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NOTES and COMMENTS

IS INTIMIDATION A GROUND FOR THE ANNULMENT OF MARRIAGE?

Stripped of all legal preliminaries, the problem is bluntly stated thus. Does the phrase 'force or violence,' as used in paragraph (e), Section 20 of the Marriage Law (Act No. 3613) embrace intimidation, or is it limited to actual physical violence?

Since it is admitted that our present Marriage Law is an importation from the states of the American Union, recurrence to the jurisprudence on the subject evolved by the courts in the United States will not be impertinent in this regard.

"No marriage is valid to which the parties have not fully and freely consented, and the consent is not free when it is extorted by violence or threats of violence. Violence may be physical or moral; that is to say, it may consist of the coercion of the person continuing down to the moment of the marriage, or of the coercion of the will of the parties by antecedent threats of bodily harm. In the latter case, the person is forced to elect between consenting to marry and exposure to the threatened evils. Such a forced consent does not bind the person who has been constrained to choose the alternative of marriage. The violence or threats must be of such a nature as to inspire a just fear of great bodily harm in a mind of ordinary firmness." (18 Ruling Case Law, 415).

Tiffany opines that the better opinion is "that, if either party is in a state of mental incompetency to resist pressure improperly brought to bear, there is no legal consent. In Scott

v. Sebright, 12 Prob. Div. 21, the duress consisted in threatening one in financial distress with exposure, and the court held that, inasmuch as this resulted in depriving the party of her free will, there was no real consent, and the marriage was annulled. So where a man is illegally or maliciously arrested for bastardy or seduction, and marries the complainant to avoid imprisonment, it is held that he acts under such duress as will avoid the marriage; and the same is true in other cases of illegal arrest". (Tiffany, Persons and Domestic Relations. 13, 16). Schouler concurs with Tiffany (Schouler, Law of Domestic Relations, 27).

"To constitute such duress as will vitiate the marriage, the influence must have been brought to bear by the other contracting party or with his procurement or connivance, and the menace must have appeared reasonably imminent and reasonably inducive of action to arrest it. (Shepard v. Shepard, 192 SW 658, Marks v. Crame, 29 SW 436; Sherman v. Sherman, 20 NYS 414). In the case of Fratello v. Fratello, 193 NYS 865, the defendant and his uncle threatened to kidnap the plaintiff, a girl of 18 years of age, to disfigure her face and destroy her father's home unless she marries the defendant; it was held that the marriage will be set aside". (38 Corpus Juris, 1034).

Thus in the light of the foregoing judicial pronouncements by the American courts in construing and applying the same provision of law, it will not be a far-fetched conclusion to advance that intimidation is comprehended in paragraph (e), Section 30, Act Uo. 3613, which provides thus: "A marriage may be annulled for any of the following causes: (e) That the consent of either party was obtained by force, unless, the violence having disappeared, such party afterwards freely cohabited with the other as husband and wife, as the case may be. "It is reasonable to presume that in copying the American pattern, our legislature must have also grafted with the copy its original construction and application.

Apart from the above considerations, it is humbly submitted that intimidation is a ground for the avoidance of marriage in this jurisdiction, even if approached from our own peculiar Civil Code standard and our social psychology and education.

It has been said that, since our Civil Code in Article 1265 expressly and specifically provides that violence or intimidation vitiates consent in ordinary contracts, and Act No. 3613

provides only for force or violence, under the cardinal maxim of statutory construction of "inclusio unius est exclusio alterius" intimidation is excluded in the words "force" and "violence". But no one can safely presume that when the legislature enacted Act No. 3613 it had in mind the Civil Code provision on contracts; rather, it is more reasonable to assume that our law-making body in passing the Act considered primarily General Orders No. 68, which was its more immediate predecessor. And because General Orders No. 68 was borrowed by the military governor from the United States, it is not difficult to locate its original construction.

Again, it must be remembered that greater capacity is required to enter into an ordinary contract than to marry. Generally, a person must be 21 years of age to execute a valid contract; but to contract marriage without parental consent one must only be 18 or 20 years old depending upon the sex. Besides, the absence of consent of the persons whose consent is necessary so that a minor may validly enter into an ordinary contract renders such contract voidable; but the fact that the parents did not consent to the marriage of their child below 18 or 20 does not necessarily affect the validity of the marriage contracted. All things being equal, the older a person is, the stronger is his mental and moral strength; the younger, the weaker. *A fortiori*, if intimidation renders voidable an ordinary contract entered into by a twenty-one year old individual, with more reason must the same be a cause for the setting aside of a marriage contracted by a younger person. For the weaker a person is, the more he is easily subjected thereto.

Furthermore, it cannot be gainsaid that marriage entails graver and more serious consequences than do ordinary contracts. The law, to be logical, should therefore concede more remedy to persons executing contracts of a more serious nature, like marriage. This attitude will certainly not subvert the marriage institution, for the State is as much interested in not forcing an individual to continue a marital relation to which he has not freely and fully consented as it is desirous of preserving the policy of upholding the sanctity of marriage validly contracted.

Even proceeding from the viewpoint of social psychology and education, still it is modestly insisted that intimidation constitutes one of the valid reasons for annulment of marriage. Articles 42 to 107 of the Civil Code provide the outstanding

proof of this. Although these particular provisions relative to marriage were were never in force, yet the reason for such suspension was not that the Filipinos were socially unprepared for them, but because of the absence of public officials to take charge of the civil registry contemplated in those provisions (Benedicto v. De la Rama, 3 Phil. 34).

Article 101 of the Civil Code states: "Son nulos: * * * (2) El contraido * * * por coaccion' o miedo grave que vicie el consentimiento. * * *"

Sanchez Roman in commenting thereon after lamenting the loose way with which the Civil Code employs different terms to mean the same thing, declared: "The force or serious fear mentioned is, without doubt, the same cause that vitiates consent, which in contracts are denominated violence or intimidation, and in general that which the jurists comprehends under the terms force and fear." (Sanchez Roman, 587).

If the Civil Code considered us sufficiently prepared to recognize intimidation as a ground for the avoidance of marriage without in any way shocking the conscience of the community, as it were, it would be the height and essence of falsity itself to aver that we have since retrograded. Judging from the logic of events and progress of the times, our present day social conditions and educational standing must have improved since the Castilian flag waved its last over this region of the globe.

There is one practical argument that will render the contrary view an absurdity. If it is insisted that only actual physical force or violence is embraced in the terms "force" and "violence", necessarily, in order that a case may arise, one of the contracting parties to the marriage or third persons at his behest and instance must be actually pounding on or choking the other at and during the time that the officiating minister or judge is solemnizing the marriage. In which case, this pertinent question may be asked: Will such a case ever arise? Clearly not; for who is the minister or judge who will soleminize a marriage under such circumstances, well knowing the penal provisions of the Marriage Law! The immediate reaction of the priest or officiating official, in the absence of collusion or coercion, will be to veremently denounce the party employing the violence. The possibility that such a case will happen through the connivance of the solemnizing officer will not help the opposite theory any, because that situation is certainly an exceptional one; and the law primarily deals with a situation

that is covered by the general rule, not the exception; with what is ordinary and not extraordinary.

One cannot say that, when a party prods a loaded revolver at the back or side of the other, concealed from view, forcing the words "I do" from the lips of the latter to save dear life, the latter has given his or her consent to the marriage because there was no actual violence used. Or that, because one party merely threatened the other to inflict harm on the latter's family or property, the marriage contracted thereunder binds him or her for the rest of his or her life to the party issuing the threats. This would be placing too much premium on what is force or violence at the expense of the party who did not freely consent, disregarding deliberately the relative position of human physical and mental strength, forcing persons to live an unnatural union, just because the letter of the law so commands. This is nothing short of inequitous, not to say tyrannical, which is foreign to the very nature and design of all laws. As aptly put by Justice Holmes, "there is no canon against using common sense in construing laws as saying what they obviously mean. (Roschen v. Ward, 277 U. S. 337). Gives the law a common sense interpretation and hence a just construction so that it will be of any practical value and utility; for in the language of Shakespeare, "The letter of the law killeth; but its spirit giveth life"

FELIX V. MAKASIAR

THE LIABILITY OF THE PHILIPPINE GOVERNMENT FOR TORT

The subject of the present inquiry is thus briefly stated: Is the Government of the Philippine Islands immune from suit based on the tortious acts committed by its special agents? Or to put it in another form, is the provision of the Civil Code expressing the consent of the State to suits arising from the negligence of its special agents and holding the State responsible in damages for such fault or negligence, still in force? The pertinent provisions are herein inserted fully as follows:

ART. 1902—Any person who by an act or omission causes damage to another by his fault or negligence shall be liable for the damage so done.

ART. 1903—The obligation imposed by the next preceding article is enforcible not only for personal acts and omissions but also for those of persons for whom another is responsible.

PAR. 5—The State is subject to the same liability when it acts through a special agent, * * *.

The rule contained in par. 5, Art. 1003 is against the overwhelming weight of authority in the United States, and it is submitted that the latter rule obtains in this jurisdiction for reasons that we will presently show.

The immunity of the State from suit is a fundamental principle of American jurisprudence. It is inherent in all sovereign states. (Nichols v. U. S. (1869) 7 Wall. 122; The Siren v. U. S. (1869) 7 Wall. 152; U. S. v. Lee (1882) 106 U. S. 196; Kawananakoa v. Polyblank (1907) 205 U. S. 349). The governments of unincorporated territories have been held by the United States Supreme Court as possessing this immunity from suit. (People of Puerto Rico v. Rosaly y Castillo (1913) 227 U. S. 270; People of Puerto Rico v. Ramos (1914) 232 U. S. 627; Fajardo Sugar Co. v. Richardson (1916) 241 U. S. 44.) As Mr. Justice Holmes said in Kawananakoa v. Polyblank *supra*, "the doctrine is not confined to powers that are sovereign in the full sense of judicial theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights." It is admitted that upon principle and authority, the Government of the Philippine Islands, possessing the same status and powers as the governments of Hawaii and Puerto Rico, is also entitled to this exemption. (Merritt v. Government of the Philippine Islands, 34 Phil. 311; People v. Santiago, 43 Phil. 120).

The doctrine of the non-suability of the State is based upon the attribute of sovereignty possessed by the State as a legal person. Historically, the conception of sovereignty first attached to the ruling monarch rather than to the State. Blackstone, in his Commentaries, states the established rule which has never been changed, together with its reasons, thus: "Our King is equally sovereign and independent within these his dominions, as any emperor is in his empire, and owes no kind of subjection to any other potentate upon the earth. Hence, it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all juris-

diction implies superiority of powers; authority to try would be vain and idle, without any redress, and the sentence of a court would be contemptible, unless that court had power to command the execution of it." Later, this immunity was carried over to the State viewed as a legal person when the proposition was accepted that sovereignty is not an inherent or a patrimonial right of the ruling monarch. Modern writers and decisions support the doctrine with arguments, practical or dogmatic in character, which have little reference to its actual historical origin. (Prof. Willoughby, Fundamental Concepts of Public Law, pp. 466-480). For the classical pronouncements of the Supreme Court of the United States pointing out the purely juristic reason and the considerations of practical necessity and policy of this doctrine, see U. S. v. Lee; Kawananakoa v. Polyblank, *supra*, Briggs v. Ligthboats (1865) 11 Allen (Mass.) 157.

Article 1903, Par. 5 of the Spanish Civil Code, *supra*, treats of the relation between an individual whose rights have been violated by a public officer, and the State itself. It is political in character. Political law is that branch of public law which deals with the organization and operation of the governmental organs of the State and defines the relations of the State with the inhabitants of the territory. (People v. Perfecto, 43 Phil. 887, 897). Articles of the Civil Code, in the nature of political laws (laws regulating the relation sustained by the inhabitants to the former sovereign) must be held to have been abrogated upon the cession of the Philippine Islands to the United States. (Rca v. Collector of Customs, 23 Phil. 315.) It is a general rule of public law, recognized and acted upon by the United States that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new sovereign are at once displaced. (Chicago Rock Island & Pac. Ry. Co. v. McGlinn, 114 U. S. 542; Alvarez v. Sanchez, 216 U. S. 167; Vilas v. City of Manila, 220 U. S. 345.)

With the abrogation of the article under consideration, we have to look to the principles of American law as enunciated by

decisions of the Supreme Court of the United States and as explained by recognized writers on the subject in order to determine what rule we should follow. The government established in the Philippine Islands is modelled after the Federal and State Governments of the United States. (U. S. v. Bull (1910) 15 Phil. 7; Merritt v. Government of the P. I., (1916) 34 Phil. 311; Abueva vs. Wood (1924) 45 Phil. 612). The political laws of the Philippines are based upon American principles and they must conform to the precedents and principles of constitutional laws of the United States and those of England as were adopted in the United States.

The immunity of the Federal and State Governments from suit applies not only to actions based on contract but also on tort committed by public officers. No claim arises against any government in favor of individuals, by reason of laches, misfeasance, or unauthorized exercise of power by its officers or agents. (Gibbons v. U. S. 8 Wall. 269; Clodfelter v. State, 86 N. C. 51; Langford v. U. S., 101 U. S. 341.) The reason is explicitly stated by Mr. Justice Story, thus: "The government does not undertake to guarantee to any person the fidelity of the officers or agents whom it employs since that would involve it in all its operations in endless embarrassments, difficulties, and losses which would be subversive of the public interest." (Claussen v. City of Luverne, 103 Minn. 491). The State may only be sued and made liable in damages for the negligence of its agents or servants by force of some legislative enactment waiving its immunity in each particular matter. (Railroad Co. v. Tennessee, 101 U. S. 337; Railroad Co. v. Alabama, 101 U. S. 832). In the United States, the individual whose rights have been violated by persons acting under State authority has no remedy against the government, State or Federal, except by express permission, and this permission has never been granted except with reference to contract claims. In no case have they rendered themselves pecuniarily responsible for the tortious acts of their agents. The injured individual has however a right of action against the public official by whose illegal acts he has been wronged. (Willoughby, The Constitutional Law of the United States, Vol. II, p. 1061.)

The rule that the government is immune while its agents are personally responsible for tort committed against private individuals has been criticized as being against the principles of

strict equity and on the general doctrine governing the responsibility of the principal for the acts of his agents. It seems strange that claims of the individual against the State based upon contract are allowed to be adjudicated but those based upon tort are not; in other words, the more wrongful and illegal the acts of the agents, the less liable is his principal. This state of the law however is a necessary and logical outcome of the general principles of American and English law that an *ultra vires act* of a public official is not the act of his government, but is a private act for which he may be held civilly and criminally responsible. (Willoughby, The Constitutional Law of the United States, p. 1105).

In the case of Merritt v. Government of the Philippine Islands, 34 Phil. 311, the Supreme Court of the Philippines speaking through Justice Trent had occasion to consider Article 1903, par. 5 of the Civil Code. Here, one E. Merritt, was injured in a collision between his motorcycle on which he was riding and an ambulance belonging to the Philippine General Hospital, a government institution. By Act 2457 passed by the Philippine Legislature, the plaintiff was authorized to bring the action against the Government in "order to fix the responsibility for the collision" and "to determine the amount of the damage, if any, to which Mr. Merritt is entitled on account of said collision." In deciding the case, the court cited the following decisions of the Supreme Court of Spain on the scope of Article 1903, par. 5; "It follows therefrom that the State, by virtue of such provisions of law, is not responsible for the damage suffered by private individuals in consequence of acts performed by its employees in the discharge of the functions pertaining to their office, because neither fault or even negligence can be presumed on the part of the State in the organization of the branches of the public service and in the appointment of its agents; on the contrary, we must presuppose all foresight humanly possible on its part in order that each branch of service serves the general weal and that of private persons interested in its operation. (Supreme Court of Spain, decision of Jan. 7, 1898; 83 Jur. Civ. 24). In a case involving damages the responsibility of the State is limited to that which it contracts through a special agent, duly empowered by a definite order or commission to perform some act or charged with some definite purpose which gives rise to the claim. (Supreme Court of Spain, decision of May 18, 1904; 98 Jur. Civ.

389; and decision of July 30, 1911; 122 Jur. Civ. 146.) Finally, the court decided: "It is therefore evident that the State (the Government of the Philippine Islands) is only liable according to the above-quoted decisions of the Supreme Court of Spain for the negligent acts of its officers, agents, and employees when they are acting as special agents within the meaning of paragraph 5 of Article 1903 of the Civil Code and a chauffeur of the General Hospital is not such a special agent."

It will be noted that the case cited above was decided on the assumption that Article 1903, par. 5, Civil Code is still in force. The question of whether this provision still subsists was not squarely presented before the court for consideration. No issue was made of the abrogation of this provision and we may reasonably say that this case does not militate against our holding that Article 1903, par. 5 is no longer in force. It is true that this case was decided after the change of sovereignty, but in an earlier case, decided by the same court and speaking through the same Justice, it was said: "But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law and when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff." (Tan Te v. Bell, 27 Phil. 354, following the principle of Tindal v. Wesley (1897) 167 U. S. 204.)

An examination of the American cases cited herein reveals that no distinction is made between officers of the government and special agents. The rule that the State is not liable applies with equal force not only in cases where the tort is committed by officers but also those committed by special agents. In view therefore of the change of sovereignty resulting in the abrogation of political laws inconsistent with the constitutional laws of the new sovereign and the substitution in this jurisdiction with the prevailing rule in the United States as laid down in decisions of the Supreme Court of the United States, we believe that the question we have propounded in the beginning of this inquiry should be answered in the affirmative—that the government of the Philippine Islands is not liable for the tortious acts committed by its special agents.

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