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THE CATHOLIC LAWYER AND DIVORCE CASES

You are a fairly successful lawyer. Through hard work you have won recognition in your community as a capable attorney. You are also a Catholic, and you insist that you are loyal to your religion.

A Mrs. Lloyd Smith approaches you and requests your services in order to obtain a divorce. Both she and her estranged husband are prominent in your locality, and the publicity you would gain in handling the case would undoubtedly increase your standing as a legal expert.

What will you do? Will you take the case once you have ascertained that your prospective client has good legal grounds for a divorce? Will you bother to inquire whether she is a Catholic? A Protestant? A Jewess? Will the question of her religion, or the lack of it, make any difference in your decision to take, or to refuse to take the case? If any misgivings on the score of religion at all enter your mind, will you dispel them promptly with the thought that civil law is your profession and the case awaiting your service is held by your associates at the bar as legitimate and dignified legal work? The law is your business, let the client be concerned about matters of conscience, and before God!

Or perhaps you will try to bring out a little more cogent reason and argue with yourself that your work as an attorney before the bar in civil law is confined to the civil effects of marriage, and that all other effects flowing from the court's decision are outside of your responsibility.

The Pope in an address to the lawyers of Italy a few years ago gives a decided jolt to so complacent an answer. His words on this particular point were addressed especially to judges, but there can be no doubt that they apply with equal force to attorneys. He said: ¹

¹ 41 ACTA APOSTOLICAE SEDIS 597, 603 (1949).

A Catholic judge cannot grant a decree of divorce (where that is permitted) for a marriage valid before God and the Church, except for reasons of great weight. He should not forget that such a decree in practice not only reaches the civil effects but in fact serves to foster the mistaken view that the bond is actually severed, and that a subsequent one is valid and binding.

Through his active participation in the court proceedings the attorney surely shares in the responsibility for these gravely evil consequences.

Can a Catholic lawyer ease his conscience by throwing the blame entirely on the law-makers? Pius XII himself asserts that the civil statutes allowing for divorce are unjust. If the laws are unjust, then the law-makers are the wrong-doers. The blame for the evils of divorce rests squarely on the shoulders of the legislators. Does this exculpate both judges and attorneys? The Holy Father answers in the negative:²

For every sentence the principle obtains that the judge cannot easily and simply refuse the responsibility of his decision by throwing it all on the law and its authors. These certainly are primarily responsible for the effects of the law in question. But the judge who by his decision applies it to a particular case is co-cause and therefore co-responsible for the effects.

Judges and lawyers cannot twist free of the fact that their work towards the granting of a decree of divorce for the plaintiff is a cooperation in an evil action.

Will a Catholic lawyer's practice suffer if he is conscientious and heeds the moral issues involved in divorce suits? That is debatable. At any rate I am sure that Catholic lawyers will agree wholeheartedly with the New York lawyer, Godfrey Schmidt, who points the finger of scorn at those lawyers who build up a "successful" legal profession on failures in marriage.³

² *Id.* at 602.

³ Palmer, *Godfrey Schmidt and the Full Life*, 17 CATHOLIC DIGEST 121, 126 (July 1953).

Lawyers themselves are appalled at the purely legalistic attitude in this matter. An association of lawyers at a recent meeting went on record as recommending that the attorney who is asked to undertake divorce proceedings should first try to reconcile the couple. Legislators, too, are disturbed. The State of Illinois just passed a law which calls for a sixty-day "cooling-off period" after the petition for divorce.⁴

Does this mean that a Catholic lawyer is bound in conscience to refuse absolutely to cooperate with a plaintiff suing for a divorce? We might answer simply along with an eminent moral theologian that "generally speaking" he must refuse to take such cases.⁵ But given the vast number of divorce pleas today, the whole question merits a rather thorough re-examination. Accordingly, I propose to examine briefly first of all the general principles involved in the lawyer's action when he institutes divorce proceedings for a client; then, to scrutinize the application of these principles to Catholic clients, to baptized non-Catholic, and to non-baptized persons.

A. *The General Principles*

Civil laws granting divorce are, for the most part, morally wrong because the State therein usurps an authority to which it has no right whatsoever. "What therefore God has joined together, let no man put asunder." (Matt.19:7). It should be obvious that the State unlawfully invades an area in which it has no competence when it claims the power to dissolve a marriage lawfully contracted by *two baptized* persons. Such a contract is a Sacrament. Christian marriage, then, belongs to the Church, and not to the Civil authorities. The Church acknowledges that she herself has not the power to dissolve such a marriage, once it has been consummated.⁶

⁴ ILL. STAT. ANN. c. 109, § 109.188(1) (Supp. 1953).

⁵ CONNELL, MORALS IN POLITICS AND PROFESSIONS 110 (1946).

⁶ "A valid matrimony 'ratum et consumatum' can be dissolved by no human power and by no cause, except death." CODEX IURIS CANONICI, canon 1118 (1918).

But it is also true that the State is powerless to dissolve the bond of matrimony contracted by non-baptized persons. God, not the State, has joined them together and has ratified their contract. Only God can loosen the bond by which the two are joined together as husband and wife. In this sense the conjugal society is above and beyond the State.

Does this mean that the civil authority has no jurisdiction at all over marriage? No. The State has a certain control over marriage in two areas. First, in the opinion of a great number of moral theologians the State has within its competence the authority to lay down certain conditions prerequisite for the validity of a marriage contract between non-baptized persons, as, for example, a minimum age, etc. And, when these conditions required by law can be proved not to have been present, the State can *annul* the marriage. In such cases, however, the action of the State consists in officially declaring that there never was a genuine marriage. Once the marriage has been validly contracted, the State is absolutely powerless to void the contract.

Divorce (the dissolution of a true marriage bond) differs essentially from annulment (official declaration that no valid bond ever existed). I might mention here in passing that the wording of State laws in this matter does not always accord with the terminology of Canon Law.

Secondly, the State has lawful jurisdiction over the civil effects of marriage. It can, for example, pass laws concerning the ownership of property of husband and wife; laws concerning inheritance, and the like. It has also the right and the duty to protect public decency, and to punish bigamy and adultery.

Pope Pius XII in the address quoted above said that a Catholic judge may grant a decree of divorce only for "reasons of great weight." This statement implies that the granting of the decree is not intrinsically wrong, that is, not

morally wrong in and by itself. For no one may cooperate in an act intrinsically wrong for even the gravest of reasons.

Canonists and moral theologians are almost in perfect agreement that the civil decree of divorce is not intrinsically wrong.⁷ They argue something like this: the decree of divorce granted by a civil magistrate results in the severance of the bond which was caused by the civil marriage. Now this "bond" is not a true conjugal bond objectively (clearly so when the parties involved are held to the ecclesiastical "form", even though the legislator intends it to have this efficacy). Rather, it is merely a legal bond before civil society causing some civil effects. Consequently the civil decree of divorce cannot be intrinsically wrong insofar as it touches the civil bond. For just as the contracting of a civil marriage is not intrinsically wrong inasmuch as it aims at producing certain civil effects only (and therefore has no influence whatsoever on the genuine matrimonial bond, but only on something superadded to this bond), so also the removal of the civil part by a decree of divorce is not intrinsically wrong. The true conjugal bond remains intact.

This conclusion that civil divorce is not per se evil holds up even though the legislator and those suing for divorce intend to dissolve completely the matrimonial bond itself. For in this case the evil would arise from the perverse intention of the judge trying to exceed his competence, or from other circumstances extrinsic to the divorce decree objectively considered.

The manner in which this argument has been presented may seem to leave untouched the case of a complete divorce granted to those who are not baptized, or who are not held to the "form" of marriage in the Church. Nevertheless there does not appear to be sufficient grounds for taking the decree of divorce as having a different significance for different

⁷ See, e.g., THE CATHOLIC LAWYERS GUILD, CANON LAW ON CIVIL ACTION IN MARRIAGE PROBLEMS (1944); 2 GASPARRI, DE MATRIMONIO 1311 (1932); Abellan, *De Sententia Fundata in Lege Iniusta*, 39 *Periodica* 5 (1950).

groups. If in the first case it signified the suppression of the civil effects merely, so likewise in the second. Neither the law nor the courts make any distinction in their decree.

In the light of arguments such as the one just advanced there does not seem to be room for a reasonable doubt that the decree of the court granting a divorce is not intrinsically wrong.

Nevertheless this decree almost always, if not always, breeds effects that are seriously evil. As the Holy Father pointed out, it tends to create the erroneous impression that the marriage bond itself is actually and completely severed. In many cases it paves the way for a subsequent marriage of one or both parties. It exerts a very strong influence in weakening the moral integrity of individual, the family, the community, the nation.

The Catholic lawyer may not *formally* concur nor cooperate in what is generally intended by the court, namely the severance of the marriage bond itself and the rendering of the plaintiff legally capable of contracting a subsequent marriage. If he ever has a just reason for rendering legal service to one suing for a divorce from a valid marriage, he must confine his formal cooperation (that is, his sincere will and intention) to the obtaining of a release from the civil effects alone for his client.

In spite of this he does share, of course, in the responsibility for the *further effects* of the decree of divorce which are often morally evil. But in the situation here envisaged his cooperation in the evil consequences would be *material*, not formal. In order that he may permit this, he must have a proportionate good resulting from his action to balance the evil effect or effects. In other words, there is the possibility that his cooperation in obtaining the divorce may be justified on the principle of double effect. When he may justly call upon the principle to defend his undertaking divorce proceed-

ings for a client can be more easily elucidated in the discussion of specific cases to be taken up in a moment.

This is perhaps the best place to make two general, but important remarks. First, the Catholic lawyer's dilemma in this matter is not exactly on a par with that of a judge. The lawyer is practically always free to refuse to take a case, while the judge sometimes is obliged to hear cases as they present themselves to him.

Second, the lawyer must do his best to avoid scandal by his action. If, then, he has sufficient reason for undertaking divorce proceedings, he must as a rule make it known publicly that he does not acknowledge the court's competence to dissolve the marriage bond itself.

B. The Application of the Principles

1. The Catholic Plaintiff Seeking a Divorce.

A civil divorce which guarantees to one of the parties the protection of the State against molestation is sometimes useful, when the Church permits the couple to separate and live apart for serious reasons. In the language of the Church this is called a separation *a thoro et mensa*.

The Third Council of Baltimore, however, forbids Catholics in the United States to apply to the civil authority for such a divorce without first obtaining the permission of the ecclesiastical authority.

A synod held in the diocese of Providence, R. I. on October 8, 1952, issued the following significant decrees: ⁸

Catholics may not, under pain of mortal sin, approach the civil courts to obtain a civil separation, divorce or annulment for any reason whatsoever unless the permission of the bishop first has been obtained.

Furthermore, a Catholic lawyer may not, under pain of mortal sin, approach the civil courts as attorney for a plaintiff

⁸ National Catholic Welfare Conference News Service, Nov. 3, 1952.

seeking either a separation, divorce or annulment of a marriage which has been contracted before a Catholic priest unless the plaintiff or the lawyer has first obtained the permission of the bishop to institute proceedings.

A Catholic lawyer may represent the respondent in cases of civil separation, divorce or annulment of a marriage which has been contracted before a Catholic priest only on condition that both lawyer and respondent will do their utmost under law to protect the bond of marriage and sincerely contest the action of separation, divorce or annulment which was initiated without the required permission.

These decrees do hardly anything more than spell out what is already contained in Canon Law. The fact that they bind under pain of mortal sin serves to show how serious this whole matter is considered by the authorities in the Church. In localities where the diocesan statutes do not legislate the practice of the Catholic lawyer in so detailed and explicit a manner, his position is none-the-less very much the same as in Providence. The statutes of the Third Council of Baltimore bind all Catholics within the United States, and that Council laid down that the permission of the ecclesiastical authorities must be obtained before the civil court may be approached for the purpose of obtaining a divorce. The Catholic lawyer would be cooperating in a seriously sinful act, if he went ahead and pleaded a case for divorce knowing that the permission has not been obtained. If the prospective client seems to be unaware that such ecclesiastical permission is necessary, the lawyer has the obligation of giving this information and advice.

If the party requesting the lawyer's service refuses to put the case before the proper ecclesiastical authorities, and above all, if he or she is seeking a civil divorce in view of a subsequent marriage, the Catholic lawyer must almost always withhold his services. It is hard to conceive of a good that might come out of his cooperation to compensate for the serious evil that is sure to follow. The fee that the lawyer

stands to lose in rejecting the case can under no circumstances justify such action on his part.⁹

Catholic lawyers should get acquainted with the officials of the Chancery Office of the diocese in which they practice law. They should cooperate loyally with the Church authorities and keep informed on any specific diocesan regulation that concerns them or possible clients.

You will notice that the decree of the Synod of Providence lays down the requirement of ecclesiastical permission in order to approach the civil courts to obtain a divorce of a marriage "which has been contracted before a Catholic priest." Strictly speaking this ecclesiastical permission is not required if a Catholic is seeking a civil divorce of a marriage attempted before a non-Catholic minister or a justice of peace. In the eyes of the Church one who has been baptized a Catholic cannot validly contract marriage except before a priest who possesses ecclesiastical jurisdiction. The permission of the Church is not needed to seek to put an end to an entanglement that is repudiated by the Church.

2. The Baptized Non-Catholic Plaintiff Seeking A Divorce.

By "baptized non-Catholic" is meant one who was baptized in a Christian religion other than Roman Catholic. If the parties to the matrimonial contract were validly baptized, even though the baptism was conferred in a non-Catholic religion, their marriage is a genuine sacrament. The Church recognizes their marriage as true and valid.

In *principle* the marriage of baptized non-Catholics is subject to the jurisdiction of the Catholic Church. Canon Law clearly makes this claim of the Church: "Cases of matrimony between baptized persons by right belong properly and exclusively to the ecclesiastical judge."¹⁰ It is hardly likely,

⁹ 3 NOLDIN-SCHMIDT, SUMMA THEOLOGIAE MORALIS 682, n. 672 (26th ed. 1940).

¹⁰ CODEX IURIS CANONICI, canon 1960 (1918).

however, that any non-Catholic will acknowledge this authority of the Catholic Church. Nor is the Catholic lawyer obliged to seek the permission of the bishop of his diocese to take legal action in order to obtain a divorce for such parties. To a certain extent he is thrown on his own discretion. Here in general is how the matter shapes up for him.

If the baptized non-Catholic is seeking a civil divorce merely to obtain the sanction and protection of the State to live separated from his or her mate safe from molestation and the like, there seems to be no valid reason why the Catholic lawyer cannot handle the case, provided the cause for such a petition is sufficiently serious. He should, however, try to reconcile the couple first, and advise on ways to remedy the friction between them.

If the baptized non-Catholic is seeking a civil divorce in view of a subsequent marriage, the Catholic lawyer ought to refuse to have anything to do with the case, at least for the general run of such cases that comes his way.

It could well be, however, that a careful scrutiny of the case will sometimes reveal that the marriage from which a divorce is sought was never valid. For example, since January 1, 1949, all who have been baptized in the Catholic Church, whether they were raised as Catholics or not, are held to the "form" of matrimony in the Church, that is, for validity their marriage contract must be made before a lawfully authorized Catholic priest.¹¹ If it be found, therefore that either the plaintiff or the respondent was baptized a Catholic and that the wedding took place before a Protestant minister or a justice of peace, after January 1, 1949, the parties in the eyes of the Church are not truly united in marriage. In such an eventuality a Catholic lawyer certainly could profer his services toward obtaining the desired civil divorce.

¹¹ 40 ACTA APOSTOLICAE SEDIS 305 (1948).

There are other circumstances in which a marriage between baptized non-Catholics could be found to be invalid, and in which a civil divorce decree would be tantamount to a declaration of nullity. Baptized non-Catholics are subject as well as Catholics to the legislation of the Church on marriage, unless they have been explicitly excluded in Law. The diriment impediments to a valid conjugal contract, therefore, bind them. It would be well for the Catholic lawyer to have accurate information on these impediments.¹² Such information might at times allow him to go ahead on a case which he would otherwise have to refuse to take in conscience.

3. The Unbaptized Plaintiff Seeking A Divorce.

A lawful marriage between non-baptized persons, although not a sacrament, is certainly recognized as genuine by the Church. Once it has been lawfully contracted the State has no power to dissolve it. Those who request the help of the Catholic lawyer in order to obtain release from it through civil divorce must be treated in various ways dependent on their intentions and the circumstances somewhat like baptized non-Catholic married persons.

There is this difference, however, that since unbaptized persons are not subject to the jurisdiction of the Church, the validity of their marriage contract is not affected by the laws of the Church. There is no possibility of finding defects in their marriage contract on the basis of ecclesiastical law which would justify an appeal to the court for a divorce and which would be tantamount to a declaration of nullity. Nevertheless, since many moralists admit that the State has the power to lay down conditions prerequisite for the validity of the marriage contract of those who have not been baptized, the Catholic lawyer may find that the marriage from which

¹² An article explaining the impediments will appear in the Spring 1954 Issue of the NOTRE DAME LAWYER.

a plaintiff seeks divorce, is in fact invalid. He can lawfully, then, institute legal proceedings to have the marriage annulled.

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