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AN ACT ESTABLISHING DIVORCE ACT No. 2710

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(Continued from March number)

COMPARATIVE STUDY OF DIVORCE LAW OF DIFFERENT COUNTRIES

- (a) France
- (b) Germany
- (c) Japan
- (d) United States
- (e) Switzerland
- (f) Philippines

Having in mind the broadness of the subject and the idea that it would be very hard, if not impossible, to discuss all the laws on the subject in minute detail in a work of this kind, I shall confine myself in discussing the present topic to the making of a comparative study of the Divorce Law of France, Germany, Japan, America, Switzerland and the Philippines.

My endeavor will be to contrast one law with another and make comparisons among them, notwithstanding their differences of customs, orientations and geographical positions. From this comparative study of divorce law of these countries, we can erect new laws of our own that are more convenient and adaptable to the Philippines. In the study of the divorce law of America, it will not be discussed the provisions in force in each State, but the writer will confine to the causes as recommended by the commissioners on Uniform Laws to be adopted by Congress for the whole Union.

As far as the definition of absolute divorce is concerned, all the above mentioned nations are in accord in the definition of the same: "Divortium a vinculo matrimonii is the dissolution of the marriage bond."

Adultery of both spouses is regarded as legitimate cause for divorce in Germany, France, Switzerland, America and the Philippines. But such provision is not followed in Japan wherein only the adultery of the wife is punished, basing their refusal on the fact that for physical and social considerations the husband should be given greater freedom of action on the ground that the consequences of a man 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 family while the wife's sin actually destroys it.

Another similarity which we find in all these countries, except in the Philippines for under our law there is but one cause, are cruelty, harshness, grave insults and ill-treatments, although each country has fixed a different degree of cruelty inflicted to justify a decree.

America, Japan, Germany and Switzerland, admit the reasonableness of wilful desertion as a legitimate cause for divorce, although some of them require the continuance of the abandonment for a certain period fixed by Statute while others do not so require, but the mere fact of a wilful and unjustifiable abandonment is a sufficient cause.

Incurable mental and contagious diseases are regarded as causes for divorce in America, Germany and Switzerland, while France and Japan are silent on this matter; but on the other hand Japan and America, unlike Germany, Switzerland and France, recognize bigamy of either spouse as a ground of divorce.

Another similarity in the provisions of the American, French and Japanese codes, is that imprisonment for a certain period is a ground of divorce, although they differ in the duration of the imprisonment and the causes giving rise to imprisonment. Germany and Switzerland make no provision on the matter for the reason perhaps that when both parties contracted the marriage relation, they intended to live together and never to separate, except, if for certain reasons which might happen during the marriage the conjugal community become unendurable and no possible restoration of such community is expected. Imprisonment for two years does not necessarily destroy nor poison the sweetness of the conjugal community, but it deprives only one of the spouses of the services and companionship of the other spouse for a very limited period of time. Besides, it is the basis of divorce proceedings to separate the spouses whenever the crime is committed against the other, but the imprisonment of one of the spouse is not an offense against the other, but it is rather against the victim.

Besides these causes enumerated above, Japan recognizes three more grounds such as divorce by mutual consent, or when for a period of not less than 3 years, it has been uncertain whether the spouses are alive or dead; or when in case of a "mukayoshi" the adoption is dissolved, or in case of an adopted son married to a daughter of the house, the adoption is dissolved or annulled. These other causes are not recognized in the other above mentioned countries, except in Switzerland where divorce by mutual consent is recognized.

Predicated therefore upon the provisions of law on the subject of each and every one of the above mentioned nations, the question which now presents itself, is the advisability of moulding our laws on the subject according to their laws.

Every principle of law has to be chosen and adopted with great care and high regards must be had before accepting any new borrowed principle of law to our own customs and traditions.

As to the advisability of amalgamating our law with the flow of the Anglo-Saxon principles, the author would much prefer to see this country serving an apprenticeship, making her own laws moulded according to her proper orientations, rather than assimilating the laws, customs and traditions of foreign countries.

IS THERE A RELATIVE DIVORCE AT THE PRESENT TIME?

IF SO, SHOULD IT BE RETAINED?

Relative divorce is the partial suspension by law of the marriage relation. It is a separation *a mensa et thoro* (from bed and board), (Bouvier's Dictionary). Before the enactment of Act 2710, there were provisions of laws regarding relative divorce. Our Civil Code provides that divorce only produces the suspension of the common life of the spouses (Sec. 104), an article taken from the second part of Sec. 83 of the Law of 1870. The same doctrine is established by the Council of Trent in the 24th session, canon 8th. This section, however, of the Civil Code has been suspended in 1889, December 29, by a decree of the tenth Governor of the Philippines, Sr. Weyler, in compliance with the instruction received from the Government of Madrid to the effect of suspending sections 42 to 107 and 325 to 332 of the Civil Code, or rather titles 4 and 12, respectively, of Book 1 of the Civil Code. In the case of *De la Rama vs. De la Rama*, 3 Phil. Rep., 34, it was decided that titles 4 and 12 of Book 1 of the Civil Code, which treat respectively of marriage and of Civil Registry, are not in force for having been suspended by an order of the Governor-General for the Philippines a short time after the Civil Code has been extended into the Islands. It is clear, then, that, section 107 of the Civil Code being suspended, we have to find out the law on the subject previous to the Civil Code, that is to say, previous to Dec. 8, 1889, date of its enforcement in the Islands. The law at that time was that entitled "Las Siete Partidas" (The Seven Parts) as interpreted by Justice Malcolm as it is asserted by our Supreme Court in the cases of *Ibañez vs. Ortiz*, 5 Phil. Rep., 342 (Sp. Ed.) and *De la Rama vs. De la Rama*, 3 Phil. Rep., 34. The Siete Partidas defined divorce as follows: *Divortium* means *departimiento* and is the means by which the wife is separated from the husband and the husband from the wife on account of some impediment existing between them when it is properly proved in Court. It provided adultery as a ground for divorce. It is evident, therefore, that before the enactment of the new divorce law, there was a law here in the Philippines providing for relative divorce. Now that Act 2710 by our Philippine Legislature has been enacted, is the old Siete Partidas still in force on the subject? According to the rules of interpretation, a subsequent law repeats a prior law when there is irreconcilable repugnancy between them, or where it is evidently intended that the law enacted should supersede the prior acts on the subject. (Black on Interpretation p. 351.) In *Manuel vs. Manuel*, Ohio, it has been ruled down that the construction of a statute will be such as to avoid any change in the prior

laws beyond what is necessary to effect the specific purpose of the act in question. There are two theories so to say in the way of interpreting the effect of a late statute on the old statutes. In a late decision by the Judge of Court of First Instance for the City of Manila, Hon. Avanceña, the second theory has been applied and the reason of his decision was more or less the lack of any provision in the new divorce law abolishing or contradicting the provision of the old one.

Besides, we would not be reasonable to say that a relative divorce exists and it is provided in the new law. Par. 2 of Sec. 9 lays it to be the law that, if the spouses fail within one year to deliver the legitime of their children, the bonds of matrimony shall not be considered as dissolved as to them. 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 spouses 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 certain fixed period within which the delivery should be made if the spouse wishes to have the bonds of matrimony dissolved. In such case, the separation of property has already been adjudged, the bodily separation effected, but that the bonds of matrimony still exist. This is a relative divorce, or at least it has the effect of a relative divorce.

Paragraph 1 of the same section 9 seems to allow the existence of a relative divorce between the spouses, such divorce to last for the period of one year. "The decree of property as soon as such decree becomes final, *but shall not dissolve the bonds of matrimony until one year thereafter*: therefore, before the one year period has elapsed, the spouses are separated bodily or from bed and board, which is equivalent to a relative divorce.

Changing the course of the reasoning an argument against this theory would be based on par. 1 of sec. 9. It reads as follows: "The decree of divorce shall dissolve the community of property as soon as such decree is final, *but shall not dissolve the bonds of matrimony until one year thereafter*." According to this legal provision, the divorce is absolute after a year has elapsed from the rendition of the judgment; so this law holds that the effect of divorce is absolute. The former law holds that the effect of divorce is only a legal separation of the spouses. Thus, the contradiction is patent and the repeal of the former one is the unavoidable consequence of the enactment of other.

In view of this argument and with due respect to the opinion of Judge Avanceña, I do not believe that it is dangerous to affirm that no relative divorce exists in the Philippines at the present time.

The ground for relative divorce, specified by the *Siete Partidas*, was adultery only. The ground of an absolute divorce is also adultery. The co-existence of the two, then, is impossible. The existence of the one repeals the existence of the other. Nothing can be and not be at the same time. If the contention of a claimant is an absolute divorce, the ground is adultery. Can a claim on divorce on the ground of adultery be granted by our courts by only decreeing a relative divorce? I do not think they have, because the new law only recognizes divorce in its absolute sense. The ground of adultery is the only ground the law says, thus covering practically the ground for relative divorce.

SHOULD THE PROVISION OF THE OLD LAW BE RETAINED?

As to the question whether or not the provision of the old law should be expressly retained, I am inclined to answer in the affirmative, provided the provision should be modified so as not to be inconsistent with the provisions of the new law. It is always advisable and worthy of praise the existence of a law which gives to the spouses an ample opportunity to reconsider the evil that they have committed. Repentance must always be given place in legislation.

It is not always the purpose of the innocent spouse to deprive the guilty of his or her inalienable right of liberty by working for his or her imprisonment. One may only be willing to live him or her for a couple of years to give him or her chance to reform his or her life. There are grounds which may be sufficient to justify a relative divorce, but they cannot be availed of for lack of legislative provision. To my mind, the time has now come in which the Philippines must have a complete legislation, different from what our Chief Justice has reported to the first Philippine Commission. (Malcolm, Phil. Gov. par. 35 No. 9) paralleled to any European legislation and unrivalled by any statute of the Union.

CONFLICT OF LAWS

The marriage relation is a contract which has a social and legal character, constituting the source of all society, 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, but also to prohibit its dissolution at the mere will or caprice of the parties, unless the consent of the State thereto is obtained.

It is an admitted principle of Private International Law that marriage relation is essentially a status and just as the incidents thereof are determined by the law of the place where the parties live (*lex domicilii*), so also its dissolution is to be regulated by the same law. But a question might arise in case that the act on account of which divorce is asked, occurred in another State by whose law it was not a cause for divorce, though constituting a ground for divorce in the State of the Divorcee

forum; which law should govern? To this question there are various theories advocated; some holding that the law of the place where the offense is committed should prevail; others are in favor of the law of the domicile of the parties at the time the offense was committed; and others in favor of the law of the parties, domicile at the time the divorce is sought.

The civil law theory is that the right to dissolve the marriage contract depends upon the law of the place where the contract was entered into, because the divorce alters not only the condition and capacity of the spouses but also the status, and for this reason it is but natural that the law which give rise to the status should have exclusive control over it in its dissolution. (Fiori, *Tratado de Derecho Internacional Privado*, vol. 3, p 43 et seq.)

But upon principles it would seem clear that the question whether or not a particular act or omission is a ground for divorce, should be determined by the municipal law of the divorce forum. *Hunt vs. Hunt*, 72 N. Y., 217; *People vs. Darwell*, 25 Mich., 247; 12 Am. Rep., p. 260; *Shreck vs. Shreck* 32 Tex., 578; 5 Am. Rep., 251; *Hood vs. Hood*, 11 Allen (Mass.) 196; 87 Am. Dec. 709.

This commonly accepted principle is based upon the lawful exercise of the sovereign power of a state, whose control over inhabitants within its territory is absolute and a lawful exercise of its police jurisdiction.

But if the object of the suit is not to dissolve the marriage status, but to pronounce the union invalid ab-initio for causes rendering the contract void, the law applicable is the *lex celebrationis* of the marriage contract.

The serious difficulty which confronts us lies as to the effect to be given in another State of a judgment lawfully rendered in another State.

"It is a fact that not all the countries recognize and admit the absolute divorce. And so the difficulty arises when the question is between two parties domiciled or married in a country where no such law is in force, who transferred afterwards in another country where such law prevails, or vice-versa, and their petition for the dissolution. In this case, since there will be a conflict of right and interest when they return to their country where divorce is not allowed, it is the best policy for the court taking cognizance of the case to adopt an attitude which would protect the interest of both parties, either in the place where the party intended to have the bond dissolved as well as in their own country. Of course, the courts of the country where the parties sought to have protection can declare themselves incompetent to take cognizance of the case; but, if they prefer to exercise jurisdiction over the case and the parties to the suit are those above described, the best policy for the court is to grant only the legal separation according to the law of the parties, regardless of the *lex fori*. This policy of the court is salutary, because it does not prejudice in any manner the rights and interests of the parties, and on the contrary it protects

the parties not only within the jurisdiction of the foreign courts, but also within their own country in case they return home" (Mariano de Joya, *Derecho Internacional Privado*).

But when the question is between two States where absolute divorce prevails, the difficulty disappears and question which confronts us to determine is the effect to be given to a foreign judgment.

The fourteenth amendment to the federal constitution provides that "no State shall deprive any person of life, liberty or property, without due process of law", that is, without notice and reasonable opportunity to be heard in his own behalf. If there has been no such due process of law as is demanded under the federal constitution, the Court is without jurisdiction and its decree absolutely void within the limits of its own State as well as elsewhere. And if the defendant resides outside of the jurisdiction of the Court wherein the action is pending, a service of notice by a general publication of the fact that a *sui* has been instituted against him, unless the defendant voluntarily appears, will not give the Court jurisdiction over his person, and although the judgment is valid where rendered, yet in general will be regarded as void and of no effect outside the jurisdiction where it is rendered. As it was held in the leading case of *Pennoyer vs. Neff*, 95 U. S., 714, a personal judgment rendered against a non-resident defendant, in pursuance to a service of notice by a general publication, was beyond the Court's jurisdiction to bind the defendant; and that a statute authorizing such a course contravened the federal constitution. The laws of one State have no binding effect and force beyond its territorial jurisdiction, and therefore the procedure followed in this case to subject the non-resident defendant to the jurisdiction of the Court, did not bind him in so far that the judgment was intended to be binding beyond its territorial limits.

However, in order that the judgment of a sister State may be given effect in another State of the Union, it is necessary that the defendant be personally served with notice of the action within the territorial limits of the Court's jurisdiction, or that he voluntarily appears allowing the Court to acquire jurisdiction over his person.

As between the States of the Union, the comity enjoined by private international law, touching the effect to be given to foreign judgment is reinforced and supplemented by the clause in the federal constitution providing that "full faith and credit shall be given each State to the judicial proceedings of every other State", but this constitutional privilege is subject to the limitation that the Court pronouncing the judgment must have jurisdiction over the case and person of the parties. And when an action is brought in one of the States of the Union to enforce a judgment rendered in another, in general only such defenses can be made thereto, as could be made in the State where it was rendered. The defenses that a defendant may show to defeat the validity of the judgment are the lack of jurisdiction of the Court which

pronounced the judgment over the subject matter over the person of the parties. *Harris vs. Hardeman*, 14 How., 334; *Cheever vs. Wilson*, 9 Wall., 108; *Thompson vs. Whitman*, 18 Wall., 457; *Grover Co. vs. Radcliffe*, 137 U. S., 287.

It is the weight of authority that divorce cases are "proceedings quasi in rem" and not purely proceedings in rem, nor proceedings in personam, because in divorce cases although the actual subject matter of the litigation is the marriage status, the status being the res, yet, it can not be said to be altogether proceedings in rem, because there is a personal element that enters into them not found in suits instituted merely to subject or affect property. These causes constitute in some measure a dividing line between proceedings strictly in rem and proceedings strictly in personam, partaking in fact of the nature of each, but the former predominating. The nature of these proceedings is the same whether the suit be for divorce "a mensa or a vinculo".

But the New York Courts are more inclined to hold the view that divorce cases are proceedings in personam, *Williams vs. Williams*, 130 N. Y., 193; *Jones vs. Jones*, 108 N. Y., 415; *O'Dea vs. O'Dea*, 101 N. Y., 667.

Hitherto we have only discussed the territorial effect of divorce decrees rendered by a sister State within the Union, and now I will consider the extraterritorial effect of divorce decrees rendered by Courts of foreign countries.

It is a well established principle of a Private International Law that a divorce obtained in one State other than the domicile of the parties is of no binding effect in foreign countries. Domicil of one of the parties at least is essential to give a divorce decree extraterritorial effect, *Van Jossen vs. State*, 37, Ohio, 317; 41 Am. Rep., 307; because when the parties are domiciled within the State where the action is brought, the nature of the proceedings is in rem, and judgments in rem are generally given conclusive effect everywhere for the sovereignty of a State within its limits is supreme. *Williams vs. Annroyd*, 7 Cr. 423; *Gelston vs. Hoyt*, 3 Wheat, 246; *China Mt. Life Ins. Co. vs. Fore*, 142 N. Y., 90.

However, although it is within the sovereign capacity of a State to enact laws whereby parties may obtain a divorce even when neither husband nor wife is there domiciled, yet, such a course is condemned by the principles of comity and Private International Law. The consent of the parties cannot give jurisdiction over their foreign status, for that would be to infringe the sovereignty of the State of domicile which is interested in the continuation of the relation. *Jackson vs. Jackson*, 1 N. Y., 424; *Harrison vs. Harrison*, 20 Ala., 129; *Smith vs. Smith*, 13 Gray (Mass.) 209. These general principles of International Law are now so clearly recognized that municipal laws invariably require that for the granting of a divorce, the parties should be domiciled within the jurisdiction. *Williamson vs. Parison*, 1 N. Y., 389; *Hoffman vs. Hoffman*, 46 N. Y., 30; *Sure vs. Luidsfelt*, 19 L. R. A., 515.

The last question to be determined is whether the Court granting the divorce must have such complete jurisdiction of the entire res as to justify the other States in admitting its sovereign right to completely regulate or dissolve the marital union. Beyond doubt, when the Court has absolute and complete jurisdiction of the res, that is, if both parties are domiciled within its jurisdiction, decrees rendered under these circumstances will be given full effect everywhere, because there is no possible ground for any other State to complain that its sovereign rights over its own citizens have been violated. *Clark vs. Clark*, 8 Cush. (Mass.) 385; *Barber vs. Root*, 10 Mass., 260; *Hood vs. Hood*, 87 Am. Dec. 709; *Harrison vs. Harrison*, 20 Ala., 629.

On the other hand, if neither of the parties are domiciled in the State where the divorce is obtained, its courts are completely without jurisdiction over the res, and other State might and would justly complain that the State granting the divorce had usurped sovereignty that it should not have exercised. And consequently decrees rendered under these circumstance, though its validity may be admitted within the divorcing State, yet, no extraterritorial effect can be given to it in foreign countries. *Janover vs. Turner*, 14 Mass., 127; *Kerr vs. Kerr*, 41 N. Y., 272; *Neff vs. Bechman*, 74 Ja., 92; *Shanon vs. Shanon*, 4 Allen (Mass), 134.

But a different question presents where one of the parties is domiciled in the State granting the divorce, while the other is domiciled elsewhere. In this case, the divorce court has only jurisdiction over part of the res, and does the taking cognizance of the case mean a usurpation of the sovereignty of another State over its citizens?

The marriage status is a reciprocal one and therefore a decree of divorce must in any State be valid as to both consort or void as to both. It cannot be valid as to one and void as to the other, for that would be to affirm that there might be a husband without a wife or vice-versa. So that the Court must do one or the other, it must exercise jurisdiction over the whole or over none.

These questions have agitated the Courts and many theories have from time to time been advanced by the Courts, but all of which have now been discarded, except three leading ones.

First Theory.—According to the first theory, it is only essential that one of the parties should be domiciled in the State granting the divorce, it is immaterial which party though it will usually be the plaintiff. The Courts of the party's domicile having jurisdiction over his or her status will draw to themselves, by reason of mutuality of the marriage relation, jurisdiction over the other party. And the service of process in this case can be made by publication. This theory presents a great inconvenience because it oftentimes permits grave injustice to be done to the defendant who frequently finds himself or herself divorced without any previous knowledge whatever that proceedings for that purpose were pending.

Second Theory.—In this second theory the personal element preponderates and causes a proceeding whose purpose is to dissolve a status to be regarded in the light of a proceeding *in personam* rather than a proceeding *in rem*. The New York Courts hold that no foreign divorce in a State where the plaintiff alone is domiciled will be valid extr territorially, unless the defendant voluntarily appears or is personally served with process within the territorial jurisdiction of the divorce Court.

This theory offers a great inconvenience, for it practically forces the plaintiff who desires a divorce at the very least to seek out the defendant, and one in the State selected by the latter, for the very reason perhaps that its laws are more hostile to the plaintiff than his or her own; and since the municipal laws of most States require that the plaintiff be domiciled in the States where he seeks a divorce, this theory would often compel him to abandon his own State altogether and take up his permanent residence in the domicile of the defendant, or else forego his right to a divorce entirely.

Third Theory.—The third theory does not require the plaintiff to go to the State of the defendant and subject himself to its laws in order to obtain his divorce, but he is permitted to get the full benefit of the divorce law of his own State; but a general publication, as is advocated by the first theory, is not sufficient. The notification required here to give the Court jurisdiction over the person of the non-resident defendant is that he should be given the best notice practicable of the pendency of the suit, or by mail, message or actual service of notice, and not by advertisement merely.

This theory adopted by the Courts of New Jersey is the best in point of reason, principle and justice to all parties, combining as it does the advantages of both and the other theories and minimizing the disadvantages of both. According to this theory, the personal element entering into a divorce suit is neither disregarded to the extent of making the divorce a proceeding *in rem*, nor so magnified as to make it a proceeding *in personam*, but is regarded as a proceeding quasi *in rem*.

SHOULD THE GROUNDS FOR DIVORCE BE INCREASED?
AND IF SO, WHAT NEW GROUNDS SHOULD BE ADOPTED?

The very nature of marriage, its purposes, its effects upon the persons immediately concerned, its effects upon the well-being of the society, and lastly the influence which it plays in the very existence of the State. These are some of the forces which compelled the government of all civilized nations to adopt a policy to regulate marriage; they encourage marriages; they provide protections and privileges and other means necessary for its continued existence during the natural lives of the consorts; they safeguard the welfare of the spouses from impurity and immorality, secures them the blessings of home and family and creates a noble nursery for the commonwealth. It is the policy of the government to maintain the existence of marriage

relations so long as it is consistent with peace and welfare of the community. It protects the family from disturbances coming from outside. When the cause of the disturbance to the peace and harmony of the family arises within the family itself; when such trouble is caused by the very members of the family; when it is beyond the power of the government to suppress such disturbance without altering the organization of the family, then the government provides for a means whereby the marriage bond may be dissolved. Thus, the author of the trouble is eliminated.

From the above consideration, it may be concluded that the fundamental object of the divorce law, in so far as it permits the separation of the spouses is to dissolve the marriage bond when it is found in such a condition that the spouses can no longer endure living such a union; when life to them has become unsupportable under the circumstances.

Keeping in view this fundamental object of the divorce law, we shall proceed to consider the justification of adultery as a ground for divorce.

The essential feature in the marriage relation is the affection. The ceremonials observed in the solemnization of marriage are nothing but legal formalities prescribed for reasons of public policy, as safeguards to good order and good morals. But once the marriage contract is consummated, there spring mutual rights and duties, the faithful observance of which is indispensable to the accomplishment of marriage's human and divine missions. These rights and obligations are of social and moral nature and a violation of the same creates a disturbance in the organization of the family and disorder in the community.

I believe that the true ground of justification for adultery as a cause for divorce is the non-observance of fidelity on the part of the offender, which both spouses, when they intended to unite for life, solemnly swore to keep mutual faithfulness toward each other. This lack of fidelity on the part of one of the spouses creates trouble in the family and its effects go directly to the very foundation of marriage. When distrust will exist between the spouses, the confidential relation is reduced to its minimum, and there is danger of bring strangers into the family. The offender will not devote as much time and energy to his family as he would had he remained faithful, because his attention is now divided; and lastly, there is the consideration that in the eyes of the public the husband is dishonored. When one of the spouses commits adultery, the conjugal community which before was the sanctuary of love and affections has become the amphitheater of temptable immorality, the state of the most abominable crime against marriage and the forever silent witness of the disgrace of the offended party. Under these circumstances, it is said that marriage relation is unbearable and that it becomes a burden in life instead of being the source of happiness. In this case divorce then is the proper means to remedy the condition in order to bring the spouses to normal happiness by giving them an opportunity to find a condition where happiness may be found.

If what has just been said of adultery is true, shall the family remain undisturbed in its harmony and peace, if none of the spouses commit adultery? Our observation in its limited sphere shows us that such a condition cannot always be attained. The fabric of which human society is made up is so intricate and perplexing that marriage relation cannot be secured from the infinite number of misfortunes. To cite an instance; if a husband, without committing adultery, wilfully and without cause, abandons his family and children without leaving any life provision whatsoever for his wife and children, will the family remain in peace? Shall the law close its eyes and its ears completely to the bitter cries and miserable situation of the family? There is no one to support; no one to protect the members of the family. and what is worse, the natural object of marriage can no longer be accomplished. Desertion is no less an offense than adultery with respect to the marriage relation, while in desertion the suffering inflicted is moral as well as material injury. If such galaxy of unhappy circumstances will loom out in the sacred sanctuary of marital affection, it is beyond peradventure of doubt that that poor helpless wife will seek refuge in the heaven of carnal profession in order to maintain the union of her body and soul together and also those of her children. In view of these reasons, we shall naturally include desertion as one of those causes with those wise limitations which are necessary to prevent abuses and miscarriage of justice. Desertion is recognized as ground for divorce in England, United States, Germany (Art. 1567), Venezuela (Art. 152 pr. 2), Porto Rico (Art. 164 pr. 5), Italy (Art. 148), Guatemala (Art. 170 pr. 8) and Japan (Art. 813 pr. 6).

Cruelty inflicted by one spouse to another should also be one of the grounds for divorce with certain carefully defined limitations. Some of these limitations are that such cruelty must be such as being intolerable, barbarous, savage or inhuman acts. Or, according to Connecticut statute, such cruelty must be such as to cause "danger to life, limb or health", or such as to make the conyugal community undurable. The apprehended harm must be bodily, including detriment to health, but not mere mental suffering, because the court has no scale of sensibilities by which it can gauge the quantum injury done and felt. This rule rests not strictly on justice, but on the difficulty of making proof. But mere rudeness of language, petulance of manners, austerity of temper, or an occasional sally of temper which does not injure or threaten to injure the health or body of the complaining party, does not constitute cruelty within this law. The justification of cruelty as ground for divorce rests on the vindication of the weaker (usually the wife). The wrong done to the wife in this particular case may be actually greater than when the husband commits adultery.

On the other hand since love and affection is deemed the foundation, cornerstone and unit of the social order, once that such natural love has disappeared, does

it not follow that it is improper, unjust and immoral to force a man and a woman to continue to live together as husband and wife while love has been destroyed by cruelty and betrayal?

Cruelty as ground of divorce is recognized in all States of the Union, except in two or three. It is also recognized in Japan (art. 813 pr. 5), Guatemala (Art. 170 pr. 3), Uruguay (Art. 148,) Porto Rico (Art. 164 pr. 4), Italy (Art. 148), Venezuela (Art. 152 pr. 2), Spain (Art. 105 pr. 2), Germany (Art. 1568) and France (Art. 231).

The third ground which I believe ought to be included as a ground of divorce is where one of the spouses is suffering absolute, perpetual and incurable impotency, occurring after marriage. Impotency used in this case means the total loss or destruction of the sexual organ, so that copulation is absolutely impossible. It is needless to state that the principal and immediate object of marriage is reproduction. I see no reason, no valid reason why the marriage relation be still maintained against the will of one of the spouses when there is absolute certainty of the impossibility of realizing the very object of marriage.

The fourth ground which I recommend is where one spouse has attempted against the life of the other spouse.

The justification of this ground is even more apparent than in adultery, desertion and cruelty. In cruelty, the body of the offended party is injured; in the one under consideration the very life of the offended is exposed to destruction. This ground of divorce is recognized in Germany (Art. 1566, Uruguay (Art. 148), and Guatemala (Art. 170).

EFFECT OF DIVORCE LAWS IN DIFFERENT COUNTRIES

(a) *Advantages:*

It is precisely under the system of matrimonial indissolubility that crime is rewarded and innocence punished; for them the unprepossessed and reckless husband can live in adultery outside of his house and demands however that this wife, faithful and submissive, should continue living with him under the same roof and tolerating his incontinence protected by law. The only thing to be attained from this system in the prostitution of the sanctity of the home, protection of vice and punishment of innocence, without avoiding the unfaithful spouse from committing the crime.

It is an undeniable fact that wherever the matrimonial institution exist, there are disagreeable marriages which only recognize hatredness and the home converted into a birth place of immorality and unfaithfulness.

In these cases when by the fault of one of the spouses the ties of marriage have been loosened and the conditions imposed by the institution cannot be fulfilled, it is an immorality, a tyranny to compel one of the spouses to remain perpetually and indissolubly subjected under the yoke of the guilty spouse.

To these unfortunate marriages which can no longer find happiness in the union contracted but misfortune and shame, the balsam is applicable, and not to the happy marriages that breathe in an environment saturated with happiness.

Can we perchance look upon with good eyes when our daughters having contracted marriage in search of happiness, do not find, however, but cruelties, insults and vexations from the man of whom they precisely await happiness, protection, and esteem? That woman is forever miserable and dead for kindness, because she has no remedy to free her oppressor. It is very unjust that love having disappeared between two beings who once loved each other and having been converted into an intolerable suffering the conyugal bed that was a time a nest of fragrant flowers, of poetical blisses and of unspeakable felicities, they should be condemned to remain during their lifetime drowned in misfortune, when each of them could look for a new love and new happiness. To deny this remedy to unfortunate beings who are grieving under the pressure of an eternal unhappiness, is unjust, immoral that cries against the justice of men and of God.

If on the contrary we only grant them personal separation, this indissolubility of marriage will place those spouses who have not made any vow of chastity in an unsupportable condition, compelling them to be criminals in order to find in the arms of a man or woman some mitigation for their suffering souls which are thirsty of love. But with a legislation on divorce, the anomalous situation of unhappy marriage and the condition of the children and of society are thereby remedied; besides, concubinage, polygamy and poliandry are avoided.

We see every day throughout the events that without a Divorce Law, illicit unions of married men and married women with women or men who are not their respective spouses and which are the external manifestation of a scandalous polygamy, are enhanced.

It is very immoral to see children living under the conyugal roof where nothing are found but infamies; where, instead of preserving the faith promised before the altar, it is converted into a place of the ugliest immoralities. It is not an edifying example that the children should grow up contemplating the impunity of the perpetual commission of such a crime which develops in the family.

But with the present law, the moral conditions of the country and the morality of the family in particular, will be bettered, for under the rule of divorce there will not have abandoned wives compelled to look for bread in clandestine relations; there will not have deserted children lost in the rivulet on account of the separation of the parents, without education, without home, without the environs of love or of charity.

Supposing that the contending parties in a divorce case should have children; it is asked, what will become of them? They will be benefitted, their surroundings

will be bettered, for the home where they were reared up is stained with infamy or cruelty, for their parents or any of them cannot give them but example of deceit and treason; their sentiments will be bettered, for an immoral home cannot produce noble sentiments; and lastly, their life will be bettered, for divorce will reduce the number of abortions, infanticides, abandonment of many children, sons of misfortunes.

Looking upon the divorce question from the stand point of events, we are convinced that it has not obstructed the progressive and moral development of procreation.

According to the Statistics furnished by the Bureau of the Census of the United States, the number of divorces is increasing in the divorce countries, as for example, Japan, which is the country most radical in divorce and, yet, its population is ever increasing.

Compared with the Philippines, Java where absolute divorce is in force, in 1880 it only had two millions and a half people for its population and now that number has increased to twenty-nine millions. On the other hand, the Philippines where no absolute divorce was in force, of one million and a half of people for the same year, can only boast now of scarcely ten million inhabitants. (Census of the Philippines).

(b) *Disadvantages:*

The divorce law which opens the way to the unloosening of passion and gives facility to the celebration of new and repeated marriages is the cause of the corruption of domestic usages and customs. Could a sadder scene and at the same time a more horrible spectacle present itself before the children than the sight of their fathers united in lawful wedlock to other women, and their mothers to other men, in such a way that they find themselves with two or more father and two or more mothers?

According to Mr. Stearney,—Divorce is the portal which is opened to passion, in order to search for, or create pretexts, whenever the weight of matrimony, the conyugal tedium is felt. Who can assure that in such cases, where love no longer reigns and the house that was formerly a paradise of delights, but now converted into a scene of ignominy, collision will not be sought so that common life could be made unupportable? There cannot be a more harmful thing to the moral well-being of the off-springs of a marriage than the divorce of their parents which destroys one or the other of the two best influences that work on childhood, and may poison even the influence that is left. And according to Mr. Pablo Mankeggaza,—“Divorce is now one of the fathomless fountains of mishaps, a slow venom which undermines domestic felicity, which destroys the healthful youth of the children, the morals of a nation, and the development of the economic resources of a country.”

Glassen in his work “Le Mariage et le Divorce”, affirms that, according to statistics, the number of divorces increases continuously in rapid progression; that divorce results in its own abuse and that the abuse of divorce endangers the existence of the family.

In England, when the bill on absolute divorce was introduced for the first time in the august body of the English Parliament, Gladstone, the celebrated orator said the following in the course of his discussion regarding the bill: "I do not know where divorce leads us; but what I know is that it drags us to the place where Christianity had taken us away. If England declares the dissolubility of marriage, it is wise to record such an event in the annals of history with black letters rather than with golden ones."

These positive assertions of eminent men lamenting the condition of their country because of divorce, would lack weight and authority to convince us of the dismal consequences which go hand in hand with divorce if we do not strengthen with facts sufficient to prove their existence.

In America, for example, where absolute divorce is known, we hear cries of alarm which spring from the hearts of the poor and the rich alike, in the hut as well as in the palace, due to the rapid increase of divorces that are daily recorded by the tribunals. As a result of this abnormality which endangers national morality and tranquility, various societies were formed to combat and dethrone from the heart of man the liking for divorce.

In Boston, a Congress of protestant bishops was held, in which a justice of the Supreme Court of Rhode Islands said,—“The institution of marriage is undergoing a vertiginous evolution from a contract for life into a contract for conventionalities. We are facing a danger which makes me tremble greatly, and the church as well as the State should co-operate and take a stand to preserve society from this imminent ruin.”

Divorce has increased and extended itself like an epidemic which corrupts morality and diminishes population. Thus, in France, the law of divorce having been re-established in 1884, the birth rate decreased in 1901 by 19% and in 1907 by 32%. In the early half of the year 1909, the number of divorces amounted to 398,710, and that of deaths to 426,913, that is, an excess of 28,203 deaths over births.

Von Moltke, the great strategic of the modern age, said: “that from 1870 France had been losing a battle each day and its cause is the law of divorce, and within fifteen years France will have 37 or 38 regiments less. And according to Mr. Bureau, a famous professor of the University of Paris, in his book entitled “La Crisis Moral de los Tiempos Modernos”, publishes the following statistics that proves the increase of divorce which has been the principal cause of the decrease of the French population.

| | |
|------------------------------------|--------|
| In 1886 the number of divorces was | 2,950 |
| In 1890 the number of divorces was | 5,497 |
| In 1905 the number of divorces was | 10,109 |
| In 1907 the number of divorces was | 12,304 |

Now, making a brief comparison of the number of divorces with that of marriages, we shall be convinced that the former number is double than the latter one. In France the suits for divorce rank from 1773 in the year 1884 to 7445 in the year 1891; whereas marriages numbered from 892 in the year 1884 to 3247 in the year 1891.

In Germany, there were 5342 divorces granted in 1882 and 6178 in 1891.

In England, divorces use from 127 in 1860 to 390 in 1887, an increase much more rapid than that of the population or that of marriages.

In the Special Census Report on Marriage and Divorce, statistics reveal us the fact that in the United States one million divorces were granted, that is, from 1887 to 1901; or within a period of thirteen years; and from 1887 to 1907, or within a period of 20 years, 1,340,000 suits for divorces were filed, and out of which more than $\frac{2}{3}$ obtained a favorable result.

Considering now the effect of divorce on the population, we find from several statistics that divorce decreases instead of increasing it. According to the American Census Report, we have the following data: from 1870—1880, the increase of population was 30 per centum; from 1880—1890 it was 25 per centum; from 1890—1900 it was 21 per centum and from 1900—1906 it was 10.50 per centum.

From the foregoing data showing the increase of divorce and the decrease of population, we can conclude that though the increase of divorce in America as well as in other nations, does not necessarily show a decline in the standard of social and domestic morality, nevertheless, it must be admitted that if the increase continues unchecked, divorce will tend to induce such a decline, it being the logical and necessary consequence of the abuse.

CONCLUSION

The natural vinculum of love is the essential element of the marriage relation, and not the nominal bond of legal sanction; if this is so, does it not follow as the night the day that the maintenance of the legal bond is improper if the natural bond ceases? It would not be right to force a man and woman to live as husband and wife who had no love for one another but only contempt and hatred; why should we think it right to force them to live as husband and wife after love has been destroyed by cruelty or betrayal?

Now, if notwithstanding the countless restrictions imposed in the application of the present law, safeguarding the interests of the State, of the family and of the individual; if despite the assurances of our Legislative, Executive and Judicial departments, to do their best to check, to guard and to suppress any attempt of abuse and corruption, there are still some who believe prejudiced in their rights as peaceful citizens by the passage of this law, forgetting perhaps that there are in this country thousands of unhappy families, that are forever condemned to suffer the cruelties, insults, and vexations of the man of whom they precisely await happiness, pro-

tection, and esteem; and if in spite of their knowledge that they as progressive citizens should uphold the passage of this law will remain obstinate by continuously refusing to yield, to them, therefore, I take the liberty of addressing these few words.

There are many things permitted by law, which the conscience of many, taken individually, cannot tolerate; nevertheless, the Legislature is forced to pass such measures in order to protect the interests of the whole community.

We must not fear that this law might destroy and poison the sweetness of our family life and degenerate the morality of our country, because this law does not compel them to resort to it; and if notwithstanding the rare unfaithfulness of some wives, we prefer to forgive them and extend to them the temptation, the encouragement, the license of running through the whole calendar of matrimonial offenses, without redressing the offense, then no body will interfere to us, and as a result we will not fail witnessing everyday the gradual but firm downfall of that scared honor which every body will stake his life for the vindication of the same.

Nor need we have any fear that the granting of divorces under these conditions will menace the stability of the family or threaten the integrity of the State. The essence of all true marriage, as we have said, is love, and love is the greatest thing in all the world. Let full freedom of choice be exercised in mating; let all worldly and material considerations as incentives to marriage be eliminated; let the union be protected and guaranteed by such regulations as we have laid down; let love be cherished and encouraged in every youthful heart, and then let it do its perfect work, and I believe that the instincts which have prompted the formation of the union may be safely trusted to safeguard its continuance.