RECENT CASES

HAW PIA, PLAINTIFF-APPELLANT, VS. CHINA BANKING CORP. DEFENDANT APPELLEE, G.R. NO. L-554, APRIL 9, 1948

Fidel J. Silva for the plaintiff-appelant.

Ross, Selph, Carrascoso & Janda for the defendant-appelee.

Perkins, Ponce Enrile, Contreras & Gomez; Gibbs, Gibbs, Chuidian & Gomez; Jose W. Diokno and *Claro M. Recto* as amici curiae.

DECISION

FERIA, *J.*:

Plaintiff-appellant instituted this action in the Court of First Instance of Manila against the defendant-appellee, China Banking Corporation, to compel the latter to execute a deed of cancellation of the mortgage on the property described in the complaint, and to deliver to the said plaintiff the Transfer Certificate of Title No. 47634 of Register of Deeds of Manila, with the mortgage annotated therein already cancelled, as well as to pay the plaintiff the sum of ₱1,000.00 for damages as attorney's fees and to pay the cost of the suit. The cause of action is that the plaintiff's indebtedness to the China Banking Corporation in the sum of ₱5,103.35 by way of overdraft in current account payable on demand together with its interests, has been completely paid, on different occasions, from October 1, 1942, to August 29, 1944, to the defendant China Banking Corporation through the defendant Bank of Taiwan, Ltd., that was appointed by the Japanese Military authorities as liquidator of the China Banking Corporation.

Upon having served with sum mons the defendant-appelle China Banking Corporation made a demand from the plaintiff-appellant for the payment of the sum of ₱5,-103.35 with interests representing the debt of the said appellant, and in the answer it set up a counter claim against the plaintiff-appellant demanding the payment, within 90 days from and after the date Executive Order No. 32 on moratorium, series of 1945, has been repealed, of said amount due from the latter to the former by way of overdraft together with its interests at the rate of 9% per annum to be compounded monthly, and the additional sum of ₱1,500.00 as attorney's fees and the costs of the suit.

After the hearing of the case, the trial court rendered a decision holding that, as there was no evidence presented to show that the defendant China Banking Corporation had authorized the Bank of Taiwan, Ltd., to accept the payment of the plaintiff's debt to the said defendant and said Bank of Taiwan,

* We are publishing this decision in its entirety because of its great significance here and abroad.

as an agency of the Japanese invading army, was not authorized under the intenational law to liquidate the business of the China Banking Corporation, the payment has not extinguished the indebtedness of the plaintiff to the said defendant under Sec. 1162 of the Civil Code. The court absolved the defendant China Banking Corporation from the complaint of the plaintiff, and sentenced the latter to pay the former the sum of ₱5,103.35 with interests within the period of 90 days from and after the above mentioned Executive Order No. 32 had been repealed or set aside, and ordered that, if the plaintiff failed to pay it within the said period, the property mortgaged shall be sold at public auction and the proceeds of the sale applied to the payment of said obligation. The plaintiff appealed from the decision to this Court.

The appellant's assignments of error may be reduced to two, to wit: First, whether or not the Japanese Military Administration had authority to order the liquidation or winding up of the business of defendant-appellee China Banking Corporation, and to appoint the Bank of Taiwan liquidator authorized as such to accept the payment by the plaintiff-appellant to said defendant-appellee; and second, whether or not such payment by the plaintiff-appellant has extinguished her obligation to said defendant-appelle.

(1) As to the first question, we are of the considered opinion, and therefore hold, that the Japanese military authorities had power, under the international law, to order the liquidation of the China Banking Corporation and to appoint and authorize the Bank of Taiwan as liquidator to accept the payment in question, because such liquidation is not a confiscation of the properties of the bank appellee, but a mere sequestration of its assets which require the liquidation or winding up of the business of said bank. All the arguments to the contrary in support of the decision appealed from are predicated upon the erroneous assumption that the liquidation or winding up of the affairs of the China Banking Corporation in order to determine its liabilities and net assets to be sequestrated or controlled, was an act of confiscation or appropriation of private property contrary to Art. 46, Sec. III of the Hague Regulations of 1907.

The provisions of the Hague Regulations, Sec. III, on Military Authority over Hostile Territory, which is a part of the Hague Convention respecting the laws and customs of war on land are intended to serve as a general rule of conduct for the belligerents in their relations with each other and with the inhabitants, but as it had not been found possible then to concert regulations covering all the circumstances which occur in practice, and on the other hand it could not have been intended by the High Contracting Parties that the unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgement of Military commanders, it was agreed that "Until a complete code of the

laws of war has been issued, the High Contracting parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of international law, as they result. for the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."

Before the Hague Convention, it was the usage or practice to allow or permit the confiscation or appropriation by the belligerent occupant not only of public but also of private property of the enemy in a territory occupied by the belligerent hostile army; and as such usage or practice was allowed, *a fortiori,* any other act short of confiscation was necessarily permitted. Sec. III of the Hague Regulations only prohibits the confiscation of private property by order of the Military authorities (art. 46), and pillage or stealing and thievery thereof by individuals (art. 47), and as regards public property, Art. 53 provides that cash funds, and property liable to requisition and all other movable property belonging to the State susceptible of military use or operation, may be confiscated or taken possession of as a booty and utilized for benefit of the invader's government (II Oppenheim, 8th ed. Sec. 137; & 321, War Department; Basic Field Manual, Rules of Land Warfare FM 27-10). The belligerents in their effort to control enemy property within their jurisdiction or in territories occupied by their armed forces in order to avoid their use in aid of the enemy and to increase their own resources, after the Hague Convention and specially during the first World War, had to resort to such measures of prevention which do not amount to a straight confiscation, as freezing, blocking, placing under custody and sequestrating the enemy private property. Such acts are recognized as not repugnant to the provisions of Art. 46 or any other article of the Hague Regulations by well-known writers on International Law, and are authorized in the Army and Navy Manual of Military Government and Civil Affairs not only of the United States, but also in similar manuals of Army and Navy of other civilized countries, as well as in the Trading with the Enemy Acts of said countries.

Hyde, in his International Law chiefly as interpreted and applied by the United States, Vol.3, 6th ed, p. 1727, has the following to say:

"In examining the efforts of a belligerent to control in various ways property within its domain that has such a connection with nationals of the enemy that it may be fairly regarded as enemy property, it is important to inquire whether the attempt is made to appropriate propery without compensation, divesting him not only of title, but also of any right or interest in what is taken, without prospect of reimbursement, or whether those efforts constitute an assumption of control which, regardless of any transfer of title, is not designed to produce such a deprivation. The character of the belligerent acts in the two

situations is not indentical. To refer to both as confiscatory is not productive of clearness of thought, unless a loose and broad signification be attached to the term 'confiscation.' The point to be noted is that a belligerent may in fact deprive an alien enemy owner of property by process that are not essentially confiscatory, even though the taking and retention may cause his severe loss and hardship. Recourse to such non-confiscatory retentions or deprivations has marked the conduct of belligerents since the beginning of the World War in 1914. They may perhaps be appropriately referred to as sequestrations. The propriety of what they have involved is, therefore, hardly discernible by reference to objections directed against confiscatory action as such, and must be tested by other means or standards.

"A belligerent may fairly endeavor to prevent enemy property of any kind within its territory (or elsewhere within its reach) from being employed as to afford direct military aid to its foe. Measures of prevention may, in a particular case, assume a confiscatory aspect. In such a situation the question may arise whether those measures are, nevertheless, excusable. It is believed that they may be, and that they are not invariably unlawful despite the absence of efforts to compensate the owners."

And in the footnote of the same page, said author adds:

"This analysis differs sharply from that of those who would regard almost all uncompensated deprivations of property as essentially confiscatory, and as, therefore, internationally illegal because of the further assumption or conclusion that confiscatory action must inevitably be so regarded. Belligerent States have not, however, generally acted on such a theory. They have in fact proceeded, especially since 1914, to exercise varying degrees of control over vast amounts of enemy private property by strictly non-confiscatory processes from which they have felt no sense of legal obligation to abstain. In so doing they have been creative of relatively fresh practices which logic has ordained and war-terminating treaties have sanctioned. Thus it happens that proper estimation of the place of confiscation of enemy private property in the law of nations has become of less importance than formerly, because both of the reluctance of States — and notably of the United States to have recourse to it, and of their preference for non-confiscatory measures exemplified in sequestrations as a desirable and sufficient means of utilizing such property."

And Oppenheim in his International Law, Vol. 2 6th ed., by Lauterpacht, says:

"But the desire to eliminate the financial and commercial influence of the enemy, and other motives, presently led in most States to exceptional war measures against the businesses and property of enemies, which, though not confiscation, inflicted great loss and injury. Sometimes these measures stopped short of divesting the enemy ownership of the property; but in other cases the businesses or property were liquidated, and were represented at the close of hostilities by nothing else than the proceeds of their realization, often enough out of all proportion to their value. In the Trading with the Enemy Act, 1939, provision was made for the appointment of custodians of enemy property in order to prevent the payment of money to enemies and to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace.

"The readjustment of rights of private property on land was provided for by the Treaties of Peace. The general principles underlying their complicated arrangements were that the validity of all completed war measures was reciprocally confirmed; but that while uncompleted liquidations on the territories of the Central Powers were to be discontinued, and the subjects of the victorious Powers were to receive compensation for the loss or damage inflicted on their property by the emergency war measure, the property of subjects of the vanquished Powers on the territories of the Allied and Associated Powers might be retained and liquidated, and the owner was to look for compensation to his own State. The proceeds of the realization of such property were not to be handled over to him, or to his State, but were to be credited to his State as a payment on account of the sums payable by it under the treaties."

In paragraph 143 (p. 313) of the same work. Oppenheim states that "Private personal property which does not consist of war materials or means of transport serviceable for military operations may not be as a rule seized." It is obvious that the word "seized" used therein signifies "confiscated" in view of the above quoted paragraphs, and therefore when Oppenheim says, in the footnote to said passage, "Nor may the occupant liquidate the business of enemy subject in occupied territories," he means "confiscate" by the word "liquidate."

Ernest K. Fieldchanfeld in his "The International Economic Law of Belligerent Occuppation (1942)" supports the foregoing conclusion of Hyde, when he says that "According to Art. 46 of the Hague Regulations, private property must be respected and cannot be confiscated. This rule affords protection against the loss of property, through outright confiscation, but not against losses under lawful réquisition, contribution, *seizure,* fines, taxes, and exporpriation" (Par. 208, p. 51). And later on he adds "A complete nationalization of a corporation for the benefit of the occupant could not be anything but a permanent measure involving final effects beyond the duration of the occupation. There is not military need for it because the same practical results can be achieved by temporary sequestration," (par. 385, p. 107).

Martin Domke in his Trading with the Enemy in World War II, pp. 4 & 5, speaking of Warfare on Economic and on military front, says that "Freezing Control is but one phase of the present war effort; it is but one weapon on the total war which is now being waged on both economic and military fronts. Coupled with Freezing Control as a part of this nation's program of economic warfare are to be found export control, the promulgation of a Black List, censorship, seizure of enemy-owned property, and financial and lend-lease aid to allied and friendly nations,. As to Japan, no official information is available as yet on steps taken by the Japanese Government. As a Commentary of April 11, 1942, point out, the Japanese Trading with the Enemy legislation enacted during the last war against Germany might throw

some light on the views adopted by Japan in this matter."

The sequestration or liquidation of enemy banks in occupied territoreis is authorized expressely by the the United States Army and Navy Manual of Military Government and Civil Affairs F. M. 2710 OPN-AV 50-E3, which, mandatory and controlling upon the theatre commanders of the U.S. forces in said territories, provides in its paragraph 12 the following:

"Functions of Civil Affairs Officers. — In the occupation of such territories for a considerable period of time, the civil affairs officers will in most cases be concerned with the following and other activities:

1. MONEY AND BANKING. —Closing, if necessary and guardding of banks, bank funds, safe deposit boxes, securities and records; providing interim banking and credit needs; *liquidation; reorganization, and reopening of banks at appropriate* times; regulation and supervision of credit cooperatives and other financial agencies and organizations; execution of policies on currency fixed by higher authority such as the designation of types of currency to be used and rates of exchange supervision of the issue and use of all types of money and credit; declaration of debt moratoria; prevention of financial transactions with enemy occupied territory."

The Civil Affairs Officers are concerned, that is, entrusted with the performance of the functions enumerated above, when so directed by the Chief Commander of the occupant military forces.

Not only the United States Army and Navy Manual of Military Government and Civil Affairs but similar manuals of other countries authorize the liquidation or impounding of the assets of enemy banks or the freezing, blocking and impounding of enemy properties in the occupied hostile territories without violating Art. 46 or other article of the Hague Regulations. They do not amount to an outright confiscation of private property, and were put into effect by the Allied Army in the occupied hostile territories in Europe during World War II.

The Combined Chiefs of Staff, in their Directive of May 31, 1943, on Military Government in Sicily, Italy, addressed to the Supreme Allied Commander, Mediterranean Theater, ordered:—"(h) An Allied Military Financial Agency under the control of the Military Government shall be established with such sub-agencies as considered necessary," "(i) Military authorities on occupying an area shall immediately take the following steps: (1) All financial institutions and banks shall be closed and put under the custody of the military forces,' (2) a general moratorium shall be declared. (j) * * * all papers of value, foreign securities, gold and foreign currencies shall be impounded with receipts granted to recognized owners. (k) The "Allied Military Financial Agency or any appointed agency by the MG will take into immediate custody all foreign securities and currencies, holding of gold, national funds and holdings of Fascist organizations for deposit." (Appendix on American Military Government, its Organization and Policies,

by Hajo Holborn, 1947, pp. 116, 117.)

The Combined Directive of April 28, 1944, for Military Government in Germany Prior to Defeat or Surrender, provided that the Allied Force "Upon entering the area of Germany will take the following steps and put into effect only such further financial measures as they deem to be necessary from a strictly military standpoint. (b) "Banks should be placed under such control as deemed necessary by them in order that adequate facilities for military needs may be provided and to insure that instructions and regulations issued by military authorities will be fully complied with." (c) "Pending determination of future disposition, all gold, foreign currencies, foreign securities, accounts in financial institutions, credits, valuable papers, and all similar assets held by or on behalf of the following, will be impounded or blocked and will be used or otherwise dealt with only as permitted under licenses or other instructions which you may issue: (1) German national state, provincial and local governments and agencies and instrumentalities thereof." (4) "Nazi party organizations including the party formations, affiliates and supervised associations, and the officials, leading members and supporters thereof; and (5) Persons under detention or other types of custody by Allied Military authorities and other persons whose activities are hostile to the interests of military government" (Holborn, *supra,* p. 141).

In the Allied Directive of June 27, 1945, to the Commander-in-Chief of the United States forces of occupation regarding the military government of Austria, the Commanding General of the United States forces of occupation in Austria, serving as United States member of the Allied Council of the Allied Commission for Austria, was authorized, subject to agreed policies of the Allied Council to close banks, insurance companies, and other financial institutions for a period long enough to introduce satisfactory control to ascertain their cash position and to issue instructions for the determination of accounts and assets to be blocked under par. 55 which authorized him to impound or block all gold, silver, currencies, securities accounts in financing institutions, credits valuable papers, and all other assets falling within the following categories: a. Property owned or controlled, directly or indirectly, in whole or in part, by any of the following: (1) the governments, nationals or residents of the German Reich, Italy, Bulgaria, Rumania, Hungary, Finland and Japan, including those of territories occupied by them; (3) the Nazi Party, its formations, affiliated associations and supervised organizations, its officials, leading members and supporters; (4) all organizations, clubs or other associations prohibited or dissolved by military government; (5) absentee owners, including United Nations and neutral governments; (7) persons subject to arrest under the provisions of paragraph 7, and all other persons specified by military gov-

ernment by inclusion in lists or otherwise. (Holborn, *supra,* p. 192).

On the other hand, the provisions of the Trading with the Enemy Acts enacted by the United States and almost all the principal nations since the first World War, including England, Germany, France and other European countries, as well as Japan, confirms that the assets of enemy corporations, specially banks incorporated under the laws of the country at war with the occupant and doing business in the occupied territory, may be legally sequestrated, and the business thereof wound up or liquidated. Such sequestration or seizure of properties is not an act for the confiscation of enemy property, but for the conservation of it, subject to further disposition by treaty between the belligerents at the end of the war. Sec. 12 of the Trading with the Enemy Act of the United States provides that "after the end of the war any claim of enemy or ally of an enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

The purpose of such sequestration is well expounded in the Annual Report of the Office of the Alien Property Custodian for a period from March 11, 1943, to June 30, 1943. "In the absence of effective measures of control, enemy-owned porperty can be used to further the interest of the enemy and to impede our own war effort. All enemy-controlled assets can be used to finance propaganda, espionage and sabotage in this country or in countries friendly to our cause. They can be used to acquire stocks of strategic materials and supplies * * * use to the enemy, they will be diverted from our own war effort.

"The national safety requires the prohibition of all unlicensed communication, direct or indirect, with enemy and enemy-occupied territories. To the extent that this prohibition is effective, the residents of such territory are prevented from exercising the rights and responsibilities of ownership over property located in the United States. Meanwhile, decisions affecting the untilization of such property must be made and carried out. Houses must be maintained and rents collected; payments of principal and interest on mortgages must be made for the account of foreign debtors and foreign creditors; stranded stocks of material and equipment must be sold; patents must be licensed, *business enterprises must be operated or liquidated,* and foreign interest must be represented in court actions. The number of decisions to be made in connection with property is in fact multiplied by state of war, which requires that productive resources be shifted from one use to another so as to confirm with the requirements of a war economy."

The defendant-appellee, China Banking Corporation, comes within the meaning of the word "enemy" as used in the Trading with the Enemy Acts of civilized countries, because not only it was controlled

by Japan's enemies, but it was besides, incorporated under the laws of a country with which Japan was at war.

Sec. 2 (1) of the Trading with the Enemy Act of Great Britain provides that the expression "enemy" means: "any body of persons (whether corporate or incorporate) carying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy." The control test has also been expressly adopted in the French Trading with the Enemy Act. The Italian Act regards as enemies "legal persons when enemy subject have any prevalent interest whatever in them." The Decree of the Dutch Government-in-exile of June 7, 1940, also adopted the control test by including in the term enemy subjects "legal persons in which interest of an enemy state or enemy subjects are predominantly involved." (Domke Trading with the Enemy Act, pp. 127-130).

In the United States, the Trading with the Enemy Act has not adopted the control theory. But Sec. 2-a of the said Act says that the word enemy shall be deemed to mean any "corporation incorporatwithin such territory of any notion with which the United States is at war." and the same definition is given to the word "enemy" by the Trading with the Enemy Act of the above named countries. The British Act in Sec. 2 (1) defines as enemy "any body of persons constituted or incorporated in or under the laws of a state at war with his Majesty," it being immaterial that they are under the control of allied or neutral stockholders. Similarly the French Act regards as enemies, corporations incorporated in conformity with the laws of an enemy state. The decree of the Dutch Government-in-exile on June 7, 1940, considers as enemies legal persons "orgahized or existing according to or governed by the law of an enemy state." The German Act of January 15, 1940, I Sec. 3 (1) 3, deems enemies all corporations, "the original legal personality of which is based on the laws of an enemy state." The Italian Act of 1938, Sec. 5, regards corporations as enemies if they are enemy of nationality under the law of the enemy estate. So too the Japanese Act, Chapter 1, No. 25, deems enemies "all corporations belonging to enemy countries." (See Martin Domke, Trading with the Enemy Act in World War II, pp. 120-122).

Sec. 3-A of the Trading with the Enemy Act of the United Kingdom of September 5, 1949, as amended up to April 1, 1943, provides that "Where any business is being carried in the United Kingdom by, on behalf of, or under the direction of, persons all or any of whom are enemies or enemy subjects or appear to the Board of Trade to be associated with enemies, the Board of Trade may, if they think it expedient so to do, make * * *;" (b) in order (herein-after in this section referred to as a winding up orders) *requiring the business to be wound*

up;" and Sec. 14 (c) of the same Act (that obviously make it applicable to enemy territories occupied by the United Kingdom's armed forces) provides that "His Majesty may by order in council direct that the provisions of this Act other than this section shall extend, with such exceptions, adaptations and modificatons, if any, as may be prescribed by or under 'the order * * * (to the extent of His Majesty's jurisdiction therein) *to any other country or territory being a foreign country or territory, in which for the time being His Majesty* has jurisdiction." (The Trading with the Enemy Act in World War II, p. 481, by Martin Domke.)

Sec. 5 (b) of the Trading with the Enemy Act of the United States provides that "during the time of war or during any period in which national emergencies declared by the President, the President may under any agency that he may designate or otherwise and under such rule and regulation as he may prescribe," and "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe, such interest or property shall be *held, used, administered, liquidated, etc.*" and Sec. 6 (e) of the same Act provides that "any payment, * * * of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. * * * and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, * * * *with like effect* as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee."

It is evident that the Trading with the Enemy Act of the United States, like that of the United Kingdom or Great Britain above quoted, and those of other countries, may be applied and enforced in a hostile territory occupied by the United States armed forces, because Sec. 2 of said Act provides "That the words 'United States', as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or *occupied by the military or naval forces thereof.*" After the liberation of the Philippines during World War II, properties belonging to Japanese Nationals located in this country were taken possession of by the Alien Propery erty Custodian appointed by the President of the United States under the Trading with Enemy Act, because, although the Philippines was not a territory or within the jurisdiction or national domain of the United States, it was then occupied by the military and naval force thereof.

Of course it is obvious that the obligations assumed by the United States, in applying the Trading with the Enemy Act of the United States to properties within her national domain, is different and distinct from those arising from the application thereof to enemy properties located within the hostile territory occupied by her armed forces. In the first case, Congress is untrammelled and free to authorize the seizure, use, or appropriation of such properties without any compensation to the owners, for although Sec. 2 of the Trading with the Enemy Act provides that "at the end of the war any claim of any enmey to any or of any ally of enemy money or other property received and held by the alien property custodian or deposited in the United States Treasury shall be settled by Congress," the owners of the proper ties seized within the national domain of the United States are not entitled to demand its release or compensation for its seizure, but what would ultimately come back to them, might be secured, not as a matter of right, but as a matter either of grace to the vanquished or exacted by the victor, for the case is to be governed by the domestic laws of the United States, and not the Hague Regulations or International law (U.S. v. Chemical Foundation, Inc., 272 U. S. I; United States v. S. S. White Dental Manufacturing Company, 274 U.S. 402). While in the latter case, when properties are sequestrated in a hostile occupied territory by the armed forces of the United States,, Congress can not legally refuse to credit the compensation for them to the States of the owners as payment on account of the sums payable by said States under treaties, and the owners have to look for compensation to their States, otherwise, they would violate Art. 46 of the Hague Regulations or their pledge of good faith implied in the act of sequestrating or taking control of such properties.

It is to be presumed that Japan, in sequestrating and liquidating the China Banking Corporation, must have acted in accordance, either with her own Manual of the Army and Navy and Civil Affairs, or with her Trading with the Enemy Acts, and even if not, it being permitted to the Allied Nations, especially the United State and England, to sequestrate, impound, and block enemy properties found with their own domain or in enemy territories occupied during the war by their armed forces, and it being not contrary to the Hague Regulations or international law, Japan had also the right to do the same in the Philippines by virtue of the international law principle that "what is permitted to one belligerent is also allowed to the other."

Taking into consideration the acts of the Japanese Military administration in treating the private properties of the so-called enemy banks, it appears evident that Japan did not intend to confiscate or appropriate the assets of said banks or the debts due them from their debtors and thus violate Art. 46 or any other article of the Hague Regulations.

It is true that, as to private personal properties of the enemy, freezing blocking or impounding thereof is sufficient for the purpose of preventing their being used in aid of the enemy; but with regard to the funds of commercial banks like the so-called enemy banks, it was impossible or impracticable to attain the purpose for which the freezing, blocking and impounding are intended, without liquidating the said banks and collecting the loans given by them to hundreds if not thousands of persons scattered over the Islands. Without doing so, their assets or money loaned to so many persons can not properly be impounded or blocked, in order to prevent their being used in aid to the enemy through the intervention of their very debtors, and successfully wage economic as well as military war.

That the liquidation or winding up of the business of the China Banking Corporation and other enemy banks did not constitute a confiscation or appropriation of their properties or of the debts due them from their debtors, but a mere sequestration of their assets during the duration of the war for the purposes already stated, is evidenced conclusively by the following uncontroverted facts set forth in the briefs of both parties and *amici curiae*:

(1) Out of the sum of about ₱34,000,00.00 collected from the debtors by the liquidator Bank of Taiwan, the latter paid out to the depositors or creditors of the same Bank about ₱9,000,000.00; and it is common sense that this last amount should not have been disbursed or taken out of the said amount of about ₱34,000,000.00 had it been the intention of the Japanese Military Administration to confiscate this amount by the Bank of Taiwan.

(2) The members of Chinese Associations were permitted to withdraw from their deposits with the China Banking Corporation a consiberable amount of money which was paid out of the sum collected from the debtors of said bank, in order that they may pay the contribution legally exacted from them by the Military occupant in accordance with Art. 51 of the Hague Regulations. And this showed the intention of the belligerent occupant not to confiscate the bank's assets and to act, at least in this respect, in accordance with said Regulations; because otherwise the Japanese Military Administration could have properly required the Chinese to pay the contribution out of their own funds, without diminishing or reducing the amount collected by the Bank of Taiwan from the debtors of the China Bank.

(3) The collection of the aforementioned debts from the bank's debtors, as well as the payment of withdrawal by the depositors, were regulary entered into the books of said Banks, so that after liberation they could easily determine the respective amounts and the persons who had made the payments which enabled all said banks to reopen

and continue their business; and the regular keeping of said books would have been unnecessary or useless, were it the intention of the Military occupant to close definitely the enemy banks and appropriate all their resources.

(4) There was absolutely no reason for confiscating the funds of the banks collected from their debtors, because by sequestrating or impounding their assets or funds after the latter had been collected from their debtors, the principal purpose of preventing the possible use of the funds of the banks in aid of Japan's enemy was completely accomplished. Absolutely no other benefit could be derived by Japan from confiscating or appropriating the payments made in *Japanese war military notes* to the enemy banks by their debtors, because the Japanese Government could have them at will without cost, except that of the ink, paper and labor necessary for printing and issuing them.

(5) The annual report, 31st December, 1945, of the Chartered Bank of India, Australia & China (pp. 11-12), which had a branch in Manila liquidated by Japanese Military authorities as one of the enemy banks, clearly shows that the liquidation of said branch was a mere sequestration, impounding or control of its assets, and not a confiscation or appropriation thereof during the occupation by the Japanese. It says that during the enemy occupation the cash balance of our *Branches were seized, their assets realized* and *repayment of varying amounts, but up to 100% in one Branch at least, made to depositors.* Said report reads, in its pertinent part, as follows:

"I informed you, when commenting upon the Balance sheet figures for the year ending 31st December, 1942, that we had reason to believe that accounts of some of our occupied Branches had been partly or wholly liquidated, and that the liquidation of such accounts would ultimately bring about a shrinkage in both Assets and Liabilities in the Balance Sheet figures. The information now in our possession and the various changes in the Balance Sheet figures to which I have referred above, confirm the *correctness of this statement,* for during the enemy occupation the cash balances of our Branches were seized, *their assets realized* where possible, and *repayment of varying amounts, but up to 100% in one Branch at least, made to depositors.* Even so, the business of the offices of the Bank which remained under our own control throughout the war has steadily increased and has offset to a great extent decreases *brought* about by *the partial liquidation of Branches which were in Japanese."* (Italics ours.)

It is obvious that the fact that Japanese Military Authorities failed to pay the enemy banks the balance of the money collected by the Bank of Taiwan from the debtors of said banks, did not and could not change the sequestration or impounding by them of the bank's asset during the war, into an outright confiscation or appropriation thereof. Aside from the fact that it was physically impossible for the Japanese Military authorities to do so because they were forcibly driven out of the Phil-

ippines or annihilated by the forces of liberation, following the readjustment of rights of private property on land seized by the enemy provided by the Treaty of Versailles and other peace treaties entered into at the close of the first World War, the general principles underlying such arrangements are that the owners of properties seized, sequestrated or impounded who are nationals of the victorious belligerent are entitled to receive compensation for the loss or damage inflicted on their property by the emergency war measures taken by the enemy through their respective States or Governments who may officially intervene and demand the payment of the claim on behalf of their nationals (VI Hackworth Digest of International Law, pp. 232, 233; 11 Oppenheim, sixth edition. p. 263). Naturally, as the Japanese war notes were issued as legal tender for payment of all kinds at par with the Philippine peso, by the Imperial Japanese Government, which in its Proclamation of January 3, 1942, and February1, 1942, "takes full responsibility for their usage having the correct amount to back them up" (See said proclamations and their official explanation, O. T., IMA Vol. 1, pp. 39, 40). Japan is bound to indemnify the aggrieved banks for the loss or damage on their property, in terms of Philippine pesos or U.S. dollars at the rate of one dollar for two pesos.

(2) The second question is, we may say, corollary of the first. It having been shown above that the Japanese Military Forces had power to sequestrate and impound the assets or funds of the China Banking Corporation, and for that purpose to liquidate it by collecting the debts due to said bank from its debtors, and paying its creditors, and therefore to appoint the Bank of Taiwan as liquidator with the consequent authority to make the collection, it follows evidently that the payments by the debtors to the Banks of Taiwan of their debts to the China Banking Corporation have extinguished their obligation to the lat ter. Said payments were made to a person, The Bank of Taiwan, authorized to receive them in the name of the bank creditor under Art. 1162, of the Civil Code. Because it is evident the words "a person authorized to recieve it," as used therein, means not only a person authorized by the same creditor, but also by a person authorized by law to do so, such as guardian, executor or administrator of estate of a deceased, and assignee or liquidator of a partnership or corporation, as well as any other who may be authorized to do so by law (Manresa, Civil Code, 4th ed. p. 254).

The fact that the money with which the debts have been paid were Japanese war notes does not affect the validity of the payments. The provision of Art. 1170 of our Civil Code to the effect that "payment of debts of money must be made in the specie stipulated and if it is not possible to deliver such specie in silver or gold coins which is a legal tender," is not applicable

to the present case, because the contract between the parties was to pay Philippine pesos and not some specifically defined species of money. "The Philippine peso and half-peso including the Philippine Treasury Certificate was and is the legal tender in the Philippines under Sec. 612 of the Administrative Code, as amended by Act No. 4199. As well stated by the Supreme Court of the United States in Knox v. Lee and Parker (Legal Tender Cases, 12 Wall, 457-681, 20 Law ed. 287, 34). "The expectation of the creditor and the anticipation of the debtor may have been that contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract, respecting its fruits, nor the anticipation of the other, constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. *Aspdin* v. *Austin,* 5 Ad. & Bl. (N.S.) 671; *Dunn* v. *Sayles, Ibid* 685; *Coffin* v. *Landis,* 46 Pa. 426. Were it not so, the expectation of results would be always equivalent to a binding engagement that they should follow. But the obligation of contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted." (Knox v. Exchange Bank of Virgina, 12 Wall. 457; 20 U. S. Supreme Court Reports, 20 L. ed., 287, 311). In said case it was held that the Legal Tender Acts of Congress which made the treasury notes legal tender for payment of debts contracted before and after their passage were not inappropriate for carrying into execution the legitimate purpose of the Government. And this Court, in Rogers v. Smith Bell (10 Phil. 319), held that "A debt of 12,000 pesos created in 1876 can now (1908) be paid by 12,000 of the Philippine pesos authorized by the Act of Congress of March 2, 1903, although at the time the loan was made which created the debt, the creditor delivered to the debtor 12,000 pesos in gold coin."

The power of the Military Governments established in occupied enemy territory to issue military currency in the exercise of their governmental power has never been seriously questioned. Such power is based, not only on the occupant's general power to maintain law and order recognized in Art. 43 of the Hague Regulations (Feilchenfeld says in his treaties on International Economic Law of Belligerent occupation, par. 6), but on military necessity as shown by the history of the use of money or currency in wars.

As early as the year 1122, during the siege of Tyre, Doge Micheli paid his troops in leather money which he promised to redeem when he returned to Venice (Del Mar, Money and Civilization, 26), and when Frederick II besieged Milan he also used leather money to pay his troops as well as in payment of wages (id. 33). When the French

forces occupied the Rhur in 1923, they finished the printing of some Reichsbank notes in process and issued them. (Nussbaum, Money in the Law, note 6, 158-59). The British during the Boer War issued receipts for requisitioned goods and made such receipts readily negotiable, an arrangement very similar to the issuance of currency (Spaight, War Rights on Land, 396). During the American Revolution the continental Congress issued currency even before the issuance of the Declaration of Independence, when the territory controlled by Congress was held in military occupation against the then legitimate government. (Dewey, Financial History of the United States, 37-38; Morrison and Commager, Growth of the American Republic, 207; Nussbaum, op. cit. supra, note 6, 172-173). The Confederacy issued its own currency in Confederate territory (Thorington v. Smith, 8 Wall. 1) and also in northern areas occupied from time to time during the war. (Spaight, op. cit, *supra*, note 19, 392.) The Japanese issued special occupation currency in Korea and Manchuria during the Russo-Japanese War of 1905. Takahashi, International Law Applied to the Russo-Japanese War, 1908, 260-61; Spaight, op. cit note 19, 397, Ariga, La Guerre Russo-Japanese, 1908, 450 et seq.) The British also issued currency notes redeemable in Sterling in London at a fixed rate of exchange in their occupation of Archangel during and after first World War. (White Currency of the Geat War, 66; League of Nations, Currency After the War, 100.)

During the World War II, the Germans had been using a variety of occupation currencies as legal tenders on a large scale, the currency initially used in most occupied areas being the Reichskroditkassa mark, a paper currency printed in German and denominated in German monetary units, which circulated side by side with the local currency at decreased rates of exchange. And the Allies have introduced notes as legal currency in Sicily, Germany and Austria. The Combined Directive of the combined Chiefs of Staff to the Supreme Allied Commander issued on June 24, 1943, directed that the task forces of the U.S. will use, besides regular U.S. coins, yellow seal dollars, and the forces of Great Britain will use besides British coins, British Military Notes (BMN), to supplement the local lire currency then in use (Hajo, Holborn, American Military Government, 1947, pp. 115, 116). The Combined Directive for Military Government in Germany, prior to defeat or surrender, of April 28, 1944, directed the United States, British and other Allied forces to use Allied military mark and Reichsmark currency in circulation in Germany as legal tender and the Allied Military Marks will be interchangeable with the Reichsmark currency at the rate of Allied Mark for Reichsmark; and that in the event adequate supplies of them were not available, the United States forces will use Yellow seal dollars and the British

forces will use British Military Authority (BMA) notes. (Holborn, op. cit. *supra*, p. 140). And the Americaan Directive o nthe Military Government of Austria of June 27, 1945, ordered that the United States forces and other Allied forces within Austria will use only Allied Military Schillings for pay of troops and other military requirements, declaring it legal tender in Austria interchangeably with Reichsmark at a rate of one Allied military schilling for one Reichsmark. Holborn, op. cit. supra, p. 192).

In the above cited case of Thorington v. Smith, the Supreme Court of the United States said.

> "* * * While the war lasted, however, they had a certain contingent value, and were used as money in nearly all business transaction of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistable force.
>
> "It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it has been issued by a foreign government, temporarily occupying a part of the territory of the United States."

According to Fielchenfeld in his book "The International Economic Law of Belligerent Occupation," the occupant in exercising his power in regard to money and currency may adopt one of the following methods according to circumstances: (1) When the coverage of the currency of the territory occupied has become inadequate as found in several Balkan countries during the War of 1914-18, and "the local currency continues to be used, an occupant may recognize the national currency by appropriate methods, such as the creation of new types and supplies of coverage" (par. 272). (2) The occupant may, and not infrequently, use his own currency, in the occupied region. But this method may be found incomvenient if the coverage for their national currency had already become inadequate, and for that reason authorities are afraid of exposing it to additional strain, and for that reason an occupant may not replace the local currency by his own currency for all currency for all purposes, and enforce its use not only for his own payment but also for payments among inhabitants (par. 285) (3) .Where the regional currency has become inadequate and it is deemed inadvisable by the occupant to expose his own currency to further strain. new types of money may be created by the occupant. Such new currency may have a new name and may be issued by institution created for that purpose (par. 296). This last method was the one adopted by Japan in this country, because the coverage of the Philippine Treasury Certificate of the territory occupied had become inadequate, for most if not all the said coverage have been taken to the United States and many million of silver pesos were buried or

thrown into the sea near Corregidor, and Japan did not want to use her national currency, and expose it to additional strains.

But be that as it may, whatever might have been the intrinsic or ex trinsic worth of the Japanese war-notes which the Bank of Taiwan has received as full satisfaction of the obligations of the appellee's debtors to it, is of no consequence in the present case. As we have already stated, the Japanese war-notes were issued as legal tender at par with the Philippine peso, and guaranteed by Japanese Government "which takes full responsibility for their usage having the correct amount to back them up (Proclamation of Jan. 3, 1942). Now that the outcome of the war has turned against Japan, the enemy banks have the right to demand from Japan, through their States or Govenment, payments or compensation in Philippine peso or U. S. dollars as the case may be, for the loss or damage inflicted on the property by the emergency war measure taken by the enemy. If Japan had won the war or were the victor, the property or money of said banks sequestrated or impounded by her might be retained by Japan and credited to the respective State of which the owners of said banks were nationals, as a payment on account of the sums payable by them as indemnity under the treaties, and the said owners were to look for compensation in Philippine Pesos or U.S. dollars to their respective States. (Treaty of Versailles and other peace treaties entered at the close of the first world war; VI Hackworth Digest of International Law, p. 232.) And if they cannot get any or sufficient compensation either from the enemy or from their States, because of their insolvency or impossibility to pay, they have naturally to suffer, as everybody else, the losses incident to all wars.

In view of all the foregoing, the judgment appealed from is reversed, and the defendant-appellee is sentenced to execute the deed of cancellation of mortgage of the property described in the complaint, and to deliver to the plaintiff appellant the Transfer of Certificate of Title No. 47634 of the Register of Deeds of Manila with the annotation of mortgage therein already cancelled, without pronouncement as to costs.

So ordered.

Moran, C. J., Parás, Pablo and *Bengzon, JJ.*, concur.

EVIDENCE — TESTIMONY OF A SPOUSE AGAINST THE OTHER

Defendant Francisco, at the time of the crime charged, was a detention prisoner, held in the municipal jail on charges of robbery. With the permission of the chief of police and accompanied by Police Sergeant Pimentel, he went home to his wife on the alleged intention of raising bail for his provisional release. On reaching defendant's house, Pimentel stayed downstairs while defendant went up to his wife. After a while, the policeman heard a woman's

scream, and on his going up the house, found defendant and his wife wounded, and their year-and-a-half old son dead. Defendant, on inquiry from Pimentel, declared that he had stabbed his son, wife, and himself because of his disgust with himself for having brought shame on his family. Defendant affirmed this declaration in an affidavit subsequently executed by him before the justice of the peace of the town.

In the trial for the parricide of his son, defendant took the witness stand and repudiated his confession previously made, alleging that the same had been extracted from him by force. His new story was that, in a moment of playfulness, his wife accidentally stabbed their son, and he, obfuscated by the injury to his child, stabbed his wife and then himself. The State presented Sergeant Pimentel and the justice of the peace before whom the affidavit of confession was made, both of whom positively testified to the voluntariness of the confession made by the accused. Over the objection of the accused, the prosecution presented further as witness, accused's own wife, the only other person present at the killing. This woman denied the imputation of the parricide made upon her by her husband, declaring positively that it was the accused himself who inflicted the wound that killed their son. Of these conflicting testimonies, the Court chose to believe those adduced by the State and convicted the accused accordingly. (People v. Juan Francisco, G.R. No. L—568, July 16, 1947).

All members of the court, possibly including dissenting Mr. Justice Feria, were of the opinion that the confession, supported by the testimonies of the sergeant of police and of the justice of the peace. was sufficient in itself to convict the accused. As was said by the majority, " . . we believe that Exhibit 'C' (the confession), contains the truth, as narrated by the accused himself who, at the time of making it, must have been moved only by the determination of a repentant father and husband to acknowledge his guilt for acts which, though perhaps done under circumstances productive of power, fell short of depriving the a diminution of the exercise of will offender of consciousness of his acts." At this phase of the case when, without a word being said further, the court could have condemned the accused with a quiet conscience, the majority did not choose to stop. It ruled on the admissibility of the wife's testimony over the objection of her husband. It is this ruling which provoked the dissenting opinion.

The majority, speaking through Mr. Justice Hilado, viewed the reasons behind Section 26 (d) of Rule 123, which disqualifies a person from testifying for or against his or her spouse without the latter's consent, except in certain cases, (in civil cases against each other, and in criminal prosecutions against one for crimes committed by one against the other). The majority, citing

Cargill vs. State, 220 P. 64, 25 Okl. Cr. 314, 35 A. L. R. 133, in justification of the rule gave these reasons: (1) identity of interest; (2) consequent danger of perjury; (3) the policy of the law which deems it necessary to guard the security and confidences of private life even at the risk of an occasional failure of justice and which rejects such evidence because its admission would lead to domestic disunion and unhappiness; and (4) because where a want of domestic tranquility exists, there is danger of punishing one spouse through the hostile testimony of the other. The exceptions to the rule were made to depend on sound reasons that outweigh, in the excepted cases, those in support of the general rule. "For instance," said the court, "where marital and domestic relations are so strained that there is no more harmony to be preserved nor peace and tranquility which may be disturbed, the reason based upon such harmony and tranquility fails. In such a case identity of interest disappears and the consequent danger of perjury based on that identity is non-existent. Likewise in such situation, the security and confidences of private life which the law aims at protecting will be nothing but ideals which through their absence, merely leave a void in the unhappy home."

The accused, said the court, laid the commission of the crime on his wife. In thus putting the blame on his wife to facilitate his defense, the accused laid his spouse open to criminal prosecution and the moral and social stigma of being branded the killer of her son. In so doing, the accused terminated the identity of interest which he had shared with his wife, thereby releasing her from the causes which had disqualified her to testify against him theretofore. The wife, in self-defense, at least, should be permitted to testify in rebuttal of the accusation. But the wife did not limit herself to rebutting her husband's testimony by denying her guilt; she testified positively against her husband by directly imputing the killing on him. This additional testimony was allowed by the court under section 3 (c), Rule 115, which authorizes the court, in furtherance of justice, to permit one or the other party to offer new additional evidence bearing upon the issue in question. In basing its ruling on this provision of law, the court considered the wife's testimony as if given when the prosecution was originally presenting its case, and the consideration was based on the doctrine of waiver.

The accused, said the court, must be deemed to have expected the most natural consequence of his testimony against his wife. He could not have justly expected to have sealed the mouth of her, who was the only person present at the occurrence, after accusing her of the crime. By testifying against her, he himself made it necessary for her to testify, and, said the court, "if the wife should, in such a case and at such a juncture, be allowed to testify upon rebuttal, the scope

of her testimony should at least be the same as that of her husband. This is only simple justice and fairness dictated by common sense. Since the husband had testified that it was his wife who caused the death of the little boy, she should be allowed to say that it was really he who did it." This is one of the cases of waiver which, in the words of the majority, "will be indefinite in number as indefinite are and always will be the varying and unpredictable circumstance surrounding each particular case."

The dissenting opinion tried to refute each of these arguments. Mr. Justice Feria, concurred in by Mr. Justice Pablo, said that the identity of interest of the spouses did not cease in this case when the accused testified that his wife accidentally stabbed their son. Far from having that effect, he said, the testimony tended to acquit the accused, so that he might be set at liberty and return to his wife that he may resume with her their conjugal life. The testimony did not lay the wife open to prosecution because it could not be used against her should she become party defendant, because of the same rule which the accused herein sought to invoke. Neither did the testimony put a social stigma on the wife in a world that recognizes her inability to answer an accusation made by her husband in his attempt to free himself from criminal liability. And it is not true, said the dissent, that there is not here the inducement to perjury, for the simple wife, possibly believing that the accusation of her husband was available against her to bring about her conviction, might have testified against him only to escape responsibility. The Justice attempted to define the scope of the privilege, saying that the pohibition relates to cases in which the testimony of a spouse is offered for or against the other in a proceeding to which the other is a party. The law does not bar testimony that disparages or disfavors the other who is not a party to the cause. And the obvious reason is that while the testimony against the spouse who is not a party is admissible, it cannot be used against such spouse in any civil or criminal action to which he or she might be a party, so that it would not effectively strain the marital and domestic relations. In effect, the dissenting opinion recognizes a sanctuary from prosecution in the conjugal relation, so that an accused spouse may lay the blame for a crime on the other without harming such spouse, who, in his own trial, may return the accusation, equally without harm.

The wife's testimony could not be admitted on the doctrine of waiver, said the dissenting opinion, because there was no waiver in this case. Justice Feria quoted Wharton, which the majority also cited, on waiver. The citation gave two instances of waiver of marital incompetence: (1) presenting the spouse by one who is deemed to have waived such spouse's incompetence; (2) failure to object in time to such spouse's introduction as witness. But the mino-

rity did not agree with the majority that there were infinite instances of waiver. According to the former, all authorities on evidence cite only two instances because those are the only instances of waiver of marital incompetence, neither of which was applicable to this case because the accused did not present his wife to testify in his defense, and he objected strenously to her introduction as witness by the prosecution.

The provision of law applicable to the case and so variously applied by the members of our courts runs as follows: "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil case by one against the other, or a criminal case for a crime committed by one against the other." (Rule 123, sec 26 (d), Rules of Court). We are interested, for the present, only with the first part of the rule, and, for the purpose of this study, only in its application to criminal cases.

This rule is the modern expression of what has long been a common law rule. In its original form, the rule excluded totally any and all testimony by one spouse against the other, who, in the words of Lord Coke, "quae sunt duae animae in carne una." But lest the privilege be a license for the husband to injure his wife in secret with complete immunity, various courts have ruled, and statutes have been enacted, declearing that the privilege did not apply in criminal prosecutions for "crimes committed by one spouse against the other." The further exception permitting the waiver of the privilege by consent is similar to the corresponding rule in other jurisdictions. The rule, therefore, in its present form as promulgated by our court, prohibits a spouse from testifying for or against the other unless the other consents. And the rule does not apply at all if the prosecution is for an offense committed by one against the other. The first inquiry then is, whether the present prosecution is for such crime committed by the husband against his wife as to permit the wife to testify against her husband over his objection.

What may probably be the closest approach to a defination of a "crime committed by one spouse against the other" is stated in Dill vs. People, (19 Colo. 469, 475, 36 Pac. 229, 232, as quoted in Wilkinson vs. People, 86, Colo. 406, 282 Pac. 257): "Since some private wrong or injury is included in every crime, it is evident that the word 'crime' in that clause of the statute which permits the husband or wife to testify against the other in a criminal action or proceeding for a 'crime committed by one against the other' means the private wrong or injury included in such public crime. The word must have such a meaning, or the statue is meaningless. It follows

that a wife is competent to testify against her husband, in a criminal proceeding, whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted." The case, Cargill v. State (Supra) used the words, "directly at tacks, or directly and vitally impairs, the conjugal relation," as defining this sort of crime. Personal assault and battery fall undoubtedly under these definitions. Various courts have included various other offenses, as the following cases will show. In the Philippines, adultery (U.S. v. Feliciano, 36 Phil. 753) and bigamy (U.S. v. Orosa, 7 Phil. 247) have been classed in this category. In the United States, the same has been said of divorce proceedings and perjury to obtain divorce. (West v. State, 13 Okl. Cr. 312, 164 Pac. 327) Causing ones wife to abort by the forcible use of instruments has also been so held in Commonwealth v. Allen. (191 Ky. 624, 16 ALR 484). But, as has been said in Cargill vs. State (supra.): "The reasons applicable to bigamy do not apply to cases of abortion, rape, incest, sodomy, etc. By the weight of authority, these are crimes against society and common decency, rather than against the marriage state. The abrogation of the rule in these cases might operate as a fraud against the one accused, even though innocent, as the easiest way to terminate the marriage relation." Rape, however, of a married woman by a third person with the connivance of her husband has been held to be a crime of the husband committed against his wife. (Victor v. Commonwealth, 221 Ky. 350, 298 S. W. 936) Of the same are pimping by the husband—living on the wife's earnings as a prostitute, enticing her for the purpose of prostitution (Denning v. U. S., 5th C.C.A., 247 Fed. 463), and Wilfull failure of the husband to provide his children with necessary food, clothing, shelter, and medical attendance. (Hunter v. State, 10 Okl. Cr. 119, 134 Pac. 1134) But in State v. Woodrow (58 W. Va. 527, 52 S. E. 545) and later in Grier v. State (158 Ga. 321, 123 S. E. 210), cases of almost indentical facts, the husband who shot at his wife but succeeded only in wounding her and killed their child instead, was permitted to object successfully against the inclusion of his wife's testimony in the prosecution for the killing of the child. Our own court followed this precedent in People v. Natividad (40 O. G. No. 12, (8th Supplement), p. 150), a case for certiorari and mandamus in relation to a criminal prosecution wherein a certain Amalan was accused of having killed the natural child of his wife by some other man. The wife attempted to testify, and Amalan objected, his objection being sustained by the lower court. The Supreme Court denied the writs of certiorari and mandamus to the prosecution, declaring among other things: "La prohibicion es clara y la excepcion no es aplicable al caso. No hay consentimiento de ambos esposos ni se trata de un delito

cometido por el contra la otra. La razon de la prohibicion, que es fundamentalmente la ficcion legal de la identidad de los esposos, en virtud del matrimonio, no existe en cuanto al hijo de uno de los conyuges. Aunque hay casos en los Tribunales de los Estados Unidos en que se ha extendido esta excepcion a delitos cometidos por un conyuge contra un hijo de otro conyuge, hay otro muchos en que se ha sostenido la teoria contraria en favor de la cual milita el peso de las autoridades."

If the weight of authority, then, is against the wife's testifying at the instance of the prosecution, could she have testified in rebuttal? Under the law she could have done so only in answer to testimony impropery admitted for the prosecution or if her husband had consented. The court did not distinguish the two grounds, and we do not find it necessary to go farther than the court did. The only inquires left are: Was Francisco's testimony accusing his wife of the crime improperly admitted, and considering that it was admitted, properly or improperly, did it constitute consent on Francisco's part to his wife's testifying against him?

Chief Justice Moran, in his Comments on the Rules of Court (2nd Ed., Vol. III, p. 9), states that "Improper evidence admitted on one side without objection, does not give the other side the right to introduce in reply the same kind of evidence if objected to; however, when a plain and unfair prejudice would otherwise inure to the opponent, the court may permit him to use a curative counter-evidence to contradict the improper evidence presented." If Francisco's testimony, therefore, was improperly admitted, even without objection, there might be ground for the admissibility of his wife's testimony as curative evidence. If Francisco's testimony was properly admitted, it seems obvious that it could not have invested his wife's testimony with any amount of admissibility, which testimony, has been found in the preceding discussion to be inadmissible. Was Francisco's testimony inadmissible?

In the case of U. S. v. Concepcion (31 Phil. 182), our court ruled on a similar set of facts, although the question was not squarely raised. In that case, the accused's house had been searched by policemen, and the accused, a married woman, had been apprehended with a can of opium in her hands. It was her husband, however, who was arrested and prosecuted, only to be acquitted. Months later, the accused was prosecuted under the Opium Law in the case that we are now discussing. Without objection from her husband or the State, she was permitted to testify that her husband had ordered her to take the can of opium from its hiding place and throw it away, and it was while obeying this order that she was apprehended. This testimony, patently adverse to the husband who was a confirmed opium addict, was not even adverted to by the court as constituting waiver when it ruled against the introduction of the hus-

band's testimony against the wife. The only difference between the Concepcion and the Francisco cases, in so far as curative admissibility is concerned, is that in the former, the other spouse had already been acquitted, while in the latter, the other spouse may yet be prosecuted. Authorities in the United States, including those cited in the following discussion, tend to hold that the difference is immaterial.

It is now uniformly held that the privilege may be invoked only by a *party* to a cause whose spouse is being presented for or against him or her. As Professor Wigmore says, "In examining then the rule in this respect, it is to be undestood that by the orthodox view the privilege applies only in favor of a person against whom as a party to the cause the testimony of a wife or husband is offered. When the testimony offered does no more than discredit the character or disparage the veracity of the witness's husband or wife, not being a party, the case is clearly without the privilege, although a few courts chivalrously proclaim here also a privilege." (Sec. 2235, p. 242). An English court put it thus,: 'I take the rule on this subject to be that in civil actions where the husband is no party, the wife may be called as a witness even to facts which, if proved in another action to which her husband is a party, and by evidence other than her own, may go to charge him. The unavailing testimony of the wife in such a case, entirely impotent as it relates to the husband, producing him no loss, and consequently exciting in him no displeasure, will not violate the reason of that policy which, in respect to the harmony to be desired in the marriage state, has given rise to to the rule in question." (Baring v. Reeder, 1 Hen & M. 154, 168)

Where the spouses are co-defendants in a cause, either may invoke the privilege to disqualify the other from testifying for or against him or her, for both are parties to the cause in which the spouse's testimony is being offered. But where a man and his wife have been charged with an offense and the husband has been separated from the cause by conviction, such husband cannot prevent his wife from stating facts adverse to him in her trial, for he is no longer a party in her case. (R. vs. Williams, 8 C & P 284). Neither may he invoke the rule if he has previously been acquitted, (State vs. Goforth, 136, No. 11). Of the same class is the case of man and wife jointly indicted but separately tried (Campbell v. State, 133 Ala. 158, 32 Co. 635); or separately indicted, although for the same offense (People v. Langtree, 64 Cal. 256, 30 ac. 813). In all these cases, the party-spouse may testify in his behalf, and the other spouse may not invoke the privilege because she is not a party in the case. It has never been held that such party-spouse, in offering testimony which discredits the character of, attributes misconduct, to or tends to accuse his spouse, has impliedly waived this privilege by rendering it

necessary for his spouse to fend off the "social stigma" which he has cast on her. In all these cases, the party-spouse is free to testify, and it has never been held that his exercise of this right unshackled his wife from her disqualification. His testimony has always been treated as proper, and no court yet, to our knowledge, except ours in the present instance has found it necessary to admit improper evidence to rebut such evidence properly admitted. This has been so because his testimony is "impotent as it relates to his wife," and therefore, "does not violate the reason of that policy which, in respect to the harmony to be desired in the marriage state, has given rise to the rule in question." (Baring v. Reeder, supra)

Our court has chosen to differ from this line of decisions. In differing, it has chosen for its point of departure a premise that seems too broad to be the major of an unerring conclusion. Under the court's premise, the declaration of a party against his spouse who is not a party terminates the identity of interests of the spouses to such a degree as to warrant the presentation of the wife against the declaring husband. A declaration, to bring about this result, must lay the wife open to criminal prosecution or stain her with a *social stigma.* No doubt, the court proposes to define this latter term through the "impact of particular decision," in the present instance, the brand of being the killer of one's own child. But if, as has been stated by the Supreme Court of the United States, "A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct," (Bassett v. U.S., 137 U.S. 496, 11 Sup. Ct. Rep. 165) then a confession of murder by an accused is against his spouse, warranting her introduction as witness for the State, as laying upon her the social stigma of being wedded to a murderer. The court could not have intended this conclusion.

Our court refused to answer the argument that the husband's testimony could not have terminated the community of interest of the spouses because such testimony was unavailing, in law, against his wife. It refused to consider the fact that although the wife could not object in this trial to the testimony of her husband, yet if such testimony were offered in her own trial for the crime which the testimony tends to establish, she could object to its introduction. The court's failure in this respect, we believe, was hardly conducive to a correct conclusion. As has been said by Wigmore (p. 240), the testimony of a person against his spouse who is not a party is, as far as it concerns such spouse, no more than an extrajudicial declaration to a neighbor. No rule of evidence provides that after proof is shown that a man has, out of court, imputed on his wife the crime the commission of which he is charged such wife may be introduced as witness against him because, by making it necessary for

her to testify in order to refute the charge that lays upon her a social stigma, he has waived the privilege of marital incompetence. Our court, by attributing the consequence that it gives in this case a declaration against a non-party spouse, in effect declares that an exta-judicial declaration can have such a result.

Because of the accused's previous confession in this case, the court was convinced that his testimony attributing the crime to his wife was a patent lie, and the chivalry of the court was pricked that such a dastardly prevarication that tends to accuse a clearly innocent spouse whose child had been killed should remain for a moment in the court's record unrefuted. To permit the refutation, it resorted to this doctrine of social stigma, perhaps overlooking the chance to erase this stigma, if it exists, by declaring clearly in its decision that the accusation was false and it believed the wife to be innocent. Had the facts been different, so that there was reasonable ground to believe that the husband might have been telling the truth when he laid the blame of the killing on his wife, would the doctrine of social stigma have availed the court in permitting the wife to testify in condemnation of her husband? The husband could not have used his knowledge to condemn his wife, and he might not have desired so to use such knowledge. Our court now says that he cannot even use such information in his own defense without incurring the risk of having his wife, who was the only other person present in the occurrence, testify against him. There is ample ground for the dissenting Justice to say that the imputation of the crime upon the wife was a device of defense that Francisco resorted to in order to free himself from criminal liability and resume his conjugal life with his wife. There was no termination of interest in such a case, and the policy of the law was not infringed. The infringement of the policy was in the introduction of the wife to defeat such defense. The latter step might, indeed, be the best way of testing the husband's testimony, but the rule of marital incompetence did not intend that the truth be arrived at by the conflicting testimony of the spouses. As our court said, it, in fact, contemplated the "risk of an occasional failure of justice." If our court believed that the injustice which the rule permitted outweighed the benefit sought to be derived therefrom by securing the harmony of the home, it should have repealed the rule, as it was in its competence to do. We believe it hardly proper for the court to riddle its own rule with this loophole of the "social stigma." And the wife should not have been permitted to testify as she did in this case.

M. A. T. CAPARAS

LAND REGISTRATION; CONCLUSIVENESS OF TITLES:

The respondent purchased a parcel of land from the registered owner thereof and as a consequence received a new transfer certificate of

title in his own name. Respondent has been declared owner of said parcel of land by a decision of the Court of First Instance of Cebu and subsequently affirmed by the Court of Appeals. The petitioner seeks to reverse this decision, contending that the original owner had sold to him said parcel on installment basis, although he admits that said contract was never registered. The Supreme Court, citing Visayan Surety & Insurance Corp. v. Veroza, 40 O.G. 1209, June 17, 1941, maintained the poverbial indefeasibility of a torrens title by holding that "there is no other owner of a property registered under the Torrens system than in whose favor a certificate of title has been issued." (Jurado v. Flores, G.R. No. L—1365, Nov. 14, 1947.)

The principle of conclusiveness of title is inherent in the Torrens system of land registration introduced by Robert Torrens (45 Amer. Jur., 658, 667), embodied in Act No. 496, section 38 of which provides that "Every decree of registration shall bind the land, and quiet title thereto, subject only to the exception stated in the following section. It shall be conclusive upon and against all persons including the Insular government and all the branches thereof, whether mentioned by name in the application, notice or citation, or included in the general description 'to whom it may concern'. Such decree shall not be opened by reasons of the absence of infancy or other disability of any person affected thereby nor by any proceeding in any court for reversing judgments or decrees; subject, however to the right of any persons deprived of land or of any estate or interest therein by decree of registration obtained by fraud to file in the Court of Land Registration a petition for review within one year after entry of the decree, provided no innocent purchaser for value has acquired an interest."

Construing the above mentioned section, the Court had held that "the provision of Act No. 496, section 38, seems to prohibit absolutely the raising of any question concerning the validity of a title of land registered under the Torrens system after the expiration of one year. We are of opinion that the prohibition contained therein apply to every claim of whatever nature which persons may have had against registered land." (de los Reyes v. Paterno, 34 Phil. 420)

The Supreme Court has repeatedly stated and enforced the doctrine that a decree of registration is conclusive upon and against all persons. (Legarda v. Saleeby, 31 Phil. 590; Acantilado v. Santos, 32 Phil 350; Government of P.I. v. Arias, 36 Phil. 194; Aquino v. Director of Lands, 39 Phil. 850; Government of P. I. v. Zamora, 41 Phil. 905) In Legarda and Prieto v. Saleeby (31 Phil. 590), plaintiff and defendant occupied as owners adjoining lots separated by a stone wall located on plaintiff's lot. Plaintiff registered his lot in 1906 while defendant registered his in 1912. The strip of land occupied by the wall was in-

cluded in both cases, although it was not a joint wall. The question to be decided was the ownership of said strip of land. The Supreme Court through Justice Johnson said: "The real purpose of the Torrens system is to quiet title to land; to put a stop forever to any question of the legality of the title, except claims which were noted at the time of registration, in the certificate, or which may arise subsequent thereto. That being the purpose of the law, it would seem that once a title is registered the owner may rest secure, without the necessity of waiting in the portals of the court or sitting in the '"mirador de su casa" to avoid the possibility of losing his land. Of course it cannot be denied that the proceeding for the registration of land under the Torrens system is judicial (Escueta v. Director of Lands, 16 Phil. 482). It is clothed with all the forms of an action and the result is final and binding upon all the world. It is an action in rem. While the proceeding is judicial, it involves more in its consequences than does an ordinary action. All the world are parties, including the government. After the registration is complete and final and there exists no fraud, there are no innocent third parties who may claim an interest. The rights of all the world are foreclosed by the decree of registration." It was intimated that the court in land registration cases is always inclined to take into consideration the nature and purpose of the Torrens system. The prime purpose of this system according to Justice Malcolm in the case of Government of P.I. v. Abural et al (39 Phil. 996), is "to decree land titles that shall be final, irrevocable and indisputable. Incontestability of title is the goal. All the due precaution must accordingly be taken to guard against injustice to interested individuals who, for some good reasons, may not be able to protect their rights. Nevertheless even at the cost of possible cruelty which may result in exceptional cases, it does become necessary in the interest of the public weal to enforce registration laws. No stronger words can be found than those appearing in section 38 of the Land Registration Law. . . ." In substantially the same language was the ruling in Director of Lands v. Abada (41 Phil. 71). In other words, Act No. 496 has for its goal the complete extinguishment, once and for all, of rights adverse to the recorded title (Aquino v. Director of Lands, 39 Phil. 850), for registration creates an indefeasible title (Suico v. Compahinay, 61 Phil. 1013).

In Quimson v. Suarez, 43 Phil. 901, two leases relating to a registered land were executed. The later contract was registered and the certificate of title issued did not contain any intimation of the existence of a prior lease, although the later lessee had knowledge that the prior lessee was in physical possession of the land. It was held that an unrecorded lease operates only as a contract between the parties and does not affect the rights of

third parties in the absence of fraud. One of the principal features of the Torrens system of land registration is that all incumbrances on the land or special estates therein shall be shown or at least intimated upon the certificate of title and a person dealing with the owner of the registered land is not bound to go behind the certificate and inquire into transactions, the existence of which is not there intimated. It is, therefore, sufficient in dealing with land registered and recorded under the Torrens system to examine the record alone for the purpose of ascertaining the real status of the title to the land. (Legarda v. Saleeby, 31 Phil. 590)

The conclusiveness of the decree of registration is extended to *transfer* certificates of title issued pursuant to Act. No. 496. Under section 39, Act No. 496, where a person holds a transfer certificate of title in good faith and for valuable consideration his title cannot be questioned. But where such a holder is in bad faith, the title is defeasible. (Ignacio v. Chua Hong, 52 Phil. 940). So in an action between Siochi and David, a partition was ordered on January 8, 1919 and commissioners were accordingly appointed. For reasons unkown, David obtained a Torrens certificate of title for said land in a cadastral case and then sold the land to Tuazon, the deed containing a recital that one-half of the land so sold was in dispute between vendor and Siochi and that the vendor was merely subrogated to the rights and obligations of the vendor. The deed was registered but through negligence of the register of deeds the reservation made in respect to the land in dispute with Siochi was not entered upon the certificate of title. After the commisioners fixed the shares of each, the question presented is the right of Tuazon. The court held that "A purchaser of registered land who takes a certificate of title for value and in good faith holds an indefeasible title to the land. A purchaser who buys a registered land with full notice of the fact that it is in litigation between the vendor and a third party is not a purchaser in good faith within the meaning of section 39 of the Land Registration Act but stands in the shoes of his vendor and his title is subject to the incidents and results of the pending litigation; his transfer certificate of title in that respect will not afford him special protection. (Tuazon v. Reyes and Siochi, 48 Phil. 844).

Where a person takes a transfer certificate of title with a full knowledge that his immediate predecessor in interest acquired the title of the land conveyed through fraud, he cannot be regarded as a bona fide holder of the certificate. In Angelo v. Director of Lands (49 Phil. 838), the applicant secured a certificate of title by a delibrate misrepresentation and prevented notification to adverse claimants, and then made a transfer to Pacheco, who was fully aware of said fraud. The court held that Pacheco was not a bona fide holder.

When once a decree of registration is made under the Torrens system and the time (one year) has passed within which the decree may be questioned, the title becomes perfect. There would be no end to litigation if every obstinate litigant could, by repeated appeals or actions, compel a court to listen to criticisms of its opinions or speculate on chances from changes in its membership. The very purpose of the Torrens system would be destroyed if the same land may be subsequently brought under a second action for registration. (Great Western Telegraph o. v. Burnham, 162 U.S. 339; Reyes v. Borbon, 50 Phil 791)

It is solely on the ground of fraud, which however the majority deny as established by proof, that Justice Perfecto based his dissent. In his dissent, he stated that "The certificate of title issued in the name of Atty. Leyson and Flores are both tainted with fraud. They should be declared null and void. There is the kind of legal technicality that may serve as a cloak so that the authors of the fraud enjoy unhampered the profits of their evil doings and bad faith."

GENEROSO J. JACINTO