-iudicialem quis exercere potest etiam in proprium commodum, aut extra territorium existens, aut in subditum e territorio absentem."*
49. A wife, however, not legitimately separated, necessarily retains the domicile of her husband, although she may acquire her own quasi-domicile. Cfr. Canon 93.

these cases. [50] The Officialis is not competent over these cases because he lacks administrative power, unless he has been expressly delegated for this process by the Ordinary. [51] Either the Bishop or the Vicar General can delegate any other priest to conduct the administrative process. [52]

There are no formalities prescribed for the administrative settlement of separation cases. The case is investigated without intervention of procurators or advocates. Such investigation, however, should be made as is necessary to induce moral certainty in the Ordinary's mind as to the existence of legitimate grounds for separation and as to their warranting perpetual or temporary separation whether for a determinate or indeterminate length of time. Equity founded on the natural law requires that both consorts be heard, the plaintiff to make his charge, the respondent to defend himself against it. Even other witnesses, if necessary, should be summoned. [53] In effect, such precautions must be taken as are necessary to beget in the Ordinary's mind moral certitude with regard to the existence and the legitimacy of the alleged grounds for separation. The summoning of other witnesses, besides the parties themselves, appears to be mandatory in most of these cases. The Ordinary should not exercise less care in these cases than he does, for example, in Pauline Privilege cases, which are normally handled in the purely administrative manner. [54] In fact, even *more* care should be taken with separation cases. For we have seen the S. R. Rota declaration that a judge can more easily dissolve a *ratum non-consummatum* marriage than pronounce in favor of separation of consorts, "because in separation cases the validity of the marriage is certain and uncontroverted and all laws proclaim that community of conjugal life be not

50. Canons 198, 368.
51. Canon 1573.
52. Canon 199, § 1.
53. CORONATA, *op. cit.*, III, n. 665, p. 926; KELLY, *op. cit.*, *The Jurist*, VI (1946), 208,209; REGATILLO, *op. cit.*, II, n. 587 *bis*, p. 396.
54. Canon 1122.

broken unless it be invincibly proved that there is present a canonical grounds for the separation." [55] Ordinaries take the greatest care and solicitude in compiling proofs for *ratum non-consummatum* cases. The S. R. Rota exhorts them to go to even greater lengths of caution in separating spouses.

The presence of the Defender of the Bond is not required in cases of separation that are settled administratively, for the marriage bond is not in question. It is, however, highly advisable that, in most cases of this type, both he and the Promotor of Justice be summoned. The Promotor of Justice especially should be in attendance because the public good is involved in separation cases. [56]

The Chancellor or notary should make a record of the verbal investigation made in the case, and also of the decree issued in its settlement. This record is to be kept in the diocesan archives. [57]

During the course of the administrative method, either of the parties or both have the right to ask that the question be solved by formal trial. [58] The Ordinary can grant or reject the request according as he feels there is or is not good reason for it. The rejection of the request is

55. *S. R. Rotæ Dec.*, II (1910), Dec. XXIV, n. 11: "[...] *non posse argui a rationibus quibus concedere præstat dispensationem a matrimonio rato et non consummato, ad rationes, quibus movendus est iudex ad decernendam thori separationem. Imo etiam in dubio utrum matrimonium validum sit, maxime in dubio facti, facilior, admitti potest probatio, sive per testes, sive per documenta, ad effectum evincendi nullitatem; dum e contrario in causa separationis thori, cum certa sit et incontroversa validitas matrimonii, omnia iura clamant ut coniugale consortium non disiungatur, nisi invicte comprobetur, adesse causam canonicam separationis.*"

56. DOHENY, *op. cit.*, II, pp. 644, 645; DE GUISE, *Le Promoteur de la Justice dans les Causes matrimoniales* (Les Publications sériées de l'Université d'Ottawa, n. 20, Ottawa, Ont.: Les Editions de l'Université d'Ottawa, 1944), p. 142.

57. CORONATA, *loc. cit.*

58. REGATILLO, *op. cit.*, II, n. 587 *bis*, p. 396: "*Pars innocens quoque hoc petere potest, quia ius habet petendi divortium, et omne ius actione iudiciali munitur, nisi aliud constet (c. 1667).*

"*Pars conventa poteritne exigere ut causa hæc iudiciali via tractetur? Hoc videtur indicare citatum responsum Commissionis Interpretum, quæ clausulam numero plurali adhibit: ad instantiam partium. Et suadetur ex analogia; nam sicut omne ius munitur actione, ita etiam exceptione, quam reus potest in iudicio opponere (c. 1667). Sic pars conventa in via administrativa instare posset ut causa iudicialiter tractetur.*"

to be embodied in a formal decree. [59] The Ordinary himself may, if difficulties have arisen during the administrative process, decide *ex officio* to remand the case for formal trial. [60]

When the case is completed, the decision of the Ordinary is given in a decree granting or refusing the separation (cfr. Appendix I, Formulary I). If separation is pronounced, the decree must state whether it is to be perpetual, or, if temporary, is to be *ad tempus certum vel incertum.* The Ordinary's decree is to be communicated to both spouses. [61]

Either of the consorts who feels himself aggrieved has the right of rescourse against the decree of the Ordinary in the administrative process. This recourse is to be made to the Sacred Congregation of the Sacraments, if both parties are baptized, or to the Sacred Congregation of the Holy Office, if one is non-baptized. [62] There is no appeal to the S. R. Rota or to the tribunal of Second Instance. [63]

In a diocese where the number of separation cases is large or distances great, a suggested mode of handling these cases administratively is the following:

The Ordinary might delegate a priest and constitute an ecclesiastical notary for each Deanery of his Diocese for the administrative hearing of separation cases. The priest could conduct the investigation of a particular case, the notary recording the verbal investigation. On its con-

59. DOHENY, *op. cit.*, II, p. 645.

60. CORONATA, *loc. cit.*

61. Canon 1868, § 2.

62. Canons 1601, 1880, 6°.

63. Pont. Comm., 22 Maii 1923 — AAS, XVI (1924), 251: "*Utrum ad normam cann. 1552-1601 institui possit actio iudicialis contra Ordinariorum decreta, actus, dispositiones, quæ ad regimen seu administrationem dioecesis spectent, ex. gr. provisionem beneficiorum, officiorum, etc., aut recusationem seu denegationem collationis beneficii, officii, etc.* [...]

"*Resp.: Negative* [...] *Mens est: exclusive competere Sacris Congregationibus cognitionem tum huiusmodi decretorum, actuum, dispositionum, tum damnorum, quæ quis prætendat ex iis sibi illata esse.*" Cfr. BESTE, *Introductio In Codicem* (ed. altera, Collegeville, Minn.: St. John's Abbey Press, 1944), apud Can. 1601, pp. 773, 774.

clusion, the priest-delegate could issue a decree stating that an ecclesiastical separation was denied or granted *ad tempus indefinitum vel definitum.* Recourse from this decree could be taken by the party feeling himself aggrieved to the Sacred Congregations (Canon 1601).

Can the Ordinary interpose himself on a board of three priests between the decree of his priest-delegate and the Sacred Congregations by giving the aggrieved consort a right of review of the acts of the case by himself or such a board? In the strict sense of the word, recourse would be had from the acts of the delegate to the Holy See. There is, however, the possibility that the Ordinary, in delegating his power, could limit it thus: "I delegate you for these cases, but reserve to myself or to a board of three priests the right to review a negative decision before your decree becomes final." Even if the Ordinary placed no such limitation on the power of his delegate, the aggrieved party would have the right to petition the Ordinary for a review of the acts, for the Ordinary can reverse a decision of his delegate. In this way the case would be presented to the Ordinary or delegated board for review. Such a step does not strickly constitute the making of a recourse; rather, it is a plea for a rehearing of the facts in the case by the same juridical authority in the person of the Ordinary. This would not be recourse in the proper sense of the word, but merely a petition for a review of the acts of the case, similar to right of "recourse" given to a pastor against the Bishop's decree of removal (Canon 2153, § 1). If the Ordinary or his board countermands the action of his priest-delegate, this last decree has full juridical effect. If the Ordinary or his board upholds the previous act of his priest-delegate, then the way for recourse to the Holy See is still open for the aggrieved party.

If, as is very often the case in America, the consorts are likewise petitioning for permission so seek a civil separation or divorce, this permission or its refusal could also

be included in the decree granting the ecclesiastical separation (cfr. *infra,* Article IV, p. 254).

B. THE JUDICIAL PROCESS

If the Ordinary decides that the separation case, whether perpetual or temporary, is to be conducted by formal trial, competency is to be determined according to Canon 1964. The competent Ordinary, therefore, would generally be he of the place where the marriage occurred or where the respondent has his domicile.[64]

The Officialis, having ordinary judicial jurisdiction, can hear the case without further delegation, unless the Bishop has expressly reserved separation cases to himself.[65] The Vicar General has no authority to hear such cases in formal trial.[66] Would the sentence of the Officialis be valid, if he, without the Ordinary's consent, settled a case of temporary separation being tried on grounds mentioned in Canon 1131, § 1? It would seem to be valid. From the response of the Pontifical Code Commission,[67] it is clear that these cases sometimes admit of the formal process according to the judgment of the Ordinary. It does not appear that this judgment is necessary for the validity of the procedure. Moreover, the judicial process contains the administrative in a more eminent degree.[68]

Since the marriage bond is not in question, one judge would be sufficient to constitute the Tribunal.[69] The S. R. Rota, however, never conducts a trial of separation of

64. Canon 1964. — "*In aliis causis matrimonialibus iudex competens est iudex loci in quo matrimonium celebratum est aut in quo pars conventa vel, si una sit acatholica, pars catholica domicilium vel quasi-domicilium habet.* Cfr. S. C. de Sacrementis, instr. (servanda a tribunalibus Diocesanis in pertractandis causis de nullitate matrimoniorum), 15 aug. 1936, Art. 1-12 — AAS, XXVIII (1936), 315, 316.
65. Canon 1573.
66. Canons 1573, 1892, 1°; *Provida,* Art. 3, § 2 — AAS, XXVIII (1936), 315.
67. Pont. Comm., 25 Iunii 1932 — AAS, XXIV (1932), 284.
68. REGATILLO, *op. cit.,* II, n. 587 ter., p. 397.
69. Canon 1576, § 1, 1°.

consorts with less than three judges. This would be the best practice for dioceasan tribunals to follow. In fact, there is one case on record which was decided by the whole *turnum* of eleven Rotal judges. [70]

Since the public good is involved in cases of separation as regards cohabitation, the Promotor of Justice should assist in the proceedings. [71] He should be cited for the various sessions of the process, and have the opportunity to be present at the interrogation of the parties and witnesses, and be informed of the other phases of the process. [72] The Instruction, *Provida Mater,* takes his presence in separation cases for granted, [73] while the Rules of the S. R. Rota say that *ex natura rei* his presence is "evidently necessary" in cases of separation. [74] The S. R. Rota always uses the offices of the Promotor of Justice in separation cases tried before that Tribunal. This is the only safe practice for dioceasan tribunals to follow. The strict wording of the law does not require this, but the proper safeguarding of the public good demands it. [75]

All the formalities of the judicial procedure are to be employed in separation cases that are tried in formal process. Thus the *libellus supplex* of the plaintiff is to be submitted to the court, the Tribunal constituted, the *libellus* accepted, procurators and advocates are to be appointed. Then follow the *litis contestatio seu dubii concordantia,* citation and hearing of parties and witnesses, together with citation of the Promotor of Justice, publication of the process, conclusion of the case, animadversions of the

70. *S.R. Rotæ Dec.,* IV (1912), Dec. XVI, pp. 193-203.
71. Canon 1586. Cfr. DE GUISE, *op. cit.,* pp. 125, 126, 142.
72. Canon 1587.
73. Cfr. *Provida,* Art. 63 — AAS, XXVIII (1936), 327.
74. Normæ S. Romanæ Rotæ Tribunalis, Art. 27, § 1: "*In causis contentiosis Ponentis est ferre iudicium de eo utrum bonum publicum in discrimen vocari possit necne, nisi interventus Promotoris iustitiæ* ex natura rei evidenter necessarius dicendus sit, *ut in causis impedimenti ad matrimonium contrahendum,* separationis inter coniuges [...]" — AAS, XXVI (1934), 457.
75. DOHENY, *op. cit.,* II, pp. 641, 642.

Defender of the Bond or Promotor of Justice, the sentence and its publication.

An appeal against the sentence can be made by the parties or the Promotor of Justice. This appeal is not mandatory, and the sentence of First Instance may stand as final. [76] If appeal is made, it should be lodged with the Tribunal of Second Instance or the S. R. Rota. [77] In the Court of Appeal, the case must likewise be tried by the formal process; it could not be conducted administratively. [78] Appeal from the sentence of Second Instance must be lodged with the S. R. Rota or with the Sacred Congregation of the Holy Office if one spouse is non-Catholic. [79]

In its sentence, the ecclesiastical Tribunal has the right to pronounce upon the civil effects of the marriage, e.g., alimony, property settlements, etc. [80] It is advisable, however, that in the United States and Canada settlement of these questions be left to the civil authority, because the ecclesiastical disposition will have no effect before the civil law.

A recent response of the Pontifical Code Commission has declared that cases of separation never become irrevocably adjudged. [81] Two concordant sentences in these cases, however, do not admit of further hearing of them, unless new and important arguments are supplied. [82]

It might sometimes happen that in a formal trial the

76. Canon 1986.
77. Canons, 1594, 1599.
78. Pont. Comm., 25 Iunii 1932 — AAS, XXIV (1932), 284: "*D. II. An in causis separationis coniugum, de quibus in canone 1131 § 1, in secundo gradu eadem servanda sit forma ac in primo gradu.*
"*R. Ad. II. Affirmative.*"
79. *Provida,* Art. 12, 216 — AAS, XXVIII (1936), 316, 355, 356. Cfr. CAPPELLO, *op. cit.,* III, Pars 2, n. 830, p. 355; DOHENY, *op. cit.,* II, p. 647.
80. Canon 1961.
81. Pont. Comm., 8 Aprilis 1941 — AAS, XXXIII (1941), 173: "*D. An causæ separationis coniugum recensendæ sint inter causas nunquam transeuntes in rem iudicatam, de quibus in canonibus 1903 et 1989.*
"*R. Affirmative.*"
82. Cfr. Canons 1903 and 1989.

grounds of adultery was not proved in First Instance, with the result that a negative sentence was issued. The plaintiff then appeals from this sentence, and in the Court of Second Instance, he alleges as grounds in his favor another sin of adultery committed by his partner after the sentence of First Instance was rendered, or a sin which was committed before sentence of First Instance, but which somehow was not alleged as grounds for separation in the Court of First Instance. Can the judge of the Court of Appeal base his sentence upon this new fact? It would seem that he cannot. For this new crime of adultery is a new grounds, and constitutes a distinct title unknown to the Court of First Instance. Therefore, this new title or grounds is not to be admitted in the Court of Appeal, not even by way of accumulation with the other grounds already alleged in the Court of First Instance. [83]

Nevertheless, the Instruction *Provida,* Article 219, § 2, [84] declares that, if in the Instance of appeal there is alleged a new grounds of *nullity* together with the former grounds and this new grounds is admitted by the Appellate Court without being contested by anyone, then the Appellate Court can render a decision based upon the new grounds, *however as of the First Instance.* This Article of the Instruction, Regatillo feels, can also be applied to cases of separation of consorts. [85]

ARTICLE III

SEPARATION BY CIVIL AUTHORITY

The Code of Canon Law declares that the Church is exclusively competent over the marriages of baptized per-

83. Canon 1891.
84. *Provida,* Art. 219, § 2 — AAS, XXVIII (1936), 356.
85. REGATILLO, *op. cit.,* II, n. 587 *ter.,* p. 397.

sons, [86] but admits the competency of the State over the merely civil effects of the marriage contract. [87] Even when one party is not baptized, the Church enjoys competency, for the matter directly concerns the baptized consort, and indirectly the unbaptized. [88] The civil judge, finally, is competent in the separation cases of non-baptized persons — provided he does not go contrary to the definitions of the Church concerning the natural law or the divine positive law. [89]

In some instances the Church out of tolerance delegates by concordat her power over separation cases to the civil authority. [90] The civil judge deciding these cases according to the provisions of the Concordat acts licitly and validly, provided nothing is done in them against divine or ecclesiastical law, and the consorts likewise act licitly in submitting their cases to his judgment. [91]

Modern States, since the time of the French Revolution, have usurped the Church's power over the marriage bond by creating a "civil contract" of marriage, and breaking that contract between subjects, baptized or not, for various reasons and grounds, and allowing both consorts to remarry. Today, therefore, the Church finds herself in the anomalous position of granting ecclesiastical separations

86. Canons 1016, 1038, 1960. Cfr. Council of Trent, Sessio XXIV, canon 12: *"Si quis dixerit, causas matrimoniales non spectare ad judices Ecclesiasticos: Anathema Sit." — Concilii Tridentini Canones et Decreta, loc. cit.,* p. 180.
87. Canons 1016 and 1961.
88. CAPPELLO, *op. cit.,* III, Pars 2, n. 830, p. 352.
89. VERMEERSCH-CREUSEN, *op. cit.,* III, n. 278, p. 144.
90. E.g. In Austria: *Konkordat Zwischen Dem Heiligen Stuhle Und Der Republik Oesterreich, Zusatzprotokoll, Zu Artikel 7, n. 2: "Der Heilige Stuhl willigt ein, dass das Verfahren bezüglich der Trennung der Ehe von Tisch und Bett den staatlichen Gerichten zusteht."* — AAS, XXVI (1934), 277.
In Italy: *Concordato Fra La Santa Sede E L'Italia, Art. 34: " Quanto alle cause di separazione personale, la Santa Sede consente che siano gindicate dall' autorità giudiziaria civile."* — AAS, XXI (1929), 291. For the application of this Article to practice by the Italian Civil Law, the reader is referred to DESJARDINS, *Le Mariage en Italie depuis les Accords de Latran* (Paris: Recueil Sirey, 1933), Chapitre IX, *Les Causes de Séparation de Corps,* pp. 113-126.
91. CAPPELLO, *op. cit.,* III, Pars 2, n. 831, p. 355.

that are not recognized by the civil authority, and the civil power granting separations and divorces which she cannot countenance. There is no consistency in the legislation of the civil powers concerning the separation of consorts or divorce. Some modern countries and states admit only complete divorce by civil law. They acknowledge no such thing as separation with the marriage bond remaining intact. Others admit separation, but only as a step towards final and complete divorce. Some admit both divorce and separation. But in most cases where separation is admitted, the grounds on which it can be obtained are not concordant with the grounds recognized by the Church (cfr. Appendices II and III).

Where the secular authority recognizes the civil separation of consorts, it is allowed on certain conditions, that consorts sometimes petition the state for a civil separation in order to obtain the civil effects of an ecclesiastical separation already obtained. It is now the common opinion of canonists and moral theologians that the consorts, for a grave reason, may seek a civil separation from the secular courts.[92] The conditions under which the seeking of civil separation (the so-called "separate maintenance") is tolerated are set down in a response of the Sacred Congregation of the Holy Office:

"1) There must be present just causes for the separation in the judgment of the Bishop; 2) there must be no other tribunal to which the Catholic can go to obtain a separation which would be recognized by civil law; 3) the sentence of this civil tribunal must have no other effect than that of separation.[93]

92. DE SMET, *op. cit.*, n. 390, p. 340; PRÜMMER, *op. cit.*, III, n. 892, pp. 646, 647; GURY, *op. cit.*, II, Art. II, Appendix, Q. 3, p. 341; LOIANO, *Institutiones Theologiæ Moralis Ad Normam Iuris Canonici* (Vol. IV, Pars 7, Taurini: Marietti, 1940), n. 564, p. 673; BERARDI, *Theologia Moralis Theorico-Practica* (Vol. V, Faventiæ: Ex Typ. Novelli et Castellani, 1905), n. 1062, pp. 577, 578; GÉNICOT, *Theologiæ Moralis Institutiones* (Vol. II, 4. ed., Lovanii: Typis Polleunis et Ceuterick, 1902), Tract. XVIII, Appendix, n. 562, pp. 631, 632.

93. S.C.S. Off., 19 decembris 1860. The Holy Office refers to this reply in its decree of April 3, 1877: *"Utrum liceat advocati et actoris partes agere, quando finis litis est simplex separatio absque ulla sentenia matrimonii nullitatem secum ipsa trahente? Responsum fuit: Provisum in præcedentibus, et feria IV, 19 decembris ejusdem anni: Dummodo pars catholica nullum aliud tribunal adire possit, a quo sententiam obtineat separationis quoad thorum et mensam, et dummodo sententia hujus tribunalis nullum alium habeat effectum quam separationem prædiciam, posse tolerari ut catholici in eo foro actoris et advocati partes agant, et dummodo adsint justæ separationis causæ judicio Episcopi; et si quid habeat præterea dubii, recurrat exponens omnes circumstantias et legis dispositiones."* — *Nouvelle Revue théologique*, XVIII (1886), 485, 486.

But what is a Catholic spouse to do when the State does not recognize legal separation from cohabitation, or, if it does, does not accord to it the civil effects of complete divorce with the marriage bond, however, remaining intact? Can the injured Catholic consort petition the civil authority for a civil divorce? Canonists and moralists are divided in their answers. Some older authors hold that a civil divorce is an intrinsic evil and under no circumstances permitted to be sought. Other authors hold that a civil divorce is not intrinsically evil, and that in certain circumstances is licitly petitioned from the civil authority.

To understand the responses of the Holy See on the subject, a little historical background is necessary.

On September 20, 1792, the new French Republic, the product of the Revolution which overthrew the monarchy, enacted laws establishing a civil marriage contract and permitting the breaking of that contract on certain grounds. In the year 1804 these enactments became part of the Civil Code of France and Belgium. In Belgium these statutes have continued in force until the present day. In France, however, with the restoration of the monarchy came their suppression between the years 1816 and 1884. After thus being dormant for sixty-eight years, these laws were revived on July 27, 1884. In its new guise, the law recognized as grounds for complete divorce with right of remarriage, adultery, cruelty and other grave injuries. Many local tribunals were lax in interpreting the law and in practice permitted divorce for slight injuries or at times, none at all. This revival of divorce in France was done in

open defiance of the Catholic Church and over the protests of French Catholics.[94]

A. RESPONSES OF THE HOLY SEE

During the period immediately following the renactment of the civil divorce law in France, there emanated several replies from the Sacred Penitentiary, presumably in answer to queries from the French clergy and hierarchy. The authors merely mention these reponses. It seems best to reproduce them in full.

1) The first response concerns the case of a wife, separated from her husband *quoad torum et habitationem* by sentence of the civil tribunal, who had only small resources of livelihood for herself and children, and had, therefore, asked from the civil authority license to run a tobacco store. The authorities told the woman that she had to get a divorce from her husband if she were to have the request granted. Being a Catholic and yet desirous of obtaining the license, the woman asked her Confessor if she could without sin fulfill the condition imposed. She was firmly resolved not to contract a new marriage during the lifetime of her husband. At her repeated insistence, her Confessor felt bound to consult the Sacred Penitentiary. On January 5, 1887, the priest received this reply: "*Sacra Pœnitentiaria mature perpensis expositis, confessario oratori respondet: Mulieri pœnitenti, in casu, nihil aliud esse consulendum nisi ut a petendo divortio sub gravi se abstineat.*"[95]

94. Cfr. GASPARRI, *op. cit.*, [ed. 1932], II, n. 1304-1323, pp. 323-337; WERNZ-VIDAL, *op. cit.*, V, n. 706-712, pp. 919-931; DE SMET, *op. cit.*, n. 371-408 pp. 323-354; CAPPELLO, *op. cit.*, III, Pars 2, n. 833-840, pp. 357-371; CORONATA, *op. cit.*, III, n. 708-718, pp. 979-994; KELLY, *loc. cit.*

95. The following is the summary written on the Sacred Penitentiary records of the case: "*Mulier, vi sententiæ separata a marito quoad torum, vellet ad vitam sustentandam quoddam publicum munus suscipere. Sed gubernium id non sinit ni petat divortium. Ipsa petere vellet, sed, in sua intentione, semper salvo ligamine. Parochus, qui est et illius confessarius, petit num admitti possit ad sacramenta, et lumen seu consilium circa reliqua, ut infra. Sacra Pœnitentiaria, mature perpensis expositis, etc.*" — NRT, XIX (1887), 74, 75.

2) A short time later was submitted the case of a woman who suffered cruelties and severe loss of fortune and family goods on account of her husband. He deserted his wife and child, and could not be located. The woman, in an effort to preserve what was left of the family fortune not already squandered by the man, was forced to sustain several costly lawsuits, to seek loans of money and to rent houses and lands. According to the then civil law of France she could not perform these acts without her husband's consent, even though she had procured a civil separation from him. Could she get a civil divorce from him under the circumstances? The Sacred Penitentiary answered: *Negative.*[96]

3) Another woman, civilly separated from her husband *quoad torum,* wished to take charge of the temporal goods

96. S.P., 14 ian. 1891: "*Eminentissime ac Reverendissime Domine,*

"*Heri et nudiustertius ad me rediit mulier, sequentia exponens:*

"*Anno 188... in matrimonium rite copulata, cum viro in urbe hujusce dioecesis N... habitavit usque ad annum 188..., prolemque habuit, hoc ipso anno mortuam. Male a viro tractata, insuper in rebus pecuniariis bonisque familiæ gravia ex parte viri damna passa est. Anno autem 188... clam aufugit vir, uxorem filiolamque deserens, neque ab eo tempore quidquam de eo auditum est: creditur Americanas regiones petiisse; ubi autem latitet, ipsa uxor, frater viri, imo agentes consulares detegere nequiverunt.*

"*Jamvero misera uxor, ut ruinam vitet, serveique quæ supersunt bona a marito non dilapidata, plures lites sustinere debet; insuper quasdam summas in mutuum petere, domos vel terras locare. Porro ex lege civili gallica, etiamsi jam separationem, ut dicunt, bonorum obtinuerit, non tamen potest prædicta omnia peragere absque consensu mariti, vel saltem absque sententia, in singulis casibus requisita, judicum civilium consensum viri absentis supplentium. Hinc sumptus continui mulierem gravantes, hinc etiam dilationes in causis apud tribunalia pendentibus, quæ ipsi valde nocent. Urgent advocati et procuratores, qui de rebus ejus curant, ut divortium civile petat, dictitantque hoc solum esse medium quo ab hujusmodi inconvenientibus et damnis eximi queat.*

"*Hinc quæsitum sequens:*

"*Dicta mulier expresse profitetur doctrinam Ecclesiæ circa matrimonium et causas matrimoniales ad solos judices ecclesiasticos pertinentes; expresse promittit se obtento divortio civili nunquam usuram ut novas attentet nuptias. An possit tuta conscientia agere apud civiles judices ut civile divortium obtineat, eo fine ut se eximat a supramemoratis damnis et de suis bonis ac rebus libere disponat?*

"*Et Deus...*

"*N... die 3 januarii 1891.*

"*Sacra Pœnitentiaria, mature consideratis expositis, ad propositum dubium respondet:*

"*Negative.*

"*Datum Romæ in Sacra Pœnitentiaria die 14 Januarii 1891.*" — *Ibid.*

and Catholic education of her orphaned granddaughter who had been abandoned by her father. Under civil law she could not perform these acts unless she had obtained a civil divorce from her husband. The reply of the Sacred Penitentiary in this instance was: *"Petitam licentiam concedi non posse."* [97]

4) Here is the fourth case:

Très saint Père,

M. de C. avait épousé, il y a neuf ans, une Demoiselle D. Trois enfants sont issus de ce mariage.

Malheureusement, la femme tint bientôt une conduite scandaleuse. Elle quitta son mari et d'une de ses relations adultères naquit un enfant, qu'elle essaya de dissimuler. Durant sa grossesse, elle rentra même momentanément sous le même toit que son mari, afin de rendre impossible à celui-ci une action en répudiation de paternité.

Pour pouvoir répudier cette paternité, pour empêcher l'introduction de nouveaux bâtards dans sa famille et sauvegarder ses intérêts de fortune et ceux de ses trois enfants, le mari, vu l'état de la législation civile, n'a d'autre moyen efficace que de demander le divorce civil.

Cependant, comme il est fervent catholique, il n'entend pas que cette rupture du lien purement civil, soit considérée comme une lésion du lien religieux qui l'unit à sa malheureuse femme.

97. S.P., 3 iun. 1891: *"Beatissime Pater,*

"Mulier N... N..., N... diocesis, vi judicii civilis anno 1884 separato a marito quoad torum, vellet suæ neptis matre orbatæ et a patre derelictæ curam et bona temporalia gere, ipsiusque educationi christianæ providere, quin timendum sit ne ab hoc pio munere adimplendo mala dicti patris voluntate prohibeatur. Sed hoc eximium opus agere nequit ni petat divortium a judice civili; quod peteret, salvo ligamine quo devincitur et quod optime novit ab Ecclesia solummodo frangi posse. Parochus, qui et ipsius est confessarius, a Nobis postulat num hæc petitio probari possit, vel saltem tolerari?

"Nos autem, attentis gravissimis responsionibus S. Officii et S. Pœnitentiaræ quæ de divortio civili in Gallia nuper prodierunt, casum hunc Nobis propositum propria auctoritate resolvere minime audemus.

"Ideo, humiliter et enixe precamur ut Sanctitas Vestras Oratrici benigne concedere dignetur licentiam adeundi judicem laicum, ab eoque divortium civile petendi, eo tantum fine, ut sublatis matrimonii effectibus civilibus, tutelam suæ neptis ipsa suscipere possit eamque a periculis omnis generis quæ ipsi impendent, liberare.

"N..., 16 Aprilis 1891.

"N..., N..., v.g.

"Sacra Pœnitentiaria, exposito casu mature perpenso, respondet:

"Petitam licentiam concedi non posse.

"Datum Romæ in S. Pœnitentiaria die 3 Junii 1891." — *Ibid.*

Ainsi sa pensée n'est-elle nullement de paraître redevenir libre de contracter une nouvelle union, mais seulement d'user des moyens que lui donne la législation en vigueur pour s'assurer une entière séparation de vie, de corps et de biens d'avec sa femme, et sauvegarder ses intérêts de fortune, ceux de sa famille et notamment de ses enfants.

Dans ces conditions, il demande s'il lui est licite d'engager une action en divorce civil contre sa femme ?

Sacra Pœnitentiaria ad præmissa respondet:

Non licere.

Datum Romæ in S. Pœnitentiaria die 7 Januarii 1892. [98]

5) The last case concerns a man who had obtained an ecclesiastical sentence of separation *quoad thorum* on grounds of his wife's adultery. To obtain civil effects for that sentence, especially to repudiate from his name and possessions the illegitimate children born of his wife's crimes, the man petitioned the Holy See for permission to obtain a civil divorce from his wife. The answer of the Sacred Penitentiary to his request was: *Orator consulat probatos auctores.* [99]

98. NRT, XXIV (1892), 528, 529.

99. S.P., 30 jun. 1892: *"Beatissime Pater,*

"Eduardus ob adulterium mulieris notorium et scandalosum, ex quo etiam proles spuria exorta est, a Judice ecclesiastico obtinuit sententiam pro separatione thori.

"Ut vero talis sententia Judicis ecclesiastici effectus civiles sortiri queat, præsertim quoad repudiationem paternitatis circa filios adulterinos, horumque exclusionem a parte et bonis prolis legitimæ, lex civilis non aliud suppeditat medium efficax quam divortium civile.

"Unde Eduardus, familiæ suæ decori et bono providere volens, ad actionem pro consequendo divortio civili recurrere cogitat. Nullo modo tamen vinculum sacramentale infringere, aut novarum nuptiarum libertatem pro se aut pro indigna muliere prætendere putat, paratus cæteroquin talem intentionem authentice coram Parocho vel Episcopo confirmare et declarare.

"Cum sæpius a S. Sede declaratum sit matrimonium civile nihil aliud significare quam meram nudamque cæremoniam seu formam quæ nullum conscientiæ vinculum aut obligationem condere queat, Eduardus itidem in divortio civili nihil aliud ac talem nudam cæremoniam considerat, quæ civiliter destruit effectus quos prius condiderat mera contractus civilis cæremonia; unde, simili jure, divortium civile æque ac matrimonium civile conscientiæ obligationibus nec addere quidquam nec detrahere ipsi videtur; proinde ordinem mere civilem et externum spectans, quamlibet vinculi sacramentalis læsionem seu violationem expresse respuit et excludit, cum divortii civilis effectus exquirit.

"Quum talis sit animi sui dispositio, ac considerata præsertim sententia judicis ecclesiastici super separationem thori, Eduardus, ut conscientiæ suæ quieti provideat, enixe petit, an ita sibi liceat adire tribunal laicum

Here are five apparently very worthy cases, and yet in none of them did the Holy See grant permission for the injured consorts to seek a civil divorce from the secular authority.

Since the cooperation of lawyers and judges in civil divorce is as direct as that of the plaintiff himself, it is well to study the Holy See's answers concerning divorce and the legal profession, as an aid in determining the conditions under which that cooperation is tolerated and licit.

After the 1884 revival of divorce in France, Bishops of that country proposed several *dubia* to the Holy Office as to whether or not it was lawful for lay judges in civil separation or divorce cases to pronounce sentence and attorneys to accept them. The Holy Office made this answer:

> It can be tolerated, in view of very grave circumstances, that some magistrates and attorneys accept marriages cases in France, without being bound to give up their office, provided: 1) they profess Catholic doctrine concerning marriage and concerning marriage cases pertaining only to ecclesiastical judges, and 2) they are so disposed that they never adjudicate nor defend nor prosecute to that end concerning validity and nullity of marriage, and concerning cases of separation which they are forced to judge, a sentence contrary to divine or ecclesiastical law. In doubtful or more difficult cases, each is to consult his own Ordinary and abide by the

pro consequendo divortio civili, sub clausulis et restrictionibus supra indicatis?

"Sacra Pœnitentiaria ad præmissa respondet:

"Orator consulat probatos auctores.

"Datum Romæ in S. Pœnitentiaria die 30 Junii 1892."

In his article (*The Jurist*, VI (1946), 221), Doctor Kelly attributes all five requests to Bishops of France and Belgium. All five probably originated in France, and only one, the third, certainly emanated from a Bishop. The first was submitted by a Confessor. Since these cases were addressed to the Sacred Penitentiary, *anyone*, cleric or layman, might have written the others. Dr. Kelly likewise says all were granted on grounds of adultery. But it seems probable that the second was for cruelty and disertion; the grounds for the third are not mentioned. Separations were granted in the first, third, and probably the second, by the civil tribunal. An ecclesiastical separation is mentioned only for the fifth case.

> latter's judgment, and, when need arises, recur through him to the Sacred Penitentiary.[100]

On receipt of this response, the Bishops sought an elaboration of the second condition. Could a judge, they asked, so form his conscience that he was abstaining from making judgment about the ecclesiastical marriage's validity, and pronounce only upon the civil contract, whether there was cause for its dissolution? Could the mayor then, having in mind only the civil contract and its effects, pronounce the divorce?[101] Could he then join the divorced person to another in civil marriage? The answer of the Holy Office to all three questions was: *negative.*[102] This answer certainly restricted the tolerance which the Church had permitted in its previous response. Perhaps the reason was that the Church wished to eradicate a broader interpretation being given to her tolerance in France at the time.

Another French Bishop asked the same Congregation: Can a Catholic accept the position of civil judge, when he knows that thereby he will have of necessity to render very often sentences of divorce? The answer of the Holy Office was: "Your Excellency is to exhort exceedingly the judge in question that he may continue in office, standing by the instructions already given by the Holy See, and

100. S.C.S. Off., 25 iun. 1885: *"Attentis gravissimis [...] adjunctis, tolerari posse ut qui magistratus obtinent, et advocati, causas matrimoniales in Gallia agant, quin officio cedere teneantur, dummodo catholicam doctrinam de matrimonio deque causis matrimonialibus ad solos iudices ecclesiasticos pertinentibus palam profiteantur, et dummodo ita animo comparati sint tum circa valorem et nullitatem coniugii, tum circa separationem corporum de quibus causis iudicare coguntur, ut nunquam proferant sententiam neque ad proferendam defendant vel ad eam provocent vel excitent divino aut ecclesiastico iuri repugnantem, et in casibus dubiis vel difficilioribus suum quisque Ordinarium adeat, eius iudicio se dirigat, et quatenus opus sit, per eius medium ad Apostolicam Pœnitentiariam recurrat."* — *Fontes*, IV, n. 1093, pp. 423, 424; *Collectanea S. C. de Prop. Fide*, Vol. II, n. 1636; NRT, XVIII (1886), 489, 490.

101. According to French civil law practice of the time, the judge pronounced that there actually did exist grounds for divorce in a certain case, while the mayor *(syndicus)* pronounced the sentence.

102. S.C.S. Off., 27 maii 1886 — *Fontes*, IV, n. 1101, p. 429; *Collectanea S.C. de Prop. Fide*, Vol. II, p. 208, nota 1; ASS, XXII (1889), 635, 636.

using the cautions which the virtue of prudence prescribes." [103]

The Bishop of Luçon, France, asked the Sacred Penitentiary if a mayor could pronounce sentence of civil divorce if he spoke as a civil magistrate, and publicly declared that he intended to break only the civil contract and civil effects of a Catholic marriage. This Sacred Tribunal answered: "[...] *tolerare posse, ut Syndicus orator ad actum de quo in precibus procedat cum declarationibus ab ipso propositis, ita tamen ut loco verborum: Solumque civilem contractum abrumpere velle, ponat solumque civilem contractum spectare posse.*" [104]

Anent this response, the Bishop of Marseilles, France asked if it could be applied to all mayors of France? Did it also apply to civil judges? To the first question, the Sacred Penitentiary replied: "*Sacram Pœnitentiariam, in rescripto de quo agitur edendo, id unum in mente habuisse, ut casui particulari pro ejus circumstantiis et exigentiis provideret.*" To the second question the answer was: *negative.* [105]

All the above *dubia* concern France. The severity of the Sacred Penitentiary and the Holy Office in all these cases apparently must be understood in the light of the 1884 revival of divorce in that country. The reason the Holy See was severe in forbidding cooperation of consorts, advocates, judges and mayors in that country, seem to be that there it was a matter of cooperation in carrying out legislation which resisted the rights and laws of the Church. The Holy See's attitude was that, in France, such

103. "*Excitandum esse summopere ab Ampl. Tua judicem de quo agitur, ut in officio perseveret, stando resolutionibus jam datis a S. Sede et adhibitis cautelis quæ a virtute prudentiæ suadentur.*" — N.R.T., XXIV (1892), 373-375; *Le Canoniste contemporain,* XV (1892), 223.

104. S.P., 24 sept. 1887 — NRT, XXI (1889), 616, 617. Some authors erroneously give this date as September 23, others as Sept. 27.

105. S.P., 4 jun. 1890 — NRT, XXII (1890), 506, 507. There is another response of the Sacred Penitentiary about a civil judge, but it merely refers the petitioner, T. Cazeneuve, S.J., to preceding declarations of the Holy See, presumably those of the Holy Office, June 25, 1885, May 27, 1886 — S.P., 4 april, 1887. Cfr. NRT, XIX (1887), 391, 392.

cooperation was illicit since these civil enactments harmed the common good of the Church. [106]

The attitude of the Holy See, together with the protestations of the French Catholics, did actually bring about amelioration of the condition. For on Feb. 6, 1893, a law was enacted giving a separated wife equal status with a divorced woman before the law as far as the administration of property was concerned. By this law, the offspring of a seperated wife were not necessarily ascribed to the innocent husband and the separated wife could be prevented from using her husband's name. [107]

Upon publication of the decree of May 27, 1886, of the Holy Office restricting the tolerance of the Church in permitting judges and mayors to execute the French laws of civil divorce, many Catholics in Belgium argued that these prohibitions must be applied to their country also, because the Belgian divorce legislation was substantially the same as the French. On Sept. 14, 1886, the Apostolic Nuntio to Brussels, Mgr. Dominic Ferrata, settled these doubts by communicating the following letter to the Belgian Minister of Foreign Affairs, who in turn communicated it to the Belgian Parliament: "*A la suite de ma demande, Son Eminence [le Cardinal Secrétaire d'Etat] vient de me faire savoir, d'après les ordres de Sa Sainteté, que la Congrégation du Saint-Office a déclaré que le décret du 27 Mai ne concerne pas la Belgique et que, par conséquent, rien n'est modifié en ce pays en ce qui touche la matière du divorce.*" [108]

To the question: Can a Catholic attorney defend the defendent against a plaintiff seeking dissolution of the bond of marriage? the Bishop of Southwark, England, received the answer: "*Dummodo Episcopo constet de probitate advocati, et dummodo advocatus nihil agat, quod*

106. CAPPELLO, *op. cit.,* III, Pars 2, n. 837, p. 368; Claeys BOUUÆRT-SIMENON, *op. cit.,* II, n. 337, p. 354.

107. Claeys BOUUÆRT-SIMENON, *loc. cit.,* p. 353.

108. NRT, XIX (1887), 73, 74.

a principiis juris naturalis et ecclesiastici deflectat, posse tolerari." [109]

The Bishop of Saint Gall, Switzerland, asked two questions of the Holy Office: Can Catholic judges pronounce upon civil divorce cases? The reply was: "*Quoad judices recurrat in casibus particularibus.*" [110] In the same letter the Bishop asked about attorney's assisting in these cases, and was referred to the Congregation's reply to the Bishop of Southwark on Dec. 19, 1860. [111]

Cardinal Gasparri is the source for the final response of the Holy Office. "Can it be permitted that a woman, *ob gravissimas causas,* seek a divorce from the civil tribunal?" The answer: "In view of the peculiar circumstances surrounding the case, it can be permitted, provided the woman petitioner declare under oath before the Ordinary or his delegate and two witnesses, that she is not breaking the marriage bond, but only wishes to be released from the obligations of the civil ceremony; provided also that scandal be removed in the best way it can according to the judgement of the Bishop. [112]

Cardinal Gasparri says that the Sacred Penitentiary has received this reply of the Holy Office as a norm for its later practice. [113] Dr. Kelly says that he personally knows of a particular case in 1945 which the Holy Office settled with the selfsame words. [114] It would seem, then, that it is safe to assume that these regulations are still

109. S. C. S. Off., 22 maii 1860 — NRT, XVIII (1886), 485.
110. S. C. S. Off., 3 april. 1877 — NRT, XVIII (1886), 484, 485; *Le Canoniste contemporain,* VIII (1885), 263.
111. S. C. S. Off., 22 maii 1860 — NRT, XVIII (1886), 485, 486. Cfr. *supra,* footnote 84.
112. "*Num permitti possit ut mulier ob gravissimas causas petat divortium a tribunali civili* [...] *Attentis peculiaribus circumstantiis in casu concurrentibus, permitti posse, dummodo mulier oratrix cor Ordinario vel eius delegato ac duobus testibus etiam iureiurando declaret se matrimoniale vinculum nullatenus abrumpere, sed tantummodo a civilis ritus oneribus exsolvi velle; remoto scandalo quo meliori modo iudicio Episcopi fierit poterit.*" — S. C. S. Off., 6 aug. 1906, cfr. GASPARRI, *op. cit.,* [ed. 1932], II, n. 1324, p. 337.
113. GASPARRI, *loc. cit.,* n. 1325.
114. KELLY, *op. cit., The Jurist,* VI (1946), p. 222.

the practice of the Holy See in allowing consorts to seek a civil divorce, and that the Holy See allows a consort to present himself to the civil courts under these conditions.

B. INTERPRETATION AND PRACTICAL APPLICATION OF THE HOLY SEE'S REPLIES

From several of the foregoing responses of the Holy See, some authors argue that the seeking of a civil divorce is something intrinsically evil in itself. [115] The common opinion of authors today seems to be that it is not, and that it is tolerated under certain conditions to petition the civil power for a civil divorce. [116] The intrinsic evil of divorce could be argued from the five petitions which the Sacred Penitentiary denied to Catholic spouses of France. [117] It could also be deducted from the two responses of the Holy Office to the Bishops of France, one on June 25,

115. ÆRTNYS, *Theologiæ Moralis* (12. ed. accommodatum a C.A. Damen, 2 tomes, Taurini: Marietti, 1932), II, n. 925, p. 617; BUCCERONI, *Institutiones Theologiæ Moralis Secundum Doctrinam Sancti Thomæ et Sancti Alphonsi* (ed. altera, 2 vols., Romæ: Ex Typ. Forzani et Socii, 1893), II, n. 983, pp. 293, 294; PLANCHARD, in NRT, XVIII (1886), 473-501; WERNZ-VIDAL, *op. cit.,* V, n. 712, p. 930; GASPARRI, *op. cit.,* [ed. 1904], II, n. 1554, p. 450.
116. DE SMET, *op. cit.,* n. 401, p. 347; CAPPELLO, *op. cit.,* III, Pars 2, n. 837, pp. 368, 369; CORONATA, *op. cit.,* III, n. 718, pp. 993, 994, GASPARRI, *op. cit.,* [ed. 1932], n. 1324, p. 337; Claeys BOUUÆRT-SIMENON, *op. cit.,* II, n. 337, p. 357; VERMEERSCH — CREUSEN, op. cit., III, n. 278, p. 145; PRÜMMER, *op. cit.,* III, n. 892, pp. 646, 647; LOIANO, *op. cit.,* n. 564, p. 674; BERARDI, *op. cit.,* n. 1064, pp. 578, 579; GÉNICOT, *op. cit.,* n. 562, pp. 631, 632; LEHMKUHL, *op. cit.,* II, n. 701, footnote 1, pp. 499, 500; MERKELBACH, *op. cit.,* III, n. 977, p. 979; SEBASTIANI, Summarium *Theologiæ Moralis Ad Codicem Iuris Canonici Accomodatum* (3 ed., Augustæ Taurinorum: Marietti, 1919), n. 584, p. 343; DE BECKER, *De Sponsalibus et Matrimonio Prælectiones Canonicæ* (Bruxellis: Société belge de Librairie, 1896) Sectio IX, cap. 1, § 2, p. 410; TANQUEREY, *Synopsis Theologiæ Moralis et Pastoralis* (Tome I, 12. ed. quam recognovit F. Cimetier, Parisiis; Tornaci; Romæ: Desclée et Socii, 1936), n. 780, pp. 453, 454; NOLDIN, *Summa Theologiæ Moralis Iuxta Codicem Iuris Canonici* (Vol. III, De Sacramentis, 26. ed. quam recognovit et emendavit A. Schmitt, S.J., Œniponte; Lipsiae: Ex. Typ. Feliciani Rauch, 1940), n. 671, p. 682; SLATER, *A Manual of Moral Theology* (Vol. II, 6 ed., London: Burns, Oates, Washbourne, 1928), chapt. VII, p. 209; DAVIS, *Moral and Pastoral Theology* (Vol. IV, 4. ed., London: Sheed and Ward, 1945), pp. 238, 239.
It is noted that Gasparri has changed his former opinion as contained in his pre-Code work.
117. Cfr. *supra,* pp. 258-261.

1885,[118] the other on May 27, 1886.[119] Other responses militate against this view, notably the letter of the Papal Secretary of State to the Belgian Minister of Foreign Affairs;[120] the reply of the Sacred Penitentiary to the Bishop of Luçon;[121] the response of the Holy Office of August 6, 1906, which Cardinal Gasparri quotes;[122] and the response of the Holy Office to a Bishop in France allowing a civil judge to continue in office despite the fact that he was forced to pronounce upon divorce cases.[123] For if the seeking or granting of a civil divorce were intrinsically evil in itself, the Holy See could not tolerate it under *any* condition.[124]

It is to be noted that the above replies of the Holy See concern particular cases and special circumstances in certain countries. From them no practical general rule can be deduced for other cases or other countries.[125] The Holy See has to date issued no general decree settling the question, and in fact seems to be designedly abstaining from the issuance of any such decree. Even though the petitioners in several of the above cases phrased their questions: *an liceat, an fieri possit,* the Holy See answered: *posse, posse tolerari.*[126]

As regards the five cases in which the Sacred Penitentiary refused consorts permission to seek a civil divorce, the later response of that tribunal, which Cardinal Gasparri quotes, can be safely followed in practice in preferance to the five. Neither from the responses of the Holy See nor from the arguments of the protagonists of the strict opinion, can the intrinsic evil of divorce be proved

118. Cfr. *supra,* footnote 100.
119. Cfr. *supra,* footnote 102.
120. Cfr. *supra,* p. 265.
121. Cfr. *supra,* p. 263.
122. Cfr. *supra,* p. 265.
123. Cfr. *supra,* p. 262.
124. DE SMET, *op. cit.,* n. 401, pp. 347, 348; GASPARRI, *op. cit.,* [ed. 1932], II, n. 1324, p. 337.
125. GASPARRI, *loc. cit.,* p. 336.
126. CAPPELLO, *op. cit.,* III, Pars 2, n. 837, p. 368.

with certainty.[127] Until, therefore, a general decree of the Holy See to the contrary is forthcoming, it seems that the seeking of civil divorce can in certain circumstances be tolerated.

From the above responses and from the teaching of canonists and moralists, are taken the following principles:

It can be tolerated that a Catholic for a serious reason seek a civil divorce when there is present only a civil ceremony, i.e. a civil union contracted before a justice of the peace or minister. In this case there is merely the undoing of a civil contract which the Church never recognized in the first place.[128]

It can be tolerated that a Catholic, with his Ordinary's permission, seek a civil divorce when his marriage, though entered into canonically, has been dissolved or declared null and void by the ecclesiastical authority — provided that this seeking of a civil divorce is not done with the intention of recognizing that the civil authority has power to dissolve marriage, but only with the intention of obtaining one's civil liberty in order to enter a new marriage *in facie Ecclesiæ* and in order to avoid civil penalties for spouse and pastor in case a new marriage is entered.[129]

127. CAPPELLO, *loc. cit.,* p. 369.
128. TANQUEREY, *op. cit.,* n. 773, p. 448; NOLDIN, *op. cit.,* n. 668, p. 679; DE SMET, *op. cit.,* n. 391, p. 341.
129. S. R. et U. I., 9 sept. 1824: "*Postulabat denique idem Episcopus* [of New Orleans] *edoceri se, et Missionarios, quomodo, posita hujusmodi matrimoniorum invaliditate, se gerere debeant erga eos qui, post civile matrimonium jam consummatum, adhuc vivente consorte, novum cum alio cojugium coram Nobis* [*inquit*] *inire poscerent.* [...] *Poscenti autem novum cum alio inire matrimonium suggerere, quod et sibi prius consulat, et ipsi Parocho, agendo scilicet ut et sibi civilis reddatur libertas, et Parocho nihil sit inde mali obventorum; non id esset civilis repudii morem approbare, dummodo rite instruatur postulans, id non ideo fieri, ut solvatur matrimoniale vinculum, quia nullo jam vinculo detinetur, sed tantum ut se ac Parochum a legalibus pœnis civilibusque vexationibus redimat. Eodem sensu ac modo, quo toleratur primus actus civilis, expressio nempe consensus coram civili Magistratu, tolerari potest et secundus, ut nimirum se partes eximant ab effectibus primi. Hisce vero penes Gubernium peragendis non se immiscere debent Missionarii. Qui nubere exposcit, ipse negotium suum agat* [...]" — NRT, XVIII (1886), 482, 483.

It can be tolerated that a Catholic defendent, who is being sued for divorce in the civil courts by his consort defend his rights and the rights of his marriage contract. It would seem that he can even file a counter-suit to his partner's action and thus petition that divorce, if any is to be granted, be issued in his favor. This permission presupposes that the Catholic defendent has no intention of entering a new marriage except by ecclesiastical authorization. [130]

Under what conditions can it be tolerated that a Catholic, bound by a marriage which is by divine and ecclesiastical law valid, seek a civil divorce from his consort?

The law in English-speaking countries is not hostile, but rather indifferent to religion, and does not attempt to touch the conscience but only the external relations of citizens. [131] In these countries, a Catholic could petition the civil courts for a divorce under the following conditions, *all of which must be verified in a particular case:*

1) In every instance the permission of the local Ordinary is necessary in order that a Catholic seek a civil divorce. [132]

2) It would be unlawful for a Catholic to petition for a civil divorce if the State recognized civil separation

130. TANQUEREY, *op. cit.*, n. 773, p. 449; DE SMET, *op. cit.*, n. 392, p. 341. Permission for the defendent to counter-sue in this instance can be deduced from the following response of the Holy Office which allows a Catholic attorney to defend him: "*Utrum advocatus catholicus possit defendere causas partis conventæ contra actorem vinculi solutionem exquirentem ? Responsum fuit: Dummodo Episcopo constet de probitate advocati, et dummodo advocatus nihil agat, quod a principiis juris naturalis et ecclesiastici deflectat, posse tolerari.*" — S. C. S. Off., 22 maii 1860, referred to by the same Congregation in reply of April 3, 1877. Cfr. NRT, XVIII (1886), 485.

131. SLATER, *op. cit.*, p. 209.

132. *Acta et Decreta Concilii Plenarii Baltimorensis Tertii*, A.D. MDCCCLXXXIV (Baltimore: John Murphy, 1886), Tit. IV, cap. 2, n. 126, pp. 64, 65: "[...] *iis omnibus, qui matrimonio conjuncti sunt, præcipimus, ni inconsulta auctoritate ecclesiastica, tribunalia civilia adeant ad obtinendam separationem a thoro et mensa. Quod si quis attentaverit, sciat se gravem reatum incurrere et pro Episcopi judicio puniendum esse.*" Cfr. also CAPPELLO, *op. cit.*, III, Pars 2, n. 838, p. 370; TANQUEREY, *op. cit.*, n. 781, p. 454; CORONATA, *op. cit.*, III, n. 713, p. 985; NOLDIN, *op. cit.*, n. 671, p. 682.

and accorded it the same civil effects as divorce, or if the State recognized other similar legal remedies, such as separate maintenance, alimony, property settlements, financial support of wife and family, etc. In these circumstances, there would be no need of complete civil divorce. [133]

3) The Catholic consort can never licitly seek a civil divorce with the intention of dissolving his valid marriage bond and entering a new civil union. This intention is intrinsically evil and contrary to divine, natural and ecclesiastical law. [134]

4) There must be present a *causa gravissima,* not only of the private order, but of the public order as well. [135]

5) The Catholic consort seeking a civil divorce must declare that he does not thereby intend to break his valid marriage bond, but wishes only to be freed from the obligations of the civil contract annexed to it, and must make declaration of this intention under oath in the presence of the Ordinary or his delegate and two witnesses (cfr. Appendix I, Formulary II).

6) All scandal attendant upon the civil divorce must be removed in the best way possible according to the judgment of the Ordinary. [136]

How should the Ordinary deal with the cause of Catholic consorts who come to him with a petition for merely a civil divorce? There is no doubt that the Ordinary, in granting permission for spouses to seek a civil divorce, is thereby implicitly granting them an ecclesiastical separation also. Therefore, it would seem to be unlawful for the Ordinary to grant permission of seeking a civil divorce on *non-canonical* grounds. The safest procedure would be for the Ordinary to treat all cases of civil divorce petition

133. TANQUEREY, *loc. cit.*; GÉNICOT, *op. cit.*, n. 562, pp. 631, 632; BERARDI, *op. cit.*, n. 1064, p. 580.

134. CAPPELLO, *loc. cit.*, p. 370; MERKELBACH, *op. cit.*, III, n. 977, p. 979; PRÜMMER, *op. cit.*, III, n. 892, p. 647.

135. CORONATA, *loc. cit.*, NOLDIN, *loc. cit.*; DE SMET, *op. cit.*, n. 401-403, pp. 347-350; LOIANO, *op. cit.*, n. 564, p. 674.

136. S. C. S. Off., 6 aug. 1906 — cfr. *supra*, footnote 112.

first as ecclesiastical separation cases. They should be tried in the administrative way or by the judicial process and be granted or refused on canonical grounds only. After the case has been tried canonically, and right of separation given, then the Ordinary could grant permission for the innocent consort to betake himself to the civil courts for a civil separation or divorce. This permission could be attached as a corollary to the decree or sentence allowing the ecclesiastical separation, or it could be issued separately. This procedure of handling civil divorce petitions seems to be best and most concordant with the spirit of the Church's legislation on the separation of consorts. If the Ordinary, however, merely grants permission for the consorts to seek a civil separation or divorce, he would seem to be acting lawfully, provided he grants that permission on canonical grounds and conduct his investigation of them in a canonical manner.

There is a conflict between the Church's legislation on separation and the civil legislation on divorce, for an ecclesiastical separation supposes that the marriage bond remains intact, while the civil divorce completely breaks the civil marriage contract, and allows the consorts to enter a new civil union. There is little difficulty where the Ordinary has granted the innocent spouse a perpetual ecclesiastical separation. Can the Ordinary grant permission for the spouses to seek a civil divorce when he has granted them only a *temporary* ecclesiastical separation? It would be unwise for him to do so if the temporary separation were issued *ad tempus definitum.* In certain cases of its being issued *ad tempus indefinitum,* the Ordinary might permit the consorts to seek a civil divorce. For the ease with which the consorts can obtain permission to remarry civilly, for example in the United States, is well known. When the cause of their separation ceases, they can readily obtain a civil marriage license and renew their marital consent in the presence of the priest.

It would be well that all concerned in civil divorce

cases ponder the evils inherent in this pernicious practice as they are so eloquently outlined by Pope Leo XIII:

> Truly, it is hardly possible to describe the great evils which flow from divorce, Marriage contracts are made variable by it; mutual love is weakened; deplorable inducements to unfaithfulness are supplied; harm is done to the education and training of children; occasion is afforded for the breaking up of homes; the seeds of dissension are sown among families; the dignity of womanhood is lessened and brought low, and women are in danger of being deserted after having ministered to the pleasures of men. Since, then, nothing has such power to lay waste families and destroy the mainstay of kingdoms as the corruption of morals, it is readily seen that divorces are in the utmost degree hostile to the prosperity of families and States, springing as they do from the depraved morals of a people, and, as experience plainly shows, opening the way to every kind of evil-doing in public and private life.
>
> Furthermore, if the matter be thoroughly considered, we shall clearly see these evils to be the more especially dangerous, because, divorce being once tolerated, there will be no restraint powerful enough to keep it within the bounds marked out or pre-conjectured. Great indeed is the power of example, and even greater still the strength of passion. With such inducements it must necessarily follow that the eagerness of divorce, daily spreading by devious ways, will seize upon the minds of many like a virulent contagious disease, or like a flood of water rampaging through every barrier. These truths are undoubtedly clear in themselves; but they will become clearer still if we recall the lessons of experience. As soon as the road to divorce began to be made smooth by law, at once quarrels, jealousies, and judicial separations greatly increased; and such shamelessness of life followed, that men who had been in favor of these divorces repented of what they had done, and feared that, if they did not carefully seek a remedy by repeal of the law, the very State itself might come to ruin. [137]

137. LEO XIII, ep. encycl. *Arcanum,* 10 febr. 1880 — *Fontes,* III, n. 580, cap. 17, pp. 162, 163.