firm in his stand, as may be seen from his observations which follow. He stated: *"Quid si agatur de crimine adulterii ad separationem thori? Videtur per decretum* c. 1, *ut lite non contestata etc.,* II, 6, *quod constitutio locum non habeat: nam ut ibi patet, processus qui per iura vetera fieri poterat contumace in causa matrimoniali fieri non potest eo casu."* [114] The use of *videtur* leads one to surmise that in actual practice the liberties as granted in this constitution were applied to separation cases. Wernz (+ 1914) remarked that this was the case, and disagreed with the Glossator, who had restricted such marriage cases as were contemplated in the constitution to cases respecting the bond.[115]

Since the later constitution, *Saepe* did not qualify the extent of the earlier constitution *Dispendiosam* in regard to marriage cases, it cannot be said that there was any authentic prohibition of the inclusion of separation cases under its provisions. Although the commentators for the most part restricted the comprehension of *"causae super matrimoniis"* to the matrimonial bond, nevertheless a contrary practice seems to have been in use. Zabarella (+ 1417) who wrote a century after the constitutions were issued, agreed with Ioannes Andreae in excluding the cases of separation from being prosecuted in a shortened procedure.[116] The commentators seemed to depend for the most part on the interpretation of Ioannes Andreae, yet, as Cerchiari pointed out, there was a general tendency to employ the summary procedure even before the Clementine legislation. The latter served only to authenticate a more or less general trend.[117] Since the prohibition derived from a doctrinal interpretation rather than from any positive law, it seems that the bishops interested in a speedier dispatch of separation cases applied the favorable view, and included them in the provisions of the two constitutions. Such a conclusion, although not supported by the teaching of the commentators at the time, seems to have some merit, especially in the light of the statements made by Cerchiari and Wernz.

[114] *Glossa Ordinaria* s.v. *matrimoniis* ad c. 2, *de iudiciis,* II, 1, in Clem.

[115] *Ius Decretalium,* IV, n. 728.

[116] *Commentarium in Clementinas* (Venetiis, 1504), Rub. *de iudiciis,* s.v. *Dispendiosam,* n. 25.

[117] *Sacra Romana Rota,* I, 140, n. 5.

CHAPTER III

THE PROCEDURE IN CASES OF SEPARATION FROM THE COUNCIL OF TRENT (1545 - 1563) TO THE CODE OF CANON LAW (1918)

THE canonical sources from the Council of Trent to the Code of Canon Law are replete in demonstrating procedural norms especially for marriage cases. Since cases of separation are included under this general heading, a complete survey of the matrimonial procedural law would be far too extensive for the purpose of this work. With this in mind, the writer will limit his treatment here to particular norms for separation cases and any treatment of the ordinary rules of marriage procedure, utilized in separation trials, will be generally omitted. This will forestall all needless repetition and unwarranted detail. However, whenever reference to the common processual regulations is necessary for the presenting of a clear and unified treatment, such mention will be made.

In the endeavor to present a uniform historical survey, the strictly chronological order will be abandoned for a rather topical treatment, inasmuch as this type of presentation seems to be more acceptable in demonstrating the evolution of already existing norms, as well as the emergence of new developments in the hearing of separation cases. In view of this distinction, the present chapter will be occupied with a study of the formal process, still the ordinary method in this period, as also with a study of the later extra-judicial and administrative procedures.

The outstanding influence for Canon Law in this period was obviously the Council of Trent. Summoned by Pope Paul III (1534-1549) in May of 1542, its primary purpose was to combat the erroneous teachings of the current Protestant revolt. As a result there were incorporated in the decrees of the Council several canons concerned with marriage, and, more important for the subject treated here, separation. The procedural norms presented in the later sessions of the Council (152-1563), although very biref, nevertheless

constituted the framework for the later legislation which dealt with the contemplated reform.[1]

In the two centuries subsequent to the Council of Trent, it is clear that procedural norms for conducting marriage trials were widely neglected.[2] Poland was especially lacking in this regard. The shocking conditions there occasioned two encyclical letters of Pope Benedict XIV (1740 - 1758).[3] So strong was the language of these epistles to the Polish bishops that the Pontiff even threatened to reserve all marirage cases of that nation to the Roman Tribunals, unless improvement was soon apparent.

Authors mentioned Poland as an example of deplorable conditions, but the disregard of legal provisions was almost universal. A more general legislation was felt so very necessary that the same great Pontiff on November 3, 1741 published to the universal Church his renowned Constitution *Dei miseratione.*[4] This celebrated constitution had far reaching effect; it not only stabilized judicial procedure in marriage cases, but was to be the norm for the thenceforth intervening legislation until the enactment of the Code of Canon Law, almost two centuries later.

Further legal enactments particularly pertinent to procedural law were the Instruction of the Sacred Congregation of the Council, issued on August 22, 1840,[5] and an Instruction of the Sacred Congregation of the Holy Office of June 22, 1883, addressed to Oriental bishops.[6] This last directive was incorporated for the most part by the Sacred Congregation for the Propagation of the Faith in its Instruction of the same year as sent to the bishops of the United States.[7] This Instruction was incorporated along with the Constitution *Dei miseratione,* of Benedict XIV in the *Acta* of the III Plenary Council of Baltimore in 1884.[8] The assembly of the hierarchy also recommended to the attention of the American bishops the procedural norms of the Austrian Instruction of 1855. This Instruction was promulgated by Joseph Cardinal Rauscher (1797 - 1875), Archbishop of Vienna, in the meeting of the Austrian hierarchy in 1855 and it was approved by the Holy See as a particular law of the Austrian Empire.[9]

[1] The Council was concerned with general reform rather than particular norms. Its chief concern was an insistence that matrimonial cases belonged to ecclesiastical tribunals and a recommendation for a reorganization of the different grades of tribunals—sess. XXXIV, *de matrimonio,* c. 12; Sess. XXIV, *de ref.,* c. 20.

[2] Feije, *De Impedimentis et Dispensationibus Matrimonialibus* (3. ed., Lovanii, 1885), p. 475 (hereafter referred to as *De Impedimentis*).

[3] Ep. encycl. *Matrimonii,* 11 apr. 1741—*Fontes,* n. 307; ep. encycl. *Nimiam licentiam,* 18 maii 1743—*Fontes,* n. 337.

[4] *Fontes,* n. 318; Bouix, *Tractatus de Judiciis Ecclesiasticis* (2 vols. in 1, Parisiis, 1855), II, 434 (hereafter referred to as *De Judiciis*).

[5] *Fontes,* n. 4069. This Congregation was erected on August 2, 1564 by Pope Pius IV (1559-1565) to provide for the execution of the Tridentine decrees. Its power was extended by Pope St. Pius V (1566-1572) and Gregory XIII (1572-1585). Finally Pope Sixtus V (1585-1590) in a constitution of Jan. 22, 1588, *Immensa aeterni Dei,* gave it the full faculty of interpreting the decrees of the Council, but reserved to the Pope any interpretation of dogma—

Zamboni, *Collectio Declarationum Sacrae Congregationis Cardinalium Sacri Concilii Tridentini Interpretum* (4 vols., Atrebati, 1860-1868), I, XIV (hereafter cited as *Collectio Declarationum S.C.C.*); Bouix, *Tractatus de Curia Romana* (Parisiis, 1859), p. 169. This Congregation shared the hearing of marriage cases with the Sacred Roman Rota, although the latter was not very active until the present century. Pope Pius X (1903-1914), by his constitution, *Sapienti Consilio,* of June 29, 1908, revived the Sacred Roman Rota and gave it jurisdiction to hear *"causae omnes contentiosae non maiores,"* which included cases of separation—*Fontes,* n. 682.

[6] S. C. S. Off., instr. (*ad Ep. Rituum Orient.*), a. 1883—*Fontes,* n. 1076.

[7] S. C. de Prop. Fide, instr., *Causae Matrimoniales,* a. 1883—*Fontes,* n. 4901; *Collectanea S. Congregationis de Propaganda Fide* (2 vols., Vol. I, ann. 1622-1866, Nn. 1-1299; Vol. II, ann. 1867-1906, Nn. 1300-2317, Romae: S. C. de Propaganda Fide, 1907), II, n. 1587 (hereafter referred to as *Collectanea*). Although there is no title of address prefaced to this Instruction in the *Fontes* or the *Collectanea,* it follows immediately upon another Instruction to the bishops of the United States regarding the manner of procedure in criminal and disciplinary cases of clerics. Many authors refer to it as directed to the bishops in the missionary territories of the world, but the better opinion confines it to the bishops of the United States. This view is substantiated by a response of the Sacred Congregation of the Holy Office, which refers to it as sent to the hierarchy of this country—cf. S. C. S. Off. (*Colonien*), 23 iun. 1903, n. 2—*Fontes,* n. 1266.

[8] "In agendis hisce causis pro rei gravitate exacte servetur tum Constitutio Benedict XIV, *Dei Miseratione,* 3 nov. 1741, tum Instructio a S. Cong. de Prop. Fide Nobis communicata quae incipit *Causae Matrimoniales . . .*"—*Acta et Decreta Concilii Plenarii Baltimorensis Tertii, A. D. MDCCCLXXXIV* (Baltimore: John Murphy and Co., 1886), n. 304.

[9] "Utiliter etiam consuli poterit Instructio pro judiciis acclesiasticis Imperii

Not only the Council of Trent but the Holy See through several papal letters and through Instructions of the Congregations insisted upon the right of the Church to hear marriage cases. These suits, it was pointed out, were not a matter of the mixed forum, but belonged to the exclusive jurisdiction of the Church. The reason for this declaration was based on the nature of such cases as *"causae spirituales"*; thus the Church alone was competent. The same applied to separation cases. These cases, since they affected the very status of persons, were considered *"res gravissimae"* and were to be judged solely by an ecclesiastical tribunal.[10]

It was not intended that the jurisdiction of the Church was exclusive in only vincular cases. Separation, even if it was only temporary, was considered a public matter and contrary to the nature of marriage. As a result, it not only looked to ecclesiastical recognition but also necessitated the intervention of ecclesiastical authority. Moreover, the actual hearing before the Church was to be considered not simply as a recommendation, but rather as a compulsory mandate.[11]

Austriaci in causis matrimonialibus, a. 1855 a gravis theologis et canonistis Romanis, licet solo privato suo judicio, commendata"—*loc. cit.*; cf. *Instructio Austriaca Josephi Cardinalis Rauscher,* 4 maii 1855—*Acta et Decreta Sacrorum Conciliorum Recentiorum, Collectio Lacensis* (7 vols., Friburgi Brisgoviae: Herder, 1870-1890), V, coll. 1286-1316 (hereafter referred to as *Collectio Lacensis*); *Analecta Iuris Pontificii* (Romae, 1855-1869; Parisiis, 1872-1891), II (1857), 2515-2562.

[10] "Si quis dixerit, causas matrimoniales non spectare ad iudices ecclesiasticos: anathema sit."—Conc. Trident., sess. XXIV, *de matrimonio,* canon 12; Pius VI, const. *Auctorem fidei,* 28 aug. 1794, Prop. 58, 59, 60—*Fontes,* n. 475; Pius IX, *Syllabus Errorum* (a. 1864), Prop. 74—*Fontes,* n. 543; idem., litt. ap. *Ad apostolicae* 22 aug. 1852, n. 2—*Fontes,* n. 511; *Idem.,* allocut. *"Acerbissimum,"* 27 sept. 1852, n. 3—*Fontes,* n. 515; instr. S. C. De Prop. Fide (a. 1883), n. 1—*Collectanea,* II, n. 1587. The authors of this period clearly confined separation cases to the ecclesiastical forum—Schmalzgrueber, *Ius Ecclesisticum Universum* (5 vols. in 12, Romae, 1843-1845), II, tit. 1, n. 53 (hereafter cited as Schmalzgrueber); Gasparri, *Tractatus Canonicus de Matrimonio,* 3. ed., II, nn. 1457, 1458; Wernz, *Ius Decretalium,* IV, n. 731.

[11] "Et propterea nefal est coniuges fideles se, propria voluntate aut arbitrio, a coniugali toro separare, nisi ex causa a sacris canonibus permissa et auctoritate ac iudicio Ecclesiae cognita et probata."—Sixtus V, const. *Ad compescendum,* 30 oct. 1586—*Bullarum Diplomatum et Privilegiorum Romanorum Pontificum Taurinensis Editio* (24 vols. et Appendix, Augustae Taurinorum, 1857-1872), VIII (1572-1588), 789. The III Plenary Council of Baltimore (1884) was faced with a special problem of Catholics seeking a civil separation without ecclesiastical permission. Such people were warned of the gravity of this offense and reminded of the penalty which he bishop might inflict at his own discretion—*Acta et Decreta Concilii Plenarii Baltimorensis Tertii, A.D.* MDCCCLXXXIV, n. 126.

[12] Wernz, *Ius Decretalium,* IV, n. 714.

[13] Sess. XXIV, *de matrimonio,* Canon 7.

[14] "Si quis dixerit, ecclesiam errare, cum ob multas causas separationem inter coniuges quoad thorum seu quoad cohabitationem ad certum incertumve

Furthermore, this hearing before the Church was a serious matter. Even in this late post-Tridentine period the solemn process was still the ordinary mode of judging such suits. The summary and administrative methods were doubtless in use, but the law still considered the formal procedure to be the accepted practice. It was not until the latter part of this era that the more informal method received ecclesiastical sanction.[12]

Article 1. The Formal Procedure

There were in this period actually very few major changes from the law of the Decretals with respect to the procedural norms for separation cases. Because of this small degree of development, the formal process will be treated as a whole, without the various divisions of the last chapter. Emphasis, as would be expected, will be placed upon the emergence of later developments. It is to be noted that the general outline of a separation suit followed the rules of marriage trials and, as was noted in the study of the Decretals, certain special provisions were added for separation cases. These supplementary norms suffered a degree of change in the period now being treated.

The Council of Trent in its decrees on separation emphasized the evangelical teaching of the indissolubility of marriage and of the need of permission for separation on the grounds of adultery.[13] It further ruled that the causes for separation were not delineated in an exhaustive list. The unity of marital life could be broken by the Church for many causes, and this could be done permanently or just as a temporary measure.[14] However, despite the general tone of the

Tridentine legislation, the interpretation of this canon always confined permanent separation to the ground of adultery. Other causes for separation were many but permitted only a temporary separation which terminated at the cessation of the motive cause.[15]

The competent ecclesiastical authority for the hearing of separation cases was determined by the Council of Trent as belonging to the bishop alone. By this decree, all inferior prelates of the diocese were excluded from any immediate jurisdiction over these suits and no infringement upon the episcopal right to judge these cases in the first instance was to be permitted.[16] The general opinion of the authors not only admitted that the vicar general could hear these cases when empowered with a special mandate but even held it as *probabilius* that he might act without this commission. In practice they noted that this difficulty was obviated through the issuance of a special mandate or in consequence of an extant legitimate custom.[17]

If the bishop himself or the vicar general in his stead could not hear these cases, provision was to be made for delegated judges.

tempus fieri posse decernit: anathema sit"—sess. XXIV, *de matrimonio,* Canon 8.

[15] S. C. C., *Taurinen.,* 16 mart. 1726—*Thesaurus Resolutionum Sacrae Congregationis Concilii* (167 vols., Urbini, 1739-1740; Romae, 1741-1908), III, 290 (hereafter cited as *Thesaurus Resolutionum S. C. C.*); Zamboni, *Collectio Declarationum S. C. C.,* IV, 388; S. C. C., *Firmana,* 16 maii 1789—*Thesaurus Resolutionum S. C. C.,* LVIII, 99; Sacra Romana Rota, *Separationis quoad Thorum et Mensam,* 5 iul. 1910 coram Rmo. P. D. Michaeli Lega, Decano, dec. XXIV, n. 11—*S. Romanae Rotae Decisiones seu Sententiae quae . . . prodierunt ab anno 1909* (Romae: Typis Polyglottis Vaticanis, 1912—), II (1910), 238, 247 (herefter referred to as *Decisiones*).

[16] "Ad haec causae matrimoniales et criminales non decani, archidiacani aut aliorum inferiorum iudicio, etiam visitando, sed episcopi tantum examini et iurisdictioni relinquantur. . . ."—sess. XXIV, *de ref.,* c. 20.

[17] Sanchez, Lib. II, disp. 40, n. 17; Lib. III, disp. 29, n. 18; Pirhing, *Ius Canonicum in V Libros Decretalium* (5 vols., Dilingae, 1674-1678), Lib. I, tit. 18, n. 47 (hereafter cited as *Ius Canonicum*); Santi, *Praelectiones Iuris Canonici* (5 vols. in 2, Ratisbonae, Neo Eboraci et Cincinnati, 1886), Lib. IV, tit. 18, n. 10; Mansella, *De Impedimentis et de Processu Iudiciali in Causis Matrimonialibus* (Romae, 1881), p. 173, n. 3; Wernz, *Ius Decretalium,* IV, n. 729; Lega, *Praelectiones de Iudiciis Ecclesiasticis* (4 vols., Romae, 1896 - 1901), IV, 468 (hereafter cited *De Iudiciis Ecclesiasticis*); Gasparri, De Matrimonio 3. ed., II, n. 1460.

Tridentine law decreed that such judges were to be appointed in provincial and diocesan synods. Their number was to be at least four, and vacancies occurring between synods were to be filled by the ordinary with the advice of his chapter. Later enactments of the Holy See repeated these provisions.[18]

Other officers of the court worthy of mention were the notary and the defender of the bond. The former was necessary to inscribe accurately the acts of the case, as in all marriage cases.[19] The office of the *defensor vinculi* was demanded by Benedict XIV for all marriage cases involving the dissolution of the bond.[20] However, most of the authoritative authors of this period dispensed with this officer in cases of separation. They were for the most part agreed that his presence was required simply in vincular cases and therefore was superfluous in separation suits; he was regarded as the defender of a bond that was not attacked, and therefore he had nothing to defend.[21]

The general rule for competency in marriage cases, and therefore in separation suits, was that the bishop of the domicile of the husband possessed jurisdiction to hear these cases. The two rules, *"actor sequitur forum rei,"* and *"uxor sequitur domicilium mariti,"* were united in the above given general norm. Both resolved themselves into a grant of competency to the bishop of the husband's domicile.[22] An important exception to this general rule was incorporated in the Instruction of the Sacred Congregation for the Propa-

[18] Conc. Trident., sess. XXV, *de ref.,* c. 10; *Benedictus XIV,* const. *Dei miseratione,* 3 nov. 1741, n. 4—*Fontes,* n. 318; S. C. C., instr., 22 aug. 1840—*Fontes,* n. 4069; S. C. de Prop. Fide, instr. a. 1883, n. VI— *Collectanea,* II, n. 1587.

[19] Benedictus XIV, *ibid.,* n. 5; S. C. de Prop Fide, *loc. cit.*

[20] *Loc. cit.*

[21] Wernz, *Ius Decretalium,* IV, n. 730; Gasparri, *De Matrimonio,* 3. ed., II, n. 1473; Lega, *De Iudiciis Ecclesiasticis,* IV, 478; Feije, *De Impedimentis,* p. 476.

[22] S. C. C., 28 ian. 1865, III: "Uxorem forum sortiri in quo vir suum domicilium habet."—*Acta Sanctae Sedis* (41 vols., 1865-1908), II (1866), 137-141 (hereafter referred to as *ASS*); *Austrian Instruction,* Sec. 96—*Collectio Lacensis,* V, col. 1298; S. C. de Prop. Fide instr., a. 1883, n. II—*Collectanea,* II, n. 1587; Schmalzgrueber, Lib. II, tit. II, n. 12; Gasparri, *De Matrimonio,* 3. ed., II, n. 1463, ftn. 2.

gation of the Faith in 1883. This exception presented two situations in which the ordinary rule of competency was not observed. They were of particular import, since they were concerned with separation cases. The two circumstances provided for were the cause of a separation *a toro et mensa* and that of a wife maliciously deserted by her husband. In the first case each spouse had the right to present his or her case before the bishop of the diocese where the defendant had a domicile after a decree of separation had been granted. In the second case, the wife maliciously deserted by her husband had the choice of pleading her cause before the bishop of the diocese wherein she was residing or before the bishop of the domicile of her errant husband. Any change of domicile after the institution of proceedings was of no importance.[23] The replies of the Roman Congregations are ample proof that the domicile of the husband with these stated exceptions continued in the law to determine competency until the advent of the Code of Canon Law.[24]

Whether a bishop was competent to hear a separation case on the basis of quasi-domicile was not stated in the law. The concept did not develop until after the Council of Trent when authors treated

[23] S. C. de Prop. Fide, instr. a. 1883, n. II: "Exceptioni locus est si conjugale vitae consortium aut per separationem a toro et mensa, aut per desertionem malitiosam a marito patratam sublatum sit. Priori casu quaelibet pars ius accusandi contra alteram ipsi competens, coram episcopo dioecesis, ubi haecce domicilium habet, exercere debet. Posteriori casu uxor apud Episcopum intra cuius dioecesim domicilium eius situm est, actionem instituere potest. Postquam citatio iudicialis intimita est, mutatio quoad coniugum domicilium facta mutationem respectu iudicis competentis minime operatur"—*Collectanea,* II, n. 1587. This quotation is a verbatim inclusion of Sec. 96 of the *Austrian Instruction,* and is demonstrative of the great influence of this particular legislation—*Collectio Lacensis,* V, col. 1298. The III Plenary Council of Baltimore explicitly decreed that this section of the foregoing instruction of the Sacred Congregation for the Propagation of the Faith should be observed in determining the competency of a judge.—*Acta et Decreta Concilii Plenarii Baltimorensis Tertii, A. D. MDCCCLXXXIV,* n. 305.

[24] S. C. C., *Parisien.,* 14 dec. 1889—*Thesaurus Resolutionum S. C. C.,* CXLVIII, 838. The Sacred Congregation of the Holy Office, while sustaining this general juridical principle, limited its application to a case of two Catholics. In a judgment affecting a mixed marriage, the bishop of the domicile of the Catholic spouse was competent—S. C. S. Off., 30 iun. 1892—*Fontes,* n. 1157; S. C. S. Off. (*Colonien.*), 23 iun. 1903—*Fontes,* n. 1266.

of the validity of marriage in places wherein the Decree *Tametsi* of the Council of Trent was not in force. Their treatment was concerned chiefly with determining the proper pastor in cases wherein the possession of parochial jurisdiction was necessary on the part of the assisting pastor.[25]

Authors were not agreed on the adequacy of quasi-domicile as a determinant of juridical competency. Gasparri (+ 1934) made mention of this lack of concord among canonists but termed the opinion favoring its inclusion as *"probabilior."* He based his argument on the fact that one becomes a subject by quasi-domicile and, since in a positive and probable doubt jurisdiction is supplied, he concluded that this was a safe opinion to follow. His treatment was a conclusion from the views of acceptable earlier canonists.[26]

The role of plaintiff in a case of separation was limited to the innocent consort alone. For no reason was a third party allowed to plead such a suit, unless he acted for the aggrieved consort with a special mandate from the latter. As a result, the parties alone had this right antecedent to the suit, and the pleading of an actual case was the right of the injured spouse alone.[27]

The adultery postulated for the bringing of a suit of separation was still what it had been in the Decretal Law. Authors of this period discussed the formal aspect more clearly, and in their descriptions of this crime always postulated an act as fully consummated, perpetrated without the consent of the other spouse, not condoned nor compensated by the same. Actually, there were no legal enactments on this matter.[28]

[25] Reiffenstuel, Lib. II, tit. II, n. 22; Schmalzgrueber, Lib. I, tit. II, n. 16, In his letter *Paucis abhinc,* Pope Benedict XIV (1740-1758) gave official recognition to quasi-domicile as a factor in the law—*Fontes,* n. 447.

[26] *De Matrimonio,* 3. ed., II, n. 1463; Pirhing, *Ius Canonicum,* Lib. II, tit. II, n. 18; Reiffenstuel, Lib. II, tit. II, n. 39; Schmalzgrueber, Lib. II, tit. II, n. 17.

[27] S. C. de Prop. Fide, instr. a. 1883, n. III—*Collectanea,* II, n. 1587; *Austrian Instruction,* sec. 215—*Collectio Lacensis,* V, col. 1311; Schmalzgrueber, Lib. IV, tit. XVIII, n. 13; Wernz, *Ius Decretalium,* IV, n. 743, III; Gasparri, *op. cit.,* II, n. 1364.

[28] Sanchez, Lib. X, disp. V, nn. 2, 3, 13, 19, 20, 23; Schmalzgrueber, Lib. IV, tit. XVIX, nn. 98, 99, 103, 106, 107, 108, 133; Cosci, *De Separatione Tori*

From a general review of the decisions and replies of the Roman Congregations as well as the doctrine of the authors of this period, it is evident that separation cases were regarded as matters of gravity and the need for most conclusive proofs is manifest. Furthermore, judges were admonished to proceed cautiously especially because of the danger of incontinence for separated consorts, and because of the danger to the public good arising from the consequent impossibility of offspring from the broken conjugal life.[29] Proofs had to be full and conclusive. They needed at least to furnish a basis for a most violent suspicion. Naturally such a thing as adultery was difficult to prove and the law duly took cognizance of this fact. A mere probable suspicion on the one hand was insufficient; a well-founded suspicion on the other hand, with its basis duly established was admissible. This proof could take the form of presumption which, although only demonstrative and not conclusive in themselves, nevertheless, when taken collectively established the necessary moral certitude in the mind of the judge. This moral certitude was sufficient for him to pass a sentence of separation.[30]

Since eyewitnesses were practically impossible in such cases, they were not expected. However, hearsay witnesses were to be barred; they had to be *"de auditu proprio alicuius actus copulae propinquae"*

Coniugalis (Florentiae, 1855), Lib. II, cap. XVI, nn. 6, 12, 17, 23, 25; Wernz, *Ius Decretalium,* IV, n. 707; Gasparri, *De Matrimonio,* 3. ed., II, n. 1365.

[29] *Sacrae Romanae Rotae Decisiones Recentiores* (ed. Pr. Farinacius, Petrus Rubeus et Ioannes Baptista Compagnus, pro annis 1518-1684, 25 vols., Romae, 1618-1703), Pars XVI (1669), dec. XCIX, n. 3 (hereafter cited as *S. R. Rotae Decisiones Recentiores*); S. C. C. *Firmana,* 16 maii 1789: "Res porro est de separatione thori, in qua ad vitandum incontinentiae periculum, publicumque deficientis prolis damnum, caute procedendum monent"—*Thesaurus Resolutionum S. C. C.,* LVIII, 99.

[30] "Tum quia concurrunt plures actus probati per testes qui simul iuncti valde adminiculantur, et maximam adulterii praesumptionem inducant, nempe . . . secretae allocutiones de nocte, salutationes et signa amoris (etc.) . . . et quibus omnibus simul iunctis adeo fortis et intensa resultat adulterii presumptio ut de eo moraliter dubitari nequeat"—*S. R. R. Decisiones Recentiores,* XI (1658), CCCXXXVII; XVI (1669), XCIX, n. 3; VI (1625), CCCXXIV, n. 2; S. C. C., *Imolen.,* 11 mart. 1786—*Thesaurus Resolutionum S. C. C.,* LV 41-43; Sanchez, Lib. X, disp. XI, n. 39; Cosci, *De Separatione Tori Conjugalis* Lib. II, cap. XVI, nn. 20, 21; Gasparri, *De Matrimonio,* 3. ed., II, n. 1365.

at least, and above all suspicion.[31] Not only was the testimony of relatives and intimates deemed altogether suitable for evidence, but if the case warranted it even the deposition of medical men or of several matrons appointed by the judge *ex officio* to examine the woman. These latter experts were especially useful in cases wherein extreme cruelty was alleged to ascertain the existence of physical abuse. Cruelty was perhaps the most frequent cause after adultery for seeking a separation. Here again strict proof and witnesses were demanded before a separation would be granted for as the Sacred Roman Rota declared: ". . . *rari sint coniuges inter quos aliquae dissensiones non oriantur.*" [32]

Wernz pointed out a very useful recommendation which he based on Sec. 236 of the *Austrian Instruction.* He remarked that, since in cases of separation there is often animosity between the spouses and therefore a danger to soul and body, the judge may, because of the possibility of harm, permit a temporary separation from the very beginning of the suit by way of a provisional decree.[33]

With regard to the matter of alimony and of the custody of children, the law manifested little change from that of the Decretals. The authors considered these points in more detail and, as would be expected, gave their opinions on the matter in a more up to date fashion. The judge was normally to give the children over to the care of the innocent party and they were to be reared at the expense of the guilty partner. However, it was left to the discretion of the judge to make any different provisions in the individual case. In a case wherein a guilty partner despite his or her unfaithfulness proved more suitable in the mind of the judge for undertaking the care of the children, the judge could issue his decree accordingly.[34]

[31] *S. R. R. Decisiones Recentiores,* XVI (1669), XCIX, n. 1; VI (1625), CCCXXIV, n. 3; VI (1633), CCXXXIX, n. 18; Schmalzgrueber, Lib. IV, tit. XIX, n. 115; Cosci, *op. cit.,* Lib. I, cap. XIV, nn. 1, 5, 6.

[32] *S. R. R. Decisiones Recentiores,* VI (1632), CLV; IX, tom. II (1645), CCCXXII; XVI (1669), XCIX, n. 4.

[33] *Ius Decretalium,* IV, n. 744, ftn. 72.

[34] Sanchez, Lib. X, disp. XIX, n. 3; disp. XX, n. 2; Pirhing, *Ius Canonicum,* Lib. IV, tit. XIX, n. 63; Reiffenstuel, Lib. IV, tit. XIX, nn. 103, 104; Schmalzgrueber, Lib. IV, tit. XIX, n. 181; Feije, *De Impedimentis,* p. 467;

Despite the guilt of the Catholic party in a case of a mixed marriage, the general rule here was to be changed. In such a case the faith of the children was to be favored through the commitment of them to the custody of the Catholic party. The great risk of putting the children in the danger of being reared in infidelity was considered to be avoided by this means.[35]

Alimony or the support of the injured spouse and payment of the expenses for the support of the children were provided for in the law of the Decretals. The same continued to be the regular norm, although the judge could provide otherwise in particular cases.[36] Authors of the period pointed out that the civil authority at the time was accustomed to adjudicate these temporal effects of marriage. However, it was not a question here of a civil divorce or separation, but merely of a declaration of the material property settlement; permission for a civil separation or divorce, a very important matter, was then as now an entirely different element, which will be discussed in a later chapter.[37]

An important problem of the post-Tridentine period was one which continues to this day, namely, when and under what conditions was the aggrieved party of a separation suit obliged to return to the erring spouse? In the matter of perpetual separation the solution was very simple. Since adultery was the only cause recognized as sufficient to effect such a separation, the necessity of returning was never present. By his or her breach of marital fidelity, the erring spouse lost all rights to cohabitation, and the innocent party could not be forced even to effect a reconciliation. Naturally judges were advised to attempt this end by persuasion; but, with adultery as a basis for the separation, it remained the pleasure of the injured party to permit or not to permit a reunion, and a new judicial sentence

Bangen, *Instructio Practica de Sponsalibus et Matrimonio* (4 vols. in 1, Monasterii, 1858), p. 148; Gasparri, *De Matrimonio*, 3. ed., II, n. 1373.

[35] Benedictus XIV, const. *Probe*, 15 dec. 1751—*Fontes*, n. 418; S. C. C., 12 aug. 1865—*ASS*, II (1866), 136, n. IX; S. C. C., *Basileen.*, 31 iul. 1869—*Fontes*, n. 4215; *Austrian Instruction*, Sec. 236—*Collectio Lacensis*, V, col. 1313.

[36] S. C. C., *loc. cit.*; Sanchez, Lib. X, disp. XX, n. 1.

[37] *Austrian Instruction*, Sec. 244—*Collectio Lacensis*, V, col. 1314; Santi, *Praelectiones Iuris Canonici*, Lib. IV, tit. XIX, n. 16; Wernz, *Ius Decretalium*, IV, n. 714.

was not necessary if the aggrieved partner wished to allow a return of the guilty one to the common life. The latter could be recalled, and since he or she was the original cause of the separation, there was an obligation to return and the errant party could even be forced by a judicial sentence to obey the summons of the innocent consort.[38]

If one of the spouses lapsed into apostasy, heresy or schism, there was a case which approximated the effects of adultery, but nevertheless, it did not as such constitute a cause for perpetual separation. In such a case the authors distinguished two elements in treating the matter of reconciliation. Needless to say, as long as the erring spouse remained in the state of apostasy, heresy or schism, the faithful spouse did not need to allow a return to marital life. The question became a little more involved when the party guilty of these sins re-embraced the faith. In such a case the authors looked to the state of the innocent party, viz., whether he or she had entered religion or had remained in the world. By entering religion, the party effected a change of state and no reconciliation was prescribed; if the party's state had not been changed, a further distinction was made in line with the method of procedure that led to the separation. If the separation occurred *propria auctoritate* on the part of the injured consort, the latter was bound to return upon the conversion of the other. However, if the separation was granted by ecclesiastical authority, then no reconciliation was necessary unless it was ordered by a judge, and it could be ordered only if there was present a sufficient guarantee of the guilty party's real sincere return to the faith.[39]

In general the other causes for separation which permitted only a temporary disruption of the marital union could be listed under two main headings. They were dangers to the soul and dangers to the body. There was no exhaustive list stated in the law. It was

[38] S. C. C., *Taurinen.*, 16 mart. 1726—*Thesaurus Resolutionum S. C. C.*, III, p. 291; S. C. C., *Firmana*, 16 maii 1789—*op. cit.*, LVIII, p. 99; Schmalzgrueber, Lib. IV, tit. XIX, nn. 118-123.

[39] Barbosa, *Collectanea Doctorum tam Veterum quam Recentiorem in Ius Pontificium Universum* (5 vols., Lugduni, 1656), Lib. IV, tit. XIX, c. VI, n. 5; Pirhing, *Ius Canonicum*, Lib. IV, tit. XIX, nn. 30, 31; Gasparri, *De Matrimonio* 3. ed., II, n. 1371.

merely illustrative and left the determination of particular causes in individual cases to the prudent judgment of the ecclesiastical authority.[40]

Article 2. Separation *Propria Auctoritate*

As has been mentioned previously, the separation of the spouses was considered a public matter, and therefore the intervention of the ecclesiastical authority was necessary for such action to be legitimate.[41] However, in special cases wherein some real danger of spiritual or physical harm impended in consequence of any delay, separation on one's own authority was allowed. The law in this matter derived from the Decretals. The authors of the period interpreted this legislation as making provision in many very practical cases. They insisted upon the necessity of ecclesiastical recognition of these suits as a general norm but clearly pointed out that there were exceptions to the general rule.

As had been the practice through the history of canon law, the important reason for any separation *propria auctoritate* was adultery.[42] The fact of a consort's suspicion did not provide a sufficient reason for a separation. If the adultery of the other party was in any way doubtful, or if proofs of the crime did not in any way exceed the domains of mere probability, the intervention of the Church was necessary. In such an event, the hypothetically innocent party could not leave on his or her own authority, since there was not adequate basis for such action. Separation was not something arbitrary, not left to the discretion of the injured party to determine whether or not the proofs sufficed for a parting. Rather, if there was any doubt or uncertainty, the right to leave on one's own authority was denied.[43]

[40] Conc. Trident., sess. XXIV, *de matrimonio,* Canon 8; Wernz, *Ius Decretalium,* IV, n. 713.

[41] Cf. *supra,* p. 45.

[42] S. C. C., Florentina, 29 mart. 1727—*Thesaurus Resolutionum S. C. C.,* IV, 33.

[43] Sanchez, Lib. X, disp. XII, nn. 2, 3, 4; Pirhing, *Ius Canonicum,* Lib. IV, tit. XIX, n. 16; Schmalzgrueber, Lib. IV, tit. XIX, n. 110; *Austrian Instruction,* Sec. 205, 241—*Collectio Lacensis,* V, coll. 1311, 1314; Feije, *De Impedimentis,* p. 464; Wernz, *Ius Decretalium,* IV, n. 711; Gasparri, *De Matrimonio* 3. ed., II, n. 1368.

The case of a notorious and certain adultery was another matter. If such a circumstance was present, then the authors did not hinder an aggrieved spouse from leaving an unfaithful partner. This opinion was based on the evangelical provision permitting separation for adultery. The authors were of the view that since the sin was notorious and certain, no further proof was necessary and the law which allowed a separation on such grounds also allowed a separation to be effected by the innocent spouse.[44]

Another general reason allowing a separation prior to an ecclesiastical decree was the possibility of danger in delay. It was not difficult to envisage cases wherein such danger could exist. A wife in leaving an insane, cruel or immoral husband might endanger her life or spiritual well-being by remaining to await a judgment of the Church. In this type of case, a separation effected on the aggrieved party's own authority was permissible. When peaceful cohabitation was impossible, there was no necessity of prolonging the imminent danger of physical or spiritual harm. A real threat to the innocent party had to be present; mere whims and fancied notions of harm were not sufficient. There had to be present a real and well founded danger in any delay.[45]

It is to be noted, however, that the authors of this period are more clear than the earlier writers on the significance of this type of separation. There is no doubt that they considered this leaving of an erring spouse an emergency measure. It is better termed a *discessus* than a *separatio.* The innocent spouse could leave because of the earlier mentioned causes, but a permanent decree of separation had to be sought in the ecclesiastical court. This applied to

[44] Sanchez, Lib. X, disp. XII, nn. 12, 13, 25; Pirhing, *op. cit.,* n. 16, not. 2; Schmalzgrueber, Lib. IV, tit. XIX, n. 111; Reiffenstuel, Lib. IV, tit. XIX, n. 89; Joder, *Formulaire Matrimonial* (3. ed., Paris, 1891), p. 242; Wernz, *loc. cit.*; Gasparri, *loc. cit.*

[45] Cosci, *De Separatione Tori Coniugalis,* Lib. II, cap. V, n. 1; De Becker, *De Sponsalibus et Matrimonio Praelectiones Canonicae* (Lovanii, 1893), p. 399; Wernz, *op. cit.,* IV, n. 714; Gasparri, *op. cit.,* II, n. 1371.

all cases but notorious adultery. The reasons given were the avoidance of the scandal which otherwise might arise from this interruption of the common marital life, and the protection of the innocent party from later blame and legal action at the behest of the guilty partner.[46]

The case of a notorious adultery was another matter. Here according to most of the authors the distinction between a *discessus* and a *separatio* was not necessary. In this situation the reason for the separation, namely the crime of adultery was superfluous. Gasparrri stressed this idea very clearly when he saids *"Ratio est quia coniunx ad divortium ius habet ex ipsa Evangelii lege, ita ut sententia iudicis tantum declaret causam, idest adulterium, vereficari: atque haec declaratio non est, quando adulterium est certum et notorium."* [47]

Wernz seemed to stand alone in his support of the stricter view. He allowed a separation for notorious adultery because of the same reason, viz., the evangelical law, but he limited it as permissible *"saltem provisorie."* He concluded that since delusions can so easily be present with regard to the notoriety of adultery a definitive and permanent separation was not to be adopted apart from a sentence rendered by an ecclesiastical judge.[48] In his well-annotated work which normally abounds in substantiating footnotes, Wernz in this instance seemed to be presenting a personal opinion. This may be inferred from the absence of any footnote by way of substantiation against the more common opinion held by the several authors cited above. It seems then, that a spouse who had left the common marital life because of notorious adultery was legally separated, and no further judicial procedure was necessary according to the common opinion of the time.

[46] Sanchez, Lib. X, disp. 11, n. 7; Schmalzgrueber, Lib. IV, tit. XIX, n. 112; Feije, *De Impedimentis,* p. 465; Wernz, *op. cit.,* II, n. 711; Gasparri, *loc. cit.*

[47] *De Matrimonio* 3. ed., II, n. 1368. Support for this view may also be found in Sanchez, Lib. X, disp. XII, n. 12; Pirhing, *Ius Canonicum,* Lib. IV, tit. XIX, n. 16; Reiffenstuel, Lib. IV, tit. XIX, n. 89; Schmalzgrueber, Lib. IV, tit. XIX, n. 11; Feije, *De Impedimentis,* p. 465.

[48] *Ius Decretalium, loc. cit.*

Article 3. The Informal Procedure

There is evidence in this post-Tridentine period of the rise in many quarters of a practice that expedited separation cases in a less formal fashion than that prescribed in the ordinary procedural law. These were doubtless the beginnings of the administrative process as it is known in the law of the present day.[49] This tendency toward a shortened process was treated in the last chapter when reference was made to the constitutions *Dispendiosam* and *Saepe* of Pope Clement V (cf. *supra,* p. 38). As was noted there, the sources did not give a clear picture of the use of these constitutions in separation cases. Some authors held to the opinion that this type of case did not benefit from the liberty granted in these constitutions, while others favored their inclusion and seemed to be supported in this view by the actual practice then current. The canonical history of the period from the Council of Trent to the Code of Canon Law shows an increasing majority favoring the latter view.

There is a difficulty, however, in determining the exact nature of the shortened process of which mention was made during this era. In some instances it was clearly judicial but of a summary type; in others it was called extrajudicial and seemed to approximate the present day administrative procedure. In order to avoid any generalities which could lead to complication, the writer will seek to distinguish the two types through examples of the few cases found in the sources and canonical commentaries of this period.

From the time of the first appearance of the Clementine legislation (1312) which permitted summary trials until the constitution *Dei miseratione* of Pope Benedict XIV in 1741, there seem not to have been any legal enactments limiting the use of the summary process. However, Cerchiari points out a development designating a proceeding *mixti ordinis,* which, so he says, consisted of an inter-

[49] The Pontifical Commission for the Authentic Interpretation of the Code of Canon Law allowed the use of the administrative form of procedure in cases of separation. Cf. *Pontificia Commissio Interpretationis* (hereafter cited P. C. I.), 25 iun. 1932—*Acta Apostolicae Sedis* (Romae, 1909—), XXIV (1932), 284 (hereafter cited *AAS*).

mingling of solemn or formal procedural elements with the shortened summary process.[50]

The earliest traceable author at least in the present writer's search who explicitly treated of the summary process in separation cases for this period is Sanchez. In his treatment of the procedure to be used in mission territories in the matter of separation and in the marriage of converts from paganism, he clearly admitted of the advisability of the shortened form. He stated that missionary judges might proceed: *"simpliciter, et de plano, absque tabellione et scriptura aliqua et iuramento testium."* He based his opinion on the great expenses involved in a formal trial as compared with the poverty of these people, as well as the difficulty in arriving at any certitude with witnesses. He directed the reader's attention to the fact that this did not signify a complete abandonment of all formalities, but that it rather justified a simplified process which still preserved the quality of a careful judicial investigation.

He distinctly pointed out that missionaries in these cases were acting in the capacity of judges with various privileges of the Holy See. He did not mention the exact nature of these privileges, but it seems derivable from his statement that missionary bishops customarily received such favors and subdelegated them to their priestly coworkers in the field.[51]

Other authors of the period until Benedict XIV continued to include marriage cases among the judicial suits that enjoyed the favor of the simpler process. Their unanimity was nevertheless confined to suits regarding the bond. Some, such as Reiffenstuel, simply included marriage cases without any express exclusion of separation trials.[52] Pirhing (1606-1679), on the other hand, while he permitted the summary treatment of marriage cases, distinctly excepted cases of separation on the ground of adultery.[53] Pellegrino (+ 1678) treated the question as Reiffenstuel; he neither expressly

[50] *Sacra Romana Rota,* I, p. 145, n. 44.

[51] Lib. X, disp. XIX, disp. XIX, nn. 1, 2. It is important to note that this author explicitly mentioned separation cases and did not confine his remarks to vincular litigations.

[52] Lib. I, tit. I, s. II, n. 47.

[53] *Ius Canonicum,* Lib. II, tit. 1, n. 104.

included nor expressly excepted separation cases from the summary procedure. He merely mentioned that marriage cases were regularly treated in summary fashion.[54] Worthy of note is the fact that this edition of Pellegrino was published two years after the constitution, *Dei miseratione,* of Benedict XIV, which had appeared in 1741. This monumental enactment had revised the procedure for matrimonial cases and according to good opinion had abrogated the Clementine summary process.[55] Yet, very soon after the appearance of this constitution there was evidence of a trend toward the shortened process as granted in indults and faculties from the Holy See.[56] Although these grants concerned vincular cases, nevertheless, there is evidence from other replies of the Holy See that a shortened form was tolerated in the hearing of separation trials. The first authoritative source on this matter that the writer has been able to discover was a reply of the Sacred Congregation of the Council in 1786. This was a response to a question regarding a separation case, and, although not explicit nor containing any express grants, the general tenor of the response implied the existence of a summary process in practice, and that even of an extra-judicial type.[57]

The nineteenth century brought clearer and more explicit legislation on this matter. There is clear evidence in the *Austrian Instruction* that in a case of necessity and for other grave reasons a briefer type or administrative procedure might be used.[58] Shortly after the appearance of this Instruction there was issued a reply from the Sacred Congregation of the Council which decided the separation suit of a woman in Bavaria whose husband had deserted her and emigrated to America. The Congregation instructed the Archbishop of Munich that the ordinary procedure in separation cases was the

[54] *Praxis Vicariorum* (ed. novissima, Venetiis, 1743), Pars II, sect. II, subj. I, intersec. 1, n. 8.

[55] Kennedy, *The Special Matrimonial Process in Cases of Evident Nullity,* The Catholic University of America Canon Law Studies, n. 93 (Washington, D. C.: The Catholic University of America, 1935), p. 47.

[56] S. C. C., *Theatina,* 18 iul et 9 sept. 1761—*Thesaurus Resolutionum S. C. C.,* XXX, 129, 134; S. C. C. *in Tanuen., Matrim.,* 30 iulii 1793, 28 ian. et 15 mart. 1794—*Op. cit.,* LXII, 184; LXIII, 2, 46.

[57] S. C. C., *Imolen.,* 11 mart. 1786—*Fontes,* n. 3850.

[58] Sec. 243—*Collectio Lacensis,* V, col. 1314.

formal process of the Decretals, but in a case such as this, with one party absent, a shorter form was permissible. Reference was made in this response to the treatment by Sanchez on this matter as mentioned above. The Roman Congregation concluded its remarks by stating: *"Consuetudo in Bavaria existens circa modum procedendi in causis separationis quoad thorum et habitationem non adversatur iuri canonico."* This is indeed clear evidence of an official recognition of the informal process by the ecclesiastical authority.[59] The explicit concession of his response served to strengthen the toleration shown in an earlier reply of the same Congregation treating of a separation case. In this prior statement, the Congregation ruled that the formal process was the ordinary method, but accepted a case for review which had been heard in the summary fashion. It even went so far as to point out the necessary elements of the summary procedure.[60]

Authors of the period were not very complete in their treatment of the summary and administrative procedures. For the most part they allowed the shortened judicial process to be used, although they pointed out that the formal method was still the ordinary legal mode of treatment. Thus Bouix (+ 1870) [61] and Feije (+ 1894) [62] limited their remarks, but Santi (+ 1885) generally demanded the regular judicial trial, although he recommended that attention be paid to the aforementioned reply to the Archbishop of Munich regarding the shorter process.[63] Wernz, however, summarized the relation of the three methods of procedure by stating: *"cum ex disciplina vigente in hisce causis nequaquam solemnis vel ordinarius processus canonicus adhiberi debeat, sed summarius usui esse possit, imo quandoque extraiudicialis procedendi modus toleretur."* This statement clearly shows the general acceptance of the different processes in separation cases at his time.[64]

[59] S. C. C., *Monacen.*, 23 ian. 1875—*Thesaurus Resolutionum S. C. C.*, CXXXIV, p. 103. Only a reference to the title and date of issuance is made in this source. A complete copy of this response may be found in Santi, *Praelectiones Iuris Canonici*, Lib. II, tit. VI, n. 8.

[60] S. C. C., 31 iul. 1869—*AAS*, V (1869), 3, 11. A further description of this type of case was included in Appendix I of the same volume, 35 ff.

[61] *De Judiciis*, II, 441.

[62] *De Impedimentis*, p. 491.

[63] *Praelectiones Iuris Canonici*, Lib. IV, tit. XIX, n. 60.

It may be noted that there is not apparent in every instance a clear distinction between the summary judicial process and what is known as the administrative process. Doubtless because of the early stages of development of the latter type, a distinct concept was now shown in canonical literature. The clearest exposition, and one important for the United States, was presented by Smith (1845-1895). He distinguished between the requirements of the letter of the law and the demands deriving through custom. According to the letter of the law, he demanded three necessary elements for a legitimate separation, namely, a just cause, a summary judicial process or trial, and a judicial sentence of the judge granting the separation. He then asserted that by custom, prevailing both in the United States and in Europe, separation cases, at least those that did not entail a permanent departure were treated more informally. In his opinion a separation for a just cause, approved by the bishop or the parish priest, and consequently without any judicial process or sentence, was legitimate. The basis for this view in his mind was clearly inferable from the fact that the Instruction which the Sacred Congregation for the Propagation of the Faith sent to the United States in 1883 made no requirement of a judicial trial in separation suits. Further support was found in the omission by the III Plenary Council of Baltimore of any definite provision on this matter, despite the custom in this country toward the informal process.[65] This argument was further supported by the recommendation of the III Plenary Council of Baltimore regarding the use of the Austrian Instruction.[66] Inasmuch as this Instruction contained provisions for the use of the administrative procedure, its recommendation as a procedural norm for the bishops of the country presented an implicit indication of the mind of the Fathers of the Council on the use of this type of procedure.

[64] *Ius Decretalium*, IV, n. 714.

[65] Smith, *The Marriage Process in the United States* (New York, 1893), nn. 79-80.

[66] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii, A. D.* MDCCCLXXXIV, n. 304.

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

PART II

CANONICAL COMMENTARY

CHAPTER IV

THE NATURE OF THE PROPER CANONICAL PROCESS IN SEPARATION CASES

Article 1. Preliminary Notions

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

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

[2] Canon 1128.

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