PHILIPPINE LAW JOURNAL

Vol. XIII AUGUST, 1933 No. 2

A CRITICAL STUDY OF SECTION 9 OF THE PHILIPPINE DIVORCE LAW

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INTRODUCTION

Man's institutions are creatures of the age and of the psychology of man's mind. The institution of divorce, like all other human institutions, has undergone a criticism both constructive and destructive on the reasons of its existence. Men, as they are, have always and will always wrangle over the justice of the institution of divorce. The Philippine Islands has not been immune from these wranglings. Right at the moment this paper was being written, our own Philippine Legislature was divided in its opinion as to the wisdom of liberalizing our existing Divorce Law.

This study, however, does not aim to justify nor yet to criticize the institution of divorce that the whole world has been developing. Neither does it seek to delve into the moral justification of such an institution, nor yet to condemn or to praise it. Here there is presented a study of the Philippine Divorce Law (Act No. 2710) with special reference to section 9, from a purely legal standpoint. The study that has been devoted to this subject has not taken into account any of the moral or psychological aspects of the question of whether there should or there should not be allowed any divorce laws nor liberalization thereof in the Philippines. But it seems opportune that just at the time when there is a talk of amending Act No. 2710 (to make it stricter or more liberal does not matter for the purposes of this thesis) our legislators should consider the legal defects of the law as it now stands, so that, when in the near future, the law is amended, such defects as this thesis will endeavor to point out shall be fairly eliminated.

Section 9 of Act No. 2710 is a peculiar feature of the Philippine Divorce Law. In this thesis, an attempt will be made to

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point out the singular characteristics of said section. A comparison with the provisions of the divorce laws of other countries will show how distinct section 9 of Act No. 2710 is, and an analysis of this very section will show what difficulties are involved in its interpretation and in its execution. There is no decision of our Philippine Supreme Court nor of the United States Supreme Court which endeavors to squarely elucidate the meaning of section 9, Act No. 2710. It is true that there are enough divorce cases adjudicated by our courts and the United States Supreme Court to facilitate the interpretation of the spirit of Act No. 2710 as a whole, and with regard to certain other points in the law; but as to section 9, no case seems to have demanded an imperative adjudication on the points covered and provided for by said section. It is, therefore, only thru indirect reasoning that we can glean our Supreme Court's stand with regards to some aspects of section 9 of Act No. 2710, by a perusal of the divorce cases it has taken cognizance of and of the decisions it has rendered.

HISTORY AND NATURE

A. *Brief history of section 9 of Act No. 2710.* It is interesting to note how section 9 came to be included in our present Divorce Law. The interest lies in the fact that by a study of its nature as gleaned from the legislative proceedings, the observer can the better conduct an intelligent criticism of said section as is the object of this thesis.

The divorce law was originally known as Senate Bill No. 65, presented by a Special Committee in substitution of Senate Bill No. 11 presented by Senator Pedro Guevara.

Senate Bill No. 65 as approved by the Philippine Senate on January 12, 1917, provided the following as causes for divorce:

1. Adultery committed by either of the spouses.
2. Unjustified abandonment of one spouse by the other continuously for three (3) consecutive years.
3. Attempt by one spouse against the life of the other.
4. Proposal of a husband to prostitute his wife.

As soon as the Senate Bill reached the House of Representatives, the Committee on Revision of Laws presented an amended bill for the consideration of the House. The causes for divorce as proposed by the House Committee cancelled cause

No. 4 of Senate Bill No. 65 but added to the remaining three the following:

1. Bigamy committed by either spouse.
2. Persistent and intolerable cruelty.
3. Impotency which appeared after marriage.
4. Imprisonment for at least five years under sentence of at least fifteen years of imprisonment.

From the foregoing, it can readily be seen that if Senate Bill No. 65 was liberal enough as far as causes for divorce were concerned, the amendment presented by the House Committee on Revision of Laws was far more liberal.

The report of Rep. Pablo of Zambales, author of the proposed amendment by the House, gives the finding that of the 11 members of the committee, 4 were opposed to the bill, which shows that over one-third were not in favor of the bill. In the discussion of the bill in the House, the forces of both sides were almost equal in strength. The main objection of the opponents of the divorce law was the fact that the Philippines is essentially a Roman Catholic country and divorce is contrary to the principles of Catholicism.

After several days of discussion by the House of Representatives, several attempts were made by the opponents of the measure to kill it by postponing action on it indefinitely, but all of them failed. However, for a time, it was feared by the proponents of the measure that the opponents would succeed in blocking the passage of their bill, so they resorted to the only tactics which could save it from sure defeat in the face of the formidable array of the anti-divorcists. This was to make the provisions of the bill more strict by limiting the causes for divorce to adultery on the part of the wife and concubinage on the part of the husband committed in any of the forms described by Art. 437 of the Penal Code. This was accomplished by the substitution of the proposed bill with the "Alunan-Gomez amendment" which provided in its Art. 9 that altho the decree of divorce, once granted and final, dissolves the conjugal partnership, yet it does not dissolve the bonds of matrimony until after the lapse of two years. The same article provided for the very provision under discussion in this thesis. Art. 11 of said "Alunan-Gomez" amendment while permitting the innocent spouse to marry again, prohibited the guilty spouse from marrying until the innocent one has first remarried. It further prohibited said guilty spouse from marrying the person who caused the divorce, while innocent spouse was still living.

From these proposed changes contained in the "Alunan-Gomez" amendment, we find that there was a decided drift towards making the proposed law more strict. The causes for divorce were reduced to those mentioned in the next preceding paragraph and there were many burdens placed on both the spouses, guilty and not guilty alike, who sought a divorce. Of course, the guilty spouse had more disabilities and consequently was in a comparatively more disadvantageous position.

With all the foregoing restrictions to prevent as much as possible the securing of a divorce decree in the Philippine Islands and with all the disabilities and disadvantages placed on the shoulders of the future divorces, the House of Representatives finally passed said "Alunan-Gomez" amendment with slight modifications.

Thus were the provisions of section 9 inserted in Act No. 2710. Although it incidentally acts as a safeguard for the future of the children of the divorcees, it does not seem that this was the main purpose of the legislature in enacting it. It was placed in the act by both divorcists and the anti-divorcists, but each with a different point of view. The divorcists agreed to its insertion in order to pacify their opponents and thus obtain votes enough to insure its approval, and the anti-divorcists voted for it in order to place as many obstacles as they possibly could think of, in the path of the spouses so that even if there would actually be a divorce law, very few would avail themselves of its provisions because of the extremely burdensome nature of the conditions which it imposes.

During the discussion in the House, somebody raised the question of the constitutionality of the Divorce Bill with reference to the clause of the Jones Law prohibiting the impairment of the obligation of contracts and calling attention to the fact that marriage is a contract. But at the time of said discussion, section 9 was as yet not incorporated in the bill, and therefore, its constitutionality could not have been taken into account. And when Act No. 2710 in its present form was discussed, its constitutionality was not again questioned.

B. *Compared with the statutes of other jurisdictions.* Section 9 of Act No. 2710, has been intimated in the introduction is a peculiar provision of our Divorce Law which does not find any precedents nor equal in the provisions for divorce in other countries. An attempt is made here to compare the Phil-

ippine provision with regards to the disposition of property of the divorced spouses and provisions to that effect governing other countries.

Unlike our law, other laws do not seem to be over-zealous about the property of the divorced spouses going to their children. The Civil Code of Switzerland, for example, has two provisions pertinent to the subject. Art. 154 says:

"Upon divorce the partial property reverts independently of the property status of the marriage, to exclusive ownership of each party.

"A profit will be apportioned to the couple according to their property status, a loss the husband has to bear in so far as he does not prove that the wife caused it.

"Separated couples have no right of inheritance from one another and can make no claims because of the marriage contract or testamentary disposition, which they may have made before separation."

And Art. 156 provides that "* * * The party from whom the children are taken shall be bound to pay a sum corresponding to his circumstances toward their maintenance and education."

The Swiss Code does not require any property to revert to the children. The latter are still entitled to and are given maintenance and education by their parents, as if no divorce had ever occurred. And the children are not in a worse condition for that matter than the children of parents divorced under the provisions of Act No. 2710. In Switzerland, the property of the spouses is simply divided between them, each one retaining exclusive ownership over his or her portion; and each of said portions of said property, of course, remains amenable to inheritance by the children when each of their parents die, either by will or by intestate succession.

Such a simple and perfectly workable system has also been applied in France where the law is even more simple and clearer with regards to the property of the spouses and the rights of their children. Art. 303 of the Civil Code of France has the following provision:

"The dissolution of marriage granted in courts shall not deprive the children born of such marriage of any of the advantages which they derive from the law, or from the matrimonial agreements of their father and mother, but the rights of the children shall only take effect in the same manner and under the same circumstances as if there had been no divorce."

This provision not only safeguards all the rights and interests of the children arising from the marriage, itself, and from matrimonial agreements of the father and mother, but it also sees to it that *status quo* is maintained with regards to the condition of the children until they acquire those rights and interests as the law dictates "in the same manner and under the same circumstances as if there had been no divorce." A more complicated provision can be found in Art. 305 of the same Civil Code which runs as follows:

"In case of divorce by mutual consent, ownership of ½ of the property of the husband and wife shall belong, as a matter of right from the day of their first declaration to the children born of their marriage. The father and mother shall, nevertheless, retain enjoyment of such half until their children come of age, on condition of providing for their support, maintenance and education in accordance with their fortune and standing, all of which shall be without prejudice to the other advantages which may have been secured to the said children by the matrimonial agreements of their father and mother."

This provision of the law, however, seems to have been disagreeable to the Frenchmen for one reason or another, and as early as July 27, 1884, it was repealed. But even Art. 305 of the French Civil Code as it existed, is better than section 9 of our Act No. 2710. In the first place, the French provision states a *definite portion* of the property of the husband and wife which is to go to the children; our law, as we shall see in the course of this thesis, is vague as to that point. In the second place, this provision of the French Civil Code which has been repealed, has the advantage of having provided that the portion which shall go to the children, does not revert to the latter immediately, but remains with the parent until the children are of age. Of course, there would not be much difference between our law and the French law with regards to this matter if the child of the French parents lacked only one year before reaching the age of majority. It was probably this phase of the law which was undesirable to the French legislators and which finally decided its repeal.

Both the Civil Codes of Brazil and Germany do not mention a word about the spouses giving their children their property as if they had died intestate. From this lack of provision, it may be inferred that the laws of these countries presume that each spouse, after the decree of divorce shall have been granted, shall have and own exclusively what is his own privately and

what may pertain to him as his share of the conjugal partnership property. This view is strengthened by the fact that those codes provide for the support of the children by the spouses and even of each spouse by the other, taking into consideration their circumstances and financial ability. From this it follows that they must have and own property, otherwise what circumstances of financial ability must be considered? If we suppose that the law presumes that the parents must give up their property to their children before the decree of divorce be considered valid and binding, where would we place the provision that the parents support the children even after the marriage is dissolved by the divorce decree? It would be more logical to expect the law to provide just the reverse, i.e., if the parents are required to give up their property to their children, then said children, instead of being entitled to support from their parents, should be the ones to support their parents who, by the provisions of the law have practically become paupers, renouncing all their rights to their own property in favor of their children. These children should at least be made to pay back to their parents what their parents have done for them, and the law should at least require them to support their parents now that the latter are thrown out of their resources.

The Civil Code of Cuba does not even attempt to create a complete separation of the financial administration of the property of the husband and wife even after divorce. The law of the country permits the husband to retain administration of the property of the wife (if he had that right during the marriage) in cases where the innocent party is the husband and the wife is the guilty party. In such cases, the husband is not relieved of his right of administration but he has to grant support to the wife, which is the only right left to the guilty wife. Naturally, in cases where the husband is guilty, there is a separation of the conjugal partnership property and the husband loses the right to administer his wife's property, if he had that right during the marriage. The provision on these points is covered by Art. 73 of the Civil Code of said country, which reads as follows:

"La sentencia de divorcio producirá los siguientes efectos: * * *

3.o—Perder el cónyuge culpable todo lo que le hubiese sido dado ó prometido por el inocente ó por otra persona en consi-

deración á éste, y conservar el inocente cuanto hubiese recibido del culpable; pudiendo además reclamar desde luego lo que éste le hubiera prometido.

4.o—La separación de los bienes de la sociedad conyugal y la pérdida de las administración de los de la mujer, si la tuviese el marido, y si fuere quien hubiere dado causa al divorcio.

5.o—La conservación por parte del marido inocente, de la administración, si la tuviere, de los bienes de la mujer, la cual solamente tendrá derecho á alimentos."

Here we find that the law makes a distinction between the consequences of divorce on the guilty and those on the innocent spouses. This is one point which the divorce provisions of Cuba, score over our own provisions. Besides, in the law of Cuba, as in the laws of Brazil and Germany, there is no provision with regards to the portion of the property of the parents which must revert to their children; neither is there any intimation that any portion at all is to go to the children while the parents live. There being no such provisions, the deduction is that the children are to have the same rights and obligations as if there had been no divorce, and are to receive only their share of their parent's property when their parents die, in the circumstances and manner prescribed by law as if there had been no divorce.

"Both the father and mother remain subject to all of their charges and obligations in favor of their children, whichever be the spouse who gave ground for divorce" orders Art. 235 of the Civil Code of Argentina, much the same as the Civil Code of France recites and orders. Art. 229 of the same code of Argentina, provides that "After their separation by decree of divorce, each of the spouses may establish his or her domicile or residence wherever he or she may see fit, even tho it be abroad; but if he or she has the custody of the children, they cannot be taken out of the country without the permission of the Judge of the domicile."

Art. 231 continues that "If during the divorce proceedings, the conduct of the husband is such as to lead to the fear of fraudulent alienations, or the dissipation of the property of the marriage, the wife may apply to the Judge of the cause to have an inventory thereof made and to have it placed in charge of another administrator, or that the husband give bond in the amount of the value of the property. After the decree of divorce, the spouses may demand the separation of the property of the conjugal partnership in accordance with the provisions contained in the title 'Of Conjugal Partnership.'"

Again here we observe the absence of the mandatory provision which our law has, regarding the distribution by the parents of their property among their children, each of whom is to receive a legitime equal to that which he would be entitled to receive had his parents died intestate. What the law of Argentina and all the other countries we have reviewed lay down as an unequivocal maxim, however, is that the children are not to lose any right or interest which they had during the marriage and which they would have had, had the marriage not been dissolved. In other words, the parents are bound to fulfill their obligations towards their children which they had during the marriage and which they would have had, had there been no divorce. But no additional obligation is imposed upon them, as for example, that of relinquishing their property to their children while they (the divorced parents) are yet alive.

How the provision of Sec. 9 of Act No. 2710 was ever framed up is a puzzle if we only consider the examples set by the Codes and laws of the countries from which our legislature could have copied our law's own provisions. But examples are not everything that count. Circumstances and environment also count in determining the reason for the existence of our divorce law's Sec. 9; and circumstances and environments there were to explain the presence of this unique provision of the law. We have but to turn back to the discussion just had under the heading previous to this one, to understand why such a provision found its way among the provisions of Act No. 2710. But be the circumstances what they may have been, there is no justification for the prolonged existence of Sec. 9 of our law, especially when it has been shown in this study how utterly complicated our provision is as compared to the simple and exact provisions bearing on the same subject matter as found in the laws of other countries.

From a survey of the law regarding divorces in other countries, the following points are conspicuous:

1. The countries here mentioned do not make it a requisite for divorce that the property of the spouses should be distributed among the children.

2. No provision appears in connection with the portion that the children are to receive out of the property of their divorced parents. This, of course, is a natural corollary to the fact mentioned in the first point.

3. Instead of provisions for the division of the property of the spouses among the children, these laws provide for the

support of the children by the parents thus insuring the well being of the children, and doing away in a very simple way with the danger which our law sought, to prevent by Sec. 9, Act No. 2710.

4. The laws of the countries included in this study do not attempt to give a vague wording to their provisions, thus avoiding dangers of misinterpretation and of the laws being declared unconstitutional.

CRITICISM

A. *The article is Vague and Uncertain.* A close examination of Sec. 9, par. 2 of the Divorce Act, will show that the parents, before their divorce becomes absolute, must deliver their property to their legitimate children, within one year from the decree. How much of it is something that cannot be reasonably ascertained from the law itself, because the terms used to designate the amount are hopelessly contradictory.

In its Spanish text, which was the one finally approved by the Legislature, the paragraph in question recites:

> "Tampoco se considerará disuelto el vínculo para el cónyuge que teniendo hijos legítimos no haya entregado a cada uno de éstos ó al tutor designado por el juzgado, dentro del mismo plazo de un año, el equivalente de lo que le habría correspondido en concepto de legítima si dicho cónyuge hubiese fallecido intestado inmediatamente despues de la disolución de la sociedad de gananciales."

What does the law mean by "lo que le hubría correspondido *en concepto de legítima* si dicho cónyuge hubiese *fallecido intestado*"?

The law here joins two terms that are mutually exclusive. There is no "legitima" if a man dies intestate, because by definition "legitima" only exists in *testamentary* succession. Art. 806 of the Civil Code defines "legítima" as "that part of his property of which the *testator* CANNOT DISPOSE BECAUSE THE LAW HAS RESERVED it for certain heirs called on that account forced heirs".

And Article 808 recites: "The legitime of legitimate children and descendants consists of *two thirds of the hereditary estate of the father or mother.*"

In other words, "legitime" is the two thirds portion of his estate of which the parent cannot dispose of *by will* except in favor of his children; obviously it has no existence, nor reason

to exist, when the parent *dies in testate,* for in that case, he cannot trespass upon the legal prohibition. In such a case, Art. 913 of the Civil Code provides:

> "In default of testamentary heirs the law gives *the estate,* in accordance with the rules hereafter set forth, to the legitimate and natural relatives of the deceased, to the widower or widow or to the State."

As the deceased could not provide otherwise, obviously the estate (la herencia) means here the *whole of it.* Furthermore,

> "Art. 931.—Legitimate children and their descendants succeed the parents and other ascendants, without distinction of sex or age, even though they spring from different marriages."
>
> "Art. 932.—The children of the deceased shall always inherit from him in their own right, dividing the inheritance in equal shares."

So that where the parent dies intestate, the children divide the *entire* inheritance equally.

Now, under the provisions of the Divorce Act, and the Civil Code, what are the children to receive; and, a converse, what is the parent to deliver? The entirety of his estate or two thirds of it? The first is indicated by the words "si hubiese fallecido intestado" (if he had died without leaving a will); the second solution finds support in the words "in concepto de legitima" (by way of legitime).

The concepts involved in the two phrases simultaneously used in the law, are so fundamentally contradictory, that neither may be adopted without discarding the other. If it is held that the law means two thirds of the estate, then the words "si dicho cónyuge hubiese fallecido intestado" must be discarded as worthless; and if the statute is held to mean the entirety of the estate then the children get more than their legítima. Designedly or not, the statute has managed to present a problem which cannot be solved except by discarding significant portions of the law itself.

There would be no difficulty if in the phrase "como si hubiese fallecido intestado" this last word had been suppressed; or if "en concepto de herencia" had been substituted for the phrase "in concepto de legítima"; either way the statute would be clear. But while on the one hand, the words "como si hubiese fallecido intestado," as implying that the law intended to give

more than the regular legitime, are too significant to suppress or discard; on the other, the term "legítima" has such a well known technical meaning in the Spanish Law, that it cannot be ignored or replaced. Moreover, either action would amount to an amendment of the law, and that is beyond the authority of any court. (*Yu Cong Eng vs. Trinidad,* 271 U. S. 518, 70 L. Ed. 1067).

> "But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitations." (Yu Cong Eng vs. Trinidad, *supra*).

B. *The article results in anomalies and injustice.* Section 9 is unjust and inconsistent with all the principles of accepted righteousness and justice. Section 9, paragraph 2, has the effect of punishing not only the guilty spouse, but also the innocent one. It is required of both spouses that they give their property to their children within one year after the decree if they want to have the divorce effective at all. The law does not limit this obligation on the guilty spouse only. It says: "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 * * * the equivalent * * *". The law does not distinguish between the guilty and innocent spouses; and where the law does not distinguish, we should not distinguish. So that in the final analysis, we have the innocent spouse burdened with the task of giving up his or her property to his or her children and live in abject poverty the rest of his or her life just because he or she has made the terrible mistake of suing out a writ of divorce. He or she is saved from the misery of living with an unfaithful spouse only to plunge into another misery of having to live without a consort and bereft of all his or her means of subsistence. Is it fair to the innocent spouse, granting that it is a fair punishment to the guilty one?

Again, the law does not consider the marriage bond dissolved with regard to the spouse who does not perform the requisites of Sec. 9, par. 2. Let us now consider the anomalies and injustice of such a provision. Suppose, a situation where the guilty spouse has performed the requisite, but where the innocent spouse, for one reason or another, has failed to comply with the commands of the law. Here we would have a condition where the marriage would, on the guilty spouse's side, be

dissolved, and on the innocent spouse's, still be unbroken and subsisting. How can a marriage be dissolved as to one and subsisting as to the other spouse? And yet that is what the application of the law will lead us to.

If the guilty spouse married again, his or her second marriage would be perfectly valid, his or her first marriage having been considered dissolved. Yet, if the innocent spouse married again, he or she would be liable to conviction for bigamy, because under the eyes of the law the former marriage was never dissolved, the requisite for its dissolution as prescribed by Sec. 9, par. 2, not having been complied with. And yet, against whom has the crime of bigamy, concubinage or adultery been committed? Is it against the guilty spouse who is safely and legally married to another? How can the law condemn a man or woman for bigamy or adultery when that man's or woman's mate is considered by that very law as having been freed from the ties of matrimony with said man or woman? Who is the offended party in such case at whose instance the action for bigamy or adultery must be instituted as required by Art. 344 of the Revised Penal Code?

Under a situation like this, the innocent spouse for whose interest the Divorce Law has decidedly been enacted, suffers more punishment than the guilty spouse who goes scott-free, and is at liberty to remarry without fear of conviction for either bigamy, concubinage or adultery. Certainly the law did not intend meting out such flagrant injustice on the innocent spouse, who by all principles of law and justice have always been protected and safeguarded against the evil designs of the wicked. Can it be that the Philippine Legislature had precisely the converse of the generally accepted dogmas of right and justice in mind when it enacted the provision that Sec. 9, par. 2, Act No. 2710 now contains?

C. *The article involves complications in its application.* A complication arises with regards to the application of Sec. 9 to foreign divorces. If we start from the premise that our courts do not recognize foreign divorces, there is of course no necessity of considering the applicability of Sec. 9 Act No. 2710 to such divorces. But if we assume that our courts may, under certain circumstances recognize the validity of foreign divorces, then we can proceed to the discussion of the effect of Sec. 9 on such divorces.

Let us assume that the validity of a certain foreign divorce is recognized by our courts. The question arises as to what

law will determine the rights of the divorcees, with regard to their property within the jurisdiction of the Philippine Islands. If the provisions of law of the country from where the divorce was secured are the same as Sec. 9 of Act No. 2710 of the Philippine Islands, then there would be no difficulty. But in case of divergence, which law will govern: the law of the country where the divorce decree was secured or Sec. 9 of Act No. 2710, the law of the land where the property of the divorcees is situated?

Sec. 9 of our divorce law provides: "* * * 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 property. * * *"

This section imposes the forfeiture of property as a condition precedent to the dissolution of the *vinculum matrimonii*. Suppose the foreign country requires no such condition precedent then the marriage is dissolved from the time the decree is granted. Now, our courts cannot modify that decree by inserting a condition precedent to its taking effect; either the foreign decree is valid and enforceable or it is invalid and not enforceable.

Yet it may be argued that the application of the foreign law which does not require any relinquishment of property to the children would place the children of the divorcees in a disadvantageous position compared to their situation under our law, since under our law they would be owners of the parental estate while under the foreign law which we have assumed, they have no such ownership, and the children being citizens of the Islands, it is to be expected that the courts here may refuse to recognize the validity of the foreign decree until Sec. 9 of our divorce law is complied with, as the comity on which private International Law is founded must bow to the paramount interests of the citizens of the forum.

> *"Injury to State of Citizens as Preventing Exercise of Comity.* It is obvious that no state will give effect to the laws of another on the principle of comity, when the effect

would be injurious to the state or its citizens. * * * It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without at the same time neglecting the duty that it owes to its own citizens or subjects." (12 C. J. 440, s. 17).

The reasoning, if followed, would result in the nullification of an express provision of our positive law (C. C. P. s. 309, jam cit.).

Let us take the very common Reno, Nevada divorces. If the plaintiff in the divorce action (a Filipino citizen) acquired a bona fide domicil in Nevada; if the defendant (also a Filipino citizen) was duly notified and personally served with summons in accordance with the laws of that State; if, therefore, the Reno Court properly acquired jurisdiction over the matrimonial status following the established authorities under American jurisprudence, then the divorce decree has, in these Islands, the same force and effect as in Nevada, and has dissolved the marriage irrespective of the conditions established in this jurisdiction, as precedent to such dissolution.

Granting that the local divorce statute is inapplicable, it would not follow that the Nevada laws would be applied to property of the couple in the Philippine Islands *if the decree has no pronouncement on the question.*

"A decree of divorce rendered in a foreign state is not binding in another state as to matters not determined by the decree, * * *. Then again, the doctrine of extraterritorial force of decrees of divorce is never applied in cases other than those involving the validity of the decree or some incident dependent thereon, such as arise under the inheritance laws, or under estates by dower, or courtesy, or in criminal prosecution for adultery or bigamy, or civil actions for damages, merely because the action is available to a party formerly married." (19 C. J. 363).

"Where a court of a sister state grants a decree of divorce to a wife residing there and makes no disposition of the property belonging to the parties and situated in another state where the husband resides, it has been held that the courts of the latter state may thereafter, in a timely suit for partition or any appropriate action divide the property therein situated between the parties as it would do under its law in a divorce proceeding, in such a manner as it deems just and equitable." (19 C. J. 368).

The above doctrines are supported by the cases.

> "We think that where a court of a sister state grants a decree of divorce to a wife residing in that state, and makes no disposition of the property belonging to the parties and situated in our state where the husband resides, the courts of this state may thereafter in a timely suit for partition or in any other appropriate action, divide the property in this state between the parties as it would do, under sec. 5723, Ballinger's Codes & St. (Pïece's Codes, 4637) in a divorce proceeding. (*Adams vs. Abbott,* 21 Wash. 29, 56 Pac. 931; *Webster vs. Fields,* 2 Wash. 441, 27 Pac. 267; *Cook vs. Cook,* 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706, 1 Euc. Pl. & Pr. 415). In this action we think the trial court was authorized to divide the property of Andrew Buckley & Philomena Buckley between them in such a manner as it deemed just and equitable under all the circumstances of the case, and that it was not obliged to divide the property equally or in any definite proportions other than would be thus equitable and just." (*Buckley vs. Buckley,* 50 Wash. 213, 126 Am. S. R. 900, 96 Pac. Rep. 1079).

The foregoing principle is further sustained by the following case:

> The defendant deserted plaintiff in Wyoming and went to Washington D. C.; plaintiff sued for divorce in Wyoming and obtained a judgment for divorce only. She sued in Washington for partition of community property in that state, alimony and attorneys' fees. The trial court allowed partition, but refused alimony and attorneys' fees. The parties appealed.
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> It was held that "the question of importance here is whether the plaintiff can maintain this action. It is apparent that the district court of Wyoming only had jurisdiction to decree a divorce and there was no adjudication of the property rights of the plaintiff and defendant in the case before the court. The disposition of the property between plaintiff and defendant in this state must depend upon the law here. It is true as stated by counsel for defendant that a decree of divorce between the parties here puts the property matters at rest, as determined in *King vs. Miller,* 10 Wash. 214, 38 Pac. 1020; but in that case the property rights were in issue, and the court had juris-

diction to determine the same. The parties and the subject matter of the litigation were before the court. In the decree made by the Wyoming court, neither the defendant nor the property was within the jurisdiction of the court, the Wyoming Court had jurisdiction over the status of the plaintiff only, the defendant not being personally served with process and not having submitted to the jurisdiction of the court; and it seems that in such cases the wife may afterwards obtain from the court of the domicile of the husband further relief as to the property and alimony. (1 Am. & Eng. Encyc. Law, 1st. Ed. 468, and cas. cited.) It is also observed in 1 Encyc. Pl. & Prac. p. 415: 'So also, in general it may be said that if the divorce is ex-parte, a decree for alimony may be subsequently rendered on the wife's application to the courts of her husband's jurisdiction, or those of her own if he can be found there and personally served.' (See also *Cook vs. Cook,* 14 N. W. 33, 56 Wis. 195). It is true, a decree for the disposition of the property of the parties, upon the dissolution of the marriage, such as shall appear just and equitable and having regard to the respective merits of the parties and to the condition in which they will be left, provided for in Sec. 5723, 2 Ballengers Am. Code Codes & St. is incidental to the divorce; but it is not identical with it or a necessary part of it, and there should be shown sufficient reason why such disposition of the property was not made pending the action when the divorce is granted. The cause for such disposition of married persons, and the authority of the Court to make such decree upon the respective property rights, arise from the divorce, the dissolution of the marriage status and we think it was appropriately done here, and that the Court had jurisdiction to try the cause. Its judgment is, therefore, affirmed." (*Adams vs. Abbott,* 21 Wash. 29, 56 Pac. 431).

Again, in the case of *Thurston vs. Thurston,* 58 Minn. 279; 59 N. W. 1017, the decree of divorce rendered by the Iowa Court awarded the custody of the child to the mother, but was silent to the maintenance and support of the child. The court there held:

"The Court there did not have jurisdiction of the person or property of the defendant husband, except by constructive service of summons, and having jurisdiction

only of the plaintiff wife, of the marriage status, and of the custody of the minor child, it would have been unpracticable to make, and impossible to enforce, any decree as to the support of the child in such case."

"The Court is committed to the doctrine that a separate suit may be maintained by the divorced parents for the support and maintenance of minor children" says the court in the case of *Horn vs. Horn*, 80 Okl. 60, 194 Pac. 102, (*West vs. West*, 246 Pac. 599).

"The authorities are practically unanimous in their holdings that the decree is admissible and *res adjudicata* as against the world only to the extent of judicially establishing the prior existence of the marriage and its dissolution and the status of the parties thereafter under the decree. To this extent only is the divorce judgment *in rem*, and *res adjudicata* in this action. The divorce decree establishes its own existence only and thereafter the status of the former husband and wife, as between themselves and the world; but the judgment of divorce does not carry into this case under the rules of former adjudication or estoppel by judgment the issues involved in the divorce trial nor the grounds upon which the decree of divorce was granted." (*Luick vs. Arends*, 132 N. W. 333; 21 N. D. 614).

Here, therefore, we have a situation where the Nevada decree is valid to all intents and purposes as between the husband and wife as to their status (no pronouncement as to their property having been made and could not have been made) and such decree is enforceable in the Philippines under the Federal Supreme Court's principle cited above and which was followed by our Supreme Court in the cases of *Ramirez vs. Gmur* (32 Phil. 855) and *Gorayeb vs. Hashim* (50 Phil. 522). But under Sec. 9 of Act No. 2710, no divorce can be effected unless the property of the spouses be partitioned among their children as if the parents had died intestate, this partition to be done within one year after the decree had been issued.

Let us assume that under the Nevada statutes the decree granted in our example was complete and unconditional. Now, if we concede that the decree is valid, then Sec. 9 of Act No. 2710 is entirely inapplicable. Sec. 9 imposes the forfeiture of the property as a condition precedent to the dissolution of the *vinculum matrimonii*. If the recognition of the Reno decree is to

have any meaning at all, it must necessarily be that this bond is already dissolved so that there is no basis for the application of Sec. 9 aforecited. Our courts cannot modify that decree by inserting a condition precedent to its taking effect; either the Reno decree is valid and enforcible or it is invalid, and the marriage tie remains unbroken. And this question can only be predicated on the existence or lack of jurisdiction of the Nevada court, being the only recognized exception to the rule of Sec. 309 of the Code of Civil Procedure, to the effect that judicial records of the several states have the same force here *as in the place where judgment was obtained.* (Gorayeb vs. Hashim, *supra.*)

Laboring under this dilemma, the only left seems to be to dissolve the conjugal partnership pursuant to the provisions of sections VI, VII, title III, Book IV of the Civil Code. Under which circumstances, Sec. 9 would seem to have no weight at all in the enforcement of the property—apportionment requisite of our Divorce Law with regards to foreign divorces recognized by Philippine courts and yet, would that be the most practicable method of safeguarding the interests of Filipino citizens as against the interests of comity of nations?

D. *The article is unconstitutional.* We have seen how Sec. 9 is vague and uncertain. The words employed by the Legislature in framing this section are such as to leave its meaning impossible to ascertain and its intent impossible to execute. For this reason, it is submitted that Sec. 9 is unconstitutional.

> "While it is the duty of the courts to ascertain the meaning of, and give effect to every legislative act, it cannot remedy defects in matters committed by the Legislature. *If an act of the general assembly is so vague and uncertain as to convey no meaning, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the Court to declare it inoperative.*"
>
> "The Court cannot adopt the conjectural interpretation of a statute to solve the doubt. If no judicial certainty can be settled on as to the meaning of the statute from its language, the court is not at liberty to supply one. There must be a competent and definite expression of the legislative will to accomplish that result." (*Jones vs. Lawson,* 143 Ark. 83, 220 S. W. 311).

"So, if an act of the legislature is so vague and uncertain in its terms as to convey no meaning, or if the means of carrying out its provisions are not adequate or effective, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the court to declare it void and inoperative." (*Hilburn vs. St. Paul M. & M. R. Co.*, 23 Mont. 229, 58 Pac. 551.)

"In construing penal statutes it is not the practice of the Court to go beyond the clear meaning and purpose of the statute and to attempt to spell out the creation of a new offense which is not clearly indicated by the ordinary meaning of the words used. If a statute is doubtful and uncertain, or is such as to make it difficult or impossible to comply with its provisions, it will be held to be of no force and effect." (*People vs. Briggs*, 193 N. Y. 457, 86 N. E. 522).

"If the enactment is so uncertain that the court is unable to determine, with any reasonable degree of certainty, what the Legislature intended, or it is so incomplete that it cannot be executed, there is no other course open but to condemn it as void for uncertainty." (*State ex rel. Husting vs. State Canvassers*, 159 Wis. 216, 150 N. W. 542).

"Where the terms of the statute are so uncertain as to their meaning that the Court cannot say with reasonable certainty what is intended, it will pronounce the enactment void." (*Cook vs. State*, 26 Ind. Appl. 278, 59 S. E. 489).

The contradiction of the terms "legitima" and "intestado" as simultaneously used in Section 9 of Act No. 2710, with reference to the property to be delivered, results in no less uncertainty than that flowing from the words found in other statutes held invalid for the same reason, such as "mob violence" (*Augustine vs. State*, 41 Tex. Crom. Rep. 59, 52 S. W. 77), "crowded car" (*U. S. vs. Capital Traction Co.*, 34 App. D. C. 592, 19 Ann. Cas. 68), "unprofessional or dishonorable conduct" (*Ozarra vs. Medical Supers.*, 25 App. D. C. 443), or "unjust and unreasonable rate" (*U. S. vs. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, 14 A. L. R. 1045).

It is true that in most of the cases the statutes invalidated were penal in character; but Section 9 of the Divorce Act is in its operation closely related to the penal laws. Non-compliance therewith, resulting in the marriage tie remaining in force, may

lead to conviction for bigamy, adultery or concubinage. There is no reason, therefore, why it should not be subjected to the same tests as a penal statute.

The constitutionality of Sec. 9 may also be objected to on the ground that it attempts to carry out arbitrary deprivation of property, for private benefit and without compensation.

Whatever interpretation be given to the provisions of Section 9 of Act No. 2710, referring to the legitime of the children as if the parents had died intestate, (and much more so if interpreted to mean that the children should receive the whole property, an interpretation apparently warranted by the English text of the law, reading "as their legal portion if said spouse had died intestate") said section could be criticized as attempting to transfer property from one person to another, which the legislature cannot presume to do, directly or indirectly (12 C. J. Sec. 489, page 958). The divorce law of the Philippine Islands is unique in this respect, and probably no other law can compare with it as an attack upon the right of holding and enjoying property, with the avowed purpose of depriving a private person of it for the sole benefit of another person equally private.

If section 9, par. 2 of the Divorce Law is construed as making the delivery of property compulsory, it will result in divorced persons being deprived or divested of their property in favor of their children without their consent, and without compensation. Such effect would be tantamount to the legislature pronouncing their property to belong to their children. This, very evidently, the legislature cannot do. As stated by the Federal Supreme Court in Chicago, *B. Q. & R. Co. vs. Chicago*, 166 U. S. 226, 235-236, 41 L. Ed. 979, 984:

> "In *Davidson vs. New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th amendment. See also *Missouri P. R. Co. vs. Nebraska Board of Transportation*, 164 U. S. 403, 417 (ante, 489, 495). Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly

or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on Constitutional Law, says, 'is that of enjoying private property without undue interference or molestation.' p. 228. The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property.' It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." 2 Story, Const. 1790; 1 Bl. Com. 138, 139; Cooley, Const. Lim. 559; *People vs. Platt*, 17 Johns. 195, 215 (8 Am. Dec. 382); *Bradshaw vs. Todgers*, 20 Johns. 103, 106; *Mount Washington Road Co's Petition*, 35 N. H. 134, 142; *Parham vs. Decatur County Justices of Inferior Ct.*, 9 Ga. 341, 348; *Ex parte Martin*, 13 Ark. 199, 206, et. seq.; *Johnston vs. Rankin*, 20 N. C. 550, 555.

"But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the 14th amendment, it must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision is not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the pro-

ceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his porperty without compensation."

In another case, the Federal Supreme Court was equally emphatic:

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion that the order in question, so far it required the railroad corporation to surrender part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was in essence and effect a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of the Amendments of the Constitution of the United States. *Wilkinson vs. Leland,* 27 U. S. 2, Pet. 627, 658, 7 L. Ed. 542, 553; *Den Murray vs. Hoboken Land Y. T. Co.,* 59 U. S. 18, How. 272, 276; 15 L. Ed. 352, 374; *Citizen's Sav. & L. Asso. vs. Topeka,* 87 U. S. 20 Wall 655, 22 L. Ed. 455; *Davidson vs. New Orleans,* 96 U. S. 97, 102; 24 L. Ed. 616, 618; *Cole vs. La Grange,* 113 U. S. 1; 28 L. Ed. 896; *Fallbrook Irrig. Dist. vs. Bradley,* 164 U. S. 112, 158, 161, 41 L. Ed. 59; *State vs. Chicago,* M. & St. P. R. Co., 36 Minn. 402." (*Missouri Pacific R. Co. vs. Nebraska Bd. of Transp.*, 164 U. S. 403, 417, 41 L. Ed. 489, 495).

To the same effect are:

Union Transit Co. vs. Kentucky, 199 U. S. 203, 50 L. Ed. 153; *Larabee vs. Dolley,* 173 Fed. 391; *First St. Bank vs. Shallenberger,* 172 Fed. 1003; *Ex parte Goodright,* 160 Cal. 421, 117 Pac. 456.

"The legislature has no power to take the property of one person and give it to another; nor can private property be taken even for public use, unless compensation is made to the owner, and the authorities all agree that the compensation must precede or accompany the taking." *Gillan vs. Hutchinson,* 16 Cal. 153, 155.

Also

> *Garvin vs. Dansumann,* 16 N. E. 826. *Newcomb vs. Newcomb,* 58 N. Y. S. 430; *Chicago & E. R. Co. vs. Keith,* 60 L. R. A. 525.

Cooley has tersely expressed the rule:

> "But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment." (Cooley, Constitutional Limitations, [1927] Vol. 2, p. 744).

In the light of the foregoing decisions and principles, paragraph 2 of Section 9 of the divorce Act cannot be interpreted as involving a compulsory duty on the part of the parents to surrender to the children any portion of their property; that such statute would be objectionable from the constitutional point of view and for that reason null and void. By holding compliance compulsory, the property of the parents is vested upon the children without their receiving any compensation therefor, and without the parents having the benefit of due process of law. It has been held, and the principle is supported by abundant authority, that

> "Independently of express authority given by the Constitution, private property can be taken *only for public use,* and the Legislature cannot authorize taking for strictly private use, even upon making compensation." (20 C. J. 564).

Could the legal provision in question be defended as an exercise of the sovereign police power of the state? It lacks the essential requisites for such exercise: public interest and reasonable operation (*U. S. vs. Toribio,* 15 Phil. 85; *U. S. vs. Villareal,* 26 Phil. 390; *Fabie vs. City of Manila,* 21 Phil. 486). The public in general is in no wise interested that property should be in the hands of one private person rather than those of another; in the possession of the divorced spouses and not in that of their children. It is only the latter, or at the most, their guardians, regular or *ad litem,* that would have interest and receive benefit, or expect it, from such a transfer as ordained by the act.

Is such transfer reasonably required, for the protection of the children? The latter's hereditary rights are in no wise changed by the divorce; their claim to support from either or both divorced spouses remains intact. The parents are, in regard to their children's patrimonial rights as much restricted, and as much obligated, as if divorce had not taken place. Why then should it be necessary for them to part with their property, to lose opportunities to make it productive or secure its help when under straits, lose the credit that its possession guarantees and, if the English text of the law is followed, be reduced to pauperism and mendicity? That the protection hitherto afforded to the children by the Civil Code is not inadequate is shown by the fact that children of widowed parents are not given increased protection. The widow or widower is not required to part with any portion of his property, and yet there is no difference in the risk and dangers run by the children of divorced parents and those whose father or mother has gone to the Great Beyond.

It may be said that it is not a consort's fault that his spouse is stricken by death. Does that make the children's interests any safer? From the latter point of view, in what way are the sons and daughters of a widowed spouse better protected by the law than those of a divorced consort? May not the widowed parent also contract a new marriage, develop new affections, fall prey to interests inimical to his heirs? Yet the law considers that the restriction of his testamentary powers under the Civil Code is ample protection for his descendants; it requires from him no actual surrender of his means of livelihood. Conditions being equal, why should the divorcee be subjected to heavier burdens? Why are not the children also empowered to enrich themselves at the expense of their father when their mother dies?

And if the protection of the children is not the purpose sought, what interest then is subserved by the surrender of the property? What public demand requires that a divorced person be handicapped in starting life anew?

Neither can it be reasonably asserted that in exchange of their properties the parents acquire the dissolution of the marriage bond, and are thus enabled to marry again. That is not the compensation that is contemplated in the constitutional provision that no private property be taken without just compensation.

"The term 'compensation' as used in various constitutional provisions forbidding the taking of private property for public use without making just compensation, means a full indemnity or remuneration of the loss sustained by the owner of the property taken or injured, and such constitutional requirement is not satisfied by mere colorable compliance." (20 C. J. 641-641).

"JUST COMPENSATION should be determined on equitable principles, and should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken." *U. S. vs. Roberts*, 257 Fed. 397; *U. S. vs. Nahant*, 153 Fed. 520, 82 C. C. A. 470. (mod 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723). To the same effect, *U. S. vs. First Nat. Bank*, 250 Fed. 299, Ann. Cas. 1918, 63 N. E. 180; *Matter of Rapid Transit Comrs.*, 128 App. Div. 103, 112 N. Y. S. 619.

The objection that the law is oppressive in operation could be easily asserted when we consider that to deprive a person of two thirds or the whole of his property is confiscatory.

Finally, it cannot be denied that if the property is compulsorily taken from the divorced parent, he is being deprived of his property without due process of law, since no hearing or investigation is provided for by the statute. The trial of the divorce action is not the hearing that would constitute due process of law with respect to the surrender of the property, for the issues therein refer only to the commission of the offense, the existence of the grounds of divorce, and the defenses thereto. The parties therein cannot be heard to offer any excuse why their property should not be taken nor is any reason there admittted as to why the property should not leave the original owner.

"Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in the court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having

jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States vs. Cruikshank,* 92 U. S. 542, 554 (23:558) 592; *Leeper vs. Texas,* 139 U. S. 462, 468 (35:225, 227). But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the 14th amendment, has said: 'Can a state make anything due process of law which by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the forms of state legislation.' *Davidson vs. New Orleans,* 96 U. S. 97, 102 (24:616, 619). The same question could be propounded and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment." (*Chicago B. Q. & R. Co. vs. Chicago,* 166 U. S. 226), 41 L. Ed. 979, 984.

The question to be considered is whether the statute in question (par. 2, Sec. 9, Act No. 2710) may be saved from invalidity by holding that the delivery of property required therein is simply optional. It is doubted if it is validated thereby. What the legislature cannot do directly it cannot be allowed to carry out indirectly. (12 C. J. 957). The ultimate fact remains that private property is transferred from one private person to another, and that compensation is not given, nor due process guaranteed.

Moreover, the option if more illusory than real: When it is considered that the divorced parents are only given one year from the decree wherein to decide between surrendering their property or living continually in danger of running afoul

the law; when it is taken into account that if, under the impression left by the divorce wreckage, the parents should decide to preserve their belongings in order to avoid becoming destitute, they will no longer be able to correct that choice, and will remain under the shadow of imprisonment for bigamy, adultery or concubinage during the balance of their natural life; when it is borne in mind that the momentous choice is imposed not only upon the party whose guilt gave rise to or sought the divorce, but upon the other innocent spouse as well; and, finally that there is now no relative divorce or judicial separation (*Valdez vs. Soteraña Tuason,* 40 Phil. 943), that it must be absolute divorce as prescribed in Act No. 2710 or none at all, it can hardly be doubted that the option allegedly granted by the law is a shadow without substance. All reasonable persons will no doubt prefer to surrender their property for nothing, rather than risk an infringement of the law at some uncertain future. In other words, the effect of the statute would be the same as if there had been no option at all.

> "The taking of the private property of one person or corporation, without the owner's consent, for the private use of another, even though this be accomplished under the guises of taxation or of exercise of the right of eminent domain, is a violation of due process of law." (12 C. J. 1252, sec. 1042).
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> "A statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another. (Re Jacobs, 98 N. Y. 98, and authorities therein cited). In the one case it despoils the owner directly, and in the other, renders him defenseless against any assault upon his property. Authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as where it attempts to do the same thing directly." (*Gillman vs. Tucker,* 128 N. Y. 190, 28 N. E. 1040, 13 L. R. A. 304, 310).
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> "The purpose of the fifth and fourteenth amendments to the Constitution of the United States is to prohibit, on every foot of American soil, all illegal acts of government, state or federal, invasive of the right to life, liberty, or property. Our constitutional systems, which parceled out the sovereignty of the people among separate and inde-

pendent departments, each of which was forbidden to enter the orbit of the other, had left little place for the arbitrary exercise of the executive prerogative concerning the enjoyment of these rights. These amendments were designed chiefly to secure the enjoyment of these rights against arbitrary exercise of legislative power and to give effective protection against such assaults upon the fundamental rights of the citizens, whenever attempted under the forms of law. It is well settled that a state cannot do or effect indirectly what it cannot do or effect directly, and that, in whatever language a statute may be framed, its purpose and its constitutional validity must depend upon 'its natural and reasonable effect' upon the right involved. *Henderson vs. Mayor,* 92 U. S. 259, 268; 23 L. Ed. 543; *Joseph vs. Randolph,* 71 Ala. 499, 46 Am. Rep. 347. 'It is the duty of the courts to be watchful of the constitutional rights of the citizen. A close, literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it were more in sound than in substance.' *Boyd vs. United States,* 116 U. S. 616-635, 6 Sup. Ct. 524, 535, 29 L. Ed. 746." (*Central of Georgia Ry. Co. vs. Railroad Co. of Ala.,* 161 Fed. 925, 962.

CONCLUSION

As a result of this study, the writer concludes that Sec. 9, Act No. 2710 is a very unique provision of our Divorce Law which requires some change. It can hardly be expected that it will not, in the future, cause our courts much inconvenience and hard study when the question of its interpretation shall come up for adjudication. The fact that it has never been questioned and has never been put to a test is no reason why it will never be brought to the attention of the judiciary at some future time.

Just as the section is worded now, there is bound to arise conflicts between recognized legal principles and law. The use of the terms "legitime" and "intestate succession" in the same section gives rise to a contradiction which, it is submitted, can only be done away with, by either of two ways:

1. Discarding entirely the phrase "as if he had died without leaving a will" as being worthless, and only considering the

phrase "by way of legitime"; or vice-versa, as the interpreter of the law may desire to give the children a lesser or a greater portion in the estate of their divorcing parents.

2. Suppressing the word "intestado" from the phrase "como si hubiese fallecido intestado" or by substituting the phrase "en concepto de herencia" for the present one "en concepto de legítima."

The first action can be availed of by the court thru its power of judicial interpretation; the second one must be performed by the Legislature thru its power of amendment.

The difficulties which the wording and the interpretation of Sec. 9 have presented, have been discussed in the body of this thesis. As a recapitulation, however, let them be outlined here, as follows:

1. The article is vague and uncertain.

2. It works an injustice on the innocent spouse in many cases and under certain circumstances.

3. The difficulties with regard to the applicability of the section to property within the Philippine Islands owned by divorcees declared as such by a foreign divorce decree which is recognized by our courts as valid and enforceable.

4. It does not conform to the requirements of a law to make it constitutional.

How to remedy these difficulties and anomalies is now the problem. To amend the law by entirely abolishing Sec. 9 seems hardly possible, taking into consideration the history of this section and of the intent of the legislature in adding to the law the aforementioned section. As was shown somewhere else in this thesis, Sec. 9 was inserted with the intention of placing in the Divorce Law a formidable check against divorces and to suit the demands of the opposition presented by some elements of the Legislature. We have also seen that Sec 9, and the Divorce Law as a whole, is strict in its provisions. As was seen in the comparative study of the divorce laws of other countries, the Philippine Divorce Law is more strict than any of the other divorce laws mentioned in the comparison; and this is so because the social make-up of the population of the Philippine Islands demands it to be so. These conditions still exist at present, and to amend the law by doing away entirely with Sec. 9 and thus cutting out the strongest deterrent to di-

vorces and the hardest provision to comply with—in other words, liberalizing the law in this respect—would meet with considerable opposition from many quarters of the Legislature and the country.

There is, however, another thing which the Legislature could do, and that is to amend Sec. 9, itself, prunning out the undesireable parts and leaving the serviceable portion in it. This could be accomplished by rewording the section as suggested in the first part of this conclusion. But if the Legislature finds the section beyond amendment, then let it abolish the section entirely but let it take the necessary precautions—enacting a new provision if need be—to keep the law not too liberal, i. e., strict enough not to serve as an inducement to the public to break their homes and to wreck their conjugal happiness.

The last alternative is judicial interpretation. This, of course, cannot be availed of unless an actual litigation comes up before the courts for adjudication. At any rate, when such a case does come up, it is hoped that our Supreme Court will decide the problems presented by Sec. 9, once and for all. It is hoped that very soon our Supreme Court shall, at the very first opportunity, avail itself of clarifying this provision of our Divorce Law, and of giving to the legal society the correct interpretation of Sec. 9 of Act No. 2710.