cient to produce moral certainty as to the existence of the impediment of ligamen. Similarly, the circumstantial evidence and other sources of proof were not sufficient to constitute moral certainty of the death of Homer, according to the norms stipulated in the Instruction of the Holy Office of 1868. Wherefore, the S. R. Rota decided: *Non constare de nullitate matrimonii in casu.*

II. CASE OF AN ITALIAN IMMIGRANT TO BRAZIL INVOLVING THE IMPEDIMENT OF LIGAMEN

A. *Species Facti.* A certain Ferdinand, from Verona, went to Brazil where he contracted a civil marriage with a certain Virginia on March 19, 1904. Two years previously Virginia had married a certain Angelo. Many years later Ferdinand impugned the validity of his marriage on the grounds that Angelo was living at the time of the marriage in 1904.

B. *In luce.* In a case of a doubt about the death of a consort, the surviving consort may not remarry until there is moral certainty of the death of the first consort. The second marriage will be valid or invalid according to the fact of the death or survival of the missing consort. As long as the doubt remains, the consort may not enter upon a second marriage.

C. *In Facto.* Some witnesses maintained that Angelo was living at the time of the second marriage on March 19, 1904, and that he was still living under an assumed name. Others testified that he had jumped off a boat and had drowned previously to that date. Since there was not sufficient proof to constitute moral certainty of the death of Angelo, the decision of the S. R. Rota was: *Non constare de matrimonii nullitate in casu.*

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CHAPTER XXV

PROPER CANONICAL AUTHORIZATION OF SEPARATION

I. KINDS OF SEPARATION

"Married persons are to observe the obligations of conjugal cohabitation, unless a just cause excuses them." There are certain reasons, however, recognized in law which authorize the separation of consorts. According to the causes and circumstances such a separation may be either perpetual or temporary. Temporary separation may, in turn, be granted for a definite period of time or for an indefinite period. Whenever temporary separation is authorized by ecclesiastical authorities it is preferable, ordinarily, that it should be granted ad tempus indefinitum. Among the other advantages derived from the use of this form is that a wife lawfully separated from her husband ad tempus indefinitum, "does not follow the domicile of her husband, but is to be cited either before the Ordinary of the place where the marriage was celebrated or before the Ordinary of her own domicile or quasi-domicile." Thus, a wife separated from her husband ad tempus indefinitum is enabled to have the intention of remaining permanently in a given place, so as to acquire her own domicile.

It is to be borne in mind that in all cases of separation, whether perpetual or temporary, the marriage bond remains intact. The consorts, even though separated, are bound by the other obligations of the matrimonial bond.

Separation cases are among those which are considered as never

1 Can. 1128.
2 Art. 6 § 2, Instructio, Procura. An example of a separation granted ad indefinitum tempus may be found in: S. R. Rota Dec., XXI (1929), 530.
3 Canonical Procedure, I, 24-25.
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CHAPTER XXV

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becoming irrevocably adjudged. This is emphasized in a recent decision of the Pontifical Commission for the Authentic Interpretation of the Code. The Code Commission was asked: “Whether the causes of separation of consorts are to be reckoned among those causes which never become irrevocably adjudged, as referred to in Canons 1903 and 1989?” To which the reply was: “In the affirmative.”

II. REASONS AUTHORIZING OR JUSTIFYING SEPARATION

I. NECESSITY OF A JUST CAUSE TO WARRANT SEPARATION

Canon 1128 rules that “married persons are to observe the obligation of conjugal cohabitation, unless a just cause excuse them.” But since this conjugal cohabitation pertains only to the integrity of marriage and not directly to its essence, a just cause may excuse the consorts from this mutual obligation.

The necessity of a just reason for separation can be easily deduced from the very nature of the obligation of conjugal cohabitation. Canon 1013 §1 states that “the primary end of marriage is the procreation and education of children; the secondary end is mutual helpfulness and the appeasement of concupiscence.” It is obvious that conjugal cohabitation tends to foster mutual love while at the same time being a helpful force in strengthening marriage ties and a potent safeguard in protecting the matrimonial bond.

II. REASONS AUTHORIZING OR JUSTIFYING PERPETUAL SEPARATION

A) Adultery

Adultery is the only crime which grants the right, natura sua, to the innocent party of perpetual separation. This is clearly enunciated in Canon 1129 which states that “adultery on the part of one consort gives to the other consort, without breaking the matrimonial bond, the right of separation, even permanently, unless the other consort has consented to the crime, has caused it, or has expressly or tacitly condoned it or committed the same crime. There is tacit condonation when the innocent consort, knowing of the crime of adultery, has freely continued to manifest marital affection toward the guilty party. This tacit condonation is presumed unless the innocent party has, within the period of six months, dismissed, deserted, or duly denounced the guilty consort.”

Separation, however, on the grounds of adultery, is not authorized unless the sin of adultery has been proved to be:

1. Consummated

According to Cappello, the following points should be borne in mind in practical cases:

Plerique dicunt copulam inchoatam, seu habitan sine effusione seminis non esse sufficiens.

Alii consent, practice sufficeret veram copulam, etiam sine effusione seminis, tum

a) quia haec gravis de se est injuria contra fidem coniugii alteri coniugis facta; tum

b) quia, posita copula, semper censetur adfuuisse ex communitur contingentibus etiam seminis effusio; tum

c) quia, in alia sententia, fere numquam constaret de seminacione, nisi sequeretur conceptio.

Rectius videtur ita distinguendum:

a) si copula carnalis habita est, haec praesumitur perfecta i.e. cum effusionem seminis, nisi probetur contrarium; onus autem probandi in-cumbit asserenti;

b) in foro interno credendum est ipsi poenitenti; aliter in foro externo, ubi probatio modo ordinariofacienda est;

c) cum vero, posta copula carnali, vix probare possit in foro externo defectus effusionis seminis, inde consequitur practica, in casu, illud adulterium fere semper habendum esse tamquam verum et perfectum.6

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5 "Quam ad rem animadvertere praestat solum adulterium natura sua ius coniugii innocenti tribuere a coniuge adultero divertendi in perpetuum; qui sedem sibi dignam frangit ius penitus amittit exsequienda a coniuge innocente observantiam obligatiorum individuique vitae consuetudinis ex matrimonio coniunxit." S. B. Rotae Dec., XXI (1929), 3.

Furthermore, as Payen comments:

Requiritur adulterium perfectum, id est coitus consummatus per effusionem seminis intra vas, debitum aut indebitum, adeoque copula per se apta ad generationem, sin minus ratione vasis aut speciei, saltum ratione actus carnalis ad eum suum producti.

Secus enim non fit illa plena divisio carnis, ex qua, tanquam ex consummata infidelitate conjugali, jus ad perpetuum separationem oritur. "Ille dicitur perfecte dividere carnem suam, qui commiscet cum aliis cum seminis emissione, scut conjuges hunc una caro quando carnalis copulat habetur, cum seminatio in vase debito " (Bonacina, De Matrimon., q. 4, p. 5, n. 2).

Ex hac definitione adulterii perfecti intelligitur quid sit sentiendum de copula mere praeparata, mere inchoata seu attentata onanistica: nam jam diximus sufficer sociali carnaliam, vel bestialam, si sit absoluta seu perfecta.

1) Copula Mere Praeparata — Omnes concedunt satis non esse copula mere seu remote praeparata per actus praevidos, v.g. per turpem amicitation, oscula, amplexus, tactus turpes. Haec enim non veniunt hominibus adesse alias praeparata, kas satis praeecum.

2) Copula Mere Inchoata — Pausis exceptis, v.g. Ojetti (Syn. n. 1864), plerique negant theorectice satis esse copulam inchoam et attentam, id est praeparatum membro virilis in vas mulieris, sine effusione seminis intra vas et sine pollutione. In usus nullius prorsus momenti est haec controversia de copula inchoata aut de copula onanistica. Nam agitur de re fori externi. Jam vero, in foro externo, habita copula, "semper cessor adfusio, ex communiter contingens, etiam seminis effusioni" (Cappello, 3, n. 826). Modo igit altera pars sit certa de copula inchoata, hus habet descendent. Unde practice sufficit copula inchoata, etiam seminis effusioni.

3) Copula Onanistica — De copula onanistica, seu de copula cum seminazione extra vas mulieris, disputari potest. Non deest gravissimam dux pandis ratio: nam hujusmodi copula nihil aliud est nisi copula inchoata cum pollutione solitaria; insuper, per hunc actum carnelle, complicles non sunt ver proprioe unica. Siigit reteremus definitionem supra datam, magis consentancem est non habere hanc gravem inijuriam pro sufficienti causa separationis perpetueae. Unum tamen notandum est: "in dubio consummati semper praesumitur" (Acrtnys, 2, n. 920).

De sodomia viri cum propria uxor, eaque prorsus invita, rectius dicitur eam "non esse causam perpetuae separationis, vere tunc non est perfecta divisio carnis cum alterius carnis, quae soles j oats ad perpetuum divertium" (Roset, 6, n. 3873). Sed hoc flagitium esse, si sche admittatur, causam separationis temporariae, patet ex can. 1131, § 1.\footnote{De Matrimonio, II, n. 2467, p. 788.}

2. Formal

In order to constitute the sin authorizing perpetual separation the adultery must be not only material, but formal. Payen well explains this point:

Non sufficit adulterium materiale, id est ex errore, adeoque sine advententia, aut ex vi, ac proinde sine libertate, commissum. Sed requiritur adulterium formale, seu subjective et graviter pravum. Ubi enim deest gravissimus culpa, iibu non est illa gravissima et injuriosa sibi conjugalis violatio, ex qua sola conjux innocens us ad separationem perpetuam consequitur. Separatio in perpetuam est poena quae non nisi proprie culpam, compati graviter injuriosam, imponi potest.

"Hinc locus divertio non est, si, e.g., vir, putans uxorem mortuam, aliam ducat, nisi, de illius vita cternior factus, in unione persiterit ...i aut vice versa si uxor, putans virum mortuum, aliter nuperit, licet nullam aliter sentiant," sed prorsus immerto, ut ex aequitatis juris, in can. 1111 statuta, constat. "Item, si conjux invincible putabat adulterum noctum accedentem "esse suum conuem." Item, si ab uxor omnino invita copula extorqueautur" per vim, ut iuvent, absolutam (C. Casparri, 2, n. 1111; Sanchez, 1, 10, disp. 5, n. 11, sqq.). Rursus idem dicendum est de uxor pagana, quae, a viro pagano dimiss, bona fide aestimata se esse liberam, et ad novas transit nuptias (Sanchez, 1, 10, disp. 5, n. 18).

De tribus est, aut esse potest, controversia: num requiratur adulterium perfecte liberum, adeoque non metu gravii extortum; peccatum formale, qua externum; peccatum formale, qua adulterium.

1) Adulterium Metu Extortum — Probabilis est adulterium metu gravii, non autem vi physica, extortum, esse justam perpetuem separationis causam. Etenim metus gravii "revera non excusat a culpa mortali adulterii et fidei fractae, quae causa divortii sunt" (Sanchez, 1, 10, disp. 5, n. 16; Roset, 6, n. 3881, sq.; Wenz, IV, n. 707, n. 114).

2) Adulterium Formale, Qua Extira — Quaeri potest, licet haec de re sileat auteores, num mulier, ui cui resistere non quid oppressa, et extrinsecus, quantum potent ac debet, reductans, sed intus in voluptatem extortam consentient, conferat marito suo innocenti jus solvendi in perpetuum vitae communionem. Censenas negandum esse aut saltem subsesse dubium: nam poenae non ingratur nisi ob delictum externum.

3) Adulterium Formale, Qua Adulterum — Denique inquirunt auteores num jus ad perpetuum separazionee conferatur fornicatio formalis, penitus ignorata mulieb adulterii, id est, v.g., fornicatio, liberrim av eos, ab uxor qua bona fide putat virum suum et vivus cessesse. Ideo negant plures, inter quos Sanchez (1, 10, disp. 5, n. 12), quia poena separationis perpetuae in conjuge adulterum, non autem in conjuge qui, censens se esse solutum, graviter peccat, ingratur. Haec sententia est
3. Morally Certain

To prove the crime of adultery is not an easy matter. The difficulty of such proof can be deduced from the sentences of the S. R. Rota in cases of this nature. Surmises, suspicions, accusations, compromising circumstances, and the like, do not constitute proof. Thus, in one case, the S. R. Rota aptly states:

Harum vercumptamen assertionum, ex quibus adulterii viri crimen erue satagit actrix, nullam prorsus in judicio probationem ipsa perhibuit, cum de amoris adieris ad epistolis nullum vestigium adsit in actis, cumque testes in judicio Iustina hauud vocaverit, qui in confirmationem allatae depositionis de illicitis viri relationibus cum foeminiis vel amicitia eis coniunctis, vel de perditae famae, aliquam facerent fidem.

Ex adverso enim ic incumebat talia iuridica argumenta proferre, quae in animo iudicis moralem certitudinem patrati criminis parerent. Copula equidem carnalis, et venerea maris et foeminae coniunctio actus sunt, qui immediate sub sensu testis non cadunt; probantur nihilominus mediantibus aliquibus actibus ad illum finem copulaeque effectum ordinatis, ex quibus validae illae suspiciones nascentur, quae viri nuncupantur, seu violenter animum iudicis trahunt ad credendum, ut habet Sanchez, De matr., lib. X, disp. XII, n. 43: “Quod si roges quando dicitur suspicio violenta sufficiens ad divertit sententiam, id deciditur c. Litteris, De praesumpt., ibi: solum cum sola, nudo cum nuda, in codem lecto iacentem viderunt, multis locis secretam, et latebris ad hoc commodis, et horis electis. Respondimus quod ex huiusmodi violenta et certa suspicione fornicationis potest sententia diversit promulgari.”

Porro in praesenti recensitae suspiciones, vel aliae similis, quae coniugis adulterium vehementer suadeant, non adducuntur; des uniuersin in casu, uti inunium, testium auctoritas, qui deponat de omnibus illis circumstantiis, ex quibus et ex communitur contingentibus fornicarii copulae exsistencia moraliter certa adstruitur. Unde tota actricia intentio in eiusdem dumtaxat testimonio fundatur, quod in iure profecto hauud attenditur; prouti etiam hauud relevant in casu, ad crimen adulterii probrandum, adserae epistolae amatoriae, peccaminosa viri cum mulieribus familiaritas, prolongatae visitationes mulierum apud virum, etc.; etiam per testes confirmarentur; tum quia suspiciumen violentam hauud constiutunt, utpote actus remoti, qui cum adulterio et copula fornicaria necessario hauud coniunguntur, tum quia actricia afirmatio: “La femme dans la lettre se plaignait qu’il n’avait pas été gentil envers elle, parce qu’elle aurait voulu avoir un enfant de lui,” haud probat conventum coisse cum scribente, sed ostendit tantummodo exoptasse scribebent adulterium cum convento patrare.11

Similarly, Payen emphasizes the moral certainty which is necessary:

Denique solum adulterium moraliter certum confert conjugi innocenti ius discendendi: nemo enim iure suo potest, per poenam, privari nisi moraliter confecit cum in culpa fuisset (Sanchez, i. 10, disp. 12, n. 39, sqq.).

1) Probatio Indirecta — Sed, cum haec in re vix sit locus probatio juridicae et directae, sufficit probatio non juridica et indirecta, per indicia et praesumptiones, quae, simul sumpta, dubium prudens excludunt. “Communiter advertem autores ex una parte non sufficere quamcumque probabilem suspicione dem adulterio, et ex altera non requiri testes de visu, qui in delictis carnis haberi non solent, sed satis esse, in utroque foro, praesumptiones, ut aiunt, violentas, quibus moralis certidum inducitur de perpetro crimine” (C. Gasparr, 2, n. 1112).

2) Quaestionem Habetur — Non desit hae violentae praesumptiones, si alias, alias ia male famae, inveniantur sola cum solo in loco ad peccandum apio; aut si reperaturn nuda cum nudo in codem loco jacens; aut si marius de adulterio uxorius certior fiat ab una alterave persona, quae sit fide dignissima (Sanchez, i. 10, disp. 12, n. 43, sqq.). Sin minus in foro externo, saltem in foro interno, sufficit hoc testimonium unius personae fide dignissimae. “Oscula, amplissimi, tactus et cetera huiusmodi, etsi per se non sufficient ad jus separari, concurrentibus alis circumsitatis, vale aggravant praesumptione adulterii, ut aliudquando sufficiente ad faciendam separationem” (Rosset, 6, n. 3874; Sanchez, i. 10, disp. 12, n. 47, sqq.). “Viro suspeiici adulterium uxorius, licet illum esse exemplum de eo possit de adulterio convincere . . .” (Sanchez, i.c., n. 52, sqq.).12

4. Neither Permitted, Nor Caused, Nor Condoned by the Aggrieved Consort, Nor Compensated by a Criminal Fine

If the aggrieved party permitted the adultery, either tacitly or expressly, there can be no grounds for permanent separation. Moreover, if the same innocent party did not prevent the sin when he or she could have easily done so, the right of separation is likewise forfeited. Thus Gasparr remarks:

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10 De Matrimonio, II, n. 2468, p. 789.
12 De Matrimonio, II, n. 2470, pp. 792–793.
Diximus cum facile posset, secur enim non censetur consentire, quod plerumque verificatur in uxorae relate ad virum. Praeterea coniux ius divoriti non amittit, si, sciens alterius adulterium, simulet se illud ignorare, ut interea testes idoneos inveniat ad infidelem coniugem observandum et de adulterio convincendam.

If the aggrieved party actually caused the adultery, the right of separation is likewise forfeited. In practical cases the remarks of Payen should be borne in mind:

Jus divoriti amittit conjux qui proxime et directe causa est adulterii, non autem qui remote tantum et indirecte ei causam dederit, "dummodo id non fecerit ea praecipe intentione ut alter, necessitate coactus, adulterium perpetraret."

1°. Proxime Et Directe — Proxime et directe causa est adulterii, conjux qui illud mandat. Item conjux qui ponit causam per se ad adulterium impellente. Sic impulsu directo causam dat adulterio uxoris, vir qui praeditens uxoris culpam, domi recipit pessimos viros, esque solus cum sola uxor reliquit. Multo magis qui vendit uxorem ut fiat alterius mulier.

2°. Remote Et Indirecte — Remote, seu leviter, et indirecte est causa adulterii, maritus qui, aspera inde, continuus jurgiis, imo sevitiis, illatis sine animo excitandi mulierem ad adulterium, occasio est, seu causa per incidentes, cur ejus uxor cum aliquo viro rem habeat.

De una alterave agenti ratione subest dubium urum proxime et directe, an remote tantum et indirecte adulterio causam det. Sic dubitatur num adulterio uxoriam proximam et directam, seu melius, se sit verborum disceptato, graviter impellentem praebat causam, vir qui ei saepius debuitum negat, necessaria alimenta non suppediit, ece domo injuste expellit, aut ipse vitam communem deserit. Plerique auctores, cum Sanchez, Schmalzgrueber, C. Gasparri, respondent negative, "dummodo id non fecerit ea praecipe intentione ut alter, necessitate coactus, adulterium perpetraret."

Condonation of the crime of adultery likewise deprives the innocent party of the right of separation, provided this condonation is granted knowingly, freely, interiorly, expressly, or tacitly. Frequently, condonation will be expressed openly in view of the generous nature or spirit of longanimity of the innocent party in order to save a family name and children from disgrace, and the like. On this point Payen aptly remarks:

13 De Matrimonio, II, n. 1173, p. 244.

Adulterium unius conjugis, ab altero conjugis sciente, libere, interne condonatum, desinit esse partis innocenti justa discenderit causa, ob injuriam jam illam. "Cum enim divoriti sit in favorem innocentis, potest innocens cedere juri suo, delictumque condonare, et sic cessabit jus divoriti."

Nem cumlibet integrum est "favori pro se principaliter introducto reunitari" (Schmalzgr., IV, p. 4, t. 19, n. 108).

At necessaria est venia sciente, libere, interna data, quin tamen requiratur partis adulterae acceptatio (Wernz-Vidal, V, n. 639, not. 113).

Condona autem: sciente, qui, de crime certior factus, praetertem ignoscit; libere, qui neque vi neque gravi metu cogitatur ad gratiam faciendam; interna, qui revera intus habet animum culpam remittendi. Ut patet, de adulterio jam commisso, non vero de futuro, valet haec venia: nullam, ut ita dicam, immunitatem in futurum, seu quodad novadulteria, tribuit (Sanchez, I, 10, disp. 5, n. 20). Nec in foro interno ullam vim retinet, nisi, una alterave de causa, sit mense externa, adeoque facta, non autem interna (Sanchez, I, 10, disp. 14, n. 2; n. 21, sqq; Aetnys, 2, n. 930).

Distingueda vero est, pro diversis veniae signis, condonatio expressa vel tacita; pro re aut juris praesumptione, condonatio reapse concessa aut jure praesumpta. "Est praesumpto juris tantum, et militat contra eum qui affirmaret se, durante semestri, vel obsequia conjugalia non praebuisset, vel id evi vel metu fecisset, aut forte ex ignorantia sui juris divertendi" (Cappello, 3, n. 826, 6).

1°. Expressa — Expressa est, si constet claris verbis, aut signis quae idem valeant.

2°. Tacita — "Tacita condonatio habetur, si conjux innocens, postquam de crime adulterii certior factus est, cum altero conjugae sponte, maritale affectu conversatus fuerit" (Can. 1129, § 2), id est usus fuerit matrimonio, sive per actum complectum seu copulam, sive per solita obsequia, puta per oscula, amplexus, aliae amicitiae signa, uno verbo per actus incompleto, sciens, liberetur, etiam interne concessos."

The innocent party frequently condones the adultery when the sin was committed only once, more through human weakness than because of any depravity of morals. This is particularly the case where there is no infamy or scandal involved.

As Canon 1129 § 2 clearly states, "tacit condonation is presumed unless the innocent party has, within the period of six months, dismissed, deserted, or duly denounced the guilty consort."

sumption is a praecepitio iuris which naturally yields to facts when these are duly proved from other sources.

The period of six months mentioned in Canon 1129 § 2 is to be understood as tempus utile. As indicated in Canon 35, equitable time (tempus utile) is to be computed from that moment when the innocent party becomes cognizant of the right of separation or from the time when the innocent party is enabled to invoke this right. Even if the innocent consort were compelled by duress or force to remain with or to accede to the wishes of the culpable party, the right of separation would be in no way jeopardized or forfeited thereby.

If both consorts commit adultery, the crime of one is considered as compensated by the crime of the other, and hence neither consort would have the right to separate. Thus the legal axiom would be applicable: parea delicta mutua compensatione tolluntur. If one consort committed adultery several times, or even frequently, and the other consort sinned only once, there would still be no right to separation. One delinquency of this nature, provided it is certain, is sufficient to deprive a guilty party of the right of separation.

A case may occur wherein both the husband and wife have been guilty of adultery. One consort later abandons this sinful way of life, while the other consort, despite pleadings, remonstrances, and warnings, continues to commit adultery. Has the repentant consort the right of separation if the other consort continues in sin? The probable and more common opinion is that the repentant consort enjoys the right of separation. Thus Payen states:

Ratio tamen habenda est mutuae reconciliationis, etiam tacitae, post mutuum adulterium, et relapsus unius tantum in idem crimen: pars quae, post reconciliationem, scelus non instaurat, juss habet solvendi vitiae communionem (Sanchez, s.10, disp. 7, n. 1).


adulterium, ultima mora sibi nocere cebet, et perinde censetur ac si, reconciliatione facta, commississet adulterium . . ." (Sanchez, t.10, disp. 7, n. 4; Schmalzg., IV, p. 4, t. 19, n. 108). Hanc sententiam pro satis probabilis habet S. Alphonsus (1,6, n. 966); et Aertnys eam aestimavit communiorum (2, n. 931, quaer. 3')

If the crime of adultery was certain, but occult, the more probable opinion holds that the innocent consort may invoke the right of separation, at least in the forum of conscience. However, in practical cases of this nature the law of charity demands that scandal and the defamation of the culpable party be avoided. If the innocent consort actually departed, the other consort could institute a suit de spatio to request the ecclesiastical authorities to compel the innocent party to return to conjugal cohabitation lest greater evils might eventuate. The duty of conjugal cohabitation is certain and proved, whereas the right of separation in an occult case is not publicly proved.

Another problem which may occur is the following: the innocent consort commits adultery after the permission for separation has been granted by the ecclesiastical authorities. One opinion maintains that the party is then bound to return to conjugal cohabitation because compensation has occurred and the right of separation was based on the condition of innocence. St. Alphonsus and others deny the existence of any such obligation since, in their opinion, the sentence of the ecclesiastical authorities gave the right to perpetual separation in virtue of which the matter became irrevocably adjudged. Nevertheless, the proponents of this opinion concede that reconciliation should be advised so as to avoid scandal and further danger to the souls of the consorts.

The proponents of the latter opinion appeared to hold that the causes of separation of consorts were to be reckoned among those causes which became irrevocably adjudged, i.e., transeuntes in rem indicatam. However, on April 8, 1941, the Pontifical Code Commission clearly defined that the causes of separation of consorts are to

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18 De Matrimonio, II, n. 2469, p. 792.
19 Can. 1560, 1°: 1698-1700.
20 Can. 1128.
21 Gasparri, De Matrimonio, II, n. 1175, p. 246.
22 Can. 1902.
23 Aertnys, Theologia Moralis, II, n. 934, p. 623.
be reckoned among those causes which never become irrevocably adjudged, as referred to in Canons 1903 and 1989.\textsuperscript{24}

B) Crimes Considered Equivalent to Adultery

Certain heinous crimes, particularly when they are habitual, are considered by many authors to constitute sufficient grounds to authorize or to justify perpetual separation. Bayon gives a clear and comprehensive statement of this opinion:

\textit{Ob Sodomiam Cum Altera Persona}

\begin{itemize}
\item a) Cum matrimonium co tendat ut conjuges efficiantur una caro, ideo violat perfecte et consummate fidem matrimonii carmen suam in alium vel in aliam dividens, in erno oritur jus divorcio, ratione supra alata. Cum autem haec diviso carnis perfecte reperiantur in omni concubitu, sive naturali sive sodomitico, hinc est ut uterque sufficiametur divorcio causam praebat. Qua ratione Christus declarans divortium licere ratione fornicationis, nomine fornicationis omnem illum concubitu per quem caro conjugis dividitur in alium includit (Sanchez, i. X, d. IV, n. 3; St. Alph., i. VI, tr. VI, n. 962).
\item b) Cum altera persona. Si vir propriae uxorem tentaret sodomitice cognoscere, non adest causa divorcii perpetui, quia vir non dividit carmen suam in aliam personam, sed in propriam uxorem; esset causa separationis temporariae, quia si vir desistere nollet, posset usor ratione periculi animae propriae divortere, ne trabatur ad convivendum in illo scelere (Sanchez, i. X, d. IV, n. 6-7).
\item c) Sodomia, quia tactus cum alia persona, quantumvis libidinosi ac animo perveniendi ad adulteri gum habiti, divortio justo causam non praebet, divorci enim fundamentum ac radix est carnis in alium divisio, quae in solis osculis, tactibus et amplexibus non habetur.
\end{itemize}

\textit{Ob Bestialitatem}—Community auctores dicunt bestialitatem esse justam divorcii causam, cum vere caro conjugis in aliam dividatur, nempe, in carnis bestias, cui copulatur, nihil enim refert miserci cum carnis ejusdem vel diversae naturae. Neque refert et bestialitatem prolem generari non posse, cum ad divorcium impertinentis sit quod generatio sequatur et an possit ex copula generation sequi. Neque ex sodomia sequitur potest, et nihilominus sodomia causam justam divorcii praebet.\textsuperscript{25}

\textsuperscript{24} Pont. Comm., 8 Aprilis, 1941, AAS, XXXIII (1941), 175. Cf. p. 620.

this new affiliation constituted a definite source of danger or perversion for the children or for the Catholic consort.

Affiliation with a society condemned by the Church is not mentioned in Canon 1131 § 1 as a reason authorizing temporary separation. Hence, such an affiliation would ordinarily not constitute sufficient grounds for separation unless such membership became a source of real danger or perversion to the children or to the Catholic consort.

If the danger of spiritual perversion of the wife and children should become proximate and if separation is the only adequate remedy available, then there is not only a right but there may be even an obligation of separation. The same is true in a case where cohabitation with an irreligious person would become an occasion of grave scandal to the faithful.

That those who belong to an atheistic sect are to be judged according to the same norms as those who belong to a non-Catholic sect is clear from a Reply of the Pontifical Code Commission of July 30, 1934. The query proposed to the Commission was:

Whether according to the Code of Canon Law, persons who belong or who have belonged to an atheistic sect are to be considered, in so far as all legal effects are concerned, even those which pertain to sacred ordination and marriage, the same as persons who belong or have belonged to a non-Catholic sect.

Reply: In the affirmative.27

B) Non-Catholic Education of the Children Effected by One Consort

The Church grants permission for mixed and disparate marriages only on the condition that all the children will be baptized and educated in the Catholic religion.28 Since this is embodied in the form of a promise, the non-Catholic consort is obliged to fulfill the promise. If the non-Catholic party flagrantly violates this solemn promise by insisting on the non-Catholic education of the children, the Catholic consort has the right to separation. It is to be noted that the guilt must be attributable to the non-Catholic party before separation may be justified on these particular grounds.

Separation from a Catholic consort is likewise authorized if this Catholic consort is the cause of the non-Catholic education of the children. This right is granted because non-Catholic education is aimed directly at the good of the child and indirectly at the gift of faith.

If separation would prove to be the sole and only efficacious means whereby a child or children could be protected against non-Catholic education, such separation is then not only licit but even obligatory. However, in practical cases it is extremely rare that separation would prove to be the sole and only efficacious means of protecting the Catholic faith of the children.

C) The Leading of a Criminal and Disgraceful Life by One Consort

The text of Canon 1131 § 1 emphasizes the fact that there must be an habitual tendency toward a criminal and disgraceful life before this particular provision of law may be invoked in favor of separation. A life of criminal habits would naturally cause mental torture to the innocent consort because of the constant anxiety and disgrace involved. This would be particularly true where there was no evidence or hope of amendment.

If one of the consorts is discovered to be a convicted robber, a confirmed kleptomaniac, a spy, an habitual drunkard, an inveterate addict of narcotics, a dissolute gambler, and the like, who has brought ignominy and disgrace upon a family, separation may be resorted to as a means to protect the children and the other consort. This is particularly true where both spiritual and temporal harm result from the criminal and disgraceful habits of life.

A single criminal or disgraceful act would not be considered sufficient to warrant separation, particularly if the family honor and good name are not permanently jeopardized. The principal reason is that the spiritual and temporal harm do not necessarily result therefrom.

D) Serious Danger Caused by One Consort to the Soul or Body of the Other Consort

Serious danger to the soul of a consort could arise from dangerous occasions and repeated temptations leading to serious sins against conjugal chastity, caused directly by the other consort or by companions or relatives. Similarly, constant and studied ridicule of the

27 AAS., XXVI (1934), 404.
28 Can. 1061 § 1, 27; 1071.
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27 AAS, XXVI (1934), 404.
28 Can. 1061 § 1, 3° 1071.
true faith, with the purpose of causing spiritual perversion and the like, would be sufficient. When these and similar dangers continue, despite pleadings and remonstrances, the innocent consort has the right of separation.

The law of nature grants each individual the right to employ efficacious means to avoid death and serious bodily injury. Hence, if conjugal cohabitation becomes a serious threat to the life or the bodily health of one consort, that consort may invoke the right of temporary separation.

Separation would be warranted in a case where actual danger of death, of real injury, or of serious mutilation existed. Moreover, a serious and repulsive contagious disease, especially a social disease, would ordinarily constitute sufficient grounds for separation. Similarly, insanity, a dangerous predisposition to fits of mental derangement, and the like would be sufficient grounds to authorize separation.

If a serious threat to life and health is caused by the presence of an unwelcome relative in a home, the aggrieved party may resort to separation if the danger is really grave and if other means have proved ineffectual. In such a case, it would have to be certain that other adequate means had been honestly attempted in an effort to adjust difficulties.

E) Unbearable Cruelty Which Renders Conjugal Life Insupportable

The wife is usually the victim of unbearable cruelty. Her right of separation is based on the principle of the divine-natural law, namely, that she is a helpmate and not a slave or servant of the husband. Hence, if she is treated cruelly she may invoke her right of separation as a just means of defense against the unjust force of the husband.

The Latin term saevitia means excessive or unbearable cruelty, harshness, extreme severity, fierceness, and barbarity. What is called cruelty, by way of travesty, in modern divorce courts could not be viewed as saevitia, in the sense of Canon 1131 § 1. Hence, the so-called incompatibility of temperament, divergence of views, and the like would not be considered sufficient to invoke separation.

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39 Schmalzgruber, Jus Ecclesiasticum, IV, 4, 19, n. 142.
40 Schmalzgruber, Jus Ecclesiasticum, IV, 4, 19, n. 143.

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PROPER CANONICAL AUTHORIZATION

The unbearable nature of the cruelty is to be judged from the social position, the personal qualities, the temperament, the circumstances of life, and similar factors surrounding the life of the wife. A genteel and highly educated person of high social rank or of noble birth could hardly be expected to endure the treatment tolerated by an uncouth woman.

Cruelty becomes unbearable because of constant quarrels, altercations, exchange of blows, and the like. The wife, it appears, has grounds for separation even if the cruelty is mutual, and even if she has been the cause of arguments and quarrels. However, it is inferred that the cruelty must be frequent or customary, with the fearful anticipation that it will continue in the future, in order to warrant separation.

If the cruelty is inflicted by relatives of the husband, the wife has a right to temporary separation, provided all other means have been employed to avoid domestic quarrles. Separation is to be considered as the last resort in such cases.

In granting the wife the right of separation in cases of unbearable cruelty, the Church is not oblivious of the harmful effect upon the children that altercations, quarrels, and the like tend to have on the young. An atmosphere of peace and charity is expected to pervade every Christian home.

F) Causes and Reasons Similar to the Foregoing

It is to be observed that the reasons authorizing separation are not taxative proposita in Canon 1131 § 1. Innumerable other reasons may be encountered in practical cases. For instance, desertion has been adjudged by the S. R. Rota as a cause sufficiently grave to authorize separation for an indefinite period of time. Separation could be invoked as a necessary precaution to save one's fortune, provided it was duly proved that such a separation was the sole means by which a family or personal fortune could be adequately safeguarded. Other causes might warrant temporary separations, provided it was duly proved that separation was the only possible expedient. Such causes might be an extremely avaricious and nig-
gardly character which made life unbearable; an excessively extravagant tendency to squander money to the detriment of the fortune of the other consort; a primitive mode of life in the jungles of Africa or in similar incompatible surroundings might well be viewed as unbearable by a lady of noble lineage, unaccustomed to hardships, and the like.

III. THE PROPER CANONICAL AUTHORIZATION OF SEPARATION

Separation is lawful only when it is duly authorized in the cases or by the proper ecclesiastical authorities mentioned in law. Separation sometimes takes place by the mutual consent of the consorts; at other times the aggrieved consort is authorized in law to separate from the guilty consort, while in other cases only the proper ecclesiastical authorities are empowered to grant permission for separation.

I. SEPARATION BY MUTUAL CONSENT

For spiritual reasons or for other noble motives consorts, particularly those advanced in years, may separate by mutual agreement. This may be in the nature of a temporary or even a permanent separation, *citra incontinentiae periculum et secluso scandalo*. Thus Gasparri states:


Separation by mutual agreement may likewise take place in cases where the consorts wish to enter upon the religious state or when the husband wishes to prepare for ordination to the priesthood. Such cases are extremely rare and require a special dispensation from the Holy See, as indicated in Canons 542, 1° and 987, 2°.

II. SEPARATION INAUGURATED BY THE AGGRIEVED CONSORT

In virtue of the authority granted in Canon 1129 §1: . . . *ius habet solvendi, etiam in perpetuum, vitae communionem*, and in Canon 1130: . . . *sive propria auctoritate legitime discesserit*, an innocent consort aggrieved by the certainly proved adultery of the other consort is free to exercise the right of perpetual separation. Similarly, Canon 1131 §1, by special authorization: . . . *etiam propria auctoritate, si de eis certo constet, et periculum sit in mora*, empowers the innocent consort to inaugurate temporary separation under certain conditions and in special circumstances.

These powers, granted to the innocent consort, are extraordinary in their latitude and scope. They are so extensive that there is even a danger of abuse in practical cases. The Church grants this right as a means to protect innocent consorts. The consorts, in turn, must be extremely conscientious and judicious in the exercise of this right.

The great danger that lurks in the exercise of the right of separation, *propria auctoritate*, as enunciated in Canons 1130 and 1131 §1 is that the consorts may act rashly, hastily, and capriciously, without due deliberation and without the required certainty. Under the influence of anger and passion, there is a danger that a consort may accept suspicions, surmises and conjectures as facts, and that the judgment may be entirely subjective. Hence, in cases involving perpetual separation, the aggrieved consorts should never be advised to separate until the fact of adultery is duly ascertained and proved. Moreover, it must be clearly established that the adultery was consummated, formal, and morally certain; and that the sin was not permitted, nor caused, nor condoned by the innocent consort, nor compensated by a similar crime. Furthermore, the experience of the S. R. Rota and of other tribunals indicates that it is very difficult to prove the fact of adultery. 35 From all this it can be easily deduced that aggrieved parties should usually be counseled to present their

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34 *De Matrimonio*, II, n. 1178, p. 248.
cases to the proper ecclesiastical authorities for adjudication, before they sever the ties of conjugal cohabitation.

In cases of temporary separation, the aggrieved consort may not, proprius auctoritate, abandon the obligation of conjugal cohabitation until there is moral certitude about the existence and gravity of the cause and that there is real danger in delay (Can. 1131 § 1). In practical cases, the innocent consort should be advised to submit the case to the ecclesiastical authorities by whom an objective and thorough study may be made of the entire matter.  

III. SEPARATION AUTHORIZED BY THE PROPER ECCLESIASTICAL AUTHORITIES

Ordinarily, the proper ecclesiastical authorities empowered to decide whether just reasons for separation actually exist in a particular case are either the Ordinary or the Officialis. If the administrative process is employed, the Bishop or his Vicar General is empowered in law to examine and decide the matter. If the judicial process is invoked, either the Officialis alone  

38 It is of interest to note that the Concordat of February 11, 1929, between Italy and the Holy See grants to the Italian Government the authority to adjudge cases of separation. Thus Article 34 states in part: "Quanto alle cause di separazione personale, la Santa Sede consente che siano giudicate dall'autorità giudiziaria civile." According to Cappello, this extends even to cases of separation involving marriages contracted before the Concordat. De Sacramentis, III, Pars II, n. 958, p. 499.


37 One judge would be sufficient in separation cases, as the question of the bond of marriage is not involved. Can. 1576 § 1, 17.