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AN ACT ESTABLISHING DIVORCE ACT No. 2710

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HISTORICAL DEVELOPMENT OF DIVORCE LAW

The origin of marriage according to the Holy Bible is of universal knowledge.

God, after having wrought the form of man out of earthly dust, in the sixth day of the creation and after having infused into him the breath of life, wanted to give him a companion whom He took from the ribs of His first creature while this was fast asleep. With which God in his Divine Providence desired that those spouses, swearing to keep mutual fidelity, to give mutual love, and to afford mutual protection, be the natural origin of all men from whom the human species might propagate and preserve itself by continual procreation.

This fact we see declared and openly confirmed in the Gospel by the Divine authority of Jesus Christ who attested to the Jews and to the Apostles that marriage by its own institution cannot be celebrated except between two individuals only, a man and a woman, and that the conjugal tie is so closely and compactly united by the will of God, that no one among the mortals can unloose or break the bonds of union.

But this form of marriage so exquisitely beautiful and remarkable, began imperceptibly to decline and disappear among the pagans, and even among the Hebrews themselves who are called the "chosen people." As a matter of fact, it became the general custom of men who were lawfully married to give free reign to their licentious passions and to legalize the union of one man with more than one woman, thus opening the door of divorce so strongly disapproved and condemned by the divine mandate of its Creator.

Then a gradual and slow corruption began to undermine the foundation of pagan society until finally the real notion and true origin of marriage were consigned to oblivion.

The corrupted idea of this form of marriage was so widely disseminated and was carried so far away that among the ancients, wherever the institution of marriage existed, there was a definite recognition of the right of either one or both, more or less formally executed, or by judicial decree of some magistrate or tribunal of competent jurisdiction.

Thus, among the Hebrews, the husband could dismiss his wife by a mere written bill of divorcement, given to her before sending her away. (Biblical Literature, p. 348.)

The investigations of Koler, Litournew and Post, have disclosed the existence among the barbarous or even savage races of mankind of a careful attention to detail a stability and often a respect for equity in the customary rules relating to dissolution of marriages. According to the generalization of Post who made the most careful groupings, "the laws of divorce found among the different peoples of the earth, vary within the widest limits conceivable." Very often among rude races, particularly where the genealogical organization is little developed or in the process of decay, the marriage bond is lax and is readily dissolved at the pleasure of either party. Such is the case with many African, American and Oceanic peoples. Among the African Demaras, for instance, the wife or husband may change his or her partner every week, but the divorced women may marry again only when the purchase price is restored to the first husband. (Post, *Africanische*. Vol. I, p. 436.)

Passing to the opposite extreme, there are peoples with whom marriage is regarded as a relation absolutely indissoluble. This conception of marriage prevails usually in countries possessing considerable progress in religious ideas; but this fact is also true among peoples standing on a very low plane of culture such as certain of the Papuas of New Guinea, the Vedahs of Ceylon, that death alone is the only cause sufficient to dissolve the marriage bond.

Between these two extremes of one sided freedom and entire prohibition of divorce various intermediate phases appear. Thus, in Yucatan, very often divorce is the sole prerogative of the man, and the woman is grudgingly allowed the privilege only for the most serious cause. This unfavorable position in which she is thus placed is no doubt due to the custom of wife capture and especially of wife purchase through which she too often sinks to the level of a mere chattel or beast of burden.

A perusal of the existing law of Islam and their Sacred Literature, will prove to us that divorce in those countries professing that religion dates from a remote period. By the form called "chol," she may buy her release, and in this case a restoration of the marriage bond is impossible, or for certain specific faults of the husband she is granted a separation through "fasch" or judicial decree. On the other hand, by "liam" or solemn oath before the Cadi, a husband could put away the spouse whom he believes to be unfaithful, but in general the right of the man to reject the woman without assigning any cause whatsoever is absolutely unrestricted, and it is only necessary for the husband who is tired of his wife to say to her "mutalaka"—"thou art dismissed." (Helwal, *Koram*, p. 410).

We cannot say that the idea of divorce to China was unknown, for according to history, she is one of the nations where the institution of divorce is almost contemporaneous with her national existence. Before her legislators could enact any law concerning divorce, there existed thousands of separations sanctioned by the community, based upon the doctrine of Confucius, which recognized the separation "a vinculo matrimonii." Under that doctrine, the husband was allowed to ask divorce

for any of the seven faults of the wife, such as wantonness, talkativeness, jealousy, etc. In addition to these seven causes recognized and sanctioned under the doctrine of Confucius, there were some more prescribed by the Statutory law of the country. Alike the law of Islam, the divorce law of China offers a peculiar characteristic, and that is, that the right of divorce is the sole prerogative of the man, and the wife cannot sue for divorce, except for some principal causes prescribed by statutes.

What has been said of China is also true of her sister nation, Japan. From the very beginning of her independent national existence, history reveals that, although the strict meaning of divorce was still beyond the conception of the Japanese people, yet, the country having inherited from China her common law had sanctioned separations of spouses legally married. This fact is not to be admired for if we peruse over the open pages of the Chinese and the Japanese history, we will not fail to see that between these two nations there existed a constant interflowing of common currents of political, social, moral and religious ideas. Perhaps the only palpable difference between these two nations is the fact that Japan is more liberal on this subject, due perhaps to the difference of their proper orientation. According to the Statistic of Special Census Report on Marriage and Divorce published in America, Japan, compared with the American and European countries, is the most liberal on the subject, because the number of divorces granted is 215 per hundred thousand people, whereas in Switzerland, the European country having the highest rate, is only 32 per hundred thousand population, and in America in the year 1900, is 73 per hundred thousand population.

Formerly in England, the doctrine of the Roman Catholic Church was part of the municipal law, and as is to be expected divorce "a vinculo matrimonii" was not recognized, being contrary to the rigid principles of the Christian religion; but nevertheless, the idea of divorce was not entirely forgotten for a separation "a mensa et thoro" was then admitted. Thereupon came the Reformation. Legally it was a mere release of the English Church from the Roman control. It did not abrogate the prior matrimonial laws, but a change in them was only contemplated. Then a manifesto was issued by Henry VIII and recognized by his son Edward VI authorizing Archbishop Granmer and other leading ecclesiastics to inquire into the subject with a view to general revision of the ecclesiastical law, and to report to the Crown the results of the deliberations. These commissioners embodied their opinions and suggestions in a work which was subsequently published under the title of "Reformatio Legum Ecclesiasticarum." Had their recommendations been adopted, the quality of indissolubility of the marriage bond would no longer have been essentially attached to the matrimonial contract; for they advised that in cases of adultery, malicious desertion, and long absence, marriage should be dissolved. They also recommended that the remedy of divorce "a mensa et thoro" should be entirely done away with. But a series of disasters, the principal of which was the death of the king, and not any want

of confidence in the utility of the plan, prevented its being carried out into effect. (Reeves, History of England, Vol. IV, p. 563.) But an Act of Parliament, dated August 28, 1857, which went into operation in 1858, deprived the English Ecclesiastical Courts of their jurisdiction over matrimonial causes, transferring them to a new court styled "The Court for Divorce and Matrimonial Causes." From that day on, absolute divorce sanctioned by the State was constantly nourished and supported by the community and transmitted through generation.

The early Romans held inevitable the family tie. Marriages were solemnized by a universally observed formality and was sustained and respected out of regard for ancient form and the stability of family life. According to their form of marriage, the wife comes under the power of the husband once marriage has been effected, and in the family she was legally regarded as being in a daughter's place. Divorce was the husband's particular prerogative. For nearly five hundred years subsequent to the foundation of ancient Rome, there is no recorded instance of divorce; however, as suggested by Professor Woolsey, this absence of recorded cases may be due to the existence of family courts which apparently had jurisdiction over divorces. But toward the end of the republic during the period of construction and reconstruction, according to Cicero, all those older and stricter forms, with their consequent one sided right of separation, had been practically superseded by free contract in which the husband and wife were placed on an equal footing, and divorce became a formless private transaction in which either a man or a woman had equal rights. (Conbiar, *Du Divorce*, p. 42.) Then public opinion had ceased to frown upon divorce; the remedy was available to both husband and wife.

This puzzling theory of absolute liberty of either spouse to dissolve the marriage contract was carried so far that, according to Cicero, "The laxity of the nuptial bond became notorious scandal. At the capital and especially in the imperial circle, wives as well as husbands gave free reign to their licentious passions." And as it was said by a recent historian in the age of Graechi and Metellus, the Macedonian, cynically exclaimed: "Romans if we could get along with wives, assuredly none of us would accept so grievous a burden, but since nature has ordained that one cannot live easily with them, nor live without them, let us sacrifice the happiness of our short life to the perpetuity of our nation. So countrymen, for the sake of our rising generation who will immortalize the eternal name of this powerful mistress of the world, let us shout once and for all, Down with the abuse."

Seneca denounced this evil with special vehemence declaring that divorce in Rome no longer brought with it any shame, and there were women who reckoned their years rather by their husbands than by the consuls. (Gibbon, *The Rome*, Vol. IV, p. 44.)

It is not, however, surprising that the founders of the Christian Church should have regarded the laxity of the marriage bond as a sign, if not the primary cause of

the degradation of Roman society. From the beginning the Christians made an earnest effort to restrict the liberty of separation and to prohibit the persons separated on proper grounds from contracting further marriage, basing their reasoning upon the fundamental teaching of Jesus Christ. But between the first assertion of the new doctrine and the final triumph of the canonical theory of absolute indissolubility of the marriage bond, a struggle of twelve hundred years had intervened witnessing the gradual but firm success of the Christian theory.

It is the general belief of millions of people gifted with the graces of civilization, and nourished with the invigorating teachings of the Christian religion that the marriage tie is indissoluble and that what God hath joined together no man can put asunder.

This is now the question which the writer proposes to discuss hereinafter. His ultimate object is to find out whether under the protecting folds of the Christian banner the idea of divorce ever existed.

From one of the biblical passages of St. Paul, the following appears: "If she departs let her remain unmarried, or be reconciled to her husband. Divinely created as male and female they twin shall be one flesh, and what God hath joined together let no man put asunder." This passage of the Holy Bible reflects the idea that only separation "a mensa et thoro" is allowed; but whether this is the only christian form of divorce allowed to either party, however grave the cause of separation is, the Apostle of the Gentiles fails entirely to place beyond the field of debate.

One of the passages of St. Mathew, equally credible and authentic as that of St. Paul above quoted, reads as follows: "the husband is forbidden to put away the wife except for unfaithfulness," from which passage all see that the indissolubility of the marriage bond according to the christian theory is not an absolute rule, for as above stated in cases of unfaithfulness a separation "a vinculo matrimonii" is allowed.

But many say that this passage of St. Mathew was not the faithful reproduction of the intention of Jesus, but rather subsequent interpretations of the passages of St. Paul, St. Luke and St. Marc. However, it is believed that these two passages are not in conflict, with each other because the passages of St. Paul and St. Marc refer to what should be the status of marriage, while the passage of St. Mathew refers to the necessity of a legislation on that special subject which mankind must never overlook.

Upon these Biblical passages, often vague and puzzling in the extreme, was eventually erected the whole doctrine of the medieval church relating to divorce. It is not surprising that harmony was reached only after many centuries of struggle by means of subtle arguments of ingenious theologians.

Thus, St. Hermans, who strongly favors the rigid view of the indissolubility of the marriage bond, allow a man to marry again whose wife sins a second time after once being reconciled. St. Basil goes even further, declaring that the husband abandoned by his wife is worthy of pardon, and that the woman who then marries

him, is not condemned. Even St. Jeronime, excuses Jabiola, a young christian woman of high position who had repudiated a licentious husband and contracted a new marriage, saying "if she did not remain unmarried, I will readily admit her fault while I admit her necessity".

Therefore, those passages of the several thinkers of the church demonstrate to us that in those and similar cases, the woman was permitted to marry again while the first husband was living, thus sanctioning the idea of divorce "a vinculo matrimonii."

Furthermore, taking the church's definition of marriage, it seems, after all, that divorce "a vinculo matrimonii," did not in reality quite disappear from the realm of the canon law. Practically speaking it cannot be doubted that there existed a very wide liberty of divorce in the middle ages, though it existed mainly for those who were able to pay the ecclesiastical judge for finding a way through the tortuous maze of forbidden degrees. And in a divorce proceeding masquerading under the guise of an action for nullifying spurious marriages, there lurk the germs of perjury and fraud. When one consort was tired of the other, the ecclesiastical courts for money would be able to find good reasons for effecting his release. So tangled was the casuistry respecting marriage at the beginning of the sixteenth century, that it might be said that for a sufficient consideration a canonical flaw would be found in almost any marriage. (Throving, *The family*, p. 1215.)

The marvelous resources of the church in the binding and unbinding of the marriage bond, was so notorious that the cases hereinafter cited will prove to us that the church has permitted and sanctioned divorces "ad vinculum matrimonium."

Pope Gregory II, in answer to the letter of the preacher Bonifacio, said: "If the wife is attacked of a sickness rendering her unable to perform the conjugal duty, the husband can marry another, but he must help her in all her material needs." (Greg. II, *Epist.* III, *Lable.* VIII, p. 178.)

Charlemagne the Great, who married nine times while his former wives were alive and who had several concubines was nevertheless canonized.

During the embassy in France of Cardinal de Vendome, abusing the exercise of his powers, he annulled the marriage of his niece, the wife of King Alfonso of Portugal, to enable her to marry her paramour, her brother-in-law. Clement IX disapproved the action of Cardinal de Vendome; but bribed afterwards for valuable consideration, confirmed the marriage of Don Pedro by issuing a papal bull.

Predicated therefore upon the history and development of the Christian principles as expounded and applied by the rulers of the church, we find that, although in theory, the idea of divorce "a vinculo matrimonii" was strongly condemned, yet, it cannot be denied, that in reality it existed within the realm of their institution.

Hitherto we have only discussed the history of divorce among the primitive,

Asiatic and European peoples. Let us now turn our eyes to the other extreme of the globe, to that progressive and powerful mistress of the Atlantic United States.

When the thirteen Colonies proclaimed their independence from Great Britain in 1776, they started with the common law and all such statute laws as had in fact been in force at the date of the separation. Accordingly they had no provision for dissolving marriages, nor any ecclesiastical courts to grant dissolutions. But very soon they felt the necessity to check the continuous demand of the people by legislating a law on the subject. They have realized that in that age of construction and reconstruction it was their primary duty above all to secure the stability and happiness of their family, the pillars of the future happy and prosperous independent American Republic. And thus, we see that in almost all the States of the Union, there prevailed law on the subject as a valuable legacy transmitted through generations from their forefathers who shed their blood and sacrificed their lives in the field of liberty.

In conclusion, after a thorough study of the history of almost all the civilized nations, the writer has found that in most of them, the existence and necessity of a legislation on absolute divorce is recognized, except in the following countries where relative divorce is the one prevailing: Spain, Finland, Portugal, Canada, Mexico and the countries of south America.

In all those countries where absolute divorce prevails, the reciprocity of freedom and equal rights of men and women to ask for the dissolution of the marriage bond, in the instances specified by law, is recognized, unlike in the countries where the theory of one sided freedom prevail.

In the language of a French writer he says: "predicated upon my long and careful observation of the tendency of all countries, it is my conclusion that the necessity of a divorce legislation is felt more the we advanced in the discoveries of the interminable chain of these world's secrets. Whether this fact is a sign of the degeneration of the morality of a country or a stepping stone toward progress, I leave time to decide.

PAST DIVORCE LAW IN THE PHILIPPINE ISLANDS.

Although it has already been decided by the Supreme Court of these Islands in the celebrated case of *Benedicto vs. De la Rama*, 3 Phil. Rep., 34, that among the many laws which have been extended by the Spanish Government into this Archipelago, relating to the subject on marriage and divorce, only the provisions of the *Partidas*, Law II Partida IV were made effective and found practical application in this country, yet for the purpose of this thesis, it is worthwhile to make a brief survey of the other laws which contain some provisions relating to divorce although they had never been enforced.

The purpose of the writer is two-fold: first—as an interesting historical study to compare the old system with the new; and, second—to get an insight into the effects produced by the old law in comparison with the effects which will result from new law.

Among the many laws which have been extended here by the Spanish Government, having to do with marriage and its dissolution we have the following, to wit: The Canon Law, *Las Siete Partidas*, The Law of Civil Marriage of 1870, and the Spanish Civil Code, title IV and XII of Book. And under the American sovereignty, we have the general Order No. 68, and the present divorce law recently passed by the Philippine Legislature, March 11, 1917, together with its amendatory Act No. 2716.

The Canon Law.—Before the separation of the church and the State, the canon law which the ecclesiastical courts administered in Spain, which was subsequently extended into the Philippines had not as such an binding force outside the Church. However some part of the canon law which by proper action of the civil authorities of the central government had become a part of the civil law, stood upon the same footing as any other municipal law of the country. This happened in the decrees of the Council of Trent, relating to marriage and its dissolution, when Philip II accepted as law of the State by royal cedula dated in Madrid the 12th of July, 1554. The canonists, in discussing those decrees of the Council of Trent, declared adultery to be a ground for divorce; but this conclusion was reached more by deduction than otherwise, because the seventh canon of the twenty-fourth session of November 11, 1563, relied upon by the ecclesiastical writers, does not say that adultery is a ground for separation, but it simply says that it is not a ground for divorce from the bond of matrimony.

Las Siete Partidas.—Under the *partidas* there are two forms of separations to which the name of divorce may be given and two reasons therefore: the one is Religion and the other is adultery. Religion authorizes divorce on this ground, that is, if any person being lawfully married and no impediment exists upon which the marriage might be dissolved, and if either of them after they have been carnally joined should desire to take holy orders and the other should grant permission, the one desiring to remain the world promising to live a life of chastity, and being so aged that none can suspect that such spouse will be guilty of the crime of fornication, and the other enter into the order in this manner, a separation results which may properly be called divorce. And the other is, if either of them should wish to join a religious order before they had any carnal connection, they may do so although the other may raise an opposition.

The other ground on which separation may be granted is adultery. But notwithstanding the separation for any of these causes, yet marriage remains intact on that account; and personal separation only is granted. (Law IV Partida IV). But as presnet as decided in the case of *Benedicto vs. De la Rama*, 3 Phil. Rep., 34, adultery is now recognized as the only ground for divorce, and the other cause cannot now be enforced owing to the complete separation between the Church and the State.

Civil Code.—Under our Civil Code, we find that there are two kinds of divorce: the first is where the marriage relation is dissolved, and is called absolute divorce, and

the second, where it merely suspends the effect of marriage as to cohabitation, and is called relative divorce. In the second case the marriage status is not affected, and it is the one provided in Art. 104 of the Civil Code. "Divorce produces only the suspension of the life in common of the spouses."

This Civil Code, as it existed in the Peninsula, was extended into the Philippines, by royal decree of July 31, 1889, and published in the *Gaceta de Manila* on November 17, 1889, to become effective on December 8, 1889. But no sooner than this law was being hailed and respected everywhere with universal jubilee, the Governor-General of the Islands, by direction of Her Majesty's Government, issued an order dated December 31, 1889, to the effect that Titles IV and XII of Book I of the Civil Code are suspended in this archipelago, until further order of the same. But since then and until the American occupation of these Islands, no new order was ever issued by the central government to revive those provisions, and thus, the articles of the Civil Code relating to divorce had never been enforced in these Islands.

Law of Civil Marriage of 1870.—The Law of Civil Marriage of 1870 contained some provisions relating to marriage and divorce. However, the whole body of the law was never extended into the Philippines, but only some of its provisions. By the royal order, only articles 44 to 78 inclusive, were enforced here, and of these articles those numbered 44 to 58 are found in title IV, relating merely to the rights and obligations of husband and wife, without touching the forms of marriage nor the subject of divorce. And as it was decided also by the Supreme Court of these Islands in the case of *Benedicto vs. De la Rama*, 3 Phil. Rep., 34, it was said that none of the provisions of the Law of Civil Marriage of 1870 relating to divorce was extended into the Philippines. Therefore, a search for the law of divorce in this law would be futile and fruitless.

General Order No. 68.—While General Order No. 68, promulgated by the Military Government of these Islands December 18, 1889, treats of marriage and nullity of the same, yet even a detailed examination of its provision will give us no scintilla of evidence of the existence of provisions relating to divorce.

Predicted therefore upon this brief study of the laws that have been extended into the Philippine jurisdiction, relating to divorce, we find that none of them contained provisions relating to absolute divorce, but only to the relative. In the case of *Benedicto vs. De la Rama*, it was said that the laws granting divorces can only be found in the *Partidas*. But the action must be brought not in the ecclesiastical courts, as it was done during the Spanish regime, but it must be brought before the Court of First Instance, by virtue of Act No. 136, entitled the Reorganization Act. Act 136, section 56, paragraphs 1 and 5, provide that: "Courts of First Instance shall have original jurisdiction, first in all civil actions in which the subject of litigation is not capable of pecuniary estimation, ——— and fifth, in all such special cases and proceedings as are not otherwise provided for."

ACT No. 2710

AN TO ACT ESTABLISH DIVORCE

Be it enacted by the Senate and House of Representatives of the Philippines in Legislature assembled and by the authority of the same:

Section 1:—A petition for divorce can only be filed for adultery on the part of the wife or concubinage on part of the husband, committed in any of the forms described in article four hundred and thirty seven of the Penal Code.

Act No. 2716. An Act amending article four hundred thirty seven of the Penal Code.

Section 1:—For the purposes of the law establishing divorce, the husband who not being included in the preceeding cases, cohabits with a woman who is not his wife, shall be considered guilty of concubinage and shall be punished with the penalty prescribed in this section for the crime of concubinage.

Under the Act No. 2710 and its amendment Act No. 2716, the adultery of the spouses is considered as the legitimate condition precedent for divorce. This provision in its ultimate analysis seems to be very justifiable, because from the very moment that the affection of the parties toward each other, has been legalized, thereupon sprung mutual rights and duties the faithful observance of which is indispensable to the accomplishment of marriage's divine and human missions. These rights and duties call strictly for reciprocal obligations on the part of the consorts, obligations which are of social and moral nature.

One of these obligations is the mutual faithfulness. The lack of fidelity constitute a breach of that solemn promise, and presupposes the failure of maintaining the state of willingness with which the union was constituted. The fidelity of one of the consorts carries with it the perturbing influence of foreign elements to the conjugal harmony, and that union which was expected to be the source of happiness becomes a burden in life. And when the spouses can no longer endure living in such a union; when life to them has lost all its primal bliss and thus becomes insupportable then the law should give them a remedy, to relieve the offended spouse from his eternal sufferings, and bring him to normality by giving him an opportunity to find a condition where happiness may be found. This laudable and meritorious purpose of the law cannot otherwise be accomplished than by dissolving the marriage bond.

In connection with this section it was maintained that concubinage of the husband as provided in section 1 of Act 2710 is the only sufficient cause, alleging that by reason of physical and social considerations the husband should be given greater freedom of action, on the ground that the consequences of a man's breaking his marriage vows are far less harmful and far-reaching. The husband is not the child bearer, and his lapse from virtue does not so seriously affect the status of the conjugal union while the wife's sin actually destroys it.

In this age of enlightenment and democracy where women are almost everywhere regarded as equal to men, such a measure of unjust inequality, will revert the current of history and will turn us back to the old benighted days of barbarous despotism, where women are considered as mere chattles or beasts of burden. When the present law was being discussed for approval, how many times did we hear from within and from without the Senate and House of Representatives that the present law is intended for the benefit of the female consort to relieve and to free her from the claws of her unfaithful husband and to give her opportunity where happiness may be found. Where is now such laudable and praiseworthy intention of our legislature, if we should insist that the amendment of the first articles of Act 2710 is unjust?

We must remember that legislation is based upon principle and not after the convenience of a particular class of persons. If we earnestly believe that the amendment of Act No. 2710, is not beneficial to us as men, for the sake of our women and as follower of the principle of justice, let us make it beneficial as citizens. Once this is done, then and only then can we hail everywhere that this virgin soil of ours is a prosperous and progressive country, where justice and equality is the supreme law of the land.

Section 2.—No person shall be entitled to a divorce who has not resided in the Philippine Islands for one year prior to the filing of the petition, unless the cause for which the divorce is claimed has taken place in said Islands.

This section as it appears is divided into two clauses: the first, relates to the right of action, when the circumstances giving rise to the action has taken place outside the Philippine Islands, and he can take advantage of the law only by residing in the Islands one year prior to the filing of the petition; and the second, is when the facts giving rise to the cause of action have taken place in the Islands, in which case the prerequisite period of one year is not essential.

It is a fundamental principle in International Law that the municipal laws of a State are strictly local in its character and it cannot affect persons outside the territorial limits of that sovereign State, but only those who actually reside within its territory whether citizens or aliens unless by comity or treaty otherwise provided.

Therefore, if a citizen of one State desires to be subjected to the law of another State, it is essential that he should reside within that State, putting himself under the absolute control of that sovereign State.

A sovereign State is the sole judge to determine what laws should be enforced and sanctioned within its territory for the welfare of its inhabitants, and therefore it could prescribe, as in this case, certain requisites sine-qua-non before any person can come within the spirit of the law. And it is an obvious proposition that the proper law controlling all matters pertaining to the remedy is the *lex fori*, regardless of the domicile of the parties or the *situs* of the cause of action. As it was decided in the case of *Hunt vs. Hunt*, 28 Am. Rep., 219. "It is a well settled rule that every State has the right

to determine the marital status of a person bona fide domiciled within its limits and the court may acquire, under statutory sanction, jurisdiction to dissolve the marriage relation of such persons, irrespective of where the marriage was celebrated or of where the cause of divorce arose, or of where the domicile of the defendant may be."

It is plain that every State has the right to determine the status or domestic and social conditions of persons domiciled within its territory. So, it is that every State may determine for itself, for what causes may that status be changed or affected, and hence upon what ground based upon what acts or missions of persons holding that relation of marriage, they may be separated and that relation dissolved.

A case, however, might arise where although the criminal act took place outside the Islands, yet the plaintiff can bring the action without having resided first, for the period of one year in the Islands, as provided in this section.

Thus, if A and B, husband and wife, are legally domiciled in the Islands, but they went abroad temporarily for pleasure's trip, and while on board of foreign vessel, the criminal act took place. I believe that a particular instance is presented where the plaintiff without complying with that one year period of residence can bring the action for divorce.

The intention of a person to permanently reside in a country accompanied by his actual residence, constitute his legal domicile; and the mere fact that he temporarily went away with the intention of returning very soon, will not operate to divest him of his rights as being legally domiciled in that country, because the legal domicile of a person is not changed, unless accompanied by his intention and actual residence in the new country. And altho they are temporarily and actually residing outside the Islands, yet no one can deny that they are also residing in the Islands by fiction of law.

Therefore, if the residence resulting from the legal domicile of a person, is the one contemplated by the section in question and not the temporary residence, we see that a case might arise where although the criminal act took place outside the Islands, yet an action for divorce can be instituted.

Another instance which might constitute an exception to this section is where the plaintiff domiciled and actually residing in the Islands brings a suit for divorce against his wife who committed the criminal act outside the Islands. In this case the plaintiff is actually residing in the Islands, and the section only requires that the plaintiff should have resided one year previous to the filing of the petition.

With regard to the second clause it is also undeniable that our courts have jurisdiction to take cognizance of the case, for there is no better law which can give the court jurisdiction over the subject matter than its absolute right to try cases arising within its territory. The locus delicti furnishes not only the law by which a crime is to be punished, but also the jurisdiction to punish it, which jurisdiction is exclusive as a matter of right of all other courts.

Section 3.—The divorce may be claimed only by the innocent spouse, provided

there has been no condemnation or consent to the adultery or concubinage, as the case may be. Where both spouses are guilty a divorce cannot be claimed by either of them.

The foundation upon which the administration of jurisdiction and equity rests is that the complaining party should come before the courts with clean hands and untainted with any cause that might defeat his right of action. And if the complaining party is also responsible or has done something which might defeat his right of action, then the court will remain silent, leaving the parties in their statu-quo.

CONDONATION

The whole doctrine of condonation goes upon the ground that there is in law no such thing as an unpardonable offense against the marriage relation. Even adultery is not universally found to be unpardonable in actual experience, and it should not be deemed to be so in law. It is an offense which may, at the option of the injured party, serve as the ground for a divorce or it may be overlooked and be forgiven. Now, if one who is free to act in either way and who has a full understanding of all the facts, deliberately and freely elects to condone the offense, and to take the real or supposed advantages which are expected to arise therefrom, it is better to hold as a general rule that the day for legal complaint has passed and that the mouth of the injured party ought thereafter to be sealed, as to that particular offense, unless a similar offense is repeated in the future. But this forgiveness or condonation shall not be a bar to prosecute the offender whenever he commits again a similar act, and not to extend to such party the temptation, the encouragement and the reckless license, to run through the whole calendar of matrimonial offenses without redress at the hand of the other party.

CONNIVANCE

Connivance is the corrupt consenting of a marriage party to that conduct of the other of which afterwards complaint is made. Under the English and American Divorce Act, a divorce will not be granted if the court finds that, during the marriage the petitioner has been accessory to, or conniving at, the adultery of the other party to the marriage. This rule is founded upon the principle "*Violenti non fit injuria.*"

Connivance on the part of the complaining spouse to the wrongdoing of the offending spouse is an implied consent thereto, and one cannot be considered injured by or heard to complain of what he has consented.

RECRIMINATION

It is a general principle of the common law that whoever seeks redress for the violation of a contract resting upon mutual and dependent covenants to obtain success, he must himself have performed the obligations on his part. Something analogous to this principle is found in the doctrine of condonation, or "*compensatio criminum,*" which was originally borrowed from the canon law, by which the de-

defendant is permitted to contest the plaintiff's application on the ground of his own violation of the marriage contract. It is not wise if he, who is the guardian of the purity of his own house, has converted it into a brothel that he should not be allowed to complain of the pollution which he himself has introduced; and their only remedy is to find sources of mutual forgiveness in the humiliation of mutual guilt.

With regard to the last part of the section, the writer cites the case of *Benedito vs. de la Rama*, 3 Phil. Rep., 34, where it was held that: "If both parties are guilty of adultery, no action for divorce can be instituted. Condonation of the husband to the wife's sin defeats the husband's right to sue for divorce, but this condonation of the husband of the wife's sin does not entitle her to institute a divorce proceeding for the adultery of the husband."

In connection with this section, the writer is of the opinion that "collusion" should be included among the defenses of the supposed injured party.

Collusion is an agreement by the two parties to manufacture a case, or to suppress marital facts, so that the court may be misled into granting a divorce. We believe that this defense should be included in our law, for it is not impossible that such a case may arise. However, I believe that this is not really a ground of defense but rather a ground for dismissing a divorce case by the trial court *ex-proprio motu* whenever it shall discover in the evidence that collusion between the parties exists. We doubt, however, if the parties will take advantages of such a defense because the supposed offender is put in danger of being imprisoned if the adultery be found by the Court to have been committed. Furthermore, in case of the adultery of the husband, who will dare to assume the part of the co-defendant? We do not think any woman in the Philippines will be bold enough to take a dangerous position, for customs and traditions have secured for them a sure place in the realm of virtue and purity.

Section 4.—An action for divorce cannot be filed, except within one year from and after the date on which the plaintiff became cognizant of the cause, and within five years from and after the date when such cause occurred; but if such cause occurred prior to the date on which this Act takes effect, then only within one year from and after such date.

One of the basic principles of every procedural law is that any cause of action must have certain limitation with which to exercise such right and not to prolong it indefinitely. The reasonableness of this principle seems to be obvious, because without such limitation, the party having the right to bring the suit, and desiring to prejudice more the other party, might bring the action twenty years thereafter, which period will create not only a great inconvenience to the defendant, but will tend to put him into an absolute impossibility to defend his case.

Section 4 of this Act relates to that prescriptive period within which the action should be brought at the expiration of which the party entitled having failed to exercise the right, is then barred to exercise it in the future. The time of limitation, as

provided in the law within which the action ought to be brought is within one year, from and after the date on which plaintiff became cognizant of the cause, and not at any time thereafter, otherwise his right is barred by the statute of limitations; but in all cases the action must be brought within five years from and after the date such cause occurred.

This last part of the section seems at first reading to be unjust, because it disregards no matter whether the party had ever acquired knowledge of the commission of the act. But considering the nature of the acts involved in cases of this kind, the palpable consequences that follow to it and the circumstances surrounding the marital relations, it is almost impossible to suppose that the other spouse cannot have knowledge within that period of time, that the other spouse is committing or has committed acts of unfaithfulness. And so having knowledge of the commission of the criminal act, and having failed to exercise the right within that time, it is presumed that he forgives and preferred to live in humiliation.

With regard to the last part of the section, it will perhaps appear to many as void under the principles that "no law shall have a retroactive effect." Our Supreme Court, in the case of *Montilla vs. Agustinian Corporation*, 24 Phil. Rep., 220, held that: "It is the rule of construction that all statutes are to be considered as having only a prospective effect, unless it is the contrary intention of the Legislature to make the law retrospective.

Besides, the constitution of the United States in providing that "no retrospective law impairing the obligation of contract shall be made," intended that the word "retrospective" was to embrace rights and not modes of redress. It is not possible to suppose that anybody ever intended to put beyond the power of the Legislature to provide a remedy for many past transactions which the immutable principles of justice require.

The Legislature ought to be competent to modify the means of suppressing vice, or affording a more competent remedy. Adultery by the law of nation is an offense; and it was so before the passage of this Act and an evil in any possible view of the subject.

However, a case of the following nature might occur under sec. 4 of this act: Suppose that A and B are husband and wife residing in France, and on the 15th of May 1917, began to reside in the Philippine Islands, in compliance to sec. 2 of this Act; but the parties had knowledge of the criminal act, since June 20th, 1916. According to sec. 4 of the Act, the parties can only bring the action within one year from and after the date of which the plaintiff became cognizant of the cause of action, and within five years from and after the date when such cause occurred. As it will be seen from the above example, the one year period has already passed before the party could, as a matter of right bring the action.

What then is the solution of the question?

It is a rule in construction that in the interpretation and construction of Statutes that which will give effect to, and carry out, the intention of the lawmaker, should be adopted rather than otherwise. In accordance with this cardinal rule on construction we must either hold that the plaintiff's right of action has already prescribed, or that such period of one year has to begin from and after the date the plaintiff could, as a matter of right, bring the action of divorce.

The writer is of the opinion that the second view is more reasonable and in consonance with the laudable intention of the lawmaker, inasmuch as that the first view is nugatory of the rights which the Legislature intended to give to the offended party.

Therefore, the one year period should be considered to begin only from and after the completion of the one year of residence according to section 2 of the Act.

Section 5: An action for divorce shall in no case be tried before six months shall have elapsed since the filing of the petition.

The marriage relation is a contract which has a social and legal character constituting the source of all community, and for this reason the State is actuated and inspired with the highest zeal in its preservation.

The interest of the State in this relation leads it not only to demand that it should not be entered into unadvisedly or lightly, but also to prohibit its dissolution at the mere will or caprice of the parties. And the best policy of the State should be to permit such dissolution only in cases when the conjugal community has become undurable and unbearable, and all possible means of restoration had failed.

For this reason the court should go reluctant in rendering judgment, it should resort to all possible means to prevent its dissolution, in so far that they are not in contravention with public policy.

This section meets the requirements, for it gives ample opportunity to the petitioner to withdraw his complaint and avoid the realization of the dread consequences which follow the dissolution of the marriage bond.

Section 6: After the filing of the petition for divorce, the spouses shall be entitled to live separately from each other and manage their respective property.

The husband shall continue to manage the community property; but, if the court deem it proper, it may appoint another to manage said property, in which case the administrator shall have the same rights and duties as a guardian and shall not be allowed to dispose of the income nor of the capital except in accordance with the orders of the court.

It is but natural for he whose right to liberty is hanging from the result of a trial commenced by the wife, he whose name, honor and dignity will forever remain stigmatized with the nefastous name of an adulterer, should resort to all means of violence and vengeance against the person who will cause his disgrace and probably his social death.

To this dreadful consequence the provision of the section is aiming at, to safe-

guard the interest and liberty of the weak party (usually the woman) to protect her against personal violence from her husband and to keep her away beyond the reach and control of the oppressor during the pendency of the action, so that the progress of the trial might not be hindered.

As a consequence of this separation the parties ought to have the right to manage their separate property which they were administering during the marriage, such as the paraphernal property of the wife the administration of which was not given to the husband.

But notwithstanding this separation the husband shall continue to manage the community property and all such other properties the administration of which were intrusted to him until a final sentence of divorce shall have been rendered. The mere fact that a petition for divorce has been filed is not sufficient cause to take away from him such power and control ipso facto vested in him by reason of marriage. But the husband like any other administrator, has the obligation thrown upon him by law to administer the property with care, frugality and without waste.

But this preference it continues no longer than it is properly exercised, and whenever there is abuse of power the court has the power to appoint another administrator in his stead, having the same rights and duties as any other guardian of the estate of a person.

Section 7. During the pendency of divorce proceedings the court shall make provision for the care of the minor children, in accordance with the circumstances and may order the community property or the income therefrom to be set aside for their support; and in default thereof said minor children shall be cared for in conformity with the provisions of the Civil Code; but the court shall abstain from making any order in this respect in case parents have, by mutual agreement, made provision for the care of said minor children and these are, in the judgment of the court, well cared for.

The very nature of marriage, its purposes, its effects upon the persons of the spouses and their children, its effect upon the well being of the society and lastly the influence which it plays in the very existence of the State, are questions which the court should be guarded against.

We are aware of the destructive influence which divorce proceedings impart upon the well being of the children, and beyond all human motives and good will of the State to preserve the marriage relation, the interest of the children above all should be protected and well guarded.

For this reason, during the pendency of the divorce proceeding the court should make provision for the care of the minor children, in accordance with the circumstances, and may order the community property or income thereof to be set aside for their support. But the Courts in determining to which of the spouses the custody shall be awarded, the controlling consideration should be the welfare of the children

They must take into consideration all of the circumstances of each particular case, and dispose of the children in such a manner as may appear best calculated to secure for them proper care and attention as well as virtuous education.

But the courts, in passing upon this question, should take into consideration the fact that the father from his obligation to maintain, protect, and educate the children which duties are thrown upon him by the law of nature as well as of society, is primarily entitled as a matter of right to the custody of his infant children.

But, however, this right of the father to have the custody of the minor children likewise the right to administer the community property, is neither unlimited or unalienable, because it continues no longer than it is properly exercised; and whenever abused, or whenever the parent has become unfit by immoral or profligate habits, to have the management and custody of the children, courts of appropriate jurisdiction should never hesitate to interfere and to restrain the abuse or remove the object of such abuse from the custody of the offending parent.

In case the Judge should fail to make provision for the care or custody of the minor children the provision of the civil code shall have to be followed; but the court shall abstain from making any order in this respect in case the parents have, by mutual agreement, made provision for the care of said minor children and those are in the judgment of the court well cared for.

SHOULD PROVISIONS FOR THE WIFE'S ALIMONY DURING THE SUIT BE ADOPTED?

The answer to this question depends upon the solution of the following one, namely: Is alimony *pendente lite* an acceptable policy? Every solution begins from the definition of the thing solved, thus Alimony as defined by Bishop as the word is used in the department of the unwritten law, is the allowance which a husband pays, by order of Court, to his wife while living separate from him for her maintenance. (Bishop on Marriage, Divorce and Separation par. 1386). Alimony, in the Philippine Islands, would be a duty devolving upon both the husband and wife, the ground for it being the right to support. (Section 143, Civil Code.)

There are two kinds of alimony: alimony *pendente lite* or temporary, and permanent alimony which is that which is payable *post litem*. (Bowman vs. Washington, 24 Ark., 522.)

The right of alimony, both temporary and permanent, was recognized in Ecclesiastical law (Sheldorf on Marriage and Divorce, 292,) and is commonly recognized by modern statutes. (14 Cyc., 742.) Even in the absence of statutory enactment, however, the Courts will, if the Legislature has given them jurisdiction in divorce cases, assume jurisdiction and administer the relief in conformity with the principles of ecclesiastical or common law. (17 Cent. Dig., Tit. "Divorce," par. 587; 14 Cyc. 743).

How the doctrine is received in the States of the Union, Bishop says that the doctrine of temporary alimony is fundamental in the law, not only in the law of divorce but in the entire legal system of the United States. "Without the aid of any statute," says he, "it is binding on our tribunals because inherent in natural justice and natural jurisprudence; because it is a part of our system of general law; because it was law in the ecclesiastical Courts of England whence it travelled to our States." (Bishop on Divorce, par. 915).

In North Carolina, the statute being silent on the subject, the court refused temporary alimony, not deciding whether or not if the husband was pursuing oppressively for divorce a wife without means, it would withhold relief until he furnished money for the defense. Afterward, legislation conferred the jurisdiction. (Taylor vs. Taylor, 1 Jones, N. C., 528.) In Massachusetts, the same authority was denied, until in 1855 it was expressly conferred by statute. (Shanon vs. Shannon, 2 Gray, 285.) In New Hampshire, the Court some times orders a small sum to be paid by the husband to a defending wife, to assist her in the defense. Beyond which "It is contrary to the construction of the statute settled by long and uniform practice" to allow temporary alimony. (Rowell vs. Rowell, 63 N. H., 222.) In Vermont, the statute permitting permanent alimony, temporary alimony was without any particular consideration disallowed. (Harrington vs. Harrington, 10 Vt., 505.) Later, the Court intimated that it might be given. (35 Vt., 360 Vt., 365.) Afterward a statute conferred the jurisdiction (41 Vt., 180. Nay vs. Braley).

In other States the doctrine of temporary alimony is awarded as under the law received by us from England, without statutory aid. Yet in many of the States, statutes have supplemented the unwritten rule. To particularize this sort of allowance is held to be within the power of the courts in New York, Michigan, Kentucky, Iowa, New Jersey, Missouri, Georgia, Pennsylvania, Maine, Illinois, Alabama, Wisconsin, Nebraska, Utah, Virginia and Maryland. To the list, not inquiring whether or not the common law principle was in the States to be mentioned supplemented by statute, we may add Arkansas, California, Indiana, Kansas, Minnesota, Colorado and Oregon. So that either by statutory aid or without, temporary alimony and suit-money are universally grantable by our American Courts. (Bishop on Divorce, par. 920.)

The doctrine having been adopted in the United States and in almost all of the States of the Union, there is no reason why the same doctrine should not be applied in the Philippines. In the case of Yango vs. Rhode, 1 Phil., 404, Justice Cooper, following the doctrines of the various States enumerated herein laid down the rule, in his dissenting opinion, that the Courts of First Instance have jurisdiction over suits for divorce, and the granting of alimony *pendente lite*, is incidental to this jurisdiction; "consequently—he says—an order granting alimony, even if erroneous, is, not an excess of jurisdiction and its enforcement cannot be restrained by prohibition."

There is a difficulty arising from the opinion of Chief Justice Arellano; according to the President, an action for alimony based upon section 143 of the Civil Code, providing for the duty of mutual support between husband and wife and that in order to have a right granted for alimony, the basis of the duty to support, namely, marriage relation, must first be proven. In this case, however, the marriage relation was objected upon demurrer so that, had any objection not been filed to the marriage relation, the doctrine of J. Cooper would have been probably followed. So, it happened that in the case of Santos vs. Sweeney,⁴ Phil., 79, a later decision, Justice Torres laid down the rule that "the complaint for divorce presupposes the existence of a marriage between the parties litigant," and he followed the same reason laid down by the President for the admission of the doctrine of alimony. "The marriage relation," says he, "imposes upon the spouses the mutual obligation of support." He continues, "during the pendency of the suit for divorce, upon a complaint filed and admitted, it is the duty of the Court to grant alimony to the wife and make provision for the support of the children not in possession of the father."

Such is the doctrine in the Philippines, and that such is the doctrine in the United States, there can be no doubt. Such also is the rule in Spain (1 Ma., 368). The right of alimony of the woman who gave the cause for divorce is, according to section 73, No. 5, of the Civil Code, absolute and must be recognized, not only when she possesses property, but also even when she has not any, in which case she must be given all necessary means for her maintenance. (Sentencia de 12 de Mayo, 1900.) The same rule is followed in France. "If the parties made no settlement on one another, or if those stipulated for do not appear sufficient to provide for the support of the party who has obtained the divorce, the Court may grant an alimentary allowance charged upon the property of the other party, which allowance must not exceed a third of the income of the party whose property is charged. This allowance may be withdrawn should it cease to be required." (Section 301, French Code.)

There are various reasons for the adoption of the rule: A fundamental reason might be as follows: Marriage is not dissolved before the proceedings for divorce are completed. Before the decree of the Court, the marriage bonds are indissoluble, the relation of wife and husband still exists; therefore, the duty to support does not yet cease to exist. Another reason is that reason given in the Michigan case of *Mary Story vs. Martin*, which is as follows: "But for the wise provision of law, a wife without relatives or friends to protect her rights, would be deprived of the means of applying to Judicial Tribunal. (Michigan Reports, Walker, pp. 421; *Mix vs. Mix*, 1 J. C. R., 108; *Denton vs. Denton*, Id., 364; *Wood vs. Wood*, 2 Paige R., 109.) The peculiarity of this case is that it holds not only a right of alimony as a means of support, but as a means to prosecute against the party providing the support. "The mere pendency," it says, "of the suit, where the wife has no separate means adequate to her support, (including litis expenses,) and the husband has the means, entitles her,

whether *plaintiff* or *defendant*, to alimony while litigation continues. (1 Bishop on Marriage and Separation, par. 911.)

The Magistrado Ponente in the *sentencia* of May 12, 1900, D. Tomas Gudal, gives the following *considerandos* in reasoning the adoption of the rule of alimony *pendente lite*: Considering that concretizing the question of the appeal to the interpretation which must be given to paragraph 5 of section 73 of the Civil Code, in so far as it refers to the right of the woman for alimony, or rather if this right is to be recognized only when the husband retains, after the separation of the conjugal property, the administration of the woman's property, or in all cases in which she is without means for her subsistence, it is made necessary so as to understand the intention of the legislator, to see only for these sole effect, what is determined in any other part of this Code for the purpose of regulating such status of separation, determined by a sentence of divorce.

Considering that the chapter which treats of such said status or rather chapter 6 of Title 3d, of Book 4th, of the expressed Code, the reciprocal obligation of the husband and wife to give in such occasion her support, is recognized, according to the strict provision of section 1434, reiterated in the section 1436, without distinction of cases, even though it cannot be granted that the woman should administer property owned by the husband when the separation is caused by a decree of divorce in which he has been declared guilty, and that such so strict obligation would be completely disregarded if the right of support should be denied to the poor woman, even found guilty, when the husband would not have any property of hers for administration, just because she has not any.

We must declare the *sentencia* of the Audiencia to be revoked. (89 Jurisprudencia Civil p. 645.)

The first question being solved, let us go to the original question, to wit: Should provisions for the wife's alimony be adopted? Until date there is no provision of law in the Philippines, except section 68 of the Civil Code. This section, as we know, has been suspended by a decree. (Dec. 9, 1889.) Nevertheless, it has been applied by our Supreme Court in the case of *Yangeo vs. Rhode*, 1 Phil., 404. It could be sustained that the necessity of such provision is unnecessary in these Islands, it being an incident of a divorce proceeding. (J. Cooper, dissent, 1 Phil., 404; J. Torres in the case of *Sweeney vs. Santos*, 4 Phil., 79.) But following the system and procedure of the various States of the United States, I venture to say that the time has come for the Philippine Legislature to make an attempt of an express provision regarding the subject which only has been known here in our country by implication, or by an uncertain provision of the Civil Code, namely, section 68, article whose effect is suspended and applicable only to relative divorce.

SHOULD SUCH RIGHT BE GIVEN ALSO TO THE HUSBAND?

There seems, however, no reason why such right is not to be extended to the husband. It may be argued that the wife being dependent upon the husband, he has therefore the obligation to provide for such temporary support. It seems nevertheless that, as the right of support has its foundation upon the right to live, it is but proper and just that the husband should be entitled to the same right whenever it appears that the wife has means and the husband has not, for in this case the mutual obligation of support still subsists unimpaired.

Section 8: A divorce shall not be granted without the guilt of the defendant being established by final sentence in a criminal action.

When the present law was being enacted, there were two streams of conflicting opinions which the Legislature did not fail to take into consideration in the enactment of the present law. It was hard to determine at the time whether the weight of public opinion was in favor of the divorce law. Some one has said that the present law on divorce was passed not because it was a real necessity in the Philippines, but because it was necessary to show that religious organizations in this country have lost their influence in the affairs of the government.

In view of this reason or pretext if we may call it so, the Legislature in enacting the present law had established many restrictions to the remedy provided for in said law. Section 8 is clearly a restriction, because it not only makes hard for the petitioner to establish the fact of adultery, due to the degree and weight of the proof that must be introduced in the criminal case, but also checks in a measure the abuse. This section constitutes the repository of all safeguard to abuse.

Now, is it advisable to abolish this section and change it to a mere preponderance of evidence?

If this provision be abolished and changed to a mere preponderance of evidence, the necessary result will be that the offended party, after obtaining a decree of divorce, will lose his or her interest in the criminal action. Thus, the gravest crime against the marriage status would, in most cases, remain unpunished; while if the provision is retained, the offended party will be a great help to the government in the prosecution of the crime of adultery.

Section 9: The decree of divorce shall dissolve the community of property, as soon as such decree becomes final, but shall not dissolve the bonds of matrimony until one year thereafter.

The bonds of matrimony shall not be considered as dissolved with regard to the spouse who, having legitimate children, has not delivered to each of them or to the guardian appointed by the court, within said period of one year, the equivalent of what would have been due to them as their legal portion if said spouse had died intestate immediately after the dissolution of the community of property.

One of the effects of the sentence of divorce is to dissolve the community of prop-

erty as soon as such decree becomes final, because the factor giving existence to the community of property is the union of the two and when such union disappeared, it follows that the community of property must also be dissolved. The rules for the dissolution of the community of property shall be the same as those provided in the Civil Code.

But the bonds of matrimony is not dissolved, until one year thereafter for many reasons affecting public policy.

SHOULD SECTION 9, PARAGRAPH 2, OF DIVORCE LAW BE ABOLISHED?
IF SO, WHAT PROVISION SHOULD BE PUT IN ITS PLACE?

"Section 9, Par. 2.

"The bonds of matrimony shall not be considered as dissolved with regard to the spouse who, having legitimate children, has not delivered to each of them or to the guardian appointed by the Court within said period of one year, the equivalent of what would have been due to them as their legal portion if said spouse had died intestate immediately after the dissolution of the community of property."

According to this provision, the spouse in a divorce proceeding, who, having legitimate children, has not within a period of one year delivered to each of them or to the guardian appointed the equivalent of their legal portion in the same manner as if the said spouse died without a testament immediately after the dissolution of the community of property, decreed by the Court as a result of the said divorce proceeding; is not yet free to marry again nor is he or she entitled to the custody of the said children. (Section 11, Divorce Law.)

Does the law mean that if the spouse fails within a year to deliver the legal portion of the children, such spouse will not be able to marry again even though he or she will deliver it in a subsequent year? The law puts the delivery of the property as a condition precedent to the dissolution of the bonds of marriage, but this condition lasts only a year, and after that year the opportunity to comply with it is lost. "The bonds of matrimony, says the law, shall not be considered as dissolved with regard to the spouse who has not delivered the property within the said period of one year." It is true that the period stated is not prescriptive, but it is neither a condition precedent simply. It is a condition precedent with a certain fixed period. The period is not the condition itself.

Now let us suppose A, a man of 21, to have married B, a dormitory girl of 16: of this marriage, three children were born. After a period of time, the poor girl is tempted by another man, and commits adultery. Proceedings for divorce are instituted by the husband and a separation of property is decreed. Now, the innocent party, the husband, fails, for one reason or other, let us say because he was ignorant of this provision of the law to deliver the legal portion of his children within one year; and B the adulteress delivered her contribution within the term prescribed by the law.

The result is that A, the innocent, cannot marry according to section 11 of the law, and B the adulteress is free to marry again. But the result is not only this, because there are three children. Who will have the custody of them? B cannot take charge of them because she is guilty; A cannot enjoy the happiness of living with his children, because the bonds of matrimony have not been dissolved as to him; the poor children are given into the hands of a guardian.

Let us suppose that, besides the failure on the part of A to deliver the property, the woman, B, also refused to comply with the provision of the law, the result would be that both of them can enjoy the whole of their property and their children are handed to a guardian, without receiving their legal portion, having no other remedy but to institute proceedings for support, in other words, without money.

Setting aside this question, there is another point of the law worthy of careful discussion. The terms of the provision bind the spouses to deliver to their *legitimate* children within one year the equivalent of what would have been due to them as their legal portion as if said spouses had died intestate immediately after the dissolution of the community property. In other words, the law wishes to avoid the blending and mixing together of different properties. The law wishes to avoid the divorcee from marrying again without securing first the property of his or her children. It might happen that the father or mother, influenced by the new spouse in a subsequent marriage, would deny his existing property to his or her children in the original or former marriage and give it all to the issues of the second or subsequent marriage. The purpose of the legislator is laudable, but the law itself, with due respect to the high authority enacting it, may lead us to various interpretations susceptible of producing serious consequences. The provision in question, at simple reading, seems to affect certain fundamental rules of intestacy.

In an intestate succession, we all agree that the legal portion of the sons and legitimate descendants is two-third of the property as a whole of the father and of the mother (article 808, Civil Code) and if the spouses are compelled to deliver an equivalent of their property such legal portion, in order to obtain a dissolution of their marriage, such spouses would be exposed to a condition of pecuniary embarrassment, and it would be still worse to both spouses, had they to follow the interpretation to the effect that in an intestate succession, the children are entitled to the whole property. This would amount to sever a life companion from one-self and abandon him or her without any means for life.

Another question is presented to our mind besides the difficulty just propounded. It affects one of the fundamental principles of succession. Section 657 of the Civil Code provides that the rights to the succession of a person are transmitted from the moment of his death, but the action of the divorce law in question seems to have changed the rule. Has progress of legislation in the Philippines been so abrupt, that a simple *fidei comisario* can acquire right of succession before the death of the testator (article

784, Civil Code,) or that a legatee can acquire rights to the pure and simple gifts (article 881) or that the rights of an heir without accepting nor repudiating his inheritance may pass to his heirs without his death? (Article 1006, Civil Code.) There is but one instance in our broad legislation in which the heirs can divide between themselves the property of one who is alive, and even though this right is founded upon a presumption of death, namely, when the owner has been absent for fifteen years, and his whereabouts is unknown. (Act No. 190, section 656.) The section in question seems to be a qualification to the fundamental rule, but since there are so many provisions in succession depending upon this fundamental principle, the abolition, substitution or reform of such section would be preferable.

Section 837 of the Civil Code, in connection with the section in question, presents us another interesting point. Here is a wife named M, who has been adjudged to separate from her husband for life under a decree of divorce. She is the innocent party. According to the Civil Code (section 834,) she can inherit from the husband, and section 837 of the Civil Code gives her one-half of the inheritance in usufruct if there is no ascendant or descendant, and she has different portions according to the persons with whom she concu's. (Sections 839, 834.) Section 9 of the Divorce Law, subsection 2, gives no opportunity to the wife to inherit and if she is to inherit at all, no property would be left to the other. The same example would apply to the widower and the same result would be brought out.

There is further another important question which arises from the provision of Paragraph 2 of section 9 of the Divorce Law in connection with article 823 of the Civil Code. The Code provides that "the father or mother may dispose in favor of one or some of his or her sons or descendants one of the two-thirds, destined for the legal portion. This portion is called "betterment." The divorce law, however, compels this father or mother to dispose of his or her property as if he or she died intestate without any regard to the right of such father or mother, to dispose of the betterment. In such case, the father loses his last opportunity to show his affection to his dearest child, before he leaves them forever and perhaps never to see them again if he is the guilty party. It is an utter disregard of paragraph 2 of article 808 of the Civil Code.

Now, we come to a case in which an acknowledged natural child is deprived of portion from the property of the parents. The divorce law has only guarded the rights of legitimate children against the abuses of their parents, but the acknowledged natural child has not been mentioned at all in the provision. According to section 840 of the Civil Code, he has also his legitime to be taken from the portion destined for free disposition by the testator, but the divorce law does not protect this right and the father, after the decree of divorce has been rendered and the bonds of matrimony have been dissolved, has a complete authority to disregard his acknowledged natural child and to expend all his remaining property; the case, however, is otherwise when the interpretation of the terms of the law is to give to all the legitimate children the whole

of the property, in which case the acknowledged natural child would be without a bit of hope of obtaining his legal portion. In the former case, the natural child has a bit of expectation from the mercy of his father, but in the latter, the father cannot, even if he would, extend his mercy to his natural son.

Another possible question would be the following: If the parents are alive and have to deliver the legal portion of their legitimate children as if they (the parents) died intestate, why can they not exercise the right to disinherit and the right to impose a burden on the legitime in the cases expressly determined by law? As a consequence of the precept that the legitime is the portion of property of which the testator cannot dispose because the law has reserved it, to determine heirs called forcible heirs (art. 806, Civil Code) is that the testator cannot deprive them of their legal portion if not in the cases expressly determined by law, nor impose over it any burden, condition or any kind of substitution, except what is provided with regard to the usufruct of the widow (article 813) provision which is developed in various articles of the Civil Code, among them, articles 763, 777, 782, 831, 886, 636, 644 and 655." Besides the absolute terms of section 813 of the Civil Code, it can be added among the burdens which can be imposed on the legal portion, besides the usufruct of the widow, the burden on the betterment (824), the substitution on the betterment in favor of the descendants (section 782), the reduction of funeral expenses which, according to section 840 of the Civil Code, are imposed on the legal portion of the natural child. It is clear, therefore, that the divorce law, as far as paragraph 2 of section 9 is concerned, would only limit or cut out the power of the divorcing parties to impose a burden on the legal portion which they are required to deliver.

It is also a rule that a testator has a right to disinherit an heir upon the grounds specified in section 756 (unworthiness) and in section 854 of the Civil Code (special causes), but unfortunately all these rules have been disregarded by the section of the new law in question. The effect would be that a testator would be compelled to give his property to a man who attempted to kill him or to a man who is his mortal enemy, he, still living witnessing the beneficiary enjoy the property.

Now let us suppose, in order to discuss another point, that after the partition of the property of the two spouses, in compliance with the decree of divorce, the creditors of the father appear and file a claim against the property. The children of this marriage would come and oppose to it. The creditors file their claim on the ground that section 753 of the Code of Civil Procedure provides that debts, funeral expenses and expenses of administration, etc., should be paid first, before the property can be assigned. The children base their contention on the ground that the delivery of the property to them is not a proceeding under section 753 of the Code of Civil Procedure, nor is it a partition of the property of a dead person, but it is a compliance with section 9 of the Divorce Law which is absolute in its terms and does not provide anything about the creditors. The section only speaks of the amount of

property to be given to the legitimate children, namely an equivalent to that portion in intestate succession; thus, the creditors are unprotected and become by this law remedyless for the recovery of their credit.

In view of these various questionable points hinted, suggestion would not be improper as to the advisability of amending or substituting the above mentioned provision, a provision which would safeguard the invariable and fundamental rules of succession, which would protect the right of the legally feigned testator, and which would grant to every heir his legal portion according to law. It is an opportunity for us to make an "innuendo" of what should the provision be. A reserve by the spouses of the property, in favor of the children would not be completely imperfect. Section 968 provides for the reserve which the widow would make before engaging a new marriage in favor of the children of the first marriage. A similar provision would be moulded after this section.

Section 10: The reconciliation of the spouses shall stop the proceedings and annul the decree, provided it takes place prior to the expiration of the period of one year mentioned in the last preceding section.

According to section 9, paragraph 1, the bonds of matrimony are not dissolved until after one year such decree becomes final. This provision responds to the great desire which our Legislature has in preserving the marriage relation; that, notwithstanding a cause has been shown to have existed sufficient to warrant a decree, yet the marriage is not declared dissolved.

The parties are given another chance to prevent the dissolution of such a tie so highly regarded as sacred, by offering them a means by which they can resume their original life and regain their paradise lost.

Although the article does not prescribe the manner in which such reconciliation may be effected, it seems that the best procedure is to notify the court which ordered the decree of divorce, of the reconciliation, in order that record of the same may be entered in the proceedings in the action for divorce, otherwise the judgment will stand effective.

If the parties after the expiration of that period would desire to resume their former relation, the author believes that the mere act of reconciliation is not enough to give them the status of husband and wife, and in order to accomplish that purpose, it is necessary to take a further step by means of a new marriage.

DOES THE RECONCILIATION OF THE SPOUSES EXTINGUISH THE CRIMINAL SENTENCE?

The crime of adultery is one of the gravest crimes against marital life and against society; it produces disturbances and revolutionizes the very foundation of the State. When adultery is committed, the State as well as the individual has suffered injury which must be redressed.

Therefore, the reconciliation of the spouses affects and extinguishes only the right

of the individual, but not that of the State. The State alone can pardon the offense committed against it, and until the State does not extend its mercy, the penalty will stand effective until fully and completely served.

Section 11: The dissolution of the bonds of matrimony shall have the following effects:

First.—The spouses shall be free to marry again.

The fundamental object of the divorce law in so far as it permits the separation of the spouses is to dissolve the marriage bond and leave the parties free to marry again, giving them opportunity to find a condition where happiness may be found. This object of the law cannot better be accomplished than by permitting the parties to marry again, to enable them to comply with the laws of nature and to meet the demands of the community.

Second.—The minor children shall remain in the custody of the innocent spouse unless otherwise directed by the court in the interest of said minors for whom said court may appoint a guardian.

Beyond all human motives of the State to preserve the welfare of marital life, the interest, care and protection of the children should never be neglected. Of course, there is no other person better fitted and well equipped to look after the education and protection of the children, than the father himself, but whenever he has rendered himself unfit to have the management and custody of the children by reason of immoral and profligate habits, the courts should never hesitate to remove the object of such abuse from the custody of such offending parent.

The spirit of the law in giving the management and custody of the children to the innocent spouse is very laudable, because his or her innocence created a *prima facie* presumption that he or she is the person called for to take care of the children; but whenever the Court believes that the interest of said minor children cannot well be protected under the control of the innocent spouse, the Court should appoint a guardian for said minor children, because the controlling consideration in determining who shall have the custody of the children, the welfare rather than the relationship should predominate.

Changing the course of the argument, the author believes that it would not be reasonable to suggest in this connection that the proviso of section 771 of Act 190 should not be consigned to oblivion in determining the person who can best secure for them the proper care and attention as well as virtuous education.

Third.—The children shall, with regard to their parents, return all rights granted to them by law as legitimate children; but upon the partition of the estate of said parents, they shall bring to collation everything received by them under the provisions of the second paragraph of section nine.

It is needless to state further the jurisdiction of this provision, because the law

itself is self-evident and self-convincing and any attempt to make a further explanation might obliterate its meaning.

Section 12: This Act shall take effect on its approval.

Effective, March 11, 1917.

(To be continued.)