VALIDITY OF FOREIGN DIVORCE DECREES

On November 20, 1965, the Supreme Court of the Philippines promulgated its decision on the *Tenchavez v. Escaño*[1] case. The main issue in this case centers on the validity of a foreign divorce decree secured by the defendant-appellee in a foreign country. The Court, in summing up its decision, ruled:

(1) That a foreign divorce decree between Filipino citizens, sought and decreed after the effectivity of the present Civil Code (Rep. Act 386), is not entitled to recognition as valid in this jurisdiction; and neither is the marriage contracted with another party by the divorced consort, subsequent to the foreign decree of divorce, entitled to validity in the country;

(2) That the remarriage of the divorced wife and her cohabitation with another person other than the lawful husband entitled the latter to a decree of legal separation conformable to Philippine law;

(3) That the desertion and procurement of an invalid divorce decree by one consort entitle the other to recover damages; and

(4) That an action for alienation of affections against the parents of one consort does not lie in the absence of proof of malice or unworthy motives on their part.

Pastor B. Tenchavez, the plaintiff-appellant and Vicenta F. Escaño, the defendant-appellee, were married before a Catholic chaplain on February 24, 1948. The marriage, celebrated in secret, was discovered by the parents of Vicenta, who sought the advice of a priest. The priest suggested a recelebration to validate what he believed to be an invalid marriage, from the standpoint of the Church, due to the lack of authority from the Archbishop or the parish priest for the officiating chaplain to celebrate the marriage. Vicenta however refused to go on with the recelebration of the marriage. Vicenta continued living with her parents. She later went to Misamis Occidental where she filed a petition to annul the marriage. The case was however dismissed. On June 24, 1950, she left for the United States. On August 22, 1950, she filed a complaint for divorce against the plaintiff Pastor in Nevada on the ground of "extreme cruelty, entirely mental in character." On October 21, 1950, a decree of divorce, "final and absolute" was issued by the said Court.

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[1] G.R. No. 19671, November 29, 1965.

On September 13, 1954, Vicenta married an American, Russel Leo Moran, in Nevada. She now lives with him in California. On August 8, 1958, she acquired American citizenship.

On July 30, 1955, Pastor filed an action for legal separation against Vicenta and for damages against Vicenta and her parents, the latter having dissuaded Vicenta from joining her husband. The lower court did not decree a legal separation, but absolved the plaintiff from supporting his wife. It allowed the counterclaim of the parents of Vicenta for moral and exemplary damages against the plaintiff Pastor.

Pastor appealed, and the Supreme Court, in deciding for the plaintiff-appellant, stated:

> It is equally clear from the record that the valid marriage between Pastor Tenchavez and Vicenta Escaño remained subsisting and undissolved under Philippine law, notwithstanding the decree of absolute divorce that the wife sought and obtained on October 21, 1950 from the Second Judicial District Court of Washoe County, State of Nevada, on grounds of "extreme cruelty, entirely mental in character." At the time the divorce decree was issued, Vicenta Escaño, like her husband, was still a Filipino citizen. She was then subject to Philippine law, and Article 15 of the Civil Code of the Philippines, already in force at the time, expressly provided:
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> > "Laws relating to family rights and duties or to the status, conditions and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad." (Article 9, Old Civil Code)

The court further said:

> The Civil Code of the Philippines, now in force, does not admit absolute divorce, quo ad vinculo matrimonii; and in fact does not even use that term, to further emphasize its restrictive policy on the matter, in contrast to the preceding legislation that admitted absolute divorce on the grounds of adultery of the wife or concubinage of the husband (Act 2710). Instead of divorce, the present Civil Code only provides for legal separation... and, even in that case, it expressly prescribes that "the marriage bonds shall not be severed" (Art. 106, sup par. 1).

The court continued:

> For the Philippine courts to recognize and give recognition or effect to a foreign decree of absolute divorce between Filipino citizens would be a patent violation of the declared public policy of the State, specially in view of the third paragraph of Art. 17 of the Civil Code that prescribes the following:
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> > "Prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs, shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country" (formerly Art. 11 Old Civil Code).

Due to the social significance of this decision, involving the legal effect of a divorce decree sought by a Filipino citizen in a foreign country and the status of the marriage subsequently contracted by the party securing the divorce, as far as Philippine laws are concerned, we must go back and trace the history of Philippine laws and decisions of judicial tribunals on foreign divorce decrees secured by Filipino citizens.

During the Spanish regime, the law on divorce in the Philippines was in the Siete Partidas. The provisions of the Civil Code on the subject were among those suspended by Governor-General Weyler on December 29, 1889, and had never been in force since.[2] The Partidas allowed only relative divorce. Act 2710, known as the Divorce Law, which took effect on March 11, 1917, provided for absolute divorce and repealed the provisions of the Partidas granting relative divorce. During the Japanese Occupation, the Chairman of the Philippine Executive Commission promulgated a divorce law, known as Executive Order No. 141, dated March 25, 1943. This order repealed Act 2710 and provided for eleven grounds for divorce. It ceased to have effect when it was repealed by General MacArthur's Proclamation of October 23, 1944; the latter also declared in full force and effect all the laws of the Commonwealth including Act 2710.[3]

The New Civil Code, in repealing Act 2710, abrogated absolute divorce and reverted to relative divorce of the Partidas and the Old Civil Code.[4]

The Supreme Court, in deciding against the validity of a foreign divorce decree secured by a domiciliary of the Philippines against a citizen of the Philippines in the case of *Ramirez v. Gmur*[5] stated: "The evidence shows conclusively that Frederick Von Kaufmann at all times since earliest youth has been, and is now, domiciled in the City of Iloilo in the Philippine Islands; that he there married Leona Castro, who was a citizen of the Philippine Islands, and that Iloilo was their matrimonial domicile; that his departure from Iloilo for the purpose of taking his wife to Switzerland was limited to that purpose alone, without any intention of establishing a permanent residence in that city. The evidence shows that the decree was entered against the defendant in default, for failure to answer, and there is nothing to show that she had acquired, or had attempted to acquire, a permanent domicile in the City of Paris. It is evident of course that the presence of both the spouses in that city was due merely to the mutual desire to procure a divorce from each other."

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[2] TOLENTINO, CIVIL CODE OF THE PHILIPPINES, (1961).
[3] AQUINO, CIVIL CODE OF THE PHILIPPINES, 230 (1958).
[4] *Ibid.*
[5] 42 Phil. 855 (1918).

> It is established by the great weight of authority that the court of a country in which neither of the spouses is domiciled and to which one or both of them may resort merely for the purpose of obtaining a divorce has no jurisdiction to determine their matrimonial status; and a divorce granted by such a court is not entitled to recognition elsewhere. The voluntary appearance of the defendant before such a tribunal does not invest the court with jurisdiction.
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> It follows that, to give a court jurisdiction on the ground of plaintiff's residence in the State or country of the judicial forum, his residence must be bona fide. If a spouse leaves the family domicile and goes to another state for the sole purpose of obtaining a divorce, and with no intention of remaining, his residence there is not sufficient to confer jurisdiction on the courts of that state. This is especially true where the cause of divorce is one not recognized by the laws of the State of his own domicile.
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> As the divorce granted by the French Court must be ignored, it results that the marriage of Doctor Mory and Leona Castro, celebrated in London in 1905, could not legalize their relations; and the circumstance that they afterwards passed for husband and wife in Switzerland until her death is wholly without legal significance. The claims of the Mory children to participate in the estate of Samuel Bischoff must be rejected. The right to inherit is limited to legitimate, legitimated, and acknowledged natural children. The children of adulterous relations are wholly excluded. The word "descendants," as used in Article 941 of the Civil Code cannot be interpreted to include illegitimate born of adulterous relation (referring to the children born of the second marriage.)

In the case of *Gorayeb v. Hashim*[6] the Supreme Court, after reiterating the reasoning in the case of *Ramirez v. Gmur* stated, "From this it will be seen that a divorce granted in one State may be called in question in the courts of another and its validity determined upon the evidence relating to domicile of the parties to the divorce; but, as has been said by the Supreme Court of the United States, it is now too late to deny the right collaterally to impeach a decree of divorce in the courts of another state by proof that the court granting the divorce had no jurisdiction even though the record purports to show jurisdiction and the appearance of the parties."

The court also stated: "In the application of the rule above stated, the circumstance that the parties to the present action contracted marriage in Syria, instead of the Philippine Islands, is not material to the case. The fact that they have contracted marriage lawfully, wherever the act may have been accomplished, created the status of married persons between them; and the question with which we are here concerned is not as to the marriage, but as to the divorce conceded to the defendant in the state of Nevada."

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[6] 50 Phil. 22 (1927).

Thus, it can be seen that under the judicial decisions under the Partidas and Act 2710, a decree of divorce granted in a foreign country cannot be recognized in this jurisdiction where the foreign court has no jurisdiction, as where the party seeking divorce has no bona fide domicile in the foreign country. The intention to take up a residence must be bona fide, not merely claimed, and is to be considered in connection with the acts of the party.

In the case of *Gonzalez v. Gonzalez*,[7] decided on March 7, 1933, the court in deciding against the validity of the foreign divorce decree, stated:

> While the parties in this action are in dispute over financial matters they are in unity in trying to secure the courts of this jurisdiction to recognize and approve of the Reno Divorce. On the record here presented this can not be done. The public policy in this jurisdiction on the question of divorce is clearly set forth in Act 2710, and the decisions of this court (citing cases).
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> The entire conduct of the parties from the time of their separation until the case was submitted to this court, in which they all prayed that the Reno divorce be ratified and confirmed, clearly indicates a purpose to circumvent the laws of the Philippine Islands regarding divorce and to secure for themselves a change of status for reasons and under conditions not authorized by our law. At all times the matrimonial domicile of this couple has been within the Philippine Islands and the residence acquired in the state of Nevada by the husband for the purpose of securing a divorce was not a bona fide residence and did not confer jurisdiction upon the court of that state to dissolve the bonds of matrimony in which he had entered in 1919.

What is more important however, is that the Court, in deciding the case, referred specifically to the provisions of the Old Civil Code which were in force at that time, and which were preserved in the New Civil Code. The Court stated:

> While the decisions of this Court heretofore in refusing to recognize the validity of foreign divorce has usually been expressed in the negative and have been based upon lack of matrimonial domicile or fraud or collusion, we have not overlooked the provisions of the Civil Code now in force in these Islands. Article 9 thereof reads as follows:
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> The laws relating to family rights and duties, or to the status, condition, and legal capacity of persons, are binding upon Spaniards even though they reside in a foreign country.

And Article 11, the last part of which reads:

> . . . the prohibitive laws concerning persons, their acts and their property, and those intended to promote public order and good morals, shall not be rendered without effect by any foreign laws or judgments or by anything done or any agreements entered into in a foreign country.

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[7] 58 Phil. 67 (1933).

> It is thus a serious question whether any foreign divorce, relating to citizens of the Philippine Islands, will be recognized in this jurisdiction, except it be for a cause, and under conditions for which the courts of the Philippines would grant a divorce. The lower court in granting relief as prayed for frankly stated that the securing of the divorce, the contracting of another marriage and the bringing into the world of innocent children brings about such a condition that the court must grant relief. The hardships of the existing divorce laws of the Philippine Islands are well known to the members of the Legislature. It is of no moment in this litigation what the personal views of the writer on the subject of divorce may be. It is the duty of the courts to enforce the laws of divorce as written by the Legislature if they are constitutional. Courts have no right to say that such laws are too strict or too liberal.

The history of our laws on divorce shows that the policy of the New Civil Code of allowing only relative divorce or legal separation is a return to the policy under the Siete Partidas, of allowing only relative divorce, as contrasted with absolute divorce. Act 2710, although it provides for absolute divorce, limits the grounds under which divorce may be adjudged to two specific cases. The Divorce Law, by which Act 2710 is commonly known, recognized only the grounds of adultery on the part of the wife and concubinage on the part of the husband. Executive Order No. 141, known as the Absolute Divorce Law, which provided for absolute divorce and recognized eleven grounds for divorce, was effective only for one year and seven months, aside from the fact that it was promulgated only by an enemy occupation government.

The cases of *Ramirez v. Gmur* and *Gorayeb v. Hashim,* the first one decided under the Siete Partidas and the second one under Act 2710, showed that a divorce decree of persons domiciled in the Philippines or Philippine citizens cannot be recognized in the Philippines if there is no bona fide domicile on the part of the party seeking the foreign divorce in the foreign country where the divorce was secured.

The case of *Gonzalez v. Gonzalez* laid down the ruling that foreign divorces will not be recognized in this jurisdiction except for a cause and under conditions for which the courts of the Philippines would grant a divorce. Otherwise, the Court in effect stated, it would violate the provisions of the Civil Code which provides that the laws relating to family rights and duties, or to the status, condition and legal capacity of persons, are binding upon citizens of the Philippines even though they reside in a foreign country. This ruling sets forth the principle that the status of an individual is governed by the laws of his nationality, even though he is abroad. Thus, if a foreign judgment based upon

a foreign law adjudges a certain Filipino to possess a certain status, this status will not be recognized in this jurisdiction if the laws of his nationality (Philippine Laws) provide for another status. And since under Philippine laws, divorce may only be granted for two specific causes, a divorce granted in a foreign country for causes other than the two specified causes will not be given recognition in the Philippines.

The Supreme Court, in the case of *Gonzalez v. Gonzalez,* also referred to the provision of the Old Civil Code, incorporated in the New Civil Code, that "... prohibitive laws, concerning persons, their acts and their property, and those intended to promote public order and good morals, shall not be rendered without effect by any foreign laws or judgments or by anything done or any agreements entered into in a foreign country."

It is conceded in all jurisdictions that public policy, good morals and the interests of society require that the marriage relation should be surrounded with every safeguard.[8] The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation. Marriage is an institution, the maintenance of which, the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. Since a law providing for divorce and specifying the grounds under which such a divorce may be secured is intended to promote public order and good morals, it is obvious that a foreign divorce decree granted to Filipino nationals cannot supersede the provisions of the divorce law in force in the Philippines, which provides for specific grounds under which a divorce may be granted, and if the foreign divorce decree were granted through a cause not provided for in the Divorce law of the Philippines, which is the national law of the parties, the foreign divorce decree would be without effect in this jurisdiction, being contrary to a Philippine law intended to promote public order and good morals.

Since a foreign divorce decree secured by Filipino nationals, when its validity is brought before the Philippine courts, constitutes a factual situation involving a foreign element, this would give rise to a question which is to be determined by the Private International Law rules or Conflict of Law rules of the Philippines. Private International Law is defined as that part of the law of each State which determines whether in dealing with a factual situation involving a foreign element, the law of some other State will be

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[8] Salomon, *Validity of Foreign Divorces under Philippine Law.* 22 Phil. L.J. 293 (October, 1947).

recognized.[9] The general rule in conflicts cases is that the proper foreign law or judgment, as the case may be, should be applied. It is only in exceptional circumstances when a conflicts case is totally resolved in accordance with the local law.[10] As a general proposition, the appropriate foreign law or judgment, properly pleaded and proved, should apply. It is only in exceptional cases that a conflict of law or private international law problem should be totally dealt with in accordance with the local internal law (Philippine Law). There are various reasons why not all foreign laws or judgments can be enforced or recognized in the Philippines. One of these reasons is that they may contravene our established public policies.[11] Foreign law will not be applied when its enforcement would run counter to some important policy of the State of the forum.

In the case of *Arca v. Javier*,[12] decided in 1954, under Act 2710, the Supreme Court refused to grant recognition to a decree of divorce secured in a foreign country. The case is summarized as follows:

> Alfredo Javier, a natural born Filipino citizen, married Salud Arca, another Filipino citizen. Before their marriage they had already a child, who thereby became legitimated. Alfredo enlisted in the United States Navy and later sailed for the United States leaving behind his wife and child. On August 13, 1940, he filed an action for divorce in the Circuit Court of Mobile County, Alabama, United States, alleging as ground abandonment by his wife. Having received a copy of the complaint, Salud filed an answer alleging, among other things, that Alfredo was not a resident of Mobile County, but of Naic, Cavite, Philippines, and that it was not true that the cause of their separation was abandonment on her part but that Alfredo was in the US Navy. The Circuit Court of Mobile County granted the divorce on April 9, 1941. Issue: Does this decree have a valid effect in this jurisdiction? Held: The courts in the Philippines can grant divorce only on the ground of adultery on the part of the wife and concubinage on the part of the husband, and if the decree is predicated on another ground, that decree cannot be enforced in this jurisdiction. This pronouncement is sound as it is in keeping with the well known principle of Private International Law which prohibits the extension of a foreign judgment or the law affecting the same, if it is contrary to the law or fundamental policy of the forum. It is also in keeping with our concept of moral value which has looked upon marriage as an institution. And such concept has actually crystallized in a more tangible manner when in the New Civil Code our people, through Congress, decided to eliminate altogether our law relative to divorce. Because of such concept we cannot but react adversely to any attempt to extend here the effect of a decree

[9] SALONGA, PRIVATE INTERNATIONAL LAW, (1966).
[10] *Ibid.*
[11] PARAS, PHILIPPINE INTERNATIONAL LAW, 54 (1962).
[12] Phil. 3538 (1954).

which is not in consonance with our customs, morals and traditions.

Thus, under the Private International Law rules of the Philippines, which is similar to that of other countries, a foreign judgment will not be recognized in this jurisdiction if such a decree or judgment is in contravention of a public policy of the forum. Our public policy with regard to marriage and divorce is clear. Under Act 2710, absolute divorce is allowed, but only on two specific grounds, adultery on the part of the wife and concubinage on the part of the husband, and there must be proof of conviction for such crimes before the divorce decree can be granted. Under the New Civil Code, only relative divorce or legal separation is allowed by the law, and the only grounds are the following:

(1) adultery on the part of the wife and concubinage on the part of the husband; and

(2) An attempt by one spouse against the life of the other.[10]

It is also a settled rule of jurisprudence in this country that a bona fide domicile or legal residence in the foreign country must be established before the foreign court can be considered to have jurisdiction over the case, that is, jurisdiction that will be recognized by Philippine courts, and this is aside from the question of the grounds for divorce.

In the case of *Tenchavez v. Escaño,* the defendant-appellee Vicenta Escaño had been in the State of Nevada for only a period of less than two months when she filed a verified complaint for divorce. (She applied for a passport on June 24, 1950 and she filed the complaint on August 22, 1950). In her passport application, she indicated that she was single and that her purpose was to study, that she was domiciled in Cebu City, and that she intended to return after two years.[11] These circumstances would clearly show that the State of Nevada is not her domicile nor her place of legal residence at the time of the filing of the complaint for divorce. Thus, the second Judicial Court of the State of Nevada, having no jurisdiction over the complaint for divorce, as far as Philippine judicial decisions are concerned, such judgment, even assuming that the ground was one recognized under Philippine law at that time, cannot be given recognition by the Philippine courts.

Besides jurisdiction by the foreign court, private international law rules also require that the judgment must be res judicata in the state that rendered it. However, for there to be res judicata, it is essential that the court rendering the judgment has jurisdic-

[13] Civil Code, Art. 97.
[14] Tenchavez v. Escaño.

tion over the subject matter and the parties. In relation to jurisdiction by the foreign court, Paras stated: "The forum judges its own jurisdiction by its own law on the matter; the forum also decides whether or not the foreign tribunal had jurisdiction. In determining this question, the forum apparently is free to adopt any reasonable and just standard or criterion."[15] (citing Ramirez v. Gmur).

At this point, it must be noted that there is something peculiar in the *Tenchavez v. Escaño* case. The complaint for divorce was filed on August 22, 1950,[16] before the effectivity of the New Civil Code, while the decree itself was issued on October 21, 1950,[14] when the New Civil Code was already in force. Thus, at the time of the filing of the divorce complaint, the relevant law was Act 2710, which allowed absolute divorce. Thus, it could be contended that although the divorce decree was issued at a time when the New Civil Code was already effective, still, what should govern the determination of the case is the policy of the law at the time of the filing of the action for divorce, that is Act 2710, which allowed absolute divorce. And the fact that under the New Civil Code, only relative divorce is allowed, should not prevent the absolute divorce decree granted by a foreign court from being recognized in this jurisdiction. As ruled in *Raymundo vs. Peñas,*[15] where a divorce action was filed before the effectivity of the New Civil Code (as cited by Paras), "Absolute divorce under Act No. 2710, if pending merely on August 30, 1950, the same would be allowed to continue till final judgment..."[19] This ruling is accepted. However, it must be noted that this ruling applies or refers specifically to divorce decrees sought to be obtained under Act 2710, and not to foreign divorce decrees. Also, in the case of *Tenchavez v. Escaño,* the ground for the divorce is not among those provided for in Act 2710. The ground in the case in issue — "extreme cruelty, entirely mental in character," is not one of those specified in Act 2710, and such cannot be recognized in this jurisdiction because it is in contravention of the existing policy of the law at the time the divorce decree was sought. Also, the court in the Escaño case has no jurisdiction over the parties since Vicenta has no bona fide domicile in Nevada at the time of the filing of the action. Hence, even assuming that the divorce decree was issued prior to the effectivity of the New Civil Code, still, it would not be given recognition by Philippine courts. It must be emphasized that the requisites of jurisdic-

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15 Paras, *op. cit.*, p. 95.
16 Tenchavez v. Escaño.
17 *Ibid.*
18 G.R. No. 6705, December 23, 1954.
19 Paras, *op. cit.*, p. 288.

tion and grounds for the divorce must both be present. So that even if we grant that the foreign court had jurisdiction over the parties, still if it is not based on any of the grounds allowed by the Philippine law on divorce, it would still be ineffectual.

Paras raised this same question in relation directly to foreign divorce decrees, and answered it: "While we were still under the old Divorce Law, some Filipino couples went to foreign countries and obtained their decrees of absolute divorce there. Were said decrees ever recognized as valid in the Philippines?" His answer was — It depends. (a) The absolute divorce would be considered as valid here, provided that the following two conditions concurred:

(1) the foreign court must have had jurisdiction over the parties and over the subject matter;

(2) the ground for divorce must have been one of the two grounds provided for under the Philippine absolute divorce law, namely, adultery on the part of the wife and concubinage on the part of the husband.[20]

(b) If either or both of the above-mentioned conditions were absent, the divorce would not be considered as valid here in the Philippines.[21]

Thus, in this jurisdiction the requisites of jurisdiction of the foreign court and of similarity of the grounds of divorce as conditions for the recognition of a foreign divorce decree secured by Filipino nationals, are shown by Philippine judicial decisions, divorce laws of the Philippines as applied, provisions of both the old and new Civil Code of the Philippines, rules of Philippine private international law and textwriters on the subject.

Another part of the decision in the *Tenchavez v. Escaño* case which is worthy of detailed discussion is the adjudgment of moral damages in favor of Pastor against Vicenta. The basis for this award of damages, which was fixed by the court at ₱25,000, is the denial or loss of consortium and the desertion of the husband. The court stated:

> From the preceding facts and considerations, there flows as a necessary consequence that in this jurisdiction Vicenta Escaño's divorce and second marriage are not entitled to recognition as valid; for her previous union to plaintiff Tenchavez must be declared to be existent and undissolved. It follows, likewise, that her refusal to perform her wifely duties, and her denial of consortium and her desertion of her husband constitute in law a wrong caused through her fault, for which the husband is entitled to the corresponding indemnity (Civil Code Art. 2176). Neither an un-

[20] Gonzalez v. Gonzalez and Javier v. Arca, *supra*.

[21] Gonzalez v. Gonzalez, Javier v. Arca, *supra* and Sikat v. Canson, 67 Phil. 207 (19).

> substantiated charge of deceit nor an anonymous letter charging immorality against the husband constitute, contrary to her claim, adequate excuse...

The Supreme Court, in summing up the case, ruled:

> (3) That the desertion and securing of an invalid divorce decree by one consort entitles the other to recover damages.

In a motion for reconsideration, the defendant-appellee Vicenta Escaño assailed the award of moral damages on the ground that her refusal to perform her wifely duties, her denial of consortium and desertion of her husband are not included in the enumeration of cases where moral damages may lie. This was answered by the Court by referring to Article 21 of the Civil Code, for which Article 2219 (10) authorizes an award of moral damages. The Court said: "The acts of Vicenta up to and including her divorce, for grounds not countenanced by our law, (which was hers at the time) constitute a wilful infliction of injury upon plaintiff's feelings in a manner contrary to morals, good customs or public policy (Civil Code, Art. 21) for which Article 2219 (10) authorizes an award of moral damages."[22]

As to the argument of the defendant-appellee that moral damages did not attach to her failure to render consortium, citing *Arroyo v. Arroyo*,[23] and *Cuaderno v. Cuaderno*,[24] because the sanction therefore is spontaneous mutual affection, and not any legal mandate or court order, the Court answered that "The Arroyo case did rule that it is not within the province of courts of this country to attempt to compel one of the spouses to cohabit with, and render conjugal rights to, the other", but it referred to physically coercive means, the Court declaring:

> "We are disinclined to sanction the doctrine that an order, enforcible by process of contempt, maybe entered to compel restitution of the purely personal right of consortium."[25]

But economic sanctions are not held in our law to be incompatible with the respect accorded to individual liberty in civil cases. Thus a consort who unjustifiably deserts the conjugal abode can be denied support (Art. 178, Civil Code of the Philippines). And where the wealth of the deserting spouse renders this remedy illusory, there is no cogent reason why the court may not award damages, as it may in cases of breach of other obligations to do *intuitu personae* even if in private relations physical coercion be barred under the old maxim *Nemo potest precise cogi ad factum*.[26]

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[22] Resolution on Motions to Reconsider, Tenchavez v. Escaño, July 26, 1966, p. 2.
[23] 42 Phil. 54 (19).
[24] G.R. No. 20043, Nov. 28, 1964.
[25] *Ibid.*
[26] *Ibid.*

It may also be added that the moral damages awarded in favor of Pastor may be looked upon not as an economic means of restoring the right of consortium, as differentiated from the physical sanctions, such as the contempt process. The award of moral damages to Pastor should be looked upon as an indemnity for his mental anguish, serious anxiety, besmirched reputation, wounded feelings, moral shock and social humiliation, and not as a means, economic or otherwise, to compel the restitution of the purely personal right of consortium. Moral damages arise from the defendant's wrongful act or omission. It is not an amount demanded because of the refusal of the defendant to do something after the plaintiff had already suffered as a result of the wrongful act or omission. Thus, the moral damages awarded had nothing to do at all with compelling the defendant to restore consortium which she denied to her husband. Rather, it is an indemnification for the sufferings of the plaintiff as a result of the wrongful act or omission of the defendant contrary to morals or good customs. It is a compensation for the damages suffered. Article 21 of the Civil Code provides: "Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall *compensate* the latter for the *damage*." (Italics mine) Art. 2217 enumerates what are included in moral damages.

It may be commented at this point that the provision of the Civil Code properly applicable is Article 21 only, and not Article 2176 and Article 21. The damages awarded by the Supreme Court are moral damages. Under Article 2176, as applied to the case in issue, only actual damages would have been awarded. The reason for this can be clearly inferred from Art. 2219, which provides that: "Moral damages may be recovered in the following and analogous cases:

(2) Quasi-delicts causing physical injuries;

(10) Acts and actions referred to in articles 21, . . ." (Art. 2176 not included in enumeration).

Thus, it can be seen that moral damages can be awarded under Art. 2176 (quasi-delict) only in cases where the fault or negligence caused physical injuries. In the present case, there were no physical injuries which will justify the awarding of moral damages. Article 21, thus, is the article properly and solely applicable.

Furthermore, Article 2176 contemplates an act or omission causing damage where fault or negligence played a part. Article 2176 states: "Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter."

The act of Vicenta of deserting her husband and denying him his right of consortium giving rise to moral suffering on his part is a *wilful* act on the part of Vicenta, which is the one contemplated by Art. 21, which provides: "Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage." The court itself said: "The acts of Vicenta . . . constitute a *wilful* infliction of injury upon plaintiff's feeling . . ." (Italics mine).

As to the loss of consortium which was made by the court as the basis for the award of moral damages, a clarification is in order. Loss of consortium is an actual damage suffered, not merely a moral damage, although it may besides being an actual damage, also give rise to moral damages. It is separate and distinct from the wounded feelings and social humiliation suffered by the husband, Pastor. Thus a separate award should have been made for actual damages arising from the loss of consortium suffered by Pastor, as a result of the desertion committed by his wife Vicenta.

Two arguments may here be raised against the award of damages. First, at the time of the desertion and the filing of the action for divorce, Article 21, the basis of the award for damages is not yet in effect, the Civil Code being effective only on August 30, 1950, and Second, judicial decisions in the past hold that a wife's domestic assistance and conjugal companionship (consortium) are purely personal and voluntary acts which neither of the spouses may be compelled to render, the necessary implication being that damages cannot be recovered since there is no legal obligation to render consortium.

As to the first, although the desertion and the filing of the action for divorce took place before the effectivity of the New Civil Code, still, the act committed by Vicenta was a continuous act of denial of consortium, which continued up to the time of the effectivity of the New Civil Code. As said by the court: "Her denial of cohabitation, refusal to render consortium and desertion of her husband started right after their wedding but such wrong has continued ever since. She never stopped her wrongdoing to her husband . . ."[27]

As to the second. It must be noted here that had the cause of action for damages arising from loss of consortium arose before the effectivity of the New Civil Code, damages would not have been recoverable. This is so because under the ruling in the cases of *Arroyo v. Arroyo* (supra) and *Lillius v. Manila Railroad Co.*,[28] a wife's domestic assistance and conjugal companionship are purely

[27] Resolution on Motions to Reconsider,
[28] 59 Phil. 758 (1934).

personal and voluntary acts which neither of the spouses may be compelled to render,[29] and the necessary implication is that damages cannot be recovered since there is no legal obligation on the part of the wife to render consortium, although loss may be suffered by the husband as a result of the denial by the wife of consortium. However, the New Civil Code, in providing for Article 21, gave the spouse denied of consortium the right to recover actual and moral damages (the latter by virtue of Art. 2219 which refers to Art. 21) if the denial is unjustified and contrary to morals and customs.

Thus, even though the defendant has no legal obligation to perform a voluntary act or duty, if his or her wilful act of refusing to render that duty caused loss or injury to another, contrary to morals or good customs, actual damages may be recovered to compensate the person who suffered the loss. And by virtue of Art. 2219, which refers to Art. 21, moral damages may be recovered as well.

The act of the defendant-appellee of refusing to render consortium having continued up to the effectivity of the New Civil Code, the plaintiff husband acquired the right to recover actual and moral damages for the loss of consortium, caused by the wilful act of the defendant, and the resulting moral suffering and social humiliation.

The decision in the present case, concerning the status of a foreign divorce decree secured by Filipino nationals, the causes for divorce and the non-severance of the marital tie in case of a relative divorce, however, consistent it may be with judicial decisions and the principles of law involved, still, leaves out much to be desired if the plight of unhappy marriages in the Philippines are to be considered. The need for a change in the law on divorce in the Philippines is shown, among others, by cases of Filipino couples who go abroad to seek divorce. These couples are cognizant of the invalidity of these foreign divorces as far as Philippine courts are concerned, however, it would seem that their attitude is that an invalid divorce is better than no divorce at all. The subject of whether absolute divorce should be allowed in the Philippines or not is still a favorite topic in campus debates and symposia. Writers advocating the adoption of absolute divorce in this country are quite numerous.

The question still is, is there need for a reform in our divorce laws, and if there is, what should the reform be?

Under the present divorce law, termed relative divorce or legal separation, the marriage is not dissolved. This divorce is called

[29] *Ibid.*, 767.

a *mensa et thoro*, or separation from bed and board. It does not dissolve the marital tie. Thus, the parties granted legal separation cannot remarry. The spouses are still considered married, although separated from bed and board. Furthermore, legal separation can only be granted for three specific causes, which can be narrowed down to two. The first ground is adultery on the part of the wife or concubinage on the part of the husband; and the second ground is an attempt on the life of one spouse by the other.

This provision for divorce is inadequate and defeats the purpose which it is supposed to achieve.

It is inadequate because there are many other causes which should justify divorce which could have been included. Instances of such causes are: Imprisonment for life of one of the spouses, incurable insanity of either the wife or the husband, habitual and unjustifiable desertion by one of the spouses. It is inadequate too for the reason that the spouse, no matter how innocent he may be, is under the law, still legally married and thus can no longer marry. This would seem not only to be inadequate, but also unjust. Should a woman be forever barred from marrying somebody or from looking for a husband, even when the cause of the divorce was the concubinage of the husband? The Filipino woman is left with no choice but to either live separately and alone throughout her life, which would be unfortunate if she has no source of income except the legal support, or to endure living with her husband who keeps concubines and, consequently suffers social humiliation and mental anguish throughout the time her husband wishes to keep concubines. The same thing can be said in the opposite case.

The present divorce law is also unjust because it allows the wealthy couples who can go and stay abroad and secure foreign citizenship the comfort of divorce, while at the same time, it is denied to those who have no means to go abroad. In the first case, so long as they acquire foreign citizenship before the divorce their divorce would be considered valid. Filipino couples who have no means to go abroad may not secure even an invalid divorce decree.

The present divorce law defeats its own purpose. The policy of the state relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together and to prevent separation. The provision of the law on divorce prohibiting the legally separated spouse from re-marrying or contracting another marriage would destroy the institution of a family. A legally separated spouse may desire to contract another marriage and make a new attempt in raising a new family. One may have fallen in love with another man, or another woman, as the case may be, and that love is reciprocated. The present divorce

law would forbid such a wish. The desire to make a fresh start to make a home would be illegal, since his or her marital bond with the first spouse is not legally severed, though actually it is. Though the law may prevent a marriage from being celebrated, it cannot impose upon that spouse celibacy, thus, the result would be husbandless mothers, fathers without a wife and illegitimate children. Instead of fostering a new home for these children and happy married life for the two persons in love, it would destroy these homes and deprive the two persons of a happy married life. If for the guilty spouse, this would be hard, how much more for the innocent spouse?

Divorce is not actually the cause of broken marriages, or separations, of social dislocations or of homeless children. Divorce should be looked upon as the remedy for these. As stated by Lichtenberger.[80]

> Divorce is an effect, not a cause. It is a symptom, not a disease. It is safe to assert, except in the most attenuated institutional sense, that divorce never broke up a single marriage. It is adultery, cruelty, desertion, drunkenness, incompatibility, the decay or transfer of affection, and the like that destroys marriage. Divorce never occurs until after the marriage has been completely wrecked — sometimes not until many years after. It is only when every marriage tie has been severed, after the parties have discontinued their marital relations and have gone their separate ways, when the marriage actually has no longer any existence in fact, that persons resort to the divorce court in order that the remaining artificial bond, created by law, may be dissolved by the law also. Divorce then may be defined as the readjustment of the legal status of persons formerly married but between whom marital relations already have ceased to exist.
>
> It is obvious therefore, that divorce in effect is nothing more than the annulment of the legal bond upon proof that the marriage de facto has been dissolved. This being the case, it is not divorce, as such, that should incur the disapproval and condemnation of those who deplore the facts and who seek to improve the situation. The real "evils" are those which destroy marriages. Respect for the "institution" of marriage can hardly be enhanced by insistence upon the preservation of the external form in those instances where the internal relations have become a mockery or where the actuality of these relations have disappeared.

We should not look upon absolute divorce as a negative factor in society, as the cause of marital unhappiness, as an instrument of self-gratification. These can be looked upon by the court and subjected to careful scrutiny. If the cause is really unjustified or contrary to morals, then it is for the court to dismiss the action for divorce. Absolute divorce should not be totally eliminated.

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[80] Cited in Martinez, *The Need for Absolute Divorce.* 3 UELJ 52 (July 1960).

After all, the happiness of the individual is still the responsibility of society. It is only when such happiness would conflict with the broader interests of society that society has to stop the individual.

I would thus propose as reforms of the present law on divorce the following:

(1) The enlargement of the grounds for relative divorce to include:

1. incurable insanity
2. Long term-imprisonment (6 or more years)
3. Habitual and unjustified desertion or abandonment by one of the spouses
4. Extreme cruelty sufficient to endanger the life of one spouse or gravely endanger his or her health.

(2) The allowance of absolute divorce in cases where there is:

1. Adultery on the part of the wife or concubinage on the part of the husband;
2. Attempt on the life of one spouse by the other.

With these proposed reforms, it is hoped that the harshness of the present divorce laws will be minimized and divorce be made as a factor in the alleviation of the present ills of society. It is up to the court to determine whether the divorce is being sought only as a means of satisfying the sexual appetite of the one seeking the divorce, or whether the alleged cause is really justified or is brought about by conditions which ought to be remedied by the courts, by the grant of either absolute or relative divorce. After all, the Latin statement, *Quod ergo Deus con homo non separet,* which is the prevailing Catholic principle in matrimonial matters[31] is softened by the admission of the Church itself that when there is an impossibility for two human beings to live together for very grave motives, said spouses may separate "their persons" and their property, even though no divorce is actually granted[32] — *Quod thoren et mutuam quad cohabitationem.* With the adoption of these proposals, perhaps, domestic marital quarrels may be resolved here instead of being settled in foreign countries.

JESUS R. AGUILAR

[31] ALBRECHT ED., DIVORCE IN THE LIBERAL JURISDICTIONS, 26 (1955).
[32] *Ibid.*