

Sentence *coram* Perathoner, 17 March 1913¹

Separation of Spouses

Malicious Abandonment

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1 – The Facts

1. Henry and Hedwig contracted marriage in the Church on June 23, 1900. This marriage seemed to be happy from the beginning and two children were born from it. But afterwards the burdened spouses became opposed to one another for various reasons, so that the man abandoned his wife and children in the month of December 1908, and hereafter he did not provide for their sustenance. At last, in a subsequent year, the man wished to re-establish their partnership, but the woman refused because of the conditions placed by the man. Then Hedwig approached the archiepiscopal court asking for a separation from table and bed for an indefinite time because of the sin of the husband, whom she accused of malicious abandonment and the denial of support. After the reconciliation of the litigating parties was attempted but was not achieved, the archiepiscopal court, having properly completed the canonical process, rejected the plea of the petitioner as not having a foundation, in a sentence of June 17, 1911. The court of second instance for the Archdiocese, and the one to which Hedwig appealed, overturned the first sentence and decreed the separation requested by the wife, on October 25, 1911, for an indefinite time, because of the sin of the husband. Henry appealed this sentence to the Apostolic See. Hence, today, by this sentence, the cause between the parties is placed under this concordance of doubts: “1. *Whether there is a legitimate cause for separation in this case?* And if affirmative: 2. *Whose “sin provides the reason for separation?”*”.

2 – The Law

2. With regard to the law, the father Auditors noted the following: Divorce, or the separation of spouses with the conjugal covenant remaining, is possible for just and diverse causes, which the Council of Trent teaches against the heretics, who are quick to release the spouses from the bond, but slow to release them from cohabitation, and, as one might expect, the heretics admit only adultery as a just cause for separation or divorce.² “If anyone says,” defined the Council in

¹ TRIBUNAL OF THE ROMAN ROTA, *coram* Perathoner, 17 March 1913, in *Sacrae Romanae Rotae Decisiones*, 5 (1913), pp. 217-225.

² Today, the term divorce means an action by the secular courts of dissolving a marriage. However, in the past, the term divorce merely indicated a separation of husband and wife. Thus, the term divorce was used to describe a variety of phenomena. First of all, the term divorce was used to describe the separation of the spouses with the bond

session 24, canon 8, “that the Church errs, in that she declares that, for many causes, a separation may take place between husband and wife, in regards to bed, or in regards to cohabitation, for a determinate or for an indeterminate period; let him be anathema.”

3. Nevertheless, the Council has not enumerated a complete list of these causes, but they are adduced by various doctors either for a perpetual or temporary separation. We are dealing only with the topic of temporary separation, which is considered to last only so long as the causes last, from which it was conceded. For a temporary separation does not have only a penal motivation, but is also a remedy to avoid grave evils of body and soul. Whence Wernz teaches (*tom. IV, n. 713*)³: “Temporary causes of separation from bed and cohabitation generally last as long as the grave dangers of soul and body” (Cf. also Scherer § 137, V). Indeed Aichner (*Compen. iur. Eccl. ed. 11, p. 721 note 18*)⁴ holds this: “All causes of separation flow from a principle: The spouses are only obliged to the partnership of life insofar as they can continue it without danger of soul, life or charity.” After Reiffenstuel (*I. IV, t. 19, n. 56*)⁵ had at length enumerated the causes, which, according to common opinion, are not sufficient for a perpetual divorce, he adds: “There is a reason for this, because after an amendment has been made, the innocent spouse is obliged to return to the perpetrator and to receive him.”

4. Specifically, “modern authors agree that malicious abandonment must be counted” among the many causes “of temporary separation” (Cf. Wernz, *loc. cit. 713, III*; Aichner, *loc. cit. p. 722*; Leitner, *ed. 2, p. 602, IV*; Scherer, *loc. cit.*; Nasoni. *Compend. Iur. Can. 11, p. 154*⁶; Alberti, *Theol. part. II, n. 98, p. 119*). The Council of Trent already hinted at this, defining that the bond of marriage cannot be dissolved because of the affected absence of a spouse (*Session 24, canon 5*), and it expressly acknowledged the Austrian Instruction, Par. 209: “The spouse, whom the

of marriage remaining, as it does in this sentence from the Roman Rota. Secondly, the term divorce was used to describe the declaration of nullity of marriage. Finally, the term divorce was used to describe the dissolution of marriage itself. Neither of the latter two meanings are found in the current sentence of the Rota. Moreover, all of these meanings are to be kept distinct from another term, “destruction of the conjugal partnership.” The latter refers to an intersubjective phenomenon of destroying or dissolving the relationship between husband and wife. In other words, the conjugal partnership can be destroyed, but the bond of marriage is not thereby affected. The parties remain married even though the relationship has been damaged or even destroyed. Consequently, as this sentence from the Rota makes clear, the intention to destroy the conjugal partnership is the essential difference between malicious abandonment and a mere prolonged absence.

³ WERNZ, F.X., *Ius Decretalium ad usum praelectionum in scholis textus canonici sive iuris Decretalium*, Vol. 4, Giachetti, 1912.

⁴ AICHNER, S., *Compendium iuris ecclesiastici ad usum cleri, ac praesertim per Imperium Austriacum, in cura animarum laborantis*, Brixinae, Weger, 1911.

⁵ REIFFENSTUEL, A., *Ius canonicum universum complectens Tractatum de regulis iuris*, Vol. 4, Paris, Ludovicum Vives, 1864-1870.

⁶ NASONI, A., *Iuris canonici compendium biennali scholae accommodatum*, Mediolani, J. Palma, 1903.

other party maliciously abandoned can ask for a separation from bed and table, until the culprit of the desertion has sufficiently proved the ready intention to fulfill the conjugal duties” (Cf. also *S.C.C.*, 31 July 1869 and 23 Jan. 1875, in *Act. S. Sed. vol. V, p. 3 ff. and p. 12*)⁷. It is pleasing to note that even recent civil codes, among those especially the Austrian Code § 109, and the Italian Code art. 150, reckon malicious abandonment among the causes of separation. “However, the reason,” says Aichner, (*loc. cit. note 17*), “why malicious abandonment is listed among causes of separation according to modern practice, is because it leads either to pre-eminent hatred or to bitter suffering of soul.” Indeed, Wernz (*loc. cit.*) reckons malicious abandonment among the dangers of the body.

5. As far as the way of proceeding in a case of malicious abandonment, Aichner, (*loc. cit.*) observes well that separation must not be decreed straightaway and immediately. “For in the first place, the spouse who unjustly separates is compelled to return by a neutral competent judge at the petition of the deserted party. A time-limit must be prescribed against this man for the intention of being absent, and if he stays where he is unknown, he must be cited with the prescribed time-limit in that very place through public newspapers. Then, with him obstinately persisting in his own mind, the judge grants a temporary separation to the innocent party with all effects.” From these words it can be adduced, not so much that the fact of abandonment is a legitimate cause for pronouncing separation, but rather that the obstinate refusal to establish the conjugal partnership after the invitation of a judge is a legitimate cause for pronouncing separation.

6. Furthermore, in order that the abandonment may be called malicious it is required that it be unjust and culpable with the intention of destroying the conjugal partnership. Moreover, the abandonment is unjust if it is done without a just cause or without any just pretext. For different situations are recognized in which the abandonment is lawful: certainly when the adultery of the other party is known, also if there is danger of body or soul in delay, e.g., if from the untamed cruelty of the man, death or wounds would be feared. There are other just causes for departing even for a long time, e.g., if the man is called to war or into the Senate. Moreover, if a longer absence is necessary to care for or defend the family, or to complete other business or duties. Beyond this, it is required for the notion of malicious abandonment that this culpability and acting unjustly be united with the intention of destroying the conjugal life. For the one who separates with this intention evidently causes an injustice to the abandoned party. Wherefore, malicious abandonment is already present if the separating party chooses a separate dwelling in the same place of domicile, or if the man expels his wife from the house, or if the wife obstinately and without cause equally refuses to follow the domicile, which the man had to

⁷ SACRED CONGREGATION FOR THE COUNCIL, Separation Case, 31 July 1869, in *ASS [Acta Sanctae Sedis]*, 5 (1869-1870), pp. 3-12.

change out of necessity, e.g., for work or duty. Indeed, if the intention to destroy the conjugal partnership is absent, then the separation of the one spouse cannot be considered true and malicious, even if it was made against the will of the other spouse. The same must be said about forced abandonment, e.g., if one spouse is driven into exile. Likewise, concerning abandonment which was granted by means of a contract which the spouses entered into for certain occasions and therefore is not unjust. Finally, about abandonment which certainly is unjust, however it was made without the consciousness of the injustice, e.g., by an insane spouse (cf. Kutschler, *Ius matr. tom. V, p. 691 ff.*). Also, it must be noted, in order to decree a separation of spouses from bed and table on the grounds of malicious abandonment it is required that one fully prove these things, or at least that one accords these things with a strong presumption (Cf. Kutschler, *loc. cit.*).

3 – The Argument

7. Since these principles of law have been set forth, the Very Rev. Auditors first of all have noted, with regard to the facts, that the woman asking for a separation had brought only one cause, namely, malicious abandonment and the denial of support. Thus, she says in the *libellus*, “I turned in my absent husband for a judicial decision because he interrupted his common life with me in December of 1908, and yet from this point on he has not supplied the necessary things for my life or for my children.” The deposition of the petitioner responds with this: “I put my husband within a judicial decision because he maliciously abandoned me and he did not care to provide the things necessary to sustain life, either for me or for our children.” Both the first judge and the judge of second instance considered this sole cause of malicious abandonment. Whence, the case has reached Us with these limits placed by the petitioner and considered by each of the judges. We must retain and renew the first doubt according to the plea of the wife, having to leave out of consideration whether other causes of separation exist in this case.

8. Indeed, the fact of abandonment is certain. All of Hedwig’s witnesses acknowledge it, and Henry’s witnesses did not dare to deny it. Indeed, the man himself confesses his abandonment, saying, “I departed to my relatives in order to support my family, since I would find the source of those things necessary for life. My family lived for a very short time in my absence, and they even had the gift of frugality.” However, it cannot be doubted that this absence lasted for a long time, because he adds, “By this time, such a state of affairs lasted for two full years.”

9. Therefore, since the fact of abandonment cannot be doubted, now it must be asked whether this can be called malicious, in other words, whether it was unjust and culpably joined with the intention of destroying the conjugal partnership. The abandonment is not unjust, in this case, if Henry had the consent of his spouse or some just cause for departing. But, we think that these things are lacking. Certainly the man did not dare to affirm that the consent of the woman was

present, but using careful words says that he departed “with the knowledge of his wife.” The witness, Sophia N., relates that the consent was plainly absent, saying, “According to the assertion of the petitioner’s sister, Imelis, after Henry initiated the plan to desert his wife, she was asking her husband, with earnest pleas, that he refrain from doing this.” Because even though this testimony of great weight was not made by her, since the witness had heard the words from the sister of the petitioner, nevertheless there exists a letter of Hedwig sent to the man at a non-suspect time, from which it is deduced that she endured the abandonment of the man as offensive. For, she writes this: “Since I am compelled to tell you, I endure this most sorrowfully that you do not love me more; nevertheless, you have not withheld your desire recently, that in this way I would endure my lot in life. These things are hardly easy to forget. And look, I am not able to have the greatest effect in this letter, for I bear it too painfully.” And consent must not be presumed: at least from the day in which the man invited the woman through a letter to re-establish the partnership of life, for the wife resisted. In this letter of January 6, 1909, the man placed such conditions, which the wife rightly refused to accept. Regarding sustenance, the man says, “Sell Humince. If you have a \$320 sale price for each of the acres, with the public treasury debt repaid, and having deducted the overhead expenses for the records and assessors, you will have \$160,000, of which \$100,000 will be used to pay off the city and provincial mortgage, and \$60,000 you will send to me so that I can buy household items. You can live in the city for the seven winter months, and you will live with me in the country for the five summer months.” But Hedwig did not assent to these conditions, seeing that going away would cause a most grave loss to her family, which the witness Constantia Maria also understood, saying: “The man had given a letter to his wife, which she read before me, in which he pressured his wife to persuade her to live together with him, nevertheless, there were many harsh monetary conditions placed by him which seemed to me to be difficult to accept.” And indeed, the sale of the estate was harsh enough, and therefore unacceptable to the wife. Likewise, it was burdensome for her to send such a great sum of money to the man, who confesses that he suffers from a lack of household things and accordingly he was not able to offer any serious and suitable guarantee to his wife that the money given would allow her to live in security, although he acknowledged that he was about to return the stated sum of money from the newly sold mortgage, besides that given for household goods. Now, from these things it follows that the consent of the wife was not present either before or after the abandonment of the man. Which, if the consent had been present, the man’s abandonment could not be called malicious, although it is not regularly permitted for spouses to separate by mutual consent, and mutual consent of this kind does not serve as a legitimate reason for a decreed separation. Therefore, since the consent of the wife is absent in this case, it remains to be seen whether the man had a just cause for leaving.

10. Indeed, Henry offers such causes and other things, for he asserts that he arranged to withdraw to the country, that is, to abandon his family, in order to prepare the means for him to support

them. But, this reason does not have any value: in the first place, it is manifest from the acts that he continually looked for the support of his family from the goods of his very wealthy wife. Moreover, if Henry in fact had deserted his family with the intention that he would support his family with his agrarian skill, he ought to have demonstrated this with actions and not only with words, that is, at least to be mindful of the support of his family. Not only his wife, but also all the witnesses testify that the man neither provided nor does he now provide nourishment for his wife and children, which however, Henry himself confesses, saying: "Indeed, I am not providing the necessary things to support the life of my family. Nevertheless, there is a primary reason for this, because I myself suffer from a lack of household things and I am not of the opinion that I am obliged by a strict law to support my family more, since my wife has to some degree impelled me to act in this way, from receiving the dowry and for not being willing to live with me." The denial of nourishment demonstrates that Henry, since he abandoned his family, by no means had the intention to prepare greater revenues for himself with his skill for the welfare of his family. Moreover, the Promoter of Justice has correctly noted that it is not understood why the man, who is an expert in agrarian things, is not able exercise his skill unless he lives in the country with his wife and family. For the opportunities for agrarian business can easily be found, indeed generally so, even in the city. Furthermore, the question whether Henry should be excused from the support of his family because he has returned his wife's dowry hardly pertains to the matter. For Hedwig has set this cause in motion not because of the denial of support, but because of the malicious abandonment of the man, which is the only thing she accuses the man of.

11. It is said that the man had another reason for leaving which pertains to the moral order. Namely, his wife had yielded too much to the pleasures of the city and to the fellowship of people, she kept loathing the solaces of the fields and everything was with him, for she would adorn herself with various types of clothes and she would take delightful trips on occasion even into bathhouses, as Joseph, the witness introduced by the man, sets forth. The same witness proceeds thus: "Many times the petitioner was complaining, bewailing about the inconvenience of country life and in her desires she kept telling me that she had to live in a city or close to a city, so that she would be able to live in the manner pleasing to her with people and to relax the mind with delight. This is the reason why Henry had invested his household things elsewhere for redemption and has provided new household things close to the city." From these words, he concludes that the wife was abandoned by right, and deservedly so, by the man who was most skilled in agrarian things, having been consigned to the care of the fields and foreign to the delights of the city. But the behavior of Hedwig cannot be blamed: for she was from the city, had an excellent education and besides was sufficiently wealthy. Whereupon, she was complaining for the reason that she was compelled by the man to perpetually live a solitary life in the country, that she outspokenly reproves Henry, writing: "I had repeatedly explained to you in person how annoyingly I suffer when I am forced to live like this, that you had, in every

respect, no reason from me, and in fact we had lived a solitary life although under the same roof. And therefore, I suffer less seriously that I was abandoned, for I was patient many times for this reason.” And it is reasonably burdensome for her, who was educated in the city, to flee the fellowship of people in the life of the city to which one is accustomed. Therefore, Hedwig cannot be blamed for wanting to live in the city, as if it were a luxury or a disclosure of immodesty and shallowness. Nor can it be said that Henry had the right to force his wife, so that she would dwell with him in the country.

12. Indeed, there is a most true principle: It is for the man and not for the woman to choose where the dwelling is established. But this principle also admits exceptions. It is heard in Ferrar’s work (*Biblioth. Canon.* under the word “Wife” n. 1-4): “The wife, per se, rather has to dwell with the man: that is, it is for the man, not however for the woman, to choose a domicile, or a place where they dwell and live together, because, as the Apostle says (Eph. 6:22), the man is head of the woman. Whence, ordinarily the wife has to follow her husband for the reason of changing domicile, provided that that change does not impair the wife with a grave inconvenience, because the wife is not thought to be obliged herself to follow with so great an inconvenience, or with danger, e.g., of health, of life, of virtue, and things of this kind.” Moreover, the wife is not her husband’s slave and property, but his lady and partner. Besides, the man did not have, in this case, a just cause to habitually stay in the country, as well, as was said, and perhaps more, he will be able to exercise his agrarian skill by remaining in the city, especially if he buys and contracts the estate which is near the city.

13. Finally, it must be noted that Henry asserts that he had abandoned his family so that he will pursue some duty as a farm owner, but in fact, up to this point, he has not found this duty, and even now he lives in the city and there discharges his function away from the foreign agriculture. Also, the other circumstances, such as quarrels between the spouses, which many witnesses testify to have existed, did not provide a just cause for Henry to abandon Hedwig.

14. For, as found in the acts, these quarrels and disagreements had broken out, either because of the man’s poor administration of goods, or because of the character of the woman; such things must not be supposed to provide Henry with a just motive for leaving. Moreover, the witness Josepha, who claims that the petitioner “also in regard to all the household things, she became bitter, hard and obstinate,” is hardly able to be considered. For the witness discharged the duty of teacher for a duration of almost five years in the house of the litigating spouses; indeed it can be deduced from the circumstance that Hedwig did not become such as Josepha describes her. Here it is desirable to note that Hedwig was commended, both by the pastor of St. Alexander and by the secretary of the General Consistory, who did not know her at first, as a truthful and honest wife both properly fulfilling the precepts of the Catholic religion and piously educating her children in the fear of the Lord. Therefore, the testimony of the bishop Sandowirien, who is less

than favorable to Hedwig, is greatly diminished. Even though Henry is well commended by two Ordinaries, nevertheless it is proven in the acts that he did not administer the good of his wife well, and this even became one of the reasons why Hedwig did not wish to live in the country. Add to this that Henry, as the witness Leonidas testifies, had decided to sell the household goods because he was most annoyingly dealing with the fire wickedly set to his own house. The woman also unwillingly dealt with this fire, and accordingly, it is easy to understand that she wanted to withdraw from the country.

15. Finally, it remains to be investigated whether Henry had in mind to disrupt the conjugal partnership by abandoning his family. The Father Auditors consider that this must be affirmed. Indeed, Henry himself confesses that he contributed to his relatives with the knowledge of his wife (but not her consent). Now, it follows from this, that Henry had manifested to his wife his plan or intention already before its execution. This is seen even more clearly from those things which the witness Maria heard from the petitioner's sister after Henry began his plan to abandon his wife, "after pleading, she asked her husband not to do this. Nevertheless, in vain; Henry abandoned his wife."

16. There is also the fact that Henry was absent for many years, which gives rise to the presumption that, by abandoning his family, he had the intention to destroy the conjugal life. It does not matter that he proposed conditions for reconciliation and the renewal of their living together. For from this it is introduced, in the first place, that Henry, and not Hedwig, is the author of the disruption of their common conjugal life; indeed the woman was not able to give in to these conditions for reconciliation that were noted above.

17. Therefore, since Henry did not have a just cause for leaving, moreover, since his intention to destroy the conjugal partnership is proven or at least it must be ardently presumed, therefore, the abandonment, in this case, must be called malicious and culpable, or injurious to his family.

18. After considering and pondering with zeal everything both in law and in fact, since the name of Christ has been invoked, We, the undersigned Auditors, sitting as the Tribunal and having only God before our eyes, respond and definitively sentence for the proposed doubt. For the first doubt: *Affirmatively, or there is a legitimate reason for separation for an indefinite time according to the plea of the wife.* For the second doubt: *From the sin of the man, establishing moreover that the expenses have to be balanced among the parties.*

We thus pronounce and definitively sentence, mandating the local Ordinaries and the Ministers of the Tribunals who are involved, that they may commit this sentence for execution and that those opposed may proceed according to the norm of the sacred canons and especially the *Decree on Reformation, Cap. 3, Sess. XXV* of the Council of Trent, with those things added for the execution and coercion, which will be more effective and opportune for the circumstances.

Given in Rome, at the seat of the Tribunal of the Sacred Roman Rota, on March 17, 1913.

Antonius Perathoner, *Ponens*
Iosephus Alberti
Petrus Rossetti

Sac. T. Tani, *Notary*

This sentence was appealed, but the appeal was thereafter deserted.