122 Phil. 752

[G.R. No. L-19671 (With Resolutions of July 26, 1966 And Sept. 14, 1966), November 29, 1965]

PASTOR B. TENCHAVEZ, PLAINTIFF AND APPELLANT, VS. VICENTA F. ESCAÑO, ET AL., DEFENDANTS AND APPELLEES.

D E C I S I O N

REYES, J.B.L., J.:

Direct appeal, on factual and legal questions, from the judgment of the Court of First Instance of Cebu, in its Civil Case No. R-4177, denying the claim of the plaintiff-appellant, Pastor B. Tenchavez, for legal separation and one million pesos in damages against his wife and parents-in-law, the defendants-appellees, Vicenta, Mamerto and Mena[1] all surnamed "Escaño" respectively.[2]

The facts, supported by the evidence of record, are the following:

Missing her late-afternoon classes on 24 February 1948 in the University of San Carlos, Cebu City, where she was then enrolled as a second year student of commerce, Vicenta Escaño, 27 years of age (scion of a well-to-do and socially prominent Filipino family of Spanish ancestry and a "sheltered colegiala"), exchanged marriage vows with Pastor Tenchavez, 32 years of age, an engineer, ex-army officer and of undistinguished stock, without the knowledge of her parents, before a Catholic chaplain, Lt. Moises Lavares, in the house of one Juan Alburo in the said city. The marriage was the culmination of previous love affair and was duly registered with the local civil registrar.

Vicenta's letters to Pastor, and his to her, before the marriage indicate that the couple were deeply in love. Together with a friend, Pacita Noel, their matchmaker and go between, they had planned out their marital future whereby Pacita would be the governess of their first-born; they started saving money in a piggy bank. A few weeks before their secret marriage, their engagement was broken; Vicenta returned the engagement ring and accepted another suitor, Joseling Lao. Her love for Pastor beckoned; she pleaded for his return and they reconciled. This time they planned to get married and then elope. To facilitate the elopement, Vicenta had brought some of her clothes to the room of Pacita Noel in St. Mary's Hall, which was their usual trysting place.

Although planned for the midnight following their marriage, the elopement did not, however, materialize because when Vicenta went back to her classes after the marriage, her mother, who got wind of the intended nuptials, was already waiting for her at the college. Vicenta was taken home where she admitted that she had already married Pastor. Mamerto and Mena Escaño were surprised, because Pastor never asked for the hand of Vicenta, and were disgusted because of the great scandal that the clandestine marriage would provoke (t.s.n.,vol. 111, pp. 1106-06). The

following morning, the Escaño spouses sought priestly advice. Father Reynes 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. The recelebration did not take place, because on 26 February 1948 Mamerto Escaño was handed by a maid, whose name he claims he does not remember, a letter purportedly coming from San Carlos College students and disclosing an amorous relationship between Pastor Tenchavez and Pacita Noel; Vicenta translated the letter to her father, and thereafter would not agree to anew marriage. Vicenta and Pastor met that day in the house of Mrs. Pilar Mendezona. Thereafter, Vicenta continued living with her parents while Pastor returned to his job in Manila. Her letter of 22 March 1948 (Exh. "M"), while still solicitous of her husband's welfare, was not as endearing as her previous letters when their love was aflame.

Vicenta was bred in Catholic ways but is of a changeable disposition and Pastor knew it. She fondly accepted her being called a "jellyfish". She was not prevented by her parents from communicating with Pastor (Exh. "1-Escaño"), but her letters became less frequent as the days passed. As of June, 1948 the newlyweds were already estranged (Exh. "2-Escaño"). Vicenta had gone to Jimenez, Misamis Occidental, to escape from the scandal thai her marriage stirred in Cebu society. Ittiere, a lawyer filed for her & petition, drafted by then Senator Emmanuel Pelaez, to annul her marriage. She did not sign the petition (Exh. "B-5"). The case was dismissed without prejudice because of her non-appearance at the hearing (Exh."B-4").

On 24 June 1950, without informing her husband, she applied for a passport, indicating in her application that she was single, that her purpose was to study, that she was domiciled in Cebu City , and that she intended to return after two years. The application was approved, and she left for the United States. On 22 August 1950, she filed a verified complaint for divorce against the herein plaintiff in the Second Judicial District Court of the State of Nevada in and for the County of Washoe on the ground of "extreme cruelty, entirely mental in character". On 21 October 1950, a decree of divorce, "final and absolute", was issued in open court by the said tribunal.

In 1951 Mamerto and Mena Escaño filed a petition with the Archbishop of Cebu to annul their daughter's marriage to Pastor (Exh. "D"). On 10 September 1954, Vicenta sought papal dispensation of her marriage (Exh. "D-2").

On 13 September 1954, Vicenta married an American, Russel Leo Moran, in Nevada. She now lives with him in California, and, by him, has begotten children. She acquired American citizenship on 8 August 1958.

But on 30 July 1955, Tenchavez had initiated the proceedings at bar by a complaint in the Court of First Instance of Cebu, and amended on 31 May 1956, aprainst Vicenta F. Escaño; her parents, Mamerto and Mena Escaño, whom he charged, with having dissuaded and discouraged Vicenta from joining her husband, and alienating her affections, and against the Roman Catholic Church, for having, through its Diocesan Tribunal, decreed the annulment of the marriage, and asked for legal separation and one million pesos in damages. Vicenta claimed a valid divorce from plaintiff and an equally valid marriage to her present husband, Russel Leo Moran; while her parents denied that they had in anyway influenced their daughter's acts, and counterclaimed for moral damages.

The appealed judgment did not decree a legal separation, but freed the plaintiff from supporting his wife and to acquire property to the exclusion of his wife. It allowed the counterclaim of Mamerto Escaño and Mena Escaño for moral and exemplary damages and attorney's fees against the plaintiff-appellant, to the extent of P45,000.00, and plaintiff resorted directly to this Court.

The appellant ascribes, as errors of the trial court, the following:

1. In not declaring legal separation; in not holding defendant Vicenta F. Escaño liable for damages and in dismissing the complaint;

2. In not holding the defendant parents Don Mamerto Escaño and the heirs of Dona Mena Escaño liable for damages;

3. In holding the plaintiff liable for and requiring him to pay the damages to the defendant parents on their counterclaim; and

4. In dismissing the complaint and in denying the relief sought by the plaintiff.

That on 24 February 1948 the plaintiff-appellant, Pastor Tenchavez, and the defendaut-appellee, Vicenta Escaño, were validly married to each other, from the standpoint of our civil law, is clearly established by the record before us. Both parties were then above the age of majority, and otherwise qualified; and both consented to the marriage, which was performed by a Catholic priest (army chaplain Lavares) in the presence of competent witnesses. It is nowhere shown that said priest was not duly authorized under civil law to solemnize marriages.

The chaplain's alleged lack of ecclesiastical authorization from the parish priest and the Ordinary, as required by Canon law, is irrelevant in our civil law, not only because of the separation of the Church and State but also because Act 3613 of the Philippine Legislature (which was the marriage law in force at the time) expressly provided that:

> "SEC. 1. *Essential Requisites*. Essential requisites for marriage are the *legal capacity* of the contracting parties and their *consent*." (Italics supplied).

The actual authority of the solemnizing officer was thus only a formal requirement, and, therefore, not essential to give the marriage civil effects[3] and this is emphasized by section 27 of said marriage act, which provided the following:

> "SEC. 27. *Failure to comply with formal requirements*: No marriage shall be declared invalid because of the absence of one or several of the formal requirements of this Act if, when it was performed, the spouses or one of them believed in good faith that the person who solemnized the marriage was actually empowered to do so, and that the marriage was perfectly legal."

The good faith of all the parties to the marriage (and hence the validity of their marriage) will be presumed until the contrary is positively proved (Lao vs. Dee Tim, 45 Phil. 739, 745; Francisco vs. Jason, 60 Phil. 442, 448). It is well to note here that in the case at bar, doubts as to the authority of the solemnizing priest arose only after the marriage, when Vicenta's parents consulted Father Reynes and the archbishop of Cebu. Moreover, the very act of Vicenta in

abandoning her original action for annulment and subsequently suing for divorce implies an admission that her marriage to plaintiff was valid and binding.

Defendant Vicenta Escaño argues that when she contracted the marriage she was under the undue influence of Pacita Noel, whom she charges to have been in conspiracy with appellant Tenchavez. Even granting, for argument's sake, the truth of that contention, and assuming that Vicenta's consent was vitiated by fraud and undue influence, such vices did not render her marriage *ab initio* void, but merely voidable, and the marriage remained valid until annulled by a competent civil court. This was never done, and admittedly, Vicenta's suit for annulment in the Court of First Instance of Misamis was dismissed for non-prosecution.

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 21 October 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.[4] She was then subject to Philippine law, and Article 15 of the Civil Code of the Philippines (Republic Act No. 386), already in force at the time, expressly provided:

> "Laws relating to family rights and duties or to the status, condition and legal capacity of person are binding upon the citizens of the Philippines, even though living abroad."

The Civil Code of the Philippines, now in force, does not admit absolute divorce, *quo ad vinculo matrimonii*; and in fact it 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 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* (Title IV, Book K, Arts. 97 to 108), and, even in that case, it expressly prescribes that "the marriage bonds shall not be severed" (Art 106, subpar. 1).

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 Article 17 of the Civil Code that prescribes the following:

> "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".

Even more, the grant of effectivity in this jurisdiction to such foreign divorce decrees would, in effect, give rise to an irritating and scandalous decimation in favor of wealthy citizens, to the detriment of those members of our polity whose means do not permit them to sojourn abroad and obtain absolute divorces outside the Philippines.

From this point of view, it is irrelevant that appellant Pastor Tenchavez should have appeared in the Nevada divorce court. Primarily because the policy of our law can not be nullified by acts of

private parties (Civil Code, Art. 17, am qout.); and additionally, because the mere appearance of a non-resident consort can not confer jurisdiction where the court originally had none (Area vs. Javier, 86 Phil. 579).

From the preceding facts and considerations, there flows as a necessary consequence that in this jurisdiction Vicente 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 undisolved. 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 unsubstantiated charge of deceit, nor an anonymous letter charging immorality against the husband constitute, contrary to her claim, adequate excuse. Wherefore, her marriage and cohabitation with Russell Leo Moran is technically "inter-course with a person not her husband" from the standpoint of Philippine law, and entitles plaintiff-appellant Tenchavez to a decree of legal separation under our law, on the basis of adultery (Revised Penal Code, Art. 333).

The foregoing conclusions as to the untoward effect of a remarriage after an invalid divorce are in accord with the previous doctrines and rulings of this court on the subject, particularly those that were rendered under our laws prior to the approval of the absolute divorce act (Act 2710 of the Philippine Legislature). As a matter of legal history, our statutes did not recognize divorces *a vinculo* before 1917, when Act 2710 became effective; and the present Civil Code of the Philippines, in disregarding absolute divorces, in effect merely reverted to the policies on the subject prevailing before Act 2710. The rulings, therefore, under the Civil Code of 1889, prior to the Act above-mentioned, are now fully applicable. Of these, the decision in Ramirez vs. Gmur, 42 Phil. 855, is of particular interest said this Court in that case:

> "As the divorce granted by the French Court must be Ignored, it result that the marriage of Dr. 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 Bishop must therefore 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 can not be interpreted to include illegitimates born of *adulterous relations*." (Italics supplied).

Except for the fact that the successional rights of the children, begotten from Vicenta's marriage to Leo Moran after the invalid divorce, are not involved in the case at bar, the Gmur case is authority for the proposition that such union is adulterous in this jurisdiction, and, therefore justifies an action for legal separation on the part of the innocent consort of the first marriage, that stands undissolved in Philippine law. In not so declaring, the trial committed error.

True it is that our ruling gives rise to anomalous situations where the status of a person (whether divorced or not) would depend on the territory where the question arises anomalies of this kind are not new in the Philippines, and the answer to them was given in Barretto vs. Gonzales, 58 Phil. 67:

> "The hardships of the existing divorce laws in the Philippine Islands are well known to the members of the Legislature. It is the duty of the Courts to enforce 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." (p.72)

The appellant's first assignment of error is, therefore, sustained.

However, the plaintiff-appellant's charge that his wife's parents, Dr. Mamerto Escaño and his wife, the late Dona Mena Escaño, alienated the affection of their daughter and influenced her conduct toward her husband are not supported by credible evidence. The testimony of Pastor Tenchavez about the Escaño's animosity toward him strikes us to be merely conjecture and exaggeration, and are belied by Pastor's own letters written before this suit was begun (Exh. "2-Escaño" and "2-Vicenta", Rec. on App. pp. 270- 274). In these letters he expressly apologized to the defendants for "misjudging them" and for the "great unhappiness" caused by his "impulsive blunders" and "sinful pride" "effrontery and audacity" (sic). Plaintiff was admitted to the Escaño house to visit and court Vicenta, and the record shows nothing to prove that he would not have been accepted to marry Vicenta had he openly asked for her hand, as good manners and breeding demanded. Even after learning of the clandestine marriage, and despite their shock at such unexpected event, the parents of Vicenta proposed and arranged that the marriage be recelebrated in strict conformity with the canons of their religion upon advice that the previous one was canonically defective. If no recelebration of the marriage ceremony was had it was not due to defendants Mamerto Escaño and his wife, but to the refusal of Vicenta to proceed with it. That the spouses Escaño did not seek to compel or induce their daughter to assent to the recelebration but respected her decision, or that they abided by her resolve, does not constitute in law an alienation of affections. Neither does the fact that Vicehta's parents sent her money while she was in the United States; for it was natural that they should not wish their daughter to live in penury even if they did not concur in their decision to divorce Tenchavez (27 Am, Jur. pp. 130-132).

There is no evidence that the parents of Vicenta, out of improper motives, aided and abetted her original suit for annulment, or her subsequent divorce; she appears to have acted independently and being of age, she was entitled to judge what was best for her and ask that her decisions be respected. Her parents, in so doing, certainly can not be charged with alienation of affections in the absence of malice or unworthy motives, which have not been shown, good faith being always presumed until the contrary is proved.

> "SEC. 529. *Liability of Parents, Guardias or kin*.—The law distinguishes between the right of a parent to interest himself in the marital affairs of his child and the absence of right in a stranger to intermeddle in such affairs. However, such distinction between the liability of parents and that of strangers is only in regard to what will justify interference. A parent is liable for alienation of affections resulting from his own malicious conduct, as where he wrongfully entices his son or daughter to leave his or her spouse, but he is not liable unless he acts maliciously, without justification and from unworthy motives. He is not liable where he acts and advises his child in good faith with respect to his child's marital relations, in the interest of his child as he sees it, the marriage of his child not terminating his right and liberty to interest himself in, and be extremely solicitous for, his child's welfare and happiness, even where his conduct and advice suggest or result in the separation of the spouses or the obtaining of a divorce or annulment, or where the acts under

> mistake or misinformation, or where his advice or interference are indiscreet or unfortunate, although it has been held that the parent is liable for consequences resulting from recklessness. He may in good faith take his child into his home and afford him or her protection and support, so long as he has not maliciously enticed his child away, or does not maliciously entice or cause him or her to stay away, from his or her spouse. This rule has more frequently been applied in the case of advise given to a married daughter, but it is equally applicable in the case of advice given to a son."

Plaintiff Tenchavez, in falsely charging Viceata's aged parents with racial or social discrimination and with having exerted efforts and pressured her to seek annulment and divorce, unquestionably caused them unrest and anxiety, entitling them to recover damages. While his suit may not have been impelled by actual malice, the charges were certainly reckless in the face of the proven facts and circumstances. Court actions are not established for parties to give vent to their prejudices or spleen.

In the assessment of the moral damages recoverable by appellant Pastor Tenchavez from defendant Vicanta Escaño, it is proper to take into account; against his patently unreasonable claim for a million pesos in damages, that (a) the marriage was celebrated in secret, and its failure was not characterized by publicity or undue humiliation on appellant's part; (b) that the parties never lived together; and (c) that there is evidence that appellant had originally agreed to the annulment of the marriage, although such a promise was legally invalid, being against public policy (cf. Art 88, Civ. Code) While appellant is unable to remarry under our law, this fact is a consequence of the indissoluble character of the union that appellant entered into voluntarily and with open eyes rattier than of her divorce and her second, marriage. All told, we are of the opinion that appellant should recover P25,000 only by way of moral damages and attorney's fees.

With regard to the P45,000 damages awarded to the defendants, Dr. Mamerto Escaño and Mena Escaño, by the court below, we opine that the same are excessive. While the filing of this unfounded suit have wounded said defendant's feelings and caused them anxiety, the same could in no way have seriously injured their reputation, or otherwise prejudiced them, lawsuits having become a common occurrence in present society. What is important, and has been correctly established in the decision of the court below, is that said defendants were not guilty of any improper conduct in the whole deplorable affair. This Court, therefore, reduces the damages awarded to P5,000 only.

Summing up, the Court rules:

(1) That a foreign divorce between Filipino citizens, sought and decreed after the effectivity of the present Civil Code (Rep. Act No. 386), is not entitled to recognition as valid in this jurisdiction; and neither is the marriage contracted with another party by the divorced consort, subsequently to the foreign decree of divorce, entitled to validity in this country.

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

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

(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.

Wherefore, the decision under Appeal is hereby modified, as follows:

(1) Adjudging plaintiff-appellant Pastor Tenchavez entitled to a decree of legal separation from defendant Vicenta F. Escaño;

(2) Sentencing defendant-appellee Vicenta Escaño to pay Plaintiff-appellant Tenchavez the amount of P25,000 for damages and attorneys' fees;

(3) Sentencing appellant Pastor Tenchavez to pay the appellee, Mamerto Escaño and the estate of his wife, the deceased Mena Escaño, P5,000 by way of damages and attorney's fee.

Neither party to recover costs.

Judgment modified.

Bengzon, C. J., Bautista Angelo, Concepcion, Dizon, Regala, Makalintal, Bengzon, J. P., and *Zaldivar, JJ.*, concur.

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[1] The latter was substituted by her heirs when she died during the pendency of the case in the trial court.

[2] The original complaint included the Roman Catholic Church as a defendant, sought to be enjoined from acting on a petition for the ecclesiastical annulment of the marriage between Pastor Tenchavez and. Vicenta Escaño; the case against the defendant Church was dismissed on a joint motion.

[3] In the present Civil Code the contrary rule obtains (Art 53).

[4] She was naturalized as an American citizen only on 8 August 1958.

R E S O L U T I O N

July 26, 1966

REYES, J. B. L., J.:

Not satisfied with the decision of this court, promulgated on 29 November 1965, in the above-entitled case, plaintiff-appelant Pastor B. Tenchavez and defendant appellee Vicenta F. Escaño, respectively, move for its reconsideration; in addition, Russel Leo Moran, whom said defendant married in the United States, has fried, upon leave previously granted, a memorandum in

intervention.

Movant Tenchavez poses the novel theory that Mamerto and Mena Escaño are undeserving of an award for damages because they are guilty of contributory negligence in failing to take up proper and timely measures to dissuade their daughter Vicenta from leaving her husband (Tenchavez), obtaining a foreign divorce and marrying another man (Moran). This theory cannot be considered: first, because this was not raised in the court below; second, there is no evidence to support it: third, it contradicts plaintiffs previous theory of alienation of affections in that contributory negligence involves an omission to perform an act while alienation of affection involves the performance of a positive act.

The prayer of appellant Tenchavez in his motion for reconsideration to increase the damages against Vicenta (P25,000 for damages and attorneys fees a were awarded to Tenchavez in the decision) should, likewise, be denied, all factors and circumstances in the case having been duly considered in the main decision.

In seeking a re-examination of the decision, defendant-appellee Vicenta Escaño, in turn, urges a comparison between the two marriages, stating, in plainer terms, that the Tenchavez-Escaño marriage was no more than a ceremony, and a faulty one at that, while the Moran-Escaño marriage fits the concept of a marriage as a social institution because publicly contracted, recognized by both civil and ecclesiastical authorities, and blessed by three children. She concludes that, since the second marriage is the better one, it deserves the law's recognition and protection over the other. This is a dangerous proposition it legalizes a continuing polygamy by permitting a spouse to just drop at pleasure her consort for another in as many jurisdictions as would grant divorce on the excuse that the new marriage is better than the previous one; and, instead of fitting the concept of marriage as a social institution, the proposition altogether does away with the social aspects of marriage in favor of its being a matter of private contract and personal adventure.

The said appellee claims that state recognition should be accorded the Church's disavowal of her marriage with Tenchavez. On this point, our main decision limited itself to the statement, "On 10 September 1954, Vicenta sought papal dispensation of her marriage (Exh. P-2)", without stating that papal dispensation was actually panted, the reason being that Vicenta's claim that dispensation was granted was not indubitable, and her counsel, during the trial in the lower court, did not make good his promise to submit the document evidencing the papal dispensation; in fact, no such document appears on record. The Church's disavowal of the marriage, not being sufficiently established, it cannot be considered. Vicenta's dated appeal to Canon Law, after she had sought and failed to obtain annulment in the civil courts, and after she had flaunted its principles by obtaining absolute divorce, does not, and tan not, sound convincing. Particularly when account is taken of the circumstances that she obtained the Nevada divorce in 1950 and only sought ecclesiastical release from her marriage to Tenchavez in 1954.

The award of moral damages against Vicenia Escaño is assailed 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 eases where moral damages may lie. The argument is untenable. The acts of Vieenta (up to and including her divorce, for grounds not countenanced by our law, which was hers at the time) constitute a willful infliction of injury upon plaintiff's feelings in a manner "contrary to morals, good customs or public policy" (Civ. Code, Art. 21) for which Article 2219 (10) authorizes an award of moral damages. Neither the case of Ventanilla vs.

Centeno, 110 Phil. 811 (which was a suit filed by a client against his lawyer for failure to perfect an appeal on time), nor the case of Malonzo vs. Galang, 109 Phil. 16 (wherein the precise ruling was that moral damages may not be recovered for a clearly unfounded civil action or proceeding), now invoked by the said defendant-appellee, is in point.

It is also argued that, by the award of moral damages, an additional effect of legal separation has been added to Article 106. Appellee obviously mistakes our grant of damages as an effect of legal separation. It was plain in the decision that the damages attached to her wrongful acts under the codal Article (Article 2176) expressly cited.

Appellee-movant commits a similar mistake by citing Arroyo vs. Arroyo, 42 Phil. 54, and Ramirez-Cuaderno vs. Cuaderno, L-20043, 28 November 1964, to support her argument that moral damages did not attach to her failure to render *consortium* because the sanction therefor is spontaneous mutual affection, and not any legal mandate or court order. The Arroyo case and 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 others, but it referred to physic any coercive means, the Court declaring that-

> "We are disinclined to sanction the doctrine that an order, *enforcible by process of contempt*, may be entered to compel restitution of the purely personal right of *consortium*." (Cas. cit., p. 60) (Italics supplied)

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. 173, Civil Code of the Phil). 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*".

For analogous reasons, the arguments advanced against the award of attorney's fees must be rejected as devoid of merit.

Contrary to intervenor Moron's contention, the decision not impair appellee's constitutional liberty of abode and freedom of locomotion, as, in fact, Vieenta Escaño did exercise these rights, and even abused them stating in her application for a passport that she was "single", the better to facilitate her flight from the wrongs she had committed against her husband. The right of a citizen to transfer to a foreign country and seek divorce in a diverse forum is one thing, and the recognition to be accorded to the divorce decree thus obtained is quite another; and the two should not be confused.

Intervenor reiterates that recognition of Vicenta's divorce in Nevada as a more enlightened view. The argument should be addressed to the legislature. As the case presently stands, the public policy of this forum is clearly adverse to such recognition, as was extensively discussed in the decision. The principle is well-established, in private international law, that foreign decrees cannot be enforced or recognized if they contravene public policy (Nussbaum, Principles of Private International Law, p. 232).

"It is thoroughly established as a broad general rule that foreign law or rights based therein will not be given effect or enforced if opposed to the settled public policy of the forum." (15 C. J. S. 853)

"SEC. 6 *Limitations*. - In the recognition and enforcement of foreign laws the Courts are slow to overrule the positive Haw of the forum, and they will never give effect to a foreign law where to do so would prejudice the state's own rights or the rights of its citizens or where the enforcement of the foreign law would contravene the positive policy of the Saw of the forum whether or not that policy is (reflected in statutory enactments." (11 Am Wr., 300-301)

"A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, *unless contrary to the policy of its own law*, Cottington's Case, 2 Swan st. 326, note; Roach vs. Garvan, 1 Ves. Sr. 157; Harvey vs. Farnie, L R 8 App. Cas. 48; Cheely vs. Clayton, 110 U. S. 701 [28:298]." (Hilton vs. Guyot, 159 U. S. 113, 167; 40 L. Ed. 95, 110) (Italics Supplied)

It is, therefore, error for the intervenor to ask that "private international law rather than Philippine civil Law should decide the instant case", as if the two branches of the law contradicted one another.

In a consolidated paper (intervenor's rejoinder and appellee Vicenta Escaño's supplemental motion for reconsideration), the issue is raised that "the Supreme Court cannot reverse the decision of the lower court dismissing the complaint nor sentence Vicenta Escaño to pay damages, without resolving the question of lack of jurisdiction over her person".

A resolution by the Supreme Court of the issue of jurisdiction over the person of appellee Vicenta Escano, and which was disallowed by the court below, was unnecessary because the matter was not properly brought to us for resolution, either on appeal or by special remedy which could have been availed of by the appellee when the lower court, on 1 June 1957, over-ruled her challenge to its jurisdiction. Neither was the alleged error of the lower court put in issue in her brief as appellee, as it was incumbent upon her to do (Relativo vs. Castro, 76 Phil. 563; Lucero vs. De Guzman, 45 Phil. 852). Not affecting the jurisdiction over the subject matter, the court properly ignored the point (Rev. Rule 51, section 7).

"SEC 7. *Questions that may be decided*. - No error which does not affect the jurisdiction over the subject matter will be considered unless stated in the assignment of errors and properly argued in the brief, save as the court, at its option, may notice plain errors not specified, and also clerical errors." At any rate.

"* * *. When, however, the action against the non-resident defendant affects the personal status of the plaintiff, as, for instance, an action for separation or for annulment of marriage, * * *, Philippine courts may validly try and decide the case, because, then, they have jurisdiction over the res, and in that event their jurisdiction over the person of the non-resident defendant is not essential. The res is the personal status of the plaintiff domiciled in the Philippines, * * *" (1 Moran 411, 1963 Ed., citing Mabanag vs. Galleinore, 81 Paid 254)

The award of damages, in the present case, was merely incidental to the petition for legal separation. For all these reasons, and because she filed a counterclaim against plaintiff (Rec. App. p. 205-206), Vicenta should be deemed to have withdrawn tie objection to the lower court's jurisdiction over her person, even though she had stated in the counterclaim that she was not waiving her special defense of lack of jurisdiction.

It is urged that the actions for legal separation and for quasi-delict have prescribed: the first, because it was not filed within one year from and after the date on which the plaintiff became cognizant of the cause; and, the second, because it was not filed within four years since the Tenchavez-Escaño marriage in 1948.

The argument on both points is untenable.

The action for legal separation was filed on 31 May 1956. Although in a letter, under date of 10 December 1954, the Department of Foreign Affairs informed plaintiff Tenchavez that "*According to information*, she (appellee) secured a decree of divorce on October 21,1950 * * * and married an American citizen, Russel Leo Moran, on September 13, 1954", there is no satisfactory and convincing evidence as to the time when plaintiff Tenchavez received the said letter; nor was he duty bound to act immediately upon hearsay information. Since prescription is an affirmative defense, the burden lay on the defendant to clearly prove it, and her proof on it was inadequate.

On the argument about the action on tort having prescribed, the basis thereof is erroneous: the marriage was not the cause of appellee's wrongful conduct. Her denial of cohabitation, refusal to render *consortium* and desertion of her husband started right after their wedding but such wrong have continued ever since. She never stopped her wrongdoing to her husband, so that the period of limitation has never been completed.

Finally, we see no point in discussing the question on appellee Escaño's criminal intent, since nothing in the main decision was designed or intended to prejudge or rule on the criminal aspect of the case, it any, or any of its constituent elements. It is to be noted that in this civil case only a preponderance of evidence is required, and not proof beyond reasonable doubt. While much could be said as to the circumstances surrounding the divorce of the appellee, we prefer to abstain from so doing in order not to influence in any way the criminal case, should any be instituted.

For the reasons above cited, all motions for reconsideration are hereby denied.

Concepcion, C. J., Barrera, Dizon, Regala, Makalintal, Bengzon, J. P., Zaldivar, and *Sanchez, JJ.*, concur.

Motion denied.

R E S O L U T I O N

September 14, 1966

REYES, J. B. L., J.:

Their first motion for reconsideration having been denied, Vicenta Escaño and Russel Leo Moron, through counsel, have filed a second motion for reconsideration.

It is first averred that this Court's decision contradicts the doctrine laid down in Banco Español Filipino vs. Palanca, 37 Phil. 921, that in proceedings *in rem* or *quasi in rem* the relief must be confined to the res, and the Court can not lawfully render a personal judgment.

Movants' own quotation from that decision demonstrates the difference in the facts between the case at bar and the authority cited. For their own excerpt shows that the rule now invoked was laid down for instances where the defendant never submitted to the jurisdiction of our courts. We said then:

> "If, however, the defendant is a non-resident, and remaining beyond the range of the personal process of the court *refuses to come in voluntarily*, the court never acquires jurisdiction over the Person at all. * * *" (Cas. Cit. p. 930)

The defendant Palanca, in 37 Phil. 921, so much refused to come in voluntarily that he was declared in default. Was this the case of Vicenta Escaño? The records show on their face that it was not. While she objected to the jurisdiction of the Court over her person, she also filed an answer with a counterclaim asking for an award damages against plaintiff-appellant Tenchavez. In stead of "refusing to come in voluntarily", as Palanca did (in 37 Phil. 921), Escaño took the offensive and asked the Court for a remedy, a judgment against her opponent; and this after the court below overruled her objection that she was not within its jurisdiction. In asking the Court for affirmative relief, Escaño submitted to its jurisdiction. In the United States, whence our adjective law finds its sources, the Federal Supreme Court has ruled (Merchant's Heat & Light Co. vs. Clow & Sons, 204 U.S. 286, 51 Law Ed. 488):

> "We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. Harkness vs. Hyde, 98 U, S. 476, 25 L. ed. 237; Southern P. Co. vs. Denton , 146 U.S. 202, 36 L. ed. 943, 13 Sup. Ct Rep. 44. But *by setting up Us counterclaim the defendant became a plaintiff in Us turn, invoked the jurisdiction of the court in same action, and, by invoking, submitted to it*. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But, even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross demand, as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant, by pleading it, is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross, demand, and that whether he shall do so or not is left wholly to his choice. Davis vs. Hedges, L. R. 6 Q. B. 687; Mondel vs. Steel, 8 Mees. & W. 858, 872; O'Connor vs. Varney, 10 Gray, 231. *This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences*. The right to do so is of modern growth, and is

> merely a convenience that saves bringing another suit, not a necessity of the defense." (Italics supplied)

The reason for the rule is manifest. The courts can not lock with favor upon a party adopting not merely inconsistent, but actually contradictory, positions in one and the same suit, claiming that a court has no jurisdiction to render judgment against it, but has such jurisdiction to give a decision in its favor (Dailey vs. Kennedy, 64 Mich. 208, 31 N.W. 125; Harvey vs. Bishop, 171 Okla. 497, 43 Pac. 2d. 48; Haverstick vs. Southern P. Co. (Calif.) 37 Pac. 2d, 146).

> "Another reason, equally valid, is that if such defendant shall ask for any relief other than that, addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary, whereby, if the determination be in his favor, he may avail himself of it, while if it be against, him, he may fall back upon his plea of lack of jurisdiction of the person." (Olcese vs. Justice's Court, 156 Calif. 82, 103 Pac. 318).

True, Escaño made a reservation of her former plea when she filed her counterclaim; but such reservation did not remove the obnoxious contradictory positions she assumed.

Secondly, appellee Vicenta Escaño not only adopted inconsistent positions in the court below but abandoned all pretense to that court's lack of jurisdiction over her person upon appeal to this Court. She made no reference whatever to that question in her brief as appellee. Coupled with her previous demand for affirmative relief, Vicenta's silence on appeal only confirms her waiver of the point. Her excuse is that, the lower court having ruled in her favor, she could not very weld assign as error the overruling of her plea of non-jurisdiction. That excuse is unserviceable; for this Court has repeatedly held (and it is now well settled) that an appellee can make counter assignments of error for the purpose of sustaining the appealed judgment, although it is not allowed to ask that the same be reversed or modified (Bunge Corp. vs. Camenforte & Co., 91 Phil. 861, and cases cited. therein; Cabrera vs. Provincial Treasurer of Tayabas, 75 Phil. 780; Pineda & Ampil vs. Bartolome, 95 Phil. 930; David vs. de la Cruz, 103 Phil. 380). Having failed to do so, this Court had every reason to consider the issue of jurisdiction abandoned, and appellee's belated attempts to resurrect it, by alleging an imaginary error on our part, are pointless and vain. The same thing can be said of her effort to escape the jurisdiction she bad invoked in her counterclaim by not appealing its rejection by the trial court. At most, it amounts to equivocal conduct that can sot revive the inconsistent claim of non-jurisdiction, abandoned by her seeking affirmative relief.

Wherefore, the second motion for reconsideration is denied.

Concepcion, C. J., Barrera, Dizon, Makalintal, Bengzon, J. P., Zaldivar, Sanchez, and *Castro, JJ.*, concur.

Second motion denied.