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The Legality and Effect of a Matrimonial Separation Agreement

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Relative divorce exists as a fact in the Philippines. Whether it is so recognized legally is an unsettled question to-day in view of the divergence of opinion among the justices of the Philippine Supreme Court as shown by the cases of *Garcia Valdez vs. Soteraña Tuazon* (40 Phil. 943) and *Andres C. Chereau vs. Asuncion Fuentebella et al* (43 Phil. 216), in the latter of which cases five justices out of the nine composing our Supreme Court dissented saying: "We agree with this decision except in so far as it declares that now, in view of Act 2710, only relative divorce is obtainable" (See also "A Critical Study of the Law on Relative Divorce in the Philippines by Jose Lopez Vito, Jr., *Philippine Law Journal,* July, 1928).

This only goes to show that this phase of our law on family relations is in a legal penumbra. But while our highest court is thus non-commital on this part of our law, notaries public continue the practice of executing matrimonial separation agreements between discontented spouses. The existence of these contracts, some being made by reputable notaries, started this investigation. What is the nature of this contract; what stipulations does it contain; can it be valid if based on the grounds for judicial separation mentioned in Article 1433, Civil Code; can there be possible cases where such contracts may be made at all; and if its stipulations fall outside those possible cases, can it be considered one made against public policy and hence, a good ground for depriving a notary public of his license? In short, the legality, force and effect of a matrimonial separation agreement are the questions which this paper hopes to ventilate.

I. Nature of this Agreement; Sample Forms

A matrimonial separation agreement is one where the spouses agree extra-judicially for any cause to live separately, each contracting not to interfere with the person or property,

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or both of the other. It is made by spouses legally married, sometimes on the consideration of a stipulated pension to the wife or without it. It usually disposes of the conjugal property and entrusts the legitimate child or children in either of the spouses. For the curiosity of the unwary reader and student of legal forms, I am presenting in full the usual, not to say "legal", form of such agreement:

ESCRITURA DE SEPARACIÓN MATRIMONIAL

Sepan todos los que la presente mieren:—

Que nosotros los conyuges Lao Bon Sen y Modesta Peralta, mayores de edad y vecinos del municipio de Kalibo, Provincia de Capiz, Islas Filipinas, por la presente hacemos constar:—

1º—Que en 7 de Mayo de 1916 hemos celebrado casamiento civil en el Juzgado de Paz de Kalibo, Capiz, Islas Filipinas.

2º—Que en dicho matrimonio hemos tenido una hija llamada Lourdes Lao que actualmente tiene la edad de cuatro años.

3º—Que durante nuestra unión marital hemos adquirido como bienes gananciales un solar para edificios situado en la calle Magalona dentro de la población de Kalibo, Capiz, I. F., una casa de materiales mixtos que se halla levantada en dicho solar y algunos bienes muebles de casa.

4º—Que no conviniéndonos el seguir viviendo juntos bajo un mismo techo, hemos convenido en separarnos desde esta fecha, de tal modo que cada uno de nosotros es libre adoptar el género de vida que mejor lo acomode, sin poder inmiscuirse para nada en la del otro, tanto en lo referente a nuestras personas respectivas, como en lo referente a los bienes que en lo sucesivo adquiera cada uno de nosotros, realizando dicha separación con las condiciones de perpetua, verdadera, firme y eficaz, con el fin de producir nuestra más amplia libertad.

5º—Que en virtud de dicha separación convenimos también en que lá expresada hija Lourdes Lao se halle siempre en poder de Modesta Peralta.

6º—Que el exponente Lao Bon Sen dona y entrega en calidad de donación a su hija Lourdes Lao la mitad de los bienes gananciales arriba consignados, participación que le corresponde a su derecho como marido, de los bienes gananciales encontrados durante el matrimonio.

En testimonio de lo cual firmamos la presente en el municipio de Kalibo, Capiz, I. F. a 19 de Enero de 1922.

Nosotros, Manuel Manalo y Leoncia Ureta, mayores de edad, y vecinos del municipio de Kalibo, Provincia de Capiz, Islas Filipinas, por la presente hacemos constar lo siguiente:

1. Que somos casados civilmente.

2. Que desde que nos casamos, el día 4 de Julio de 1916, hasta el presente, no hemos tenido ninguna prole ni adquirido clase alguna de bienes.

3. Que no conviniéndonos el seguir viviendo juntos bajo un mismo techo, hemos convenido en separarnos desde esta, de tal modo què cada uno de nosotros es libre de adoptar el género de vida que mejor le acomode, sin poder inmiscuirse para nada en la del otro, tanto en lo referente a nuestras respectivas personas como en lo referente a los bienes que en lo sucesivo adquiera cada uno de nosotros.

4. Que en el caso de que más tarde, dentro del plazo señalado por la ley para el reconocimiento de la prole, Leoncia Ureta de a luz algún hijo, yo, Manuel Manalo, consentiré que se le ponga a dicho hijo mi apellido en la partida bautismal correspondiente, y quederé obligado a todo cuanto la ley prescribe, como tal padre en la medida de mis recursos.

5. Que hemos hecho este convenio libremente, sin presión de ninguna clase.

En testimonio de todo lo cual firmamos la presente de nuestro puño y letra en Kalibo, a .... de Octubre de 1916.

(Fda.) LEONCIA URETA (Fdo.) MANUEL MANALO

II. Analysis of the Stipulations

(1) To live separately such that each is free to adopt the kind of life that suits each, without interference whatever with regard to each's respective person or properties which each may subsequently acquire.

Is this stipulation valid? With regard to the separation of persons amounting to a relative divorce, "a mensa et thoro", it can be said that it is void as seen from the decision of *Valdez vs. Soteraña Tuazon* (40 Phil. 943). And even if relative divorce be subsequently recognized here as the concurring decision in the case of *Chereau vs. Fuentebella et al* (43 Phil. 216) shows, still that kind of divorce can only exist by virtue of a judicial decree of separation (*Benedicto vs. De la Rama,* 3 Phil. 34, 42-45; also Fisher's Monograph on Marriage and Divorce). Under no law of Spain in force in the Spanish peninsula or its colonies is there a recognition of extra-judicial divorce with legal effects whether the ground be lawful or not, unless first passed upon by a competent tribunal. (Fisher's Monograph on Marriage and Divorce, p. 11, first par., and p. 12, last par.).

In the above cited case of *Benedicto vs. De la Rama,* itself a thesis on the Law of Divorce prior to the enactment of Act No. 2710, the decision in part says:

"It will be seen from these laws that the only ground for divorce now of importance here is adultery."

Law 2, title 9, of the fourth partida, provides in part as follows:

"Husband and wife may accuse each other, in another way than those mentioned in the preceding law; and that is for adultery. And if the accusation be made with a view to separating the parties from living together, or from having any commerce with each other, no other person but the spouses themselves can make an accusation for such a cause, and it ought to be made before the bishop or the ecclesiastical judge

(official) either by the parties themselves or their attorneys... And in all the various ways in which the husband can accuse the wife, mentioned in these two laws, the wife may in like manner, according to holy church, accuse him, if she choose; and she ought to be heard, as he is himself." While Law 2 of title 10 seems to speak only of the adultery of the wife, this clearly gives the wife the right to accuse the husband of adultery for the purpose of securing a separation. So does Law 13, title 9, partida 4.

The divorce did not annul the marriage. Law 3, title 2, partida 4, says among other things, the following:

"Yet, with all these, they may separate, if one of them commit the sin of adultery, or join any religious order, with the consent of the other, after they have known each other carnally. And notwithstanding they separate for one of those causes, no longer to live together, yet the marriage is not dissolved on that account." Law 4, title 10, partida 4 is to the same effect. Law 7, title 2, partida 4, is in part as follows:

"So great is the tie and force of marriage that when legally contracted it can not be dissolved, notwithstanding one of the parties should turn heretic or Jew or Moor or should commit adultery. Nevertheless, if for any of these causes they may be separated by a *Judgment* of the *church*, so as to live no longer together, not to have any carnal connection with one another, according to what is said in the title on the clergy, in the law which begins with the words 'otorgándose algunos'."

The partidas contain other provisions in regard to the form of libel (Law 12, title 9, partida 4), and Law 7, title 10, partida 4, confers jurisdiction upon the church in cases of divorce. (Cited on pages 42-43 of the decision).

* * * By the operation of this law (Novísima Recopilación), first enacted in 1530, those laws of the partidas hereinbefore referred to relating to divorce, upon the discovery and settlement of the Philippines became at once effective therein. They have remained in force since as civil laws of the state as distinguished from the laws of the church. (It may be added also that upon them the ecclesiastical courts apparently in part relied in determining cases for divorce pending before them. They are cited as authorities by the writers upon ecclesiastical law. (3 Procedimientos Eclesiásticos, Salazar and La Fuente, p. 9; Práctica Forense, Rodriguez, p. 410, 413; 2 Práctica General Forense, Zuñiga, p. 90; 2 Procedimientos Eclesiásticos, Cadena, p. 210).

Being in force on August 13, 1898, they continued in form with other laws of a similar nature. (Am. Ins. Co. vs. Canter, 1 Pet. 511; Proclamation of General Merritt, August 14, 1898). There is nothing in the case of *Hallett vs. Collins* (10 Haw. 175) which is inconsistent with this result. In fact that case assumes that the law of the partidas regarding matrimony was in force in Louisiana, this conclusion being reached, however, without taking into consideration the above-mentioned Law of the Indies and without making the proper exceptions. (Law 2, title 1, book 2).

The partidas recognized adultery as a ground for divorce. Therefore, according to the civil as well as the canonical law in force here on August 13, 1898, the commission of that offense gave the injured party the right to a divorce. That provision of the substantive civil law was not repealed by the change of sovereignty. The complete separation under the American Government of church and state, while *it changed the tribunal* in which this right should be enforced, could not affect the right of itself. The fact that the ecclesiastical courts no longer exercise such power is not important. The jurisdiction formerly possessed by them is now vested on the Courts of First Instance by virtue of Act No. 136. Section 56, first and fifth paragraphs of that Act, provides 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; fifth... and in all special cases and proceedings as are not otherwise provided for. (Citation found on pages 44-45).

In the case of *Garcia Valdez vs. Soteraña Tuazon*, 40 Phil. 944, 945, 946, the petition does not allege, nor is it in fact claimed by the petitioner, that the respondent has at any time been convicted of the offense of adultery. It results that the divorce sought in this proceedings cannot be granted if Act No. 2710 is applicable to the case. It is, however, insisted for the petitioner that supposing the fact of adultery on the part of the respondent to be proved, he is entitled to a divorce of the character recognized by the law prevailing in these Islands prior to the passage of Act No. 2710, that is to say, a divorce *a mensa et thoro* or decree of judicial separation, entailing as one of its consequences the dissolution of the ganancial partnership and liquidation of the community assets. In other words it is supposed that the absolute divorce conceded under certain conditions by Act No. 2710 is an additional remedy, and not exclusive of the remedy of the limited divorce formerly allowed.

The question thus raised is one of law, and in the view we take of the case it is determinative of the appeal.

"The law of divorce as it formerly existed in this jurisdiction was summed up in a few words by Justice Willard, speaking for this Court is *Benedicto vs. De la Rama,* (3 Phil. Rep. 34, 45), as follows:

'(1) That Courts of First Instance have jurisdiction to entertain a suit for divorce; (2) that the only ground therefore is adultery; (3) that an action on that ground can be maintained by the husband against the wife, or by the wife against the husband; and (4) that the decree does not dissolve the marriage bond'."

Comparing the propositions thus stated with the provisions of Act No. 2710, it is quite manifest that the divorce consisting of judicial separation without the dissolution of the bonds of matrimony, which was formerly granted for the adultery of either of the spouses, has been abrogated and in its place has been substituted the absolute divorce *ex vinculis matrimonii,* obtainable only under the conditions stated in said Act.

The above cases were cited only to show that our laws and our courts never for a moment, entertain the idea that an extrajudicial separation agreement can be valid; that the separation of the spouses can be valid before the law, only when so decreed by competent tribunal.

Article 1315 of the Civil Code provides: "Persons about to be joined in matrimony may before entering into the marriage, establish by contract the conditions to which the conjugal contract is to be subject with respect to their present or future property subject only to the limitations prescribed by the code.

In default of a contract relating to such property, it shall be deemed that the marriage has been contracted under the regime of the legal conjugal partnership.

Article 1316. "The parties to the contracts mentioned in the next preceding article shall not stipulate therein anything contrary to law or good customs, or which is derogatory to the authority in the family which corresponds to the future spouses respectively.

"Any stipulation contrary to the provisions of this article shall be void."

Article 1432. "In default of a specific declaration in the marriage contract, no separation of the property of the spouses shall take place during the marriage except by virtue of a judicial decree, except in the case provided for by article 50." (Article 50 not in force).

Article 1433. "Either the husband or the wife may use for a separation of the property, and it shall be decreed, whenever the spouse of the plaintiff shall have been condemned to a penalty which carries with it that of civil interdiction, or shall have been declared an absentee (or shall have given cause for divorce).

"In order that such separation be decreed, it shall be sufficient to present the final judgment rendered against the guilty or absent spouse in any one of the three cases above mentioned."

Manresa's comments on Article 1433, found in Vol. 9, p. 769, under the topic "Procedimiento" is as follows:

Ni la pena de interdicción civil, ni la declaración de ausencia, ni el decreto de divorcio, producen por si solos la separación de bienes en el matrimonio. La ley atiende, ante todo a la voluntad del conyuge inocente o presente, y les concede este derecho para que á su arbitrio hagan ó no uso de él, solicitándolo ó dejando de solicitar; pero obteniendo en su caso la solemne declaración de los tribunales, que revista hecho tan importante y trascendental, de la autenticidad, publicidad, y justicia necesarios, para que se produzcan los extraordinarios efectos que tal declaración debe producir.

La voluntad del conyuge presente o inocente es, pues, por si sola inútil; la voluntad ó resolución de los tribunales, por si sola, también lo es, no obstante la gravedad de los hechos ó causas que pueden motivar la separación. El interesado lo ha de pedir y los tribunales lo deben acordar. ¿Con que trámites? ¿Ante que juez? ¿Por virtud de que resolución?

La ley, en artículo 1433, solo dice: "Para que se decrete la separación *bastará* presentar la sentencia firme que haya recaído contra el conyuge culpable ó ausente en cada uno de los casos expresados."

Interpretado este artículo aisladamente, su inteligencia es sencilla. No hay necesidad de juicio especial alguno. Ya está impuesta la pena de interdicción, ó está declarada la ausencia ó está decretado el divorcio, hechos que se justifican cumplidamente con la sentencia firme que hubiere recaído; de ese hecho nace el derecho, voluntario en el conyuge presente ó inocente, de pedir la separación. Al tribunal, por lo tanto, le basta conocer la expresión de esa voluntad en el escrito que al efecto se le dirije solicitando la separación, y cerciorarse de que existe causa legal para ello, por estar decretado el divorcio declarada la ausencia ó impuesta la pena de interdicción civil.

Se trata de una especie de ejecución de sentencia, porque efecto legal de la sentencia dictada en cada caso es el derecho

de pedir la separación. Nada de ausencia del conyuge culpable ni de otras personas, nada de más prueba que la sentencia misma: petición justificada y resolución inmediata decretando la separación, sin que á ello pueden negarse los tribunales, siempre que se cumpla la prescripción legal."

From the above provisions it is clear that the agreement to separate such that each is free to adopt the mode of life which suits him or her without interference whatever with regard to each's respective person, being in derogation of marriage relation can not even be a valid subject for stipulation in the marriage settlements; much less can it be validly stipulated during the marriage.

But with regard to property, separation thereof may be made as a stipulation in the matrimonial separation agreement when there is a specific declaration in the marriage contract. In the case of *Quintana vs. Lerma,* 24 Phil. 285, it appears that the parties were lawfully married in 1901 and that in February, 1905, they entered into an agreement of separation whereby each renounced certain rights as against the other and divided the conjugal property between them, the defendant undertaking in consideration of the promises to pay the plaintiff within the first three days of each month the sum of 20 pesos for her support and maintenance.

The action is brought by the wife against the husband for support based upon the written contract.

The Supreme Court held that under Article 1432, Civil Code, the agreement in suit is void. The wife, however, has a right of action against her husband for support under the provisions of the Civil Code and altho the contract in question is void, her right of action does not for that reason fail. "An agreement between husband and wife providing for a separation and a division of the conjugal property between them is void unless provisions permitting such a separation and division are contained in the marriage contract." (Syllabus).

Another possible case of a valid stipulation of property separation in the matrimonial separation agreement is where, after a decree of divorce which has the effect of dissolving the community property, the parties do provide as to the disposition of the conjugal property. But any spouse may if she prefers to do so, keep her share of the community property, in which even as to him or her, the decree of divorce merely amounts to a legal separation without releasing her from the bonds of marriage. (Section 9, Act 2710; Fisher's Monograph on Marriage and Divorce, p. 26 at the top).

(2) For support and separate maintenance of the wife as well as the children.

Apparently it seems as if this can be validly agreed upon provided the amount of support be adequate, that is, proportionate to the capital or means of the person required to pay it and to the necessities of the recipient for food, shelter, clothing and medical standing according to the social standing of the family. (Articles 142 and 146, Civil Code). But the agreement is as good as none because being regulated by the provisions of law, none of the parties would be estopped from disregarding it; much less prevent the court from regulating it in the exercise of its discretionary powers. As was said in the above case of *Quintana vs. Lerma,* the agreement fixing the amount of support is void, but "the wife, however, has a right of action against her husband for support under the provisions of the Civil Code." The obligation which the law imposes on the husband to maintain the wife is a duty universally recognized in civil society and is clearly expressed in Articles 142 and 143 of the Civil Code. The enforcement of this obligation by the wife against the husband is not conditioned upon the procurance of a divorce by her, nor even upon the existence of a cause for divorce. Accordingly it has been determined that where the wife is forced to leave the matrimonial abode and to live apart from her husband, she can, in this jurisdiction, compel him to make provision for her separate maintenance (*Goitia vs. Campus Rueda,* 35 Phil. 252) and he may be required to pay the expenses, including attorney's fees, necessarily incurred in enforcing such obligations. (*Mercado vs. Ostrand* and *Ruiz,* 37 Phil. 179). In a still later case, it was held that where the wife is forced to leave the marital home by ill-treatment from her husband, he can be compelled to provide for her separate maintenance without regard to whether a cause for divorce exists or not. (*Arroyo vs. Vazquez de Arroyo,* 42 Phil. 54).

III. Comparison with the American and English Law on the Subject

The American law on the subject is different, as shown by Tiffany's Persons and Family Relations, Chapter VII entitled Separation and Divorce, pp. 184-187. According to the American law and decisions it may be laid down as a general rule that the courts will enforce covenants or promises in agreements of separation relating to the maintenance of the wife and other collateral agreements, provided the separation has actually

taken place at the time of the agreement, or immediately follows the agreement. (Clark, Cont. 444, and cases cited).

But an agreement having in view a separation in the future is altogether void, as against public policy, and it is immaterial whether they are made before or after marriage, because they give inducements to the parties not to perform "duties in the fulfillment of which society has an interest." (*Hunt vs. Hunt*, 4 De Gex. F. & I. p. 221). "The distinction", it has been said, "rests upon the following grounds: An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still, that state of things is abnormal and not to be contemplated beforehand. 'It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.' Or in other words, to allow the parties, in effect, to make the contract of marriage determinable on conditions fixed beforehand by themselves." (Pol. Cont. 286).

It must be noted that, where the law does not enforce an agreement of separation, it does so only as to the provision as to maintenance and other collateral engagements. The courts of this country, at least, will not aid in carrying out such an engagement, in so far as it relates solely to the parties living apart. As was said in a Pennsylvania case: "When the parties have effected the separation, equity will control its incidents, and accomplish its lawful objects. It will compel the husband to pay what he stipulated to pay for the maintenance of the wife,... but it will not decree a separation." (*Smith vs. Knowles*, 2 Grant Cas. [Pa.] 413).

An agreement of separation will be considered as rescinded if the parties afterwards cohabit or live together as husband and wife, by mutual consent, for even so short a time. And in such an event all the provisions of the agreement will cease to operate, and the parties will be restored to all their marital rights to the same extent as if no separation had ever taken place. (*Carson vs. Murray*, 3 Page. [N. Y.] 483).

In England the attitude of the courts to extra-judicial agreements to separate is interesting to trace. At one time the courts refused to countenance any agreement between husband and wife to live separately, without regard to whether the agreement contemplated an immediate separation or a separation in the future, and without regard to the cause of the separation. All agreements for a separation were held void as against public policy, because in derogation of the marriage

relation. "This court," once said Lord Stowell, "considers a private separation as an illegal contract, implying a renunciation of stipulated duties; a dereliction of those mutual offices which the parties are not at liberty to desert; an assumption of a character in both parties, contrary to the real status personæ, and to the obligations which both of them have contracted in the sight of God and man, to live together, 'till death do them part,' and on which the solemnities both of civil society and of religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for cause which the law itself has not pronounced to be sufficient and sufficiently proved." (*Mortimer vs. Mortimer*, 2 Hagg. Consist. Rep. 310, 318). Thus far the doctrine is a genuine interpretation of Philippine law on the subject.

There has, however, been a complete change in the law in this respect in England, and agreements to live separately are sustained by the English courts to-day even to the extent of enforcing specific performance of the agreement to live apart. This was caused by a change in judicial opinion as to the demands of public policy. As was said by Jessel, M. R.: "A change came over judicial opinion as to public policy. Other considerations arose and people began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequences might be that they would live separately." (*Besant vs. Wood*, 12 Ch. Div. 605). Since a married woman could, in a suit for divorce, sue or defend in her own name, it was held that she could compromise such suit, and that, since she could compromise the difference with her husband before the commencement of litigation, by agreement to live separately, on certain terms providing for her maintenance and the custody of her children. (*Besant vs. Wood*, 12 Ch. Div. 605 and other cases).

IV. Force and Effect

(1) *Is this contract against public policy?*

Now that we have seen that this kind of contract is not against public policy in America and England, is it nevertheless against the public policy of this country where its stipulations fall outside the two possible cases herein already mentioned; namely, (1) where provision for the separation of property is stipulated in the marriage settlements (Art. 1432, Civil Code) and (2) where, after a decree of divorce, which has the effect

of dissolving the community property, the parties stipulate as to the disposition thereof (Section 9, Act 2710)?

Undoubtedly yes. Manresa (Vol. 8, p. 606) says: "Public policy (orden público)—which does not here signify the material keeping of public order—represents in the law of persons the public, social and legal interest, that which is permanent and essential of the institutions, that which, even if favoring an individual in whom the right lies, can not be left to his own will. It is an idea which, in cases of the waiver of any right, is manifested with clearness and force. Thus the jurisprudence on the subject of mortgages contains an interesting declaration on this point on a resolution of January 24, 1898, where it was held that: 'The power of the husband to give marital permission cannot be validly conferred upon any attorney-in-fact, as the legislature has willed that, for reasons of the interest of society and of family government and discipline it should be vested only in the husband, being personal to him in the highest sense and therefore not capable of being transmitted'."

Mucius Scaevola's (Vol. 20, p. 505) conclusion is that: "Agreements in violation of *orden público* must be considered as those which conflict with law, whether properly, strictly and wholly a public law (derecho) or whether a law of the person, but law which in certain respects affects the interest of society."

By *public policy,* as defined by the courts in the United States and England, is intended that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the "policy of the law", or "public policy" in relation to the administration of the law. (Words and Phrases Judicially Defined, Vol. 6, p. 5813, and cases cited). Public policy is the principle under which freedom of contract or private dealing is restricted by law for the good of the public. (Id., Id.). In determining whether a contract is contrary to public policy the nature of the subject matter determines the source from which such question is to be solved. (*Hartford Fire Insurance Co. vs. Chicago, M. & St. P. Ry. Co.,* 62 Fed. 904, 906).

In the case of *Ferrazzini vs. Gsell,* 34 Phil. 697, 712, from where the above citations were taken the court, speaking thru Mr. Justice Trent, states that "There is no difference in principle between the public policy (orden público) in the two jurisdictions (the United States and the Philippine Islands) as determined by the Constitution, laws and judicial decisions." I believe that the court advances that principle only in so

far as the general principles of contracts are concerned, the question involved in the decision being contracts in undue or unreasonable restraint of trade. There is surely a world of difference with regard to the policy of the two jurisdictions with regard to the marriage relation, as wide a world of difference as the common law is to the civil law on the subject. The law and judicial pronouncements on extra-judicial matrimonial separation agreements is precisely a case of what is against public policy here but no longer so in the United States and England.

(2) *Is a Contract like this, void as against public policy, a good ground for depriving a notary public of his license?*

A study of the case of In re De Lara, 27 Phil. 176, leads to the conclusion that it seems to be, although it is one that is addressed to the discretion of the appointing power. Section 82, Act 136, dealing with the appointment and removal of notaries public provides in part:

Notaries public may be removed from office for *good cause,* by the judge or judges of the province or his successor in office. In the city of Manila, the judges of the Supreme Court may appoint as many notaries as the public good requires, and may remove them from office for *good cause.*

SECTION 84. *Oath.*—Every notary public, before entering upon his duties, shall take and subscribed the following oath or affirmation:

"I, ..., solemnly swear (or affirm) that I will faithfully and impartially discharge and perform all the duties of the office of notary public within and for the province of ..... according to the *best of my ability and understanding agreeably to the laws* of the Philippine Islands." etc.

In the case of In re De Lara (supra) the instrument, object of the proceeding to remove Eugenio de Lara, as the executing notary public, is similar in nature to the agreement object of this thesis. The instrument therein executed is as follows:

"*Know All Men by these Presents:*

"That we, Cirilo San Pedro and Petronila Trias, both of lawful age and residents of the city of Manila, P. I., solemnly state and declare:

"1. That the said Cirilo San Pedro states and promises that he will legally marry the said Petronila Trias within 30 days following the death of his wife, to whom he is at present married.

"2. That the said Petronila Trias also states and promises that she will make no contract of espousal or of marriage with any other man than said Cirilo San Pedro while she remains single, she agreeing to await and fulfill that which she has agreed to in the present instrument.

"3. Both parties are obligated to comply with the provisions of this instrument, and the party refusing to do so shall pay as damages the sum of ₱500.

"In witness whereof we sign the present agreement and bind ourselves to respect all the paragraphs thereof, this 21st day of February, 1912.

(Sgd.) "C. SAN PEDRO
"PETRONILA TRIAS."

The prosecuting attorney indorsed upon a copy of said instrument forwarded to the Attorney General the opinion that he did not believe that this matter was covered by the penal laws, but it occurred to him that a notary public who could execute such papers, particularly in view of paragraph 1 of the document, could be disciplined by the Supreme Court.

The Attorney General in turn referred the papers in question to the Honorable E. Finley Johnson, vacation justice, who made order directed to Eugenio de Lara, ordering him to appear personally before the Supreme Court and "to show in writing why he should not be removed as a notary public, in accordance with the provisions of section 82 of Act No. 136, for the alleged misconduct complained of by the prosecuting attorney of the city of Manila, and which is fully set out in the document thereto attached."

The evidence showed that the respondent composed and drew the document in question, and not the contracting parties. Hence it was adjudged, among others, that "his appointment as notary public be, and the same is hereby, revoked, canceled, and annulled, and that his license and certificate to practice and act as such be and the same is hereby also revoked, canceled and annulled."

Perhaps, because of the willful perversion of facts by the respondent who produced as his own defense in the investigation to remove him from office as notary public a false affidavit of a third person, which he included as evidence, knowing it to be false, the Supreme Court was forced to deal with him severely when they could have otherwise reprimanded him. For surely the good faith of the notary public must be taken into consideration specially when the law on this subject is not well settled and where, in the words of Mr. Justice Holmes in his dissenting opinion in the "Board of Control Cases," even the more specific of the great ordinances of the Constitution

are found "to terminate in a penumbra shading gradually from one extreme to the other."

CONCLUSION

A matrimonial separation agreement is generally void except where (1) provision for the separation of property is stipulated in the marriage settlement (Articles 1432, Civil Code) and except further (2) where, after a decree of divorce which has the effect of dissolving the community property, the parties deem it proper to stipulate as to the disposition thereof (Section 9, Act 2710). All these exceptions are confined only to property rights. Because its other possible provisions are against public policy, because derogatory to family relations, the contract cannot produce any effect; it cannot be the basis of rights and obligations; it is void *ab initio* and as such, not even of value as evidence that the spouses separated. It may be contended that inasmuch as separation *de facto* of some spouses exists as a fact in the Philippines and that even in certain cases the Supreme Court has decreed the separation and separate maintenance of the wife for cause or no cause; that the parties do nothing but put in paper in black and white where they stand as such separated spouses. But the fact that it exists is no excuse for being. Moreover, the court does not possess the machinery to enforce its judgment and even if it has, its orders would otherwise work greater hardships on the parties. As said by our Supreme Court, "the interests of both parties as well as society at large requires that the court should move with caution in enforcing the duty to provide for the separate maintenance of the wife, for this step involves a recognition of the anomalous *de facto* separation of the spouses. From this consideration it follows that provision should not be made for separate maintenance in favor of the wife unless it appears that the continued cohabitation of the pair has become impossible and separation necessary from the fault of the husband." (*Arroyo vs. Vazquez de Arroyo*, 42 Phil. 54, 56).

Hence as long as the provisions of law remain as they are, as long as there is no change in public policy, so long will matrimonial separation agreements remain void, altho, to prophesy a little, time will come when the further development of the law on the subject will follow the development of the American and English laws.