# NOTES AND COMMENTS:

## Natural Children—Complex Action for Recognition and Partition

As may be intimated from its name, the complex action of recognition and partition refers to a suit that may be maintained by a natural child to demand recognition from his parents or other relatives [1] and to ask for a partition of the property to which he is entitled as an heir. More accurately, said action may include any ulterior relief to which a person having the character of an heir may lawfully demand,[2] as for instance, the recovery of real property.[3] Two forms of relief, therefore, closely related to each other, nay, one dependent upon the success of the other are sought to be obtained in a single proceeding. The action for the partition or recovery of property [4] complements the action for acknowledgment.[5] Under the present rulings of the Supreme Court, both actions need not be instituted separately but may be joined in one action. As will be seen later, it may not even be necessary for the plaintiff to expressly pray for both reliefs in his pleadings.

### DEVELOPMENT OF THE ACTION

As early as the case of Conde v. Abaya [6] our Supreme Court recognized as included within the jurisdiction of the probate court the power to determine whether a person is a natural child acknowleged by the decedent or not. The basis for this power lies in the fact that such determination must necessarily be made by the court in declaring who the heirs of a decedent are before the distribution of the latter's property.[7] In that case, it becomes necessary for the alleged natural child to intervene in the testate or intestate proceedings of his alleged natural parent during the distribution of the

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[1] In case of the death of the parents during the natural child's minority, from the relatives of the decedent who are his heirs. Art. 285, New Civil Code. Conde v. Abaya, 13 Phil. 248; Serrano v. Aragon, 22 Phil. 10.

[2] Briz v. Briz, 43 Phil. 763, 768.

[3] Suarez v. Suarez, 43 Phil. 901; Briz v. Briz, *supra*.

[4] Which is the ultimate purpose of a natural child asking for recognition in most cases, if not in all of them.

[5] Which is the natural child must first establish as a basis for the right of partition or recovery.

[6] 13 Phil. 248.

[7] In Jimoga-on v. Belmonte, G. R. No. L-1605, it was said: "The jurisdiction of the probate court includes the power to entertain the question of whether or not a person is a natural child acknowledged by the decedent." In Lopez v. Lopez, 37 O. G. 3091, it was said: "Inasmuch as the recognition of her status is a prerequisite to her right to heirship, her prayer that she be declared a universal heiress implies a like

estate of the deceased.[8] Cases, however, came before the court which did not involve testate or intestate proceedings but which were instituted as ordinary civil actions by an alleged natural child and which sought to recover certain parcels of land or for the partition of the same. The complaints in these actions [9] did not expressly ask for compulsory recognition as a natural child of the deceased. However, since the right to the relief asked for rested upon the fact that the natural child was an heir of the deceased, which latter status depends on whether the child was acknowledged or not,[10] the court found it indispensable to first ascertain whether the said child was in fact acknowledged, or, whether he could be acknowledged by the natural parent. Upon the pleadings seeking for the partition or recovery of property, with an allegation that the plaintiff is an acknowledged natural child of the decedent, the court assumed the jurisdiction to hear and decide whether said child was or could be acknowledged by his natural parent in spite of the absence of a prayer to that effect in the complaint. This procedure was first announced in the leading case of Briz v. Briz [11] and in support thereof, the court relied on its former rulings enunciated in the cases dealing with testate or intestate proceedings wherein the intervention of an alleged acknowledged natural child in the distribution of the estate authorized the court to pass upon the question of recognition of said child.[12] This doctrine was followed by the court in the subsequent case of Suarez v.

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prayer that she be recognized as an acknowledged natural child." The distribution of the property takes place only after the payment of the debts, funeral charges, expenses of administration, allowance to widow and inheritance tax, if any. Rule 91, section 1; Conde v. Abaya, *supra;* Severino v. Severino, 43 Phil. 343; Lopez v. Lopez, *supra;* Jimoga-on v. Belmonte, *supra.*

[8] Capistrano v. Fabella, 8 Phil. 135; Conde v. Abaya, *supra;* intimated in Ramirez v. Gmur, 42 Phil. 855; Severino v. Severino, *supra;* Gaas v. Fortich, 54 Phil. 196. A natural child may, in an intestate or testate proceedings, intervene in the appointment of an administrator or oppose the probate of a will upon a showing of a *prima facie* evidence of his status as an acknowledged natural child. Asinas v. Court of First Instance, 51 Phil. 665.

[9] Briz v. Briz, *supra;* Suarez v. Suarez, *supra.*

[10] In Briz v. Briz, *supra,* it was said: "In the present case, there being now in existence no legitimate descendants or ascendants of Maximo Briz, his more remote kin, of whom Vivencia Briz is apparently one, would be entitled to inherit his property in case the plaintiff is not recognized." p. 768.

[11] *Supra.*

[12] It was said in Briz v. Briz, *supra:* "The conclusion above stated, though not heretofore explicitly formulated by this court, is undoubtedly to some extent supported by our prior decisions. Thus we had held in numerous cases and the doctrine must be well-settled, that a natural child having a right to compel acknowledgment but who has not been in fact legally acknowledged may maintain partition proceedings for the division of the inheritance against his co-heirs (Siguiong v. Siguiong, 8 Phil. 5; Tiamson v. Tiamson, 32 Phil. 62); and the same person may intervene in the proceedings for the distribution of the estate of his deceased natural father or mother (Capistrano v. Fabella, 8 Phil. 855). In neither of these situations has it been thought necessary for the plaintiff to show a prior decision compelling acknowledgment." p. 769.

Suarez,[13] in Lopez v. Lopez,[14] and lately, in the case of Escoval v. Escoval.[15] It is worthy of note that in the leading cases of Briz v. Briz and Suarez v. Suarez, the court implied the existence of the other action, that of recognition, from the complaint asking for partition or recovery of property.[16] Viewed in the light of these cases, it is safe to say that in an action by an alleged acknowledged natural child to ask for the partition or recovery of property, the court will assume that the action also carries with it that of compulsory recognition when the same is proper.[17] For the court, however, to so imply the other action [18] as necessarily instituted, certain requisites have to be complied with. Firstly, the conditions justify the joinder of the two causes of action,[19] secondly, that the plaintiff had impleaded all persons who would be necessary parties defendant to an action to compel acknowledgment,[20] and lastly, that an allegation be made that the plaintiff is an acknowledged natural child of the decedent. It may be observed that the principle laid down in these cases rests on a sound basis. If in testate or intestate proceedings, it is appropriate to declare a person a natural child acknowledged by his parent and award him his corresponding share as such heir in the same proceedings, there seems to be no valid reason why the same could not be done in an ordinary civil action subject to the rule on joinder of causes of action.[21] Also, the requisites for said action being present, the plaintiff should not only be entitled to such relief prayed for but also for such other relief as he is entitled upon his pleadings.[22] Finally, it may be said that said course of action adopted by the court avoids multiplicity of suits.

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[13] *Supra.*

[14] *Supra.*

[15] G. R. No. L-2712, promulgated, Oct. 25, 1950.

[16] It was stated in Suarez v. Suarez, *supra:* "The present action must therefore be considered in the nature of a complex action in which the plaintiff seeks to obtain a judicial declaration of her status as a recognized natural child and at the same time to procure a division of the estate pertaining to * * * (the) deceased, and to recover from his legitimate children * * * the proportionate part pertaining to the plaintiff as one of the co-heirs." p. 905 and p. 904, respectively. In Briz v. Briz, *supra,* it was said: "Reverting now to the complaint, it will be noted that it is in the form commonly used in a reivindicatory action for the recovery of land, and the plaintiff seeks to recover solely * * * as heir * * *. She does not ask for a decree compelling the defendants to recognize her as a natural child; * * * The question whether a person in the position of the * * * plaintiff can in any event maintain a complex action to compel recognition and at the same time to obtain ulterior relief * * * is one which in the opinion of this court must be answered in the affirmative. * * *" p. 768.

[17] That is, all the requisites necessary for this type of action are met.

[18] The action of compulsory recognition.

[19] Joinder is permissible as implied from the ruling of Briz v. Briz, *supra.* In Escoval v. Escoval, *supra,* the court expressly ruled the propriety of the joinder of the actions for recognition and partition or recovery under Rule 3, section 5, Rules of Court.

[20] Briz v. Briz, *supra,* p. 768.

[21] Rule 3, section 5, Rules of Court. As stated elsewhere, the joinder of the two causes of action, recognition and partition has been held proper.

[22] See Rule 36, section 9, Rules of Court. In Lopez v. Lopez, *supra,* the court held: "Furthermore, it is a well-settled rule of pleading, though part of the pleading,

## AN ASPECT THE SUPREME COURT OVERLOOKED

Based upon the obseravtions made, as supported by the cases cited, a necessary corollary would be that in an action to recover or to ask for a partition of real estate by an alleged acknowledged natural child from which, as seen above, the action to compel recognition is deemed implied, the defendant is duty-bound to interpose all defenses available not only against the action for partition or recovery of property which is expressly instituted by the plaintiff but also against that which is deemed implied from it, namely, the action for recognition. Consequently, any defenses that the defendant fails to set up in his answer as to either action shall be deemed waived by him.[23] With this proposition as a basis, it is believed that some of the Supreme Court decisions regarding the complex action of recovery or partition and recognition stand open to some comments.

In the case of Suarez v. Suarez [24] it appears that the plaintiff was an alleged acknowledged natural child of Manuel Suarez. She filed an action to recover her portion of the estate of her deceased father from the four legitimate children. The court considered the action as a complex one following the earlier case of Briz v. Briz. But as she instituted the action after the expiration of two years [25] within which she should have brought an action to compel acknowledgment, the court ruled, "It results that at the time this complaint was filed, any action to compel acknowledgment had prescribed." [26] The defense of prescription of action does not appear to have been raised by the defendant nor touched upon in the decision of the lower court.[27] Briefly, then, the situation of the case is as follows: In an action for recovery of real property, the court also implied the action

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is not part of the cause of action or defense, alleged therein and the pleader is entitled to as much relief as the facts fully pleaded may warrant. (Rosales v. Reyes, 25 Phil. 495; Aguilar v. Gonzalez-Villa, 40 Phil. 670; Ybañez Barnuevo v. Fuster, 29 Phil. 606; Allarde v. Abaya, 57 Phil. 909. Cf. Cohen and Cohen v. Benguet Co., 24 Phil. 526, 533)."

[23] Rule 9, section 10, Rules of Court. In the dissenting opinion of then Justice Moran in the Lopez case, *supra*, it was stated that the failure to set up prescription as a defense will be regarded as a waiver of the same, citing the following cases: Domingo v. Osorio, 7 Phil. 405; Pelaez v. Abreu, 26 Phil. 415; Karagdag v. Barado, 33 Phil. 529; Calma v. Calma, 56 Phil. 102; Sesuya v. Lacopia, 54 Phil. 534; Aldeguer v. Horkyn, 2 Phil. 500; Harty v. Luna, 13 Phil. 31; Marzon v. Udtujan, 20 Phil. 232; Maxilom v. Tabotabo, 29 Phil. 390; Sunico v. Ramirez, 14 Phil. 500; U. S. v. Serapio, 23 Phil. 844. This part of the discussion applies with equal force to the case of an intervention by an alleged acknowledged natural child in the testate or intestate proceedings to demand her share in decedent's estate as an heir.

[24] *Supra.*

[25] The period of four years in article 137 of the old Civil Code within which the action for acknowledgment should be filed in case of death of parents during the child's minority was modified to two years by section 44 and 45 of the Code of Civil Procedure. Under the new Civil Code, there has been a reversion to the four-year period. Article 285, paragraph 1.

[26] p. 906.

[27] This could be gleaned from the decision of the Supreme Court which mentioned the lower court's decision. See p. 905.

for recognition and as the latter action should have been instituted within two years after attaining majority, which was not the case, the whole action fell through, since the action for recognition had then prescribed. The court either disregarded or failed to take into account the rule on waiver of defenses.[28] While prescription is a valid defense, the defendant's omission to plead it in his answer should have been deemed as a waiver. It was the defendant's duty to have set up defenses not only against the action for recovery or partition of property but likewise against the action for acknowledgment. If the court's decision were solely based on this ground,[29] the court should have proceeded with the case, notwithstanding the fact that the complaint was filed out of time in so far as the action for recognition was concerned.

In another case, that of Gitt v. Gitt,[30] the same oversight was made more manifest. In said case, Mike and Violeta Gitt, alleged natural children of William Gitt, sought to recover their shares from their alleged father's estate and be declared his heirs. Opposition was filed by the surviving widow. As the petition was not filed within four years [31] during which it should have been commenced, it was held that the action had already prescribed. Prescription of action was not relied upon by the oppositor, nevertheless, the court held that said defense could not have been interposed, the applicant having failed to bring a separate action to compel acknowledgment.[32] Does the court mean that a separate action has to be instituted to compel recognition and another action to recover as heirs? To so hold would be running afoul of the established doctrine of the propriety of complex action. In fact, there was much less reason for the court to deny the relief expressly prayed for as well as that implied [33] considering that the proceeding in this case was more in the nature of a declaration of heirship which is founded on no less than the original principle laid down in Conde v. Abaya, an older and much firmer basis to rely on and from which the comparatively new complex action for recognition and partition or recovery [34] was sought to be justified. Just recently, the propriety of complex action was affirmed with favorable citations of Briz v. Briz and Suarez v. Suarez.[35] Seen through past decisions, it is clear that the application

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[28] Rule 9, section 10, Rules of Court.

[29] There were two other grounds on which the judgment was based, namely, that the plaintiff did not in fact enjoy the continuous possession of the status of natural child; the other was acquisitive prescription by the defendants of plaintiff's share.

[30] 40 O. G. No. 5, 2nd Supp., p. 118.

[31] This should be two years only since the decision was based on the laws in force before the new Civil Code.

[32] This is based on the discussion in the dissenting opinion of Justice Moran in the same case. p. 125.

[33] The court must first resolve the question of the status of the natural children.

[34] There is a striking similarity between intervention by an alleged natural child in the distribution of the decedent's estate in testate or intestate proceedings and ordinary civil complex action. In both cases, though the child's main purpose is to recover, the court, as shown above, has first to decide his status.

[35] Escoval v. Escoval, *supra*.

of the Gitt children was sufficient for the purpose of implying the action for acknowledgment,[36] just as seen through the preceding discussion the waiver of the defense of prescription necessarily followed from the failure to set it up in the answer. The case having arisen long after the ruling on complex action was announced, with more reason the defendant should have been on her guard as to the implications of the suit instituted by the natural children just as she is presumed to know and be held responsible for all other rulings of the court.[37] Proceeding from the law and precedents pertinent to the case, the court should have undertaken to declare the Gitt children as acknowledged by their deceased father and awarded them the shares which properly belonged to them as such heirs.[38] It may not be amiss to state here that whatever doubts the court might have entertained in the premises should have been resolved favorably to the natural children, that being the view of prominent commentators on the civil law.[39] Reliance on this just and reasonable principle would have further strengthened any decision of the court in favor of the Gitt children. As Manresa puts it, "The high principles of justice are ever favorable to the natural children and a way to improve their condition should not be closed to them, which, after all, is very unlikely to result in the social upheavals assumed by those simple souls untutored in the realities of life." [40]

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[36] The court, however, implied the action for acknowledgment in this case, as may be inferred from the fact that it dismissed the petition for having been filed out of time in so far as recognition was involved.

[37] The case of Suarez v. Suarez, *supra*, was neither the first case on this matter. If this were the first case wherein the doctrine of complex action was first enunciated, the writer is of the belief that the defendant should not be held liable for failure to set up a defense to an action of which existence he was not apprised until the court resolved that such was the case, implying it from the express action filed.

[38] The majority in the Gitt case seemed to admit that there were sufficient proofs to show that the Gitt children were in continuous possession of the status of natural children. Justice Moran, in his dissent said: "There is not the least doubt that the applicant-appellees, Mike Gitt and Violeta Gitt, have been in the continuous possession of the status of natural children of the deceased William Gitt." pp. 124-125.

[39] Then Justice Moran wrote a strong dissent in this case, concurred in by Justice Laurel. Justice Moran cited the liberal views of Manresa and Scaevola. Justice Moran himself said the following: "Those children of distracted love, who were brought into the world without their consent and under disadvantageous conditions, at times bordering on cruelty, are deserving of all the equitable considerations within the power of the courts to dispense, which courts would undoubtedly be acting in consonance with the spirits of the times, if, instead of applying the rigors of the law in all their crudeness, they were to facilitate them the means, compatible with the interest of justice to improve their lot or condition. * * *" p. 126.

[40] I Manresa, *Commentaries on the Civil Code*, p. 560. Cited in Justice Moran's dissenting opinion. p. 126.

## Contracts — Minors — Should They Be Estopped from Disaffirming Their Contracts?

This question is posed in view of the ruling laid down in the case of Sia Suan and Gaw Chiao v. Alcantara [1] which reiterates the doctrine laid down in Mercado vs. Espiritu.[2] The heart of the doctrine is:

> "The Courts, in their interpretation of the law, have laid down the rule that sale of real estate, made by minors who pretend to be of legal age, when in fact they are not, is void and they will not be permitted to excuse themselves from the fulfillment of the obligations contracted by them, or to have them annulled *in pursuance of the provisions of Law 6, title 19, of the 6th Partida;* and the judgment that holds such a sale to be valid and absolves the purchaser from the complaint filed against him does not violate the laws relative to the sale of minor's property, nor the juridical rules established in consonance therewith. (Decisions of the Supreme Court of Spain of April 27, 1860, July 11, 1868 and March 1, 1875)." [3]

This doctrine seems to have been unquestioned until the Court of Appeals in the case of Young v. Tecson,[4] decided otherwise. For in the case of Bambalan v. Maramba,[5] decided eleven years after the Mercado v. Espiritu case, we infer a recognition of the doctrine laid down in the latter from the following pronouncement of the Court—

> "As regards this minority, the doctrine laid down in the case of Mercado v. Espiritu (37 Phil. 215), wherein the former was held to be estopped from contesting the contract executed by him pretending to be of age, is not applicable herein. In the case now before us the plaintiff did not pretend to be of age; his minority was well known to the purchaser, the defendants . . ." [6]

So that if the plaintiff-minor in the Bambalan case had pretended to be of age and his minority was not known to the defendant, the ruling in the Mercado v. Espiritu case would still have been applied.

In the above-mentioned case of Young v. Tecson, however, promulgated December 13, 1938, the Court of Appeals, in a unanimous decision of its second division composed of Messrs. Justices Moran, Bengzon, Padilla, Lopez Vito and Tuason [7] refused to follow the

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[1] G. R. No. L-1720, promulgated March 4, 1950.

[2] 37 Phil. 215.

[3] 37 Phil. 215 (228).

[4] 37 O. G. No. 36, p. 953.

[5] 51 Phil. 417.

[6] 51 Phil. 417(419).

[7] We observe that, while in the Young v. Tecson case, Mr. Justice Tuason concurred in the decision, in the recent case, however, of Sia Suan and Gaw Chiao v. Al-

doctrine in the Mercado v. Espiritu case. The opinion penned by Mr. Justice Padilla states:

> "The theory advanced by the appellants that misrepresentation made by defendant as to his age estops him from denying that he was of age, or from asserting that he was under age, at the time he entered into the contract, for the breach of which this action is brought is untenable, because under the principle of estoppel the liability resulting from misrepresentation has its judicial source in the capacity of the person making the misrepresentation to bind himself. If the person making the misrepresentation cannot bind himself by a contract, he cannot also be bound by any misrepresentation he may have made in connection therewith. A person entering into a contract must see to it that the other party has sufficient capacity to bind himself." [8]

It is submitted that this should be the correct rule in this jurisdiction. The Mercado v. Espiritu case, in holding otherwise, relied on the decisions of the Supreme Court of Spain. These decisions were however based on express provisions of law, namely: Law 6, title 19, 6th Partida. This law runs:

> "If he who is a minor (1) deceitfully says or sets forth in an instrument that he is over 25 years of age,[9] and this assertion is believed by another person who takes him to be of about that age; (2) in an action at law he should be deemed to be of the age he asserted, and should not (3) afterwards be released from liability on the plea that he was not of said age when he assumed the obligation. The reason for this is that the law helps the deceived and not the deceiver."

In this jurisdiction, however, no similar law exists that may be the basis of estoppel on the part of minors who pretend to be of age when they enter into a contract.

On the contrary, basic provisions of the Civil Code on contracts point out the inherent infirmity of contracts entered into by minors. These provisions are:

> There is no contract unless the following requisites concur:
>
> (1) Consent of the contracting parties;
>
> (2) Object certain which is the subject-matter of the contract;
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> (3) Cause of the obligation which is established.[10]

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cantara, *supra*, he departed from the former's ruling, by concurring with the majority which upholds the ruling in Mercado v. Espiritu. The other Justices, however, to wit: Justices Moran, Padilla and Bengzon have remained consistent with their stand, taken on the matter, while yet in the Court of Appeals.

[8] 39 O. G. No. 36, p. 953.

[9] It is observed that under this law, the age of majority is at 25 years. It may probably be this relatively late age for majority that was the reason for this quoted provision of the Partidas. In the Philippines majority is reached at 21.

[10] Art. 1318, Civil Code.

The following persons cannot give consent to a contract:

(1) Unemancipated minors;

(2) Insane or demented persons, and the deaf-mutes who do not know how to write.[11]

The following contracts are voidable or annullable, even though there may have been no damage to the contracting parties:

(1) Those where one of the parties is incapable of giving consent to a contract;

(2) Those where the consent is vitiated by mistake, violence, intimidation, undue influence or fraud.

These contracts are binding unless they are annulled by a proper action in court. They are susceptible of ratification.[12]

An obligation having been annulled the contracting parties shall restore to each other the things which have been the subject matter of the contract, with their fruits and the price with its interest, except in cases provided by law.

In obligations to render service, the value thereof shall be the basis for damages.[13]

When the defect of the contract consists in the incapacity of one of the parties the incapacitated person is not obliged to make any restitution except insofar as he has been benefited by the thing or price received by him.[14]

Under these provisions, a minor cannot give that consent, which in law, is essential to make a valid contract.[15] And because there is no valid contract the minor may bring an action to annul the contract,[16] and if the latter is declared annulled, the parties are bound to restore to each other the things which have been the subject matter of the contract, with their fruits and the price with its interest; and when the nullity is declared, because of the incapacity of one of the parties, the incapacitated person is only bound to return what he has profited by the thing sold, or by the price received.

The provisions, therefore, seem to indicate, though clearly, that it is the duty of the person contracting with a minor to ascertain the capacity of the latter to contract; otherwise, it would not have given the minor the right to annul the contract nor limited his duty to make restitution only to the extent that he has been benefited by the thing or price received by him, in the event of the contract being declared a nullity. The situation is not altered by the fact that the minor has misrepresented himself as being of age. The misrepresentation cannot estop him because he could not give a consent valid

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[11] Art. 1327, Civil Code.

[12] Art. 1390, Civil Code.

[13] Art. 1398, Civil Code.

[14] Art. 1399, Civil Code.

[15] See Gan Tingco v. Pabinguit, 35 Phil. 81 (88-89).

[16] See Art. 1391, Civil Code.

in law. True, this contention protects the minor, apparently in an undue manner, but it is precisely the protection of the minor that is the spirit and the policy behind these civil code provisions.

And this view seems to be supported by the doctrine in the United States cited in the concurring opinion of Mr. Justice Carson in Mercado v. Espiritu, *supra*. The citation reads:

> Estoppel to disaffirm—(1) In General—The doctrine of estoppel not being as a *general rule applicable to infants*, the Court will not readily hold that his acts during infancy have created an estoppel against him to disaffirm his contracts. Certainly the infants cannot be estopped by the acts or admissions of other persons.
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> (2) False representation as to age—According to some authorities the fact that an infant at the time of entering into a contract falsely represented to the person with whom he dealt that he had attained the age of majority does not give any validity to the contract or estop the infant from disaffirming the same or setting up the defense of infancy against the enforcement of any rights thereunder; but there is also authority for the view that false representations will create an estoppel against the infant, and *under the statutes* of some states no contract can be disaffirmed where, on account of the minor's representations as to his majority, the other party had good reason to believe the minor capable of contracting. Where the infant has made no representations whatever as to his age, the mere fact that the person with whom he dealt believed him to be of age, even though his belief was warranted by the infants' appearance and the surrounding circumstances, and the infant knew of such belief, will not render the contract valid or estop the infant to disaffirm." [17]

It is true that under the second heading there are two sets of authorities on the subject of false representation as to age but under the second view that false representation will create estoppel, is added the statement that the same has been embodied in some statutes, obviously recognizing, as it does recognize, the general rule, that in the absence of a statute, "estoppel is not applicable to infants and that the Court will not readily hold that his acts during infancy have created an estoppel against him to disaffirm his contracts."

We should be aware, however, of some impelling reasons which must have guided the majority decision in Sia Suan v. Gaw Chiao, *supra*. The Court must have taken judicial notice (though not expressly stated therein) of the common, prevailing practice of minors performing acts incident only to the possession of full civil capacity; so that to hold that minors are free to disaffirm their contracts might in a way undermine the stability of business and commercial transactions. The existence of the practice, however, should be the more reason for putting a person into inquiry as to the age and capa-

[17] 22 Cyc. (p. 610).

city of the person with whom he contracts. And if the existing law is inadequate to meet the prevailing practice, a law, similar to the one applied in the Spanish Supreme Court decision cited in Mercado v. Espiritu may be enacted by Congress, or the age of majority may be lowered from 21.

The argument that undue protection is extended to a minor by holding that estoppel cannot bind him, is not ultimately tenable because, with the existence of the right to annul, the same must be exercised within four years after reaching majority.[18] And at any time within said period of four years, the contract may be ratified, which ratification extinguishes the action to annul the voidable contract.[19] The law does not require that ratification be made in an express manner. There may be a tacit ratification when, with knowledge of the reasons which renders the contract voidable and such reason having ceased, the person who has the right to invoke it should execute an act which necessarily implies an intention to waive his right.[20] An instance of such act indicative of waiver is the alienation of the property subject matter of the contract, by the minor upon reaching the age of majority.[21]

Nor is there such undue protection to minors when we consider the effects flowing from an annulment which he may obtain. As stated above, the measure of his obligation in case of annulment on the ground of minority, is the benefit derived from the thing or price received by him. In the event, however, that he cannot return such benefits, the other party cannot be compelled to comply with what in turn is incumbent upon him,[22] saving the only case where the object of the contract was lost without fault or fraud on the part of the person entitled to the annulment, in which case he is deemed to have derived no benefits. Such being the case, the person contracting with the minor must make restitution, even if the minor cannot do the same.[23]

Moreover, if the person who contracted with the minor really acted in good faith, relying on the minor's representations, the civil code provisions on quasi-delicts seem to supply additional grounds of relief to such person. It is submitted that while he may not pin the minor to his contract, on the principle of estoppel, he may assert either in an independent action or in a counterclaim to an action brought for annulment that the person, who pretended to be of age and with whom he contracted, was guilty of fault and comes within the purview of "whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done . . ." [24] In an action on quasi-delict, the "father and, in case of his death or incapacity, the mother, are responsible for the dam-

[18] Art. 1391.
[19] Art. 1392.
[20] See Art. 1393.
[21] See Uy Soo Lim v. Tan Unchuan, 38 Phil. 552; Tacalinar v. Corro, 34 Phil. 898.
[22] See Art. 1402.
[23] See Art. 1401.
[24] Art. 2176, Civil Code.

ages caused by the minor children who live in their company,[25] and they may exempt themselves from this responsibility only when they prove that they observed all the diligence of a good father of a family to prevent damage.[26] Whatever damages may be recovered in this action may be less than the benefits which the contract would bring to the person contracting with the minor if the contract were not annulled. Yet the principle of *ubi jus, ibi remedium* is upheld. Mention should pertinently be made of the new provision in the Civil Code to the effect that "if the minor or insane person causing damage has no parents or guardian, the minor or insane person shall be answerable with his own property in an action against him where a guardian *ad litem* shall be appointed." [27]

—TEODORO PADILLA

## Extinguishment of Obligations—Loss of the Thing Due.

One of the various modes of extinguishment of obligation is the loss of the thing due. This subject, which is covered by Articles 1262-1269 of the New Civil Code, is broad in concept and scope. It is not limited to obligations to deliver but also to those which are personal, embracing therefore all causes which render impossible the performance of the prestation. In some American Codes, the latter kind is designated as *impossibility of performance.*[1]

### A. MEANING OF LOSS

1. *With respect to obligations to deliver:*

The term "loss" should not be understood in its vulgar sense. Juridically speaking, "it is understood that the thing is lost when it perishes, or goes out of commerce, or disappears in such a way that its existence is unknown or it cannot be recovered." [2] It will be noted that Article 1189 of the Code does not clearly state that loss embraces the *destruction* of the thing due. But Article 1262 of the Code provides that "an obligation which consists in the delivery of a determinate thing shall be extinguished if it should be lost or destroyed without the fault of the debtor, and before he has incurred in delay." We believe that the term *destroyed* is employed in said article to convey a meaning that should come within the purview of the term *loss.* This is clear from the fact that Section 2 under which the said article comes is entitled "Loss of the thing due." Furthermore, Sanchez Roman, in explaining the meaning of *loss,* says: It means, aside from the destruction of the thing due, its

[25] Art. 2180, Civil Code; Young v. Tecson, *supra.*
[26] *Id.*
[27] Art. 2181, Civil Code.
[1] 8 Manresa, 344-345.
[2] Article 1189, No. 2, Civil Code.

disappearance by loss, theft or robbery; that is to say, its *non-existence* in the hands of the obligor or when, through any cause, the fulfillment of the obligation becomes impossible.[3] Thus the term *loss* embraces various concepts. We shall make a brief discussion of the *three forms of loss* according to the said article: [4]

(a) When the thing perishes.—While this term may include the destruction of the thing, it should not, according to Manresa, be understood in its absolute sense, that is, that it does not refer to the absolute disappearance of the things. When a thing has been transformed in such a way that it can not have any economic use, then it cannot be considered existing for such purpose.

If at the time the parties into the contract believed that the thing existed when in fact it did not, then the contract is void for want of subject matter at the moment of perfecting the contract. The non-existence of the thing from the beginning places this matter outside the purview of Article 1262. What is contemplated by this provision of the law is that the thing *ceases to exist.*

> "*Existence of thing ceasing.*—Where by the intent of the parties the continued existence of a specific subject matter is essential to the performance of a contract, its destruction will operate as a discharge where neither of the parties have assumed such risk. For example, where a public hall is let for a musical entertainment on a future day, if, before the day arrives, it is accidentally destroyed by fire, the bargain is ended. In these cases, where, before the thing has ceased to exist, there has been a part performance, complications may arise not so easily passed upon. Thus, where one undertook to build certain machinery into the structure of another, which was accidentally destroyed by fire while the work was in progress, it was first held that he might recover the value of what was actually put in; but the decision was reversed on appeal, both parties were excused from further performance, and the one who had done the work, not having reached the point at which he was entitled to be paid, was allowed nothing." [5]

(b) When it goes out of commerce.—A thing is said to be out of the commerce of men when it is no longer subject to private appropriation, as the case of a private land which is expropriated by the Government for public use, or is dedicated to divine purposes; [6] or when the use or possession of an article is declared by law illegal, as opium.

(c) When it disappears in such a way that its existence is unknown.—Loss in the vulgar sense is not equivalent to *loss* in its juridical acceptation, unless it is accompanied by one of these two circumstances: either that the whereabouts of the thing is unknown,

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[3] 4 Sanchez Roman, 442

[4] 8 Manresa, 346.

[5] Bishop on Contracts, pp. 247-249.

[6] 8 Manresa, 346-347.

or in case such is known, the thing cannot be recovered.[7] In case a thing is stolen, the whereabouts of the thing may be said to be unknown specially so when the thief is not known. On the other hand, the whereabouts of a thing may be known but it is impossible to recover it. The impossibility may be either physical or legal.[8] Under the first supposition, we have the case of a ring accidentally dropped into the sea. Under the latter, a thing may not be recovered by reason of prescription. It is also possible that a thing can no longer be recovered because its use or possession has by law been declared illegal.

The subsequent impossibility of procuring the thing may be due to the act of God, of public enemy or by reason of the enactment of a law prohibiting the thing.[9]

2. *With respect to obligations to do.*

(a) *Loss* as a mode of extinguishing obligation is designated in some American codes as impossibility of payment or performance.[10] Article 1266 provides:

> "The debtor in obligations to do shall also be released when the prestation becomes legally or physically impossible without the fault of the obligor."

Under the foregoing provision of the code, impossibility of performance is either physical or legal. The first presupposes a situation where the impossibility is beyond the will of the obligor or out-

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[7] 8 Manresa, 346, 348.

[8] Bishop on Contracts, pp. 251-253.

[9] "*Act of God—Public Enemy.*—Where as already intimated, the thing contracted for becomes impossible through what is termed in the books "the act of God or the king's enemies," the one who has promised to do it (not promised to compensate the other for what he shall have suffered from its not being done) is excused. There are cases which seem contrary to this, wherein defendants have been compelled to pay money because they could not contend successfully with the Almighty or with the public enemy."

Same defined.—"The act of God," within this doctrine, is some manifestation of nature to which man has not contributed and which he cannot overcome, such as lighting and the fire it kindles, cold, or a tempest, but not a fire from an ordinary accident. By the "act of the public enemy," are meant the ravages or restraints of war, but not of a robber or a mob.

Act of the law.—"We have seen that the constitutional provision against impairing the obligation of contracts does not restrain legislation from making unlawful the thing lawfully agreed to be done. When, therefore, the carrying out of a contract is thus forbidden by law, the decisions are uniform that the party who was under obligation to do the thing is excused. Within this principle, a declaration of war may dissolve a contract of affreightment. And when, during slavery, one sold a life estate in slaves, covenanting to protect through such life the purchaser in his title to them, their emancipation by law was held not to put him in default." (Bishop on Contract, pp. 251-253).

[10] 8 Manresa, 345.

side of his intervention; or the impossibility is due to a personal impediment on his part. Under the first case, we may cite by way of illustration the case of Labayen vs. Talisay-Silay,[11] wherein a contract was entered into by a sugar central and the owner of an hacienda. It provides for the construction of a railroad "whenever the contour of the land, the curves, and the elevations permit the same." It was shown that such construction was possible, but dangerous to life and property. The contract further provided that "in case of inability to secure, under reasonable conditions such rights of way as "La Central" may require, * * * its effects shall be suspended in part or in whole during such period of incapacity." It was shown that the owner of the haciendas through which the railroad would have to pass would not grant permission to use his land for this purpose. On these facts, the Court held that the action for breach of contract could not prosper.

The other kind of impossibility arises when the obligor, for example, becomes crippled and can not render the service,—to play as a pianist,—at a restaurant, which he bound himself to do.

The legal impossibility of prestation cannot render the obligor liable, because the cause of the impediment is legal and is beyond his will.[12] Such a situation arises when, by reason of war, a person who has bound himself to construct a building for a foreigner, cannot perform the work because the latter has become the enemy of his country.

A new concept of *loss* with respect to *obligations to do*, has been introduced in a new article of the Civil Code. Article 1267 provides:

> "When the service has become so difficult as to be *manifestly* beyond the contemplation of the parties, the obligor may also be released therefrom, in whole or in part."

The Code Commission, which introduced the above new provision, gave as reason therefor the fact that the intention of the parties to a contract should govern and if it appears that the service turns out to be so difficult as to have been beyond their contemplation, it would be doing violence to that intention to hold the obligor still responsible.[13] We may then state that "difficulty beyond contemplation" is included within the purview of the term *loss*.

### B. Essential Conditions of Loss to Extinguish Obligation

In order that the loss should effectively extinguish the obligation and exempt the obligor from any further liability, the following conditions must concur:

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[11] 52 Phil. 449.

[12] 8 Manresa, 354.

[13] Giorgi: *Teoria de los Obligaciones*, Vol. 8, pp. 190-203.

(1) The thing to be delivered must be determinate.[14]
(2) The obligor must not be at fault. (culpa)[15]
(3) The obligor must not incur in delay or *mora*.[16]
(4) The obligor must not act in bad faith.[17]

According to Giorgi, the conditions of *loss* may be classified into two: namely, objective, requiring that the impossibility (or loss) must be perfect and posterior; and the second, it must remove absolutely the intervention of the debtor in the causes of impossibility or loss.[18]

The first of the conditions we have enumerated above requires that the thing be specific, or particularized object. It must have its own individuality. If the thing to be delivered is generic, the loss of anything of the same kind does not extinguish the obligation.[19] In the recent case of De Leon et al. vs. Soriano, decided by the Supreme Court, on August 24, 1950, it appears that the plaintiff and the defendants (in the lower court) entered into a contract whereby the latter obligated themselves to deliver annually a certain quantity of rice to the former until she dies and that such obligation constituted a lien on the properties of her deceased husband. The defendants failed to make complete deliveries of the rice mentioned in the contract. Hence, an action was filed to recover the alleged shortage. The defendants contended that their failure to comply fully with their contract was due to the Huk troubles in Central Luzon and that the delivery of rice was dependent upon the produce of the land. The Court said that there is no stipulation in the contract that the rice was to be the produce of any particular land, and that any palay of the quality agreed on regardless of the origin would be obligation on the part of the obligee to receive and would extinguish the obligation. In the same case, the Court made a distinction between determinate and generic things, by stating that the first is a concrete, particularized object while the latter is one whose determination is confined to that of its nature.[20]

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[14] Article 1262, Civil Code.
[15] Article 1265, Civil Code.
[16] *Ibid.*
[17] Article 1165, Civil Code.
[18] Report of the Code Commission, p. 33.
[19] Articles 1262, 1263, Civil Code.
[20] "Article 1182 of the Civil Code, which was in force at the time the agreement in question was entered into, provides that 'any obligation which consists in the delivery of a determinate thing shall be extinguished if such thing should be lost or destroyed without fault on the part of the debtor and before he is in default.' Inversely, the obligation is not extinguished if the thing that perishes is indeterminate."

"Manresa explains the distinction between determinate and generic things in his comment of Art. 1096 of the Civil Code of Spain, saying that the first is a concrete, particularized object, indicated by its own individuality, while a generic thing is one whose determination is confined to that of its nature, to the genus (genero) to which it pertains such as a horse, a chair. These definitions are in accord with the popular meaning of the terms defined.

"Except as to quality and quantity, the first of which is itself generic, the contract sets no bounds or limits to the palay to be paid, nor was there even any stipulation

In the case of Yu Tek & Co. v. Gonzales, a contract was entered into for the sale of sugar. In the action filed for failure to deliver the sugar, the Supreme Court held that the contract is not perfected until the quantity agreed upon has been selected and is capable of being physically designated and distinguished from all other sugar.[21]

With reference to the second condition of the *loss*, it is necessary that the obligor should take care of the thing with due diligence,[22] and he is liable if he fails to exercise the diligence that is required of him under the circumstances.[23] The *onus probandi* is upon him to show the loss occurred without his fault.[24] In the case of Paez v. Villegas, the Supreme Court held that "the debtor must show that he is free from negligence, for negligence is presumed from the mere fact of loss." [25]

In the case of Lizares v. Hernaez, the Supreme Court held:

> "In this bailment ordinary care and diligence are required of the bailee and he is not liable for the inevitable loss or destruction of the chattel, not attributable to his fault. If while the bailment continues, the chattel is destroyed, or stolen, or perishes, without negligence on the bailee's part, the loss, as in other hiring, falls upon the owner, in accordance with the maxim *res perit domino*." [26]

Under the third condition of the *loss*, the obligor must not be guilty of *mora*, otherwise he is liable even if the loss occurs by reason of fortuitous event.

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that the cereal was to be the produce of any particular land. Any palay of the quality stipulated regardless of origin or however acquired (lawfully) would be obligatory on the part of the obligee to receive and would discharge the obligation. It seems therefore plain that the alleged failure of crops thru alleged fortuitous causes did not excuse performance.

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"In considering the effect of impossibility of performance on the rights of the parties, it is necessary to keep in mind the distinction between: (1) natural impossibility preventing *performance from the nature of the thing;* and (2) impossibility in fact, in the *absence of inherent* impossibility in the nature of the thing stipulated to be performed. (17 C. J. S., 951). In the words of one Court, impossibility must consist in the nature of thing to be done and not in the inability of the party to do it. (City of Montpelier v. National Surety Co., 122 A 484, 97 Vt. Ill. 33 A. L. R. 489). As others have put it, to bring the case within the rule of impossibility, it must appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not in law deemed impossible. (17 C. J. S. 442). The first class of impossibility goes to the consideration and renders the contract void. The second, which is the class of impossibility that we have to do here, does not. (17 C. J. S. 951, 952; De Leon et al. v. Soriano, G. R. No. L-2724, August 24, 1950; Reyes v. Caltex, G. R. No. L-1802, Sept. 30, 1949).

[21] Yu Tek & Co. vs. Gonzales, 29 Phil. 384.

[22] Article 1163, Civil Code.

[23] Article 1170, 1173, Civil Code.

[24] Article 1265, Civil Code.

[25] Off. Gaz., Sup., Aug. 30, 1941, p. 135.

[26] 40 Phil. 981.

The last condition of *loss* requires that the obligor be not guilty of fraud, or bad faith. In case he has promised to deliver the same thing to two or more persons, he shall be responsible for any fortuitous event until he has effected the delivery.[27]

1. *Exceptions.*

The loss of the thing does not extinguish the obligation, when by law or stipulation the obligor is liable even for fortuitous events and he shall be responsible for damages. Likewise, the obligation is not extinguished when the nature of the obligation requires assumption of risk.[28] The first part of the exception has a direct relation to Article 1268, which provides that "when the debt of a thing certain and determinate proceeds from a criminal offense, the debtor shall not be exempted from the payment of its price, whatever may be the cause for the loss, unless the thing having been offered by him to the person who should receive it, the latter refused without justification to accept it. Thus, a thief who stole a carabao has the duty to return it to the owner. While the carabao is in his possession, it is drowned on the occasion of a flood. In spite of such fortuitous loss of the carabao, the thief must pay its price, unless the owner refuses to receive the same. The second part of the exception refers to cases of risk, such as fire and marine insurance.[29]

## C. Partial Loss to Extinguish Obligation

Article 1264 provides that "the courts shall determine whether, under the circumstances, the partial loss of the object of the obligation is so important as to extinguish the obligation." This contemplates a case where a person obligated himself to deliver a particular team of white horses to another to be used for a special carriage. The death of one of the team renders it impossible for the obligor to comply with his contract. Under these circumstances, it is believed that obligation of the obligor should be extinguished.

## D. Presumption of Fault

Article 1265 provides: "Whenever the thing is lost in the possession of the debtor, it shall be presumed that the loss was due to his fault, unless there is proof to the contrary, and without prejudice

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[27] Article 1165, Civil Code.

[28] Article 1262, Civil Code.

[29] Future impossibility.—"An impossibility which may afterward arise or, as just seen, be disclosed, however its probability may be contemplated by the parties is treated as unknown to both; for so it truly is. Therefore an agreement between them, whereby one is to pay the damages which the inevitable in the future may bring to the other, is valid. A familiar illustration is a policy of marine insurance, by which the underwriter promises to compensate the owner in money for damages from 'perils of the sea,' against which no human power is able to contend. This sort of contract is everyday enforced in our courts. The illustrations of it, besides the one just given, are abundant." (Bishop on Contracts, p. 245).

to the provisions of Article 1165. This presumption does not apply in case of earthquake, flood, storm or other natural calamity."

The presumption that the obligor was at fault when the thing is lost in his possession, is justified by the fact that, according to Article 1163, every person obliged to give or deliver something is also obliged to take care of it with the proper diligence of a good father of a family.

## E. Rights of Creditors

Article 1269 provides that once the obligation is extinguished by the loss of the thing, the creditor has the right of action which the debtor may have against third persons by reason of the loss.

The application of this article is shown in the case of Urrutia & Co. v. Baco River Plantation Co., where it appears that a vessel guilty of negligence in a collision was sunk. In such case, ordinarily the owners of the vessel are relieved from liability for damages caused by the vessel to other vessels or owners of a cargo. However, if the vessel is insured, and the insurance money is collected by the owners of the vessel, such insurance money is liable for damages suffered by others.[30]

## Conclusion

Article 1189 of the Civil Code does not give a comprehensive definition of *loss*. From a reading of said article, without the aid construction or interpretation, or resorting to commentaries of jurists, the impossibility of performance is not included. Such defect has given rise to a wide range of interpretations by the Courts, thereby giving occasion to parties to resort to litigation with a view to enforcing an obligation or avoiding an obligation. Thus, the Code should be so amended as to include impossibility in law and in fact, and a distinction should be made between *natural impossibility* and *impossibility in fact.*

It will be observed that while Article 1266 provides that in *obligation to do,* the obligor is released when the presentation becomes *legally or physically* impossible without his fault, Article 1262 does not make a categorical statement regarding *legal* or *physical* impossibility in *obligations to deliver.* There is no valid reason for not making a similar provision in cases of *obligations to deliver.* Hence, the necessity of amending the law to carry out the suggestion we have made.

Amelia G. de Castro

[30] 26 Phil. 632.

# LEGISLATION:

**Republic Act No. 394—Divorce Among Mohammedans.**—In our jurisprudence, marriage with all its corresponding rights, duties, obligations and effects [1] is conceived not only as an inviolable social institution [2] but as the very foundation of the family and of society without which progress and civilization would be impossible. Vitally affecting our present law on marriage and legal separation [4] and our law on bigamy [5] is Republic Act No. 394 which took effect on June 18, 1949.

The full text of the law provides that "for a period of twenty years from the date of the approval of the act, divorce among Moslems residing in non-Christian provinces shall be recognized and be governed by Moslem customs and practices." [6]

*Requisites:*

In order that the act shall be applicable it is necessary that (1) the parties are Moslems and that (2) they reside in non-Christian provinces. The provision of the law intends to frustrate any attempt on the part of any Christian to change his religious robes to take advantage of absolute divorce which is now prohibited or to reside in Mindanao or Sulu for the same purpose.[7]

In the United States, the same requisites are necessary to hold Indian divorces valid.[8]

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[1] Goitia v. Campos Rueda, 35 Phil. 252, 254.

[2] Article 52, Civil Code.

[3] Ramirez v. Gmur, 42 Phil. 855, 864; Maynard v. Hill, 125 U.S. 210, 8 S. Ct. 726.

[4] Title III and IV of Republic Act No. 386.

[5] Article 349, Revised Penal Code.

[6] Sec. 1, Republic Act No. 394.

[7] Ombra Amilbangsa, Congressional Record, Vol. IV, No. 67, p. 1631:

Mr. Allas. I want to call attention to the fact that the bill says "divorce among Moslems residing in non-Christian provinces shall be recognized and governed by Moslem customs and practices." Suppose a married Christian goes to Mindanao and joins your religion, thus becoming a Moslem, can he take advantage of the provisions of this bill?

Mr. Amilbangsa. He cannot take advantage of the provisions of this bill, if he was previously married.

Mr. Allas. Suppose he is a Christian Filipino and he is married now?

Mr. Amilbangsa. He cannot use this law to camouflage his immoral intention.

[8] In the United States, the right of the Indians to regulate their divorce practices has long been recognized as one of those tribal affairs beyond the power of the states to regulate (The Kansas Indians, Charles Blue Jacket v. Board of Commissioners County of Johnson, 5 Wallace 737; Kobogun v. Jackson Iron Co., 43 N.W. 602). In order, however, that the divorces had in accordance with tribal custom be regarded as valid it is necessary that the party claiming to be divorced must have lived within

*Mohammedan Divorce*

Divorce among Mohammedans is not a matter of leaving each other. Certain rules and practices govern it.[9] Although rituals in the different provinces may cause minor differences in its practice, it is invariably recognized that the inexorable dicta of the Koran is the fundamental rule.[10] Mohammed, although he allowed divorce, discouraged its unrestricted practice.[11] He allowed a period of reconciliation to pass between the parties before the granting of divorce [12] and allowed the remarriage of the woman with the first husband in cases where this will prove beneficial to both.[13] Mohammedan divorce is prohibited during the menstruation period of the woman.[14] The right to divorce a spouse is vested both in the man and the woman.[15] This is different from the old Hebrew practice of allowing only the man to divorce the woman and not vice versa.[16] The Islamic law of divorce is in a sense elastic because it does not strictly limit the causes of divorce. The causes vary with the varying conditions of society and humanity.[17]

Thus in the Philippines, insanity, adultery, incapacity to support the wife or abandonment are some of the grounds for divorce.[18] These, although valid here, may not be valid grounds in other countries.

*Effects on the Civil Code*

The Civil Code expressly allows within a period of twenty years from its effectivity or shorter,[19] Mohammedans to marry in accord-

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the bounds of the Indian Territory (La Framboise v. Day, 161 N.W. 529). This requisite is similar to the law we are discussing. Where this requisite has been fulfilled divorces granted in accordance with the customs of the Sioux (Earl v. Godley, 44 N.W. 254; La Framboise v. Day, 161 N.W. 529), Shawnee (The Kansas Indians, Charles Blue Jacket v. Board of Commissioners County of Johnson, 5 Wallace 737), Pottawatomie (Cyr v. Walker, 116 Pac. 931, 934), and Piankashaw (Buck v. Branson, 127 Pac. 436, 438) tribes have been held as valid.

[9] Ombra Amilbangsa, Congressional Record, Vol. IV, No. 67, p. 1630.

[10] Statement by Mr. Abdulwahid Bidin of Sibutu, Sulu and Mr. Mamintal Tamano of Dansalan, Lanao.

[11] The Holy Qur-án, translated by Maulvi Muhammad Ali, Chapter XXXIII, Verse 37.

[12] *Ibid.*, II: 228, 295.

[13] *Ibid.*, II: 232, 306.

[14] *Ibid.*, II: 228.

[15] *Ibid.*, II: 229.

[16] The Holy Bible, King James Version, Deuteronomy, XXIV:1: "When a man hath taken a wife and married her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement and give it in her hand and send her out of his house."

[17] Maulvi Muhammad Ali, The Holy Qur-án, p. 104.

[18] Ombra Amilbangsa, Congressional Record, Vol. IV, No. 67, p. 1630.

[19] Article 78, Civil Code: "But the President of the Philippines upon recommendation of the Secretary of the Interior, may at any time before the expiration of said

ance with their customs, rites and practices [20] as long as they have the legal capacity to marry and give their consent freely.[21] But the Civil Code after repealing Act No. 2710 does not grant them the right to absolute divorce as recognized by Moslem practice. It only grants them legal separation.[22] With the passage of Republic Act No. 394, therefore, the Civil Code provisions pertinent to legal separation are modified to the extent that absolute divorce is allowed to Moslems residing in non-Christian provinces only.

*Effects on the Revised Penal Code*

The penalty of *prision mayor* is imposed upon any person who contracts a second or subsequent marriage before a former marriage has been legally dissolved.[23] In the leading case of People v. Bitdu [24] the defendant was found guilty of bigamy on the ground that a divorce granted in accordance with Mohammedan religious practices was not a valid divorce, hence the first marriage he contracted was not legally dissolved.[25] With the approval of Republic Act No. 394 this case no longer holds and the application of the article of the Revised Penal Code above mentioned is relatively modified.

No serious question as to the constitutionality of the law, I believe, can be raised in the future.[26] The authors of the law, on the contrary, should be commended for their interest in legislating in behalf of our less fortunate Moslem brothers. But whether or not their intention of providing a means by which Moslems would be able to assimilate the better customs and practices of the Christian majority will be realized only the rigors of the years will tell.

RAFAEL SALAS

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period, by proclamation make any of said provisions applicable to the Mohammedan * * * provinces."

[20] Article 78, Civil Code.

[21] Article 53, Civil Code.

[22] Title IV, Articles 97 to 108, Civil Code. Note: No question here should arise as to the interpretation of the word "Divorce" in the law above discussed. The authors meant by it absolute divorce stating that "The abolition of divorce in the Philippines contemplated in Republic Act No. 386 is contrary to Moslem tradition, practices, and customs." See Congressional Record, Vol. IV, No. 67, p. 1628.

[23] Article 349, Revised Penal Code, defining bigamy.

[24] 58 Phil. 817.

[25] Note: In People v. Mora Dumpo, 62 Phil. 246, although reference was made to Mohammedan divorce practices, the main issue of the case was not validity of Mohammedan divorces but rather of Mohammedan marriages.

[26] When Republic Act No. 394 was introduced in the House of Representatives fear was expressed by some members that the law was unconstitutional (See Congressional Record, Vol. IV, No. 67, p. 1629). Their fear was grounded on the belief that it was legislating in favor of the Mohammedan religion which is expressly prohibited by the Constitution (Article III, Sec. 1, Clause 7) and the Constitutional principle of religious freedom (Thomas Cooley, Vol. II, p. 966). In our jurisdiction, however, the Supreme Court has time and again decided that legislation with regard to non-Christians, if unconstitutional should fall not under the "freedom of religion"

clause but under the aegis of the "equal protection" clause (Constitution, Article III, Sec. 1, Clause 1, Rubi v. Provincial Board of Mindoro, 39 Phil. 660; De Palad v. Saito and Madrazo, 55 Phil. 831; People v. Cayat, 68 Phil. 12). It has also decided that classification into Christian and non-Christian or Moslems is constitutional as long as it fulfills the elements of a valid classification which are (a) that the classification must rest on substantial distinctions; (b) that it is germane to the purposes of the law; (c) that it must not be limited to existing conditions only; and (c) that it must apply equally to all members of the same class (Borgnis v. Falk Co., 133 N.W. 209; Lindslay v. Natural Carbonic Gas Co., 220 U.S. 61, People v. Vera, 65 Phil. 56). There seems to be no question that this law fulfills the requisite. Thus in our jurisprudence, laws pertaining to marriage (Sec. 25, Act 3613, now article 78, of the Civil Code), segregation of non-Christian (Sec. 2145, Administrative Code of 1917), conveyances and encumbrances of lands (Sec. 118, Public Land Act, Act No. 3874), and ardent and spiritous liquors (Secs. 2 and 3, Act No. 1639) because they were made on valid classifications were declared constitutional. The purpose of this legislations is not to discriminate or to legislate in favor of a class but to improve the living conditions of non-Christians leading them to economic and social and political equality and unification with the more highly civilized inhabitants of the country (Rubi v. Provincial Board of Mindoro, 39 Phil. 660, 771; Explanatory Note H. No. 2679).