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The  
Canonical Separation  
*of*  
Consorts

AN HISTORICAL SYNOPSIS AND COMMENTARY  
ON CANONS 1128-1132.

BY

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## CHAPTER X

## The Effects of Separation

## ARTICLE I

## EFFECTS OF LEGITIMATE SEPARATION

Any separation occurring between husband and wife does not dissolve the marriage bond between them. Their marriage bond, which was created when they validly exchanged their marital consent, continues to persevere, no matter the reason for their separation. Legitimate separation makes it lawful for the consorts to dissolve the community of their conjugal life. They are released from the obligations and duties of bed, board and cohabitation. The other rights and duties arising from their marriage contract remain inviolate for the consorts, and, if they are parents, for their children.<sup>1</sup> The legitimately separated wife, therefore, unless special law rules otherwise, shares in the state of her husband as far as canonical effects are concerned (Canon 1112). Such separation, in itself, does not deprive her of a sharing in the burial place of her husband (Canon 1229).

## A. RESTORATION OF CONJUGAL COMMUNITY

Legitimate separation following upon the adultery of one of the consorts gives the innocent party the right in justice to refuse perpetually to the other the community

1. ROMANI, *op. cit.*, n. 1172, p. 799; WERNZ-VIDAL, *op. cit.*, V, n. 647, p. 849; TILLOY, *Traité théorique et pratique de Droit canonique* (2 vols., Paris: Arthur Savaète, 1895), II n. 2486, p. 104.

of conjugal life.<sup>2</sup> This right in justice arises from divine and ecclesiastical law. Canon 1130 is speaking only of the obligation in justice. Even if, therefore, the guilty party is repentant and amends his way of life, the innocent party is not bound in justice to take him back. Authors generally feel that *per accidens* there might sometimes exist an obligation *ex caritate, decentia, vel honestate* to receive the repentant sinner to conjugal life.<sup>3</sup> There might be such an obligation of receiving him in order to avert great evil or to promote great good. But the fear that the guilty one may commit the sin again unless conjugal life is restored, would not constitute any such obligation. However, the obligation *ex iustitia* cannot be enforced, because the innocent party is absolutely freed from a justice obligation of conjugal community, and the adulterer has perpetually lost the right by committing sin.<sup>4</sup>

Does the adulterous spouse have a right to restoration of conjugal life, if his formerly innocent spouse has committed the same crime after legitimate separation has taken place? Almost all authors hold that if the innocent party has committed the sin after separation *propria auctoritate*, he is bound to return at the other's request. For there exists compensation of the injury in this case, and the right of separation *propria auctoritate* is granted *sub conditione*, i.e. provided the innocent one does not commit the sin himself.<sup>5</sup>

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

3. VERMEERSCH-CREUSEN, *op. cit.*, II, n. 441, p. 306.

4. PAYEN, *op. cit.*, II, n. 2476, pp. 796, 797; BALLERINI, *Opus Theologicum Morale* (Vol. VI, absolvit et edidit Dominicus Palmieri, S.J., Prati: Giachetti, 1892), Tract X, Sect. VIII, cap. 2, n. 781, p. 377; CAPPELLO, *op. cit.*, III, Pars 2, n. 827, p. 348; SCHMALZGRUEBER, *op. cit.*, IV, tit. XIX, § II, n. 128, 129, pp. 419, 420; SAINT ALPHONSUS, *Theologia Moralis* (Tome VII, ed. novissima quam curavit Mich. Heilig, Mechliniæ: P. J. Hanicq; Sylvaeducis: Fratres Verhaeven, 1845), n. 965, p. 471.

5. SANCHEZ, *op. cit.*, III, lib. X, disp. 9, n. 30, p. 353; PAYEN, *loc. cit.*; CORONATA, *op. cit.*, III, n. 660, p. 920; GASPARRI, *op. cit.*, II, [ed. 1932], n. 1173, p. 245.

About the case of the innocent's separating with authority of the ecclesiastical judge, there was, and is, a dispute among authors. Some hold with Saint Thomas Aquinas<sup>6</sup> that strict justice would not force the *prius innocens*, in whose favor sentence of separation had been passed, to take back the other, but that the judge, out of equity, should force him to do so in order to avert danger to soul and public scandal. According to this opinion, the first adulterer has no right to petition reconciliation. This view is founded on the axiom: *quod semel bene definitum est, minime est retractandum*.<sup>7</sup>

Its advocates were also under the impression that causes of separation became irrevocably adjudged; "when the sentence of separation becomes irrevocably adjudged (*transit in rem iudicatam*) by the fact that the ten years conceded for appeal have elapsed, or if sentences in first, second and third instances were rendered."<sup>8</sup> They felt that the sentence of separation dissolved the right of cohabitation and that adultery committed later was a sin committed against God, but not against the dismissed spouse, *nec illi injuriam infert, utpote qui jure in illius corpus destitutus erat per sententiam*.<sup>9</sup>

The other opinion is that, on the contrary, the now guilty partner has to return because the judge's sentence did not give him a right to depart, but merely declared that he could use publicly the right given him by his partner's adultery. This right, arising from his partner's sin, was conditioned on his being innocent of the same sin and his continuing to remain so.<sup>10</sup>

6. SAINT THOMAS AQUINAS, IV, dist. 35, art. 6, ad 4um.

7. C. 6, C. VI, q. 4.

8. SANCHEZ, *op. cit.*, III, lib. X, disp. 9, n. 30, p. 354.

9. SAINT ALPHONSUS, *op. cit.*, n. 967, p. 474; PIRHING, *op. cit.*, IV, tit. XIX, § III, p. 100.

10. SCHMALZGRUEBER, *op. cit.*, IV, tit. XIX, n. 135, p. 421; REIFFENSTUEL, *op. cit.*, IV, tit. XIX, § III, p. 110; SANTI, *op. cit.*, IV, tit. XIX, n. 55, p. 186; WIDMANN, *Ius Canonicum Theorico-Practicum* (5 vols., August. Vind. et Eneponi: Josephus Wolff, 1760), IV, tit. XIX, n. 32, p. 496.

The Code does not directly solve the controversy, for the innocent spouse who commits adultery after legitimate separation is no longer a *coniux innocens*. Furthermore Canon 1130, in using these words, seems to designate a spouse who was innocent *before* separation.<sup>11</sup> If an innocent spouse, committing the sin of adultery after separation *propria auctoritate* is bound to return to his spouse, so would he seem to be obliged after separation by a judge's sentence. Does the sin of the second adulterer restore the right of community of conjugal life to the first? The common opinion is that it does not.<sup>12</sup> All the authors agree that the consorts should be exhorted to resume marital life in order to prevent danger of incontinence to each other and to prevent scandal.<sup>13</sup>

This is Romani's conclusion on the controversy: "*Quid autem si interea, pendente divortio, pars insons ipsa in adulterium inciderit? Communis sententia est eam non amittere ius permanendi in divortio; id mihi durius, neque publico iuri cavet neque privato, nec congruit cum principiis generalibus de compensandis iniuriis: reor itaque adigi posse ad redintegrandam vitæ communionem.*"<sup>14</sup>

There is no doubt that the innocent's committing the sin gives his partner the right of action before the ecclesiastical court to sue for resumption of marital life. The Pontifical Code Commission, on April 8, 1941, declared that causes of separation of consorts are considered before the law as causes which never become irrevocably adjudged.<sup>15</sup> Therefore adultery on the part of the formerly innocent consort is a new fact which permits reopening of the case,

11. PAYEN, *op. cit.*, II, n. 2476, footnote 1, p. 797.

12. VERMEERSCH-CREUSEN, *loc. cit.*; CAPPELLO, *op. cit.*, III, Pars 2, n. 827, p. 349.

13. AERTNYS, *op. cit.*, II, n. 934, p. 623; BALLERINI, *op. cit.*, n. 782, p. 378.

14. ROMANI, *op. cit.*, n. 1168, p. 797.

15. 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."

even though it may have passed through two concordant sentences upholding separation.

It would seem best that the resuming of conjugal life should take place in the same way the separation was effected, i.e. by judicial sentence. Thus Cardinal Gasparri says that the no-longer innocent party "is certainly not bound to restore conjugal life before he is forced to do so by sentence of the ecclesiastical judge upon petition of the other party."<sup>16</sup>

After legitimate separation, *auctoritate propria vel ecclesiastica*, the innocent consort has the right to enter the religious life, or, if the husband, to enter the clerical state. In practice, the man separating on his own initiative could scarcely become a cleric without scandal, unless his wife's adultery were notorious. He should, therefore, get the sanction of the ecclesiastical judge for his separation.<sup>17</sup> The innocent consort does not need the consent of the adulterer to pursue a higher life. He can do so even against the latter's will. The only requisites, according to Code Law, are certain dispensations from the Holy See in order that he be validly admitted into novitiate (Canon 542, 1°), or in order that he may receive Holy Orders (Canon 987, 2°).

This right is not conceded to the guilty partner unless the other gives his consent, or has himself embraced a state opposed to marital community. If the guilty party embraces the religious life without the other's consent, he could, according to pre-Code law, be recalled by the innocent spouse even after solemn religious profession.<sup>18</sup> This contingency could hardly take place today because the consent of the other party is ascertained before dispensation is given. *Tacit* consent of the innocent to the other's entering religion sufficed, for example, when the innocent knew of the proposed entry and did not stand in the way when he could

16. GASPARRI, *op. cit.*, II, [ed. 1932], n. 1173, p. 245.

17. SAINT ALPHONSUS, *op. cit.*, n. 979, p. 473.

18. SANCHEZ, *op. cit.*, III, lib. X, disp. 10, n. 12, 13, p. 359.

easily do so. Pre-Code authors presumed consent when the innocent party, upon the other's petition, denied reconciliation, or when he neglected to call the other back after a separation of two years.<sup>19</sup> By continued refusal of reconciliation, the innocent party tacitly shows that he never wants to be reconciled. If hope of reconciliation is forever taken away from the guilty spouse, the innocent party acts unjustly and unreasonably in intending that his consort remain continually *in statu suspensivo*.<sup>20</sup>

The innocent party has the right to recall the guilty partner to community of conjugal life if he wishes, and this even after a sentence of separation has been rendered by the ecclesiastical judge. The guilty party is under obligation to return when called, unless, with his partner's consent, he has embraced a state contrary to marriage, i.e. the religious life or clerical state.<sup>21</sup> For the separation was granted as a favor to the innocent party. Its purpose is not to penalize him by being turned to his harm or disadvantage. Nor should the sentence of separation be to the advantage of the guilty one against whom it was rendered. The innocent party can recall his spouse, even though sentence of separation was given. It is not even necessary that a reversal of sentence be awaited, for by it the innocent party has lost no right, nor has the guilty been freed from the obligation of cohabitation, except as long as he has not been recalled by the innocent. If the guilty refuses to return, he can be forced to do so by ecclesiastical sentence and sanction.<sup>22</sup> Saint Alphonsus excepts the case where the guilty party is the wife, and she prudently fears

19. SAINT ALPHONSUS, *op. cit.*, n. 969, p. 476; SANCHEZ, *loc. cit.*, n. 16, p. 360.

20. SCHMALZGRUBER, *op. cit.*, IV, tit. XIX, n. 126, p. 419; SANCHEZ, *op. cit.*, III, lib. X, disp. 10, n. 8, 16, pp. 358, 360; WERNZ, *op. cit.*, IV, Pars 2, n. 710, footnote 126, p. 659; SAINT ALPHONSUS, *op. cit.*, n. 969, p. 476; BALLERINI, *op. cit.*, n. 779, pp. 375, 376.

21. Canon 1130. — "[...] *potest autem eundem admittere aut revocare, nisi ex ipsius consensu ille statum matrimonio contrarium susceperit.*"

22. SCHMALZGRUBER, *op. cit.*, IV, tit. XIX, n. 123, p. 418; BALLERINI, *loc. cit.*

death or cruel treatment from her husband on her return. This is evident, for cruelty is itself a grounds for her separation from her husband.<sup>23</sup>

As regards separation on the grounds mentioned in Canon 1131, §1, "in all these cases the common life must be resumed when the reason for the separation ceases. If, however, the separation was pronounced by the Ordinary either for a time or indefinitely, the innocent party is not obliged to return except when the time specified by the Ordinary has elapsed or the Ordinary gives written order to return."<sup>24</sup>

Very probably Canon 1131, § 2 is an extension to other grounds of the rule which Pope Urban III enunciated concerning the case of a wife separated by reason of her husband's heresy:

*De illa vero, quæ, viro suo labente in hæresim, ipsius consortium sine iudicio ecclesiæ declinavit, utrum, revertente illo ad catholicam unitatem, ad redintegrandum matrimonium sit cogenda, videtur nobis, quod mulier, maxime si ea intentione decessit, ut lapsus in hæresim tædio pariter et confusione affectus se ab errore suo converteret, ei, quum reversus fuerit, est reddenda, quæ, etiamsi reverti noluerit, compellatur. Si vero iudicio ecclesiæ ab eo sine spe matrimonii redintegrandi recessit, ad recipiendum eum nullatenus eam dicimus compellendam.*<sup>25</sup>

These other grounds are extrinsic to the nature of marriage, and do not directly contradict its nature as adultery does. There is less evil in them, and their effects, therefore, are commensurate with the causes themselves. The *ius coniugale* is not lost by them, but only its exercise for a time.<sup>26</sup> Their effect is only temporary, so that, when the

23. Saint ALPHONSUS, *op. cit.*, n. 967, p. 474; ÆRTNYS, *op. cit.*, II, n. 934, p. 623.

24. Canon 1131. — § 2. "In omnibus his casibus, causa separationis cessante, vitæ consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumve tempus, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore."

25. C. 6, X, de divortiiis, IV, 19.

26. ZOESIUS, *Commentarius in Jus Canonicum Universum Sive Ad Decretales Epistolas Gregorii IX* (ab J. Nabben et Mauritio a Geismaer locupletatus, Venetiis: Nicolaus Pezzana, 1757), in lib. IV, tit. XIX, n. 26, p. 535.

cause ceases, the right of separation ceases also.<sup>27</sup> If a spouse has separated *propria auctoritate* on any of these grounds when the reason for separation is certain and there is danger in delay, he is bound to restore marital life on cessation of the grounds.

The Canon, however, tempers with equity the last sentence of Pope Urban's decision above: "*Si vero iudicio ecclesiæ ab eo sine spe matrimonii redintegrandi recessit, ad recipiendum eum nullatenus eam dicimus compellendam.*"<sup>28</sup> If the Ordinary has fixed a time limit to the separation, *eo elapso*, conjugal life is to be restored, unless the separation has been prorogued by the Ordinary.<sup>29</sup> If the sentence or decree of the Ordinary conceded separation "until the cause ceases," then the separation must cease upon cessation of the grounds. If the innocent party is unwilling to return, he sins, and the other partner can seek the intervention of the Ordinary to verify the cessation of the grounds and to enforce reconciliation. If the Ordinary has fixed a time limit to the separation, say three months, on its expiration community of marital life is to be restored, and the recalcitrant party sins in refusing reconciliation.<sup>30</sup> If the Ordinary has granted separation *ad tempus indefinitum*, the innocent party cannot be forced to return on cessation of the cause, but only by a new decree of the Ordinary.<sup>31</sup> In any case, the innocent spouse should not be compelled to restore conjugal community unless the guilty party gives sure signs of amendment and sufficient guarantee of security for his spouse.<sup>32</sup>

27. WERNZ-VIDAL, *op. cit.*, V, n. 647, p. 849.

28. BLAT, *op. cit.*, III, Pars 1, n. 543, p. 692.

29. WERNZ-VIDAL, *loc. cit.*

30. COKONATA, *op. cit.*, III, n. 666, p. 927.

31. Canon 1131, § 2; WERNZ-VIDAL, *op. cit.*, V, n. 647, p. 849.

32. SANCHEZ, *op. cit.*, III, lib. X, disp. 18, n. 1 sq., p. 399; SCHMALZGRUEBER, *op. cit.*, IV, tit. XIX, n. 143, 163 sq., pp. 423, 431; WERNZ-VIDAL, *op. cit.*, V, n. 645, footnote 130, p. 847; ENGEL, *Collegium Universi Juris Canonici* (14. ed., 2 partes, Salisburgi: Typis J. J. Mayr, 1759), II, lib. IV, tit. XIX, § IV, p. 1079.

## B. NEED OF RECOURSE TO ORDINARY

When an innocent consort separates on his own initiative from his partner guilty of certain and manifest, or at least public, adultery, he is under no obligation to betake himself to his Ordinary for ratification of the separation. For the innocent spouse in this case gets his right of separation from the words of Christ, and any sentence of the Ordinary would be only declarative, i.e. saying that from the proofs it is evident that the crime has been committed. Recourse to the Ordinary and his declaration are not necessary when the sin is certain and notorious, or at least public. Recourse to the Ordinary, however, is necessary when the crime is only doubtful.<sup>33</sup> In practice every case of perpetual separation *propria auctoritate* on grounds of adultery should be submitted to the Ordinary's judgment in order to prevent the abuse and evils which might arise from hasty, ill-advised separations occasioned by mistaken judgment and exaggeration on the part of the innocent consort concerning his grounds for separation.<sup>34</sup>

When the innocent spouse separates from his consort *propria auctoritate* on grounds for temporary separation mentioned in Canon 1131, § 1, the reason being certain and there being danger in delay, must he betake himself to his Ordinary for ratification of his privately-instituted separation? Most modern authors neglect to answer the question. Coronata says simply: *non certo constat*.<sup>35</sup> Payen says the Canon does not demand recourse by strict precept, and even seems to deny its necessary.<sup>36</sup> From the general principles governing this kind of separation, however, it would seem that he is obliged to recur to the Ordinary

33. CAPPELLO, *op. cit.*, III, Pars 2, n. 827, p. 347; GASPARRI, *op. cit.*, [ed. 1932], II, n. 1175, p. 246; PIRHING, *op. cit.*, IV, tit. XIX, n. 16, p. 99; SCHMALZGRUEBER, *op. cit.*, IV, tit. XIX, n. 111, p. 413.

34. CAPPELLO, *op. cit.*, III, Pars 2, n. 827, p. 348; DE SMET, *op. cit.*, n. 260, p. 228.

35. CORONATA, *op. cit.*, III, n. 664, p. 925.

36. PAYEN, *op. cit.*, II, n. 2489, p. 810.

for a ratification of the separation. For, in allowing separation because of danger in delay, the Legislator is giving an emergency permission for the protection of the innocent consort.

De Smet calls this kind of separation *provisoria*. By the word, he seems to mean that it is given with the conditional stipulation that the case be submitted later to the Ordinary for settlement.<sup>37</sup> In another place, this author says that every case, apart from that dealing with certain and notorious adultery, must be referred to the Ordinary, and a sentence of separation must be obtained.<sup>38</sup>

This opinion is corroborated by what pre-Code authors say about cruelty, one of the grounds mentioned in the Canon. Reiffenstuel explains private separation on grounds of cruelty thus:

*Quando uxor ex sævitia viri patitur probabilem timorem aut periculum vitæ, membri, gravis, aut atrocis verberationis, aut crudelis tractationis juxta dicta, potest propria auctoritate discedere a viro, non quidem ad faciendum verum, et constans Divortium, sed ad vitandum tale periculum, donec causa coram Judice proposita, sententia feratur, vel eidem sufficiens cautio de securitate præstetur. [...] Ratio est: quia existente, et urgente tali periculo, Jus naturæ defensionem quovis modo etiam ex fuga capiendam concedit[...].*<sup>39</sup>

This seems to be the purpose of the permission to separate *propria auctoritate* when there is danger in delay, as Reiffenstuel explains, in order to "avoid such danger until the case, litigated before the judge, is settled by sentence." Many pre-Code authors, when mentioning the danger-in-delay permission, add the phrase: *vel non sit facilis aditus ad judicem*.<sup>40</sup> Saint Alphonsus allows private separation also for the innocent party, *si non posset litigare, aut judicem adire, vel facile sævitiam probare*. "If he can approach

37. DE SMET, *op. cit.*, n. 261, p. 228.

38. DE SMET, *op. cit.*, n. 263, p. 229.

39. REIFFENSTUEL, *op. cit.*, IV, tit. XIX, § II, n. 46, pp. 106, 107.

40. Thus SANCHEZ, *op. cit.*, III, lib. X, disp. 18, n. 3, p. 399; PIRHING, *op. cit.*, IV, tit. XIX, n. 62, p. 106; ZOESIUS, *op. cit.*, in lib. IV, tit. XIX, n. 28 p. 535.

the judge," the Saint says, "and prove the cruelty, he is bound to await the sentence of the judge. [...] The reason that a sentence is required is lest separations take place far and wide. Another reason is that this grounds [cruelty] was introduced by authority of the Church, and it is equitable, therefore, that no one make use of it as grounds for separation without the authority of the Church."<sup>41</sup> What these authors say about the grounds of cruelty should be applied to the other reasons for separation mentioned in Canon 1131, § 1. If the reason for separation is certain and there is danger in delay, the innocent consort can separate *propria auctoritate* until the case can be referred to the ecclesiastical judge. In the words of Santi: "*Et quidem quando probabilis timor periculi gravis urgeat, potest uxor auctoritate etiam privata virum deserere donec causa discutiaturs coram iudice.*"<sup>42</sup>

#### C. DOMICILE OF THE LEGITIMATELY SEPERATED WIFE

A very important effect of legitimate separation for the wife, if she were legitimately separated from her husband by ecclesiastical decree or sentence, perpetually or *ad tempus indefinitum*, is that she can acquire her own domicile. This provision is made by the Instruction, *Provida Mater*. Article 6, § 2 states:

A wife, who has been legitimately separated from her husband perpetually or for an indefinite time (i.e. by judicial sentence of a competent ecclesiastical tribunal or even by sentence of a civil tribunal, provided that sentence is recognized by the Holy See in virtue of a concordat, or by a decree of the Ordinary) does not follow the domicile of her husband, and therefore should be cited either before the Ordinary of the place where the marriage occurred or before the Ordinary of her own domicile or quasi-domicile.<sup>43</sup>

41. Saint ALPHONSUS, *op. cit.*, n. 971, p. 476.

42. SANTI, *op. cit.*, IV, tit. XIX, n. 43, p. 184.

43. *Provida*, Art. 6, § 2 — AAS, XXVIII (1936), 316: "*Uxor, a viro perpetuo aut ad tempus indefinitum separata legitime, i.e. per sententiam iudicalem competentis tribunalis ecclesiastici, vel etiam civilis a S. Sede, vi concordati, recognitam, aut per Ordinarii decretum, non sequitur domicilium viri, ideoque conveniri debet vel coram Ordinario loci in quo nuptiae initae sunt, vel coram Ordinario sui domicilii vel quasi-domicilii.*"

It is to be noted that the Instruction uses the words "perpetually or for an indefinite time." A wife, therefore, separated from her husband by sentence or decree of the Ordinary *ad tempus definitum*, is incapable of acquiring her own domicile, but rather follows the domicile of her husband as prescribed by Canon 93, § 1. It is evident that, if she is separated *ad tempus definitum*, she lacks the intention of remaining apart from her husband indefinitely — which intention is necessary for the acquiring of her own proper domicile.

The Instruction mentions only legitimate separation by judicial sentence or by a decree of the Ordinary. What is to be said of a wife who has legitimately separated perpetually from her husband on her own authority, as permitted by Canons 1129 and 1130, when his crime of adultery is morally certain and either notorious or public? Again what is to be thought of a wife who has legitimately separated temporarily from her husband on her own authority, as permitted by Canon 1131, § 1, when the reason for separation is certain and there is danger in delay? Do the wives in these two cases acquire their own domicile?

The common opinion of the authors is that a wife, who is separated from her husband according to the norms of Canons 1128-1132, is legitimately separated from him and is, therefore, capable of acquiring her own domicile, according to Canon 93, § 2.

She, then, who separates legitimately *propria auctoritate* on account of her husband's certain and manifest or public adultery, or he from her, is capable of acquiring her own domicile. It makes no difference whether she is the innocent party separating from, or whether she is the guilty party being expelled by him. In either instance she can have the intention of remaining permanently in a place apart from her husband.

The wife, likewise, who is separated on her own authority from her husband on grounds mentioned in Canon 1131,

§ 1, when the reason is certain and there is danger in delay, can also, according to the common opinion, acquire her own domicile.<sup>44</sup> Here again it makes no difference which partner is the guilty one. The intervention of the Ordinary, according to the majority of authors, is not absolutely necessary for the wife's acquiring domicile in this case. It is merely required that she be *legitimately* separated from her husband *ad tempus indefinitum*. The possibility that she may have to return to her husband, *causa cessante*, has no bearing, because, for the acquiring of domicile, it is not necessary that she have the absolute intention of remaining forever apart from her husband. The intention of remaining apart from him in another place for an indefinite period of time suffices. She will certainly have the intention of living apart from him until the grounds for separation ceases.<sup>45</sup>

A few authors, however, seem to hold that if the wife lawfully separates on her own authority for adultery or danger in delay, she is not capable of domicile without a

44. DOHENY, *op. cit.*, II, pp. 649, 650; MICHELIS, *Principia Generalia De Personis In Ecclesia* (Lublin, Polonia: Universitas Catholica; Brasschaat, Belgium: De Bievre, 1932), pp. 135, 136; BESTE, *op. cit.*, in Can. 93, § 2, p. 139; CORONATA, *Institutiones Iuris Canonici* (Vol. I, ed. altera, Taurini: Marietti, 1939), n. 126, footnote 7, p. 144; TOSO *Ad Codicem Iuris Canonici Commentaria Minora* (Lib. II, De Personis, Tom. I, Taurini-Romæ: Marietti, 1922), p. 20; BLAT, *Commentarium Textus Codicis Iuris Canonici* (Lib. II, De Personis, ed. altera, Romæ: Ferrari, 1921), p. 16; OJETTI, *Commentarium In Codicem Iuris Canonici* (Lib. II, De Personis, Romæ: Apud ædes Universitatis Gregorianæ, 1928), p. 54; VERMEERSCH-CREUSEN, *op. cit.*, I, n. 212, p. 181; COSTELLO, *Domicile and Quasi-Domicile*, The Catholic University of America Canon Law Studies, n. 60 (Washington, D.C.: The Catholic University of America Press, 1930), pp. 163, 164; OESTERLE, *Prælectiones Iuris Canonici* (Tom. I, Romæ: Collegium S. Anselmi, 1931), in Can. 93, p. 55; ROMANI, *Institutiones Iuris Canonici* (Vol. I, Jus Constitutionale, Romæ: Apud Auctorem, 1941), n. 225, p. 142; MAROTO, *Institutiones Iuris Canonici Ad Normam Novi Codicis* (Tom. I, 3. ed., Romæ: Apud Commentarium Pro Religiosis, 1921), pp. 411, 412; CHELODI, *Ius Canonicum De Personis* (3. ed. curavit Pius Ciprotti, Vicenza: Societa' Anonima Tipografica, 1942), n. 92, p. 155; CAPPELLO, *Summa Iuris Canonici* (Vol. I, 4. ed., Romæ: Apud Ædes Universitatis Gregorianæ, 1945), n. 194, p. 160; BERUTTI, *Institutiones Iuris Canonici* (Vol. II, Taurini-Romæ: Marietti, 1943), n. 5, p. 13; COCCHI, *Commentarium In Codicem Iuris Canonici* (Vol. II, 4. ed., Taurinorum Augustæ: Marietti, 1937), n. 3, p. 23; WERNZ-VIDAL, *op. cit.*, II, n. 12, footnote 9, p. 15.

45. MICHELIS, *loc. cit.*

previous *ad tempus indefinitum* decree or sentence of the Ordinary.<sup>46</sup> Sartori, whom the others appear to follow, says: "*Ratio videtur, quia non est legitime [idest per iudicem ecclesiasticum] a viro suo separata, etsi legitime discesserit propria tantum auctoritate, juxta can. 1130.*" This is this author's comment upon a response of the Pontifical Code Commission which will be discussed later (cfr. *infra*, p. 312).

Coronata and Regatillo (in the 1941 edition of his *Institutiones*) deny domicile to the wife legitimately separated *propria auctoritate* because of danger in delay (Canon 1131, § 1).<sup>47</sup> In the 1946 edition of the same work, Regatillo goes even further and excludes legitimate separation *propria auctoritate* on grounds of adultery: "*Domicilium voluntarium habere possunt: [...] uxores a maritis legitime separatæ (c. 1. 129-1.131) per sententiam vel decretum separationis perpetuæ seu indefinitæ; non propria auctoritate ob adulterium (c. 1.130), neque ob causas c.1. 131; etsi ob adulterium permittitur innocenti separatio perpetua; non ob alias causas; [C. Sacram. 15 aug. 1936 art. 36 (sic)] ; [...]*".<sup>48</sup>

In Volume II of his *Ius Sacramentarium* published in the same year, Regatillo thus explains his view:

"Effects of separation made *propria auctoritate* — This has a *merely moral* effect, in relation to peace of conscience. The innocent consort in the above-mentioned cases, of course, separates *licitly*. But [the separation] lacks *juridic* value, namely as far as the effects of law are concerned. Thus, although an innocent wife, on account of the adultery of her husband, separates *licitly* from him perpetually on her own authority, yet she cannot acquire her own

46. BENEDETTI, *Ordo Iudicialis Processus Canonici Super Nullitate Matrimonii Instruendi* (ed. novissima, Taurini: Marietti, 1938), p. 15; TORRE, *Processus Matrimonialis* (Neapoli: M. d'Auria, 1947), p. 14; SARTORI, *Enchiridion Canonicum seu Sanctæ Sedis Responsiones* (5. ed., 1917-1935, Vicetia: Ex Typ. Commerciali, 1935), p. 24.

47. CORONATA, *loc. cit.*; REGATILLO, *Institutiones Iuris Canonici* (Vol. I, Santander: Sal Terræ, 1941), n. 193, p. 112.

48. *Ibid.*, 2. ed. adaucta, 1946, n. 193, p. 122.



domicile, but necessarily retains the domicile of her husband. The Sacred Congregation of the Sacraments (*loc. cit.*, art. 6, § 2) defines the *legitimate* separation by which, according to Canon 93, § 2, a wife can acquire her own domicile, as that which takes place by sentence of the judge or by decree of the Ordinary *in perpetuum vel ad tempus indefinitum*." 49

There is no doubt that the omission by Article 6, § 2 of *separatio propria auctoritate* in its definition of "legitimate separation" has caused Regatillo to change his former opinion. Although several of the books quoted above in footnote 44 appeared after the Instruction of 1936, yet it must be admitted that, of the authors holding the common opinion, only Doheny alludes to this Article of the Instruction on the subject and nevertheless retains the common opinion.

It is difficult to believe that the Legislator has made an oversight in omitting mention of the two instances of legitimate separation *propria auctoritate*. That omission would seem to have been deliberate, for the same omission was made by the Pontifical Code Commission on July 14, 1922, almost fourteen years before the appearance of the Instruction in question. On that date, the Commission solved the following doubt: "*Utrum uxor, a viro malitiose deserta, possit, ad normam can. 93, § 2, obtinere proprium ac distinctum domicilium.*" The response was: "Negative," nisi a iudice ecclesiastico obtinuerit separationem perpetuam, aut ad tempus indefinitum (cfr. *infra*, p. 312).

A probable reason for the Holy See's restricting the effects of this permission to separate on private authority, at least as far as matrimonial processes are concerned, is the arbitrary nature of them. The Instruction seems to make it licit for a wife to separate thus, without granting this kind of separation the effects of legitimacy as regards voluntary domicile mentioned in Canon 93, § 2. The decree

49. REGATILLO, *Ius Sacramentarium*, II, n. 588, p. 398.

at the beginning of the Instruction *Provida Mater* states that the Canons of the Code are in no wise changed by the provisions therein contained.<sup>50</sup> Therefore, the writer feels, Canon 93, § 2 can still be given the common interpretation mentioned above, until such time as the Holy See issues a further declaration on the subject. From Article 6, § 2, it can be surmised that any declaration issued will probably be in the direction of the opinion now held by Regatillo. In practice, therefore, it seems safest for diocesan tribunals to obtain a decree or sentence of separation, before proceeding with marriage cases, the competency over which depends upon a separated wife's domicile.

#### D. CUSTODY OF CHILDREN

It is a general principle of law that, after separation, the children are to be given in custody to the innocent party. This rule is thus enunciated by the Roman Law:

*Illud quoque disponendum esse perspeximus, ut si quando inter maritum et uxorem nuptias solvi contigerit, ex huiusmodi [matrimonio] nati filii nullo modo lædantur ex separatione nuptiarum, sed ad parentum hereditatem vocentur ex patris substantia indubitanter alendi. Et si quidem pater occasionem separationis præbeat et mater ad secundas non venit nuptias, apud matrem nutriantur expensas patre præbente; si vero per causam matris ostenditur solutum matrimonium, tunc apud patrem et maneat filii et alantur. Si autem contigerit patrem et maneat filii et alantur. Si autem contigerit patrem quidem minus idoneum esse matrem vero locupletem, apud eam pauperes filios manere et ab ea nutriri iubemus. Quemadmodum enim filii locupletes coguntur matrem egentem alere, ita iustum decernimus et a matre locuplete filios pasci. Quod autem de alenda matre et filiis definivimus indigentibus, hoc quoque in omnibus ascendentibus descendantibusque personis utriusque naturæ valere præcipimus.*<sup>51</sup>

50. AAS, XXVIII (1936), 312.

51. Nov. (117.7).

We have seen how the provisions of this Novel were adopted and adapted by Pope Gregory IX, when he awarded custody of child to a husband-convert against his wife remaining in Judaism. The response of Pope Gregory, incorporated into the *Corpus Iuris Canonici*,<sup>52</sup> became a norm of the Canon Law of the Church and was applied by the Glossarists to separation cases (cfr. *supra*, p. 106).

The Code retains the principle that custody of children is to be given to the innocent party. An exception to the general rule is where one of the consorts is a non-Catholic. In this case, the Catholic consort is to be given custody in compliance with Pope Gregory's words: "*in favorem maxime fidei Christianae respondemus.*" But the Ordinary in either case may decide otherwise for the welfare of the children, and, especially, for their Catholic education.<sup>53</sup>

Canon 1132 does not refer to children of either spouse by a former marriage or to children born to either from an adulterous union. It has in view only the children common to both parents. The reason the Code gives custody to the innocent party is the presumption that he is better suited to have charge of them, especially as regards their Catholic education. Further, since he is the innocent party, he has more right in this regard than has the guilty consort.<sup>54</sup>

If the innocent party, however, is non-Catholic, the rule is that the guilty Catholic consort is to obtain custody, since he is presumed to be better able to procure the children's Catholic training. But, in any case, whether both spouses are Catholic or one is non-Catholic, the Code leaves

52. C. 2, X, *de conversatione infidelium*, III, 33.

53. Canon 1132. — "*Instituta separatione, filii educandi sunt penes coniugem innocentem, et si alter coniugum sit a Catholicus, penes coniugem Catholicum, nisi in utroque casu Ordinarius pro ipsorum filiorum bono, salva semper eorumdem catholica educatione, aliud decreverit.*"

The S. R. Rota often decides custody of children in its sentence of separation, usually giving custody to the innocent plaintiff. Cfr. S. R. Rota Dec., XXI (1929), Dec. LXIV, n. 11, p. 530: "[...] *commissa filia curae patris*"; S. R. Rota Dec., XXIV (1932), Dec. XIX, n. 32, p. 189: "[...] *filii remanentibus penes matrem.*"

54. REIFFENSTUEL, *op. cit.*, IV, tit. XIX, § III, n. 103, p. 111; SANCHEZ, *op. cit.*, III, lib. X, disp. 20, n. 2, p. 407; PAYEN, *op. cit.*, II, n. 2497, p. 815; VERMEERSCH-CREUSEN, *op. cit.*, II, n. 444, p. 308.

to the judgment of the Ordinary which is to have charge of the children. He is to decide which consort is better fitted for their Catholic upbringing. In a mixed marriage, according to the circumstances of the case, this might even be the non-Catholic spouse.

There are other factors which might influence the Ordinary's decision. Pre-Code authors permitted custody to the guilty husband in a case where the mother afterwards remarried. If the father were the cause of the separation, the children were to be raised by the mother at the father's expense. If the mother were the cause, they were to be raised by the father at the mother's expense, especially in a case where she was wealthy. Father and mother were considered as correlative in regard to the matter expenses. Older authors also advised that generally the children under three years of age were to be left with the guilty mother; after that age they were to be given over to the father's care.<sup>55</sup> Today, according to Code Law, these matters are left to the judgment of the Ordinary. He must look first of all to the Catholic education of the children. It is well that, in the matter of the children's custody and expenses, he have regard for the civil law of the country.<sup>56</sup>

#### E. SUPPORT OF WIFE

The Code of Canon Law omits mention of the support of the separated wife. In pre-Code Law, however, this matter was treated at great length. In the Decretals of Pope Gregory IX, the entire eight Chapters of Title XX, *De donationibus inter virum et uxorem, et de dote post divortium restituenda*, Book IV, are devoted to this subject, and especially concern the question of the wife's dowry.<sup>57</sup>

55. REIFFENSTUEL, *loc. cit.*, n. 104, 105, pp. 111, 112; SANCHEZ, *loc. cit.*, n. 3-10, pp. 407, 408; SCHMALZGRUBER, *op. cit.*, IV, tit. XIX, n. 181-183, p. 437.

56. VERMEERSCH-CREUSEN, *loc. cit.*

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

The provisions therein contained are taken in great part from Roman civil law.<sup>58</sup> The Church, in settling cases of separation, is sometimes called upon to decide the matter of the wife's support and dowry *ex connexione causarum*, i.e. in connection with the separation case itself.<sup>59</sup> In these instances, She follows the principles contained in this Title of the Decretals, derived from Roman law.

The Church does not insist, however, that these principles of Roman law be followed in deciding the civil effect of the wife's support after separation. She recognizes the jurisdiction of the civil law in this matter, and allows determination of the civil effects of separation by the civil courts, provided the sentences of these conform to the principles of natural justice.<sup>60</sup> In fact, it is the consensus of authors that Ordinaries should generally leave the settlement of the civil effects of separation, such as custody and support of children, the wife's alimony, etc., to the civil tribunals, provided these do not contravene divine or ecclesiastical laws.<sup>61</sup>

It is unnecessary to delve deeply into the institution of the dowry, its different kinds and its disposition after separation, since it is obsolete in modern times. The following is a general summary of the question:

If the husband is the cause of the separation, the wife retains all her rights acquired by marriage. She recovers her dowry and any *donatio propter nuptias* which he may have given her.<sup>62</sup> He is bound to support her for the rest of her life, if the separation is perpetual, in the same manner

58. De Angelis, *op. cit.*, III, in lib. IV, tit. XX, pp. 342, 343.

59. Canons 1553, § 1, 1° and 1961.

60. Canons 1016 and 1961.

61. TILLOY, *op. cit.*, II, n. 2486, p. 104; WERNZ-VIDAL, *op. cit.*, n. 647, p. 849; CORONATA, *De Sacramentis*, III, n. 667, p. 928; SANTI, *op. cit.*, II, in lib. IV, tit. XIX, n. 61, p. 188; BALLERINI, *op. cit.*, n. 815, p. 389.

62. C. 1, 4, X, *de donationibus inter virum et uxorem, et de dote post divortium restituenda*, IV, 19; ENGEL, *op. cit.*, II, in lib. IV, tit. XX, n. 15, pp. 1085, 1086; WIDMANN, *op. cit.*, IV, tit. XX, n. 6, p. 502; SEBASTIANELLI, *Praelectiones juris Canonici* (2. ed., De Rebus Romae: Pustet, 1905), n. 168, p. 172.

he was supporting her before the separation took place.<sup>63</sup> If the adultery of the wife is the cause of the separation, she loses her dowry to her husband. For the general rule is that the innocent party is not bound to restore the things he has received from the other.<sup>64</sup> If the wife is the cause of a perpetual or temporary separation, she receives neither dowry nor support from her husband.<sup>65</sup>

If the separation took place by mutual consent of the spouses for the purpose of entry into religion, the wife recovers her dowry, the man his *donatio propter nuptias*, equal distribution being made of the goods which accrued to the couple as a result of their common industry. The equitable settlement of these questions is left to the judgment of the judge hearing the separation case.<sup>66</sup>

## ARTICLE II

### EFFECTS OF ILLEGITIMATE SEPARATION

The wife who illegitimately separates from her husband necessarily retains his domicile.<sup>67</sup> To the question: "Whether a wife, maliciously deserted by her husband, can acquire her own and distinct domicile according to Canon 93, § 2?" the Pontifical Code Commission replied: "Negatively, unless she has obtained from the ecclesiastical judge a perpetual separation, or one *ad tempus indefinitum*."<sup>68</sup> Where-

63. SANTI, *op. cit.*, IV, tit. XX, n. 15, 16, p. 192; SCHMALZGRUBER, *op. cit.*, IV, tit. XX, n. 111, p. 478; REIFFENSTUEL, *op. cit.*, IV, tit. XX, § III, n. 81, p. 117.

64. SEBASTIANELLI, *loc. cit.*; COUARRUVIAS, *Omnia Opera* (2 tomes, Venetiis: Apud Hæredem Hieronymi Scoti, 1597), I, Pars 2, cap. 7, § 6, n. 1, 2, pp. 232, 233.

65. SANCHEZ, *op. cit.*, III, lib. X, disp. 20, n. 7, p. 408.

66. SANTI, *loc. cit.*; REIFFENSTUEL, *loc. cit.*, n. 80, p. 117.

67. Canon 93, § 1.

68. Pont. Comm., 14 iulii 1922 — AAS, XIV (1922), 526: "*Utrum uxor, a viro malitiose deserta, possit, ad normam can. 93, § 2, obtinere proprium ac distinctum domicilium.*"

"Resp. Negative, nisi a iudice ecclesiastico obtinuerit separationem perpetuam, aut ad tempus indefinitum." Cfr. I.E.R., XX (1922), p. 548.

fore, if a husband maliciously has deserted his wife, she indeed licitly lives apart from him because she is innocent, but not *legitimately* in the sense that she can thereby acquire her own domicile.<sup>69</sup>

There is a very important *private* response of the Supreme Signatura which declared that the competent court in a certain marriage case was not that of the legal, obligatory domicile, as far as the wife was concerned. The case involved a physician who had married a woman in New York. The man later abandoned her and fled to Florence, Italy, where he endeavored to sue for the nullity of the marriage before the ecclesiastical tribunal of Florence on the grounds of fear. The Apostolic Tribunal replied that "the competent tribunal in this case is only the court of New York, where the marriage took place, and where Clelia, the wife of Alexander, has her quasi-domicile."<sup>70</sup> This decision, contrary to the common opinion of canonists, was undoubtedly founded on principles of equity, for the decision states: "*Non igitur [...] concludi potest ius esse viro, qui erga uxorem ita se gessit, eam postea trabendi coram iudice domicilii quod sibi eligere placuerit, in ultimis etiam finibus terræ.*" This decision is of the greatest importance, both on account of the authority of the Supreme Tribunal, whose decisions other ecclesiastical tribunals must reckon in order to avoid any possible *querela nullitatis* against their own sentences, and on account of the great breadth of its application which embraces all matrimonial causes.<sup>71</sup>

Book V of the Code of Canon Law, *De Delictis et Pœnis*, contains no sanctions against spouses who separate from one another illegitimately. Title XIV of that Book contains some Canons. *De delictis contra bonos mores*, against big-

69. VERMEERSCH-CREUSEN, *op. cit.*, I. n. 212, p. 181.

70. Supreme Signatura, Decision, *Florentina, Commissionis, seu nullitatis matrimonii*, 7 nov. 1932 — Apoll., VI (1933), 102-105; J.P., XIII (1933), 106-108.

71. J.P., XIII (1933), 108.

amy, rape, incest, public adultery, public concubinage. But none of the Canons in this Title concerns spouses who illicitly separate as regards cohabitation. This silence of the Code forces the conclusion that illegitimate separation is not a delict in the strict sense of the law, because no canonical sanction *saltem indeterminata* has been attached to it.<sup>72</sup> It cannot, then, be a grounds for criminal prosecution against the guilty party. The Ordinary, however, can protect and enforce the rights of the innocent party, victim of illegitimate abandonment by the other, with judicial or administrative sanctions. Bishops and particular councils, moreover, if they feel it necessary, can enact legislation in this regard, and sanction their laws with penalties.<sup>73</sup>

In the United States, the Third Plenary Council of Baltimore commands Catholic consorts not to approach the civil tribunals to obtain a separation *a thoro et mensa* without ecclesiastical authority. If they have done so, they are guilty of serious sin, and are to be punished according to the judgment of the Ordinary.<sup>74</sup> The Fathers of the Council seem to have translated directly into Latin the expression "separation from bed and board," which, in English, connotes the idea of separation as regards cohabitation as well. In Latin, however, *separatio a thoro et mensa*, if taken strictly, means separation from bed and board — the two aspects of community of conjugal life which refer to the

72. Canon 2195, § 1.

73. Canon 2221. Cfr. LE PICARD, *op. cit.*, pp. 257, 258.

74. *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, precipimus, ne 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 iudicio puniendum esse."

The Second Plenary Council of Baltimore recommended that Bishops in their synods forbid under pain of excommunication civilly divorced persons to enter new marriages — *Acta et Decreta Concilii Plenarii Baltimorensis Secundi*, A.D. MDCCCLXVI (ed. altera, Baltimore: John Murphy, 1880), tit. V, cap. 9, n. 327, p. 172. The Third Plenary Council (*loc. cit.*, n. 124, pp. 63, 64) did actually inflict *ipso facto* excommunication, reserved to the Ordinary, on divorced persons who dared to attempt remarriage. Cfr. Canons 1063, § 1 and 2319.

private order. The Council Fathers undoubtedly meant to legislate against 'civil separations as regards cohabitation, and civil divorce.

In another place, this same Council says that it is evident that those who ask their marriages to be dissolved by the civil magistrate, are guilty of *gravissima culpa*.<sup>75</sup> This legislation, since it supplements the Code Law, is still in effect.<sup>76</sup>

For principles concerning the nature and gravity of the sin committed by consorts who separate illegitimately as regards cohabitation, the reader is referred to the writings of the moral theologians.<sup>77</sup>

75. *Acta et Decreta Concilii Plenarii Baltimorensis Tertii, loc. cit.*, n. 124, p. 63.

76. BARRETT, *A Comparative Study of the Third Plenary Council of Baltimore and the Code*, The Catholic University of America Canon Law Studies, n. 83 (Washington, D.C.: The Catholic University of America, 1932), p. 134.

77. Cfr. especially: PRÜMMER, *op. cit.*, III, n. 677, p. 492; MERKEL-BACH, *op. cit.*, III, n. 970, p. 973; NOLDIN, *op. cit.*, III, n. 667, p. 679; GÉNICOT, *op. cit.*, II, n. 558, pp. 624, 625; LEHMKUHL, *op. cit.*, II, n. 713, p. 509; SABETTI-BARRETT, *Compendium Theologiae Moralis* (34, ed. recognita a D. F. Creeden, S.J., Neo-Eboraci-Cincinnati: 1939), n. 861, p. 858.

## Conclusions

Separation of consorts, in the canonical sense, has its origin with Christianity. Christ, in reaffirming the indissolubility of the marriage bond, abolished divorce and permitted separation in its stead. He Himself allowed separation as regards cohabitation on the grounds of adultery. Saint Augustine, with his broad interpretation of that word, was chiefly instrumental in extending Christ's permission to other grounds.

From the beginning there have been a gradual growth and evolution of the Church's doctrine and practice concerning separation. This development centered chiefly in the conditions and qualifications necessary for the grounds' legitimacy and in the method by which the separation was to take place. The Code Law has made very little change in the former legislation on the doctrine. The main differences are that now separated spouses require certain dispensations before they can enter religion and that heresy is no longer a grounds for perpetual separation.

The inevitable conclusion to be drawn from a study of former and present-day ecclesiastical legislation concerning the separation of consorts is that the Church regards the cohabitation of husband and wife as a serious obligation. As public authority, the Church is the custodian of family life and is vitally interested and concerned that marital community be preserved. Its preservation is the rule, its disruption the exception. All law, divine natural, divine positive and ecclesiastical, demands that the spouses preserve the community of their conjugal life.

The Church requires that, as a general rule, consorts desiring to disrupt their common life submit their case to her judgment. Their separation from one another concerns the public order, and the Church, the public authority, insists that they cannot separate without her sanction. The

Church, in order to protect the innocent party from injury, makes two exceptions to the general rule: the cases of adultery and danger in delay. Even in these, it is strongly urged that the separations be submitted to the Ordinary for ratification whenever possible, on account of the dangers latent in subjective private separations.

As to the grounds themselves, adultery is the only cause for perpetual separation. The other grounds, no matter their nature, are temporary in the sense that the separation must cease upon their cessation. The Church insists that many conditions be fulfilled before any separation grounds becomes legitimate. Thus the adultery must be *perfectum et consummatum*, formal and culpable, morally certain, not permitted, nor caused, nor condoned, nor compensated. The other grounds must have one effect, namely, danger of grave harm to either body or soul of the innocent spouse. The consorts, therefore, must not be separated for doubtful, slight or trivial reasons. It is not sufficient that there be present merely incompatibility of temperament, dislike for one another, desire for peace and tranquillity, etc.

The Ordinary, in hearing separation cases, has the choice of two procedures: the administrative and the judicial. The end and object of them both is that he arrive at moral certainty as to the existence and legitimacy of the grounds alleged. His choice of the administrative method does not mean that he can be less exacting of proof necessary to induce that moral certitude.

Under certain conditions the Ordinary may allow the consorts to present themselves to the civil courts in order to secure civil effects for an ecclesiastical separation already obtained. He may even give them, if necessary, permission to seek a civil divorce. Here it is question of the Church's tolerating a pernicious system as a necessary evil. The Church is very strict in determining the conditions under which her tolerance can be used. Rarely should civil divorce petitions be granted because of the evils consequent upon their being granted, the chief one being that the parties are thereby

freed from any civil penalties for contracting a bigamous union. In all cases of this kind, it is highly desirable that the Ordinary first try the case ecclesiastically on canonical grounds, and then, if need be, grant permission for the separated spouses to betake themselves to the secular courts.

Separated consorts should be reconciled if the innocent party himself commits the sin of adultery, the grounds on which he was separated. Spouses should be reunited, if they have been separated for other causes, when these cease or when the time limit set by the Ordinary has expired. If the Ordinary has granted separation *ad tempus indefinitum*, the innocent partner cannot be forced to return except by a new decree of the Ordinary.

An important effect of legitimate separation is that the wife can acquire her own distinct domicile provided she has been separated from her husband by ecclesiastical decree or sentence perpetually or *ad tempus indefinitum*. There is question whether or not she can acquire domicile in separating legitimately *propria auctoritate*. It is safest in practice to act on the principle that she cannot.

The children of separated consorts are generally to be given in custody to the innocent party, except when he is non-Catholic. In that case, custody is to be given to the guilty Catholic spouse. The Ordinary may, in a particular case, disregard the general rule for the child's welfare and especially for its Catholic education. Regarding the civil effects of separation, among them the matter of the wife's support, the civil laws of the country are to be taken into consideration, with settlement of these generally to be made by the secular courts.

It is to be noted, in conclusion, that the Code of Canon Law contains no penalties against consorts who separate illegitimately from each other.

AD LAUDEM ET GLORIAM  
OMNIPOTENTIS DEI AC  
INTEMERATÆ VIRGINIS