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VICENTE J. FRANCISCO
Editor and Publisher

LOPE E. ADRIANO
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Assistant Editors

ADELA OCAMPO
Business Manager

RICARDO J. FRANCISCO
Assistant Business Manager

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Tel. 5-43-55

In this issue

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THE SUPREME COURT, THE CONSTITUTION AND THE PEOPLE

By Josiah W. Bailey, United States Senator, North Carolina

The American people have within the last few days been suddenly confronted with a new and deeply disturbing question: The proposition has been put forward under alarming circumstances to increase the number of Justices of the Supreme Court from nine (the present number) to fifteen — provided those Justices 70 years of age or more shall not retire.

There are six Justices of the Supreme Court who fall within the terms of this bill. The effect is to notify each of them that if he remains on the Bench another Justice will be appointed to off-set his presence, because of the alleged infirmity of age. If he retires another will replace him. It looks to a reconstruction of the Supreme Court at one stroke. It is either a judicial recall or a judicial neutralization. It implies even more than reconstruction of the Court. It predicates a new version of the Constitution.

What are the circumstances in which this far-reaching change in the fundamental structure of our Government is put forward?

First, we must take note of the fact that the Court has within the last two years found it necessary to hand down an annual number of opinions holding acts, or portions of acts, of Congress unconstitutional; and that in every instance it has sustained the historic interpretation of the Constitution. If the present Court has been wrong, then the Court has been wrong for seventy-five years or more.

Second, that these acts were passed by the Congress at the instance of the President.

Third, that when these measures were under consideration by the Congress, many Representatives and Senators were troubled on the question of their constitutionality.

Fourth, that in one instance the President sent a letter to a Representative advising him to disregard his doubts as to the constitutionality of a bill, however reasonable.

Fifth, that many members of the Congress felt constrained to waive for the time the question of constitutionality and leave the matter to the Court. That is, instead of bearing their part of the brunt of proposed legislation as beyond the power of the Congress, not a few of its members thought best to pass the whole burden to the Court. Let it be said that this was done under the impulses of a sense of profound emergency, and with much regret on the part of some.

Sixth, that the effect of this procedure was to subject the Supreme Court to widespread criticism and not a few bitter attacks. The Court was described as an oligarchy; it was spoken of as exercising the veto power; careless men said even that it had nullified acts of the Congress; — none of which accusations are true; — and even a scurrilous and ribald book was printed in which the highest court in our land, the highest on earth, respected always and everywhere, made up of learned and venerable men long known in our public life, was held up to scorn and contempt. I have read this book. There is more of falsehood and less of truth in it than in any similar number of pages of which I have had knowledge these fifty years I have been reading.

And seventh, we must bear in mind that in his address to the Congress on January 6th, the President complained of the decisions of the Supreme Court and made some suggestions, the full import of which did not appear at the time.

This is the general background in which legislation is proposed, which, if passed, would either enlarge the Court by six new members or cause six present members to retire and be re-

REASONS FOR THE PRESIDENT'S PLAN AND THE REMEDY

By Homer S. Cummings, Attorney-General of the United States

Only nine short days have passed since the President sent to the Congress recommendations for the organization of the Federal judiciary. Yet in that brief time, unfriendly voices have filled the air with lamentations and have vexed our ears with an insensate clamor calculated to divert attention from the merits of his proposal. Let us, therefore, disregard for a moment these irrelevancies and direct our attention to a dispassionate consideration of the reasons for the action taken by the President and the remedy he suggests.

From the beginning of President Roosevelt's first administration I have been in intimate contact with him with reference to ways and means of improving the administration of justice. Literally thousands of proposals have been considered. In addition, the critical literature of the law has been searched, and the lessons of experience have been canvassed.

Out of it have come certain well-defined conclusions:

First: In our Federal courts the law's delays have become intolerable. Multitudes of cases have been pending from five to ten years.

Rather than resort to the courts many persons submit to acts of injustice. Inability to secure a prompt judicial adjudication leads to improvident and unjust settlements. Moreover, the time factor is an open invitation to those who are disposed to institute unwarranted litigation in the hope of forcing an adjustment which would not be secured upon the merits.

Furthermore, the small business man or the litigant of limited means labors under a grave and constantly increasing disadvantage because of his inability to pay the price of justice. I do not stress these matters further, because the congestion in our courts is a matter of common knowledge.

Second: Closely allied with this problem is the situation created by the continuance in office of aged or infirm judges.

For eighty years Congress refused to grant pensions to such judges. Unless a judge was a man of independent means there was no alternative open to him except to retain his position to the very last.

When, in 1869, a pension system was provided, the new legislation was not effective in inducing retirement. The tradition of aged judges had become fixed, and the infirm judge was often unable to perceive his own mental or physical decreptitude. Indeed, this result had been foreseen in the debates in Congress at that time. To meet the situation the House of Representatives had passed a measure requiring the appointment of an additional judge to any court where a judge of retirement age declined to leave the bench. However, the proposal failed in the Senate.

With the opening of the twentieth century similar proposals were brought forward. The justices of the Supreme Court, however, protested and the project was abandoned. When William Howard Taft, a former Federal judge, left the Presidency, he published his views.

"There is no doubt," he said, "that there are judges at 70 who have ripe judgments, active minds and much physical vigor and that they are able to perform their judicial duties in a very satisfactory way. Yet in a majority of cases when men come to be 70 they have lost vigor, their minds are not as active, their senses not as acute and their willingness to undertake great labor is not so great as in younger men and as we ought to have in judges who are to perform the enormous task which falls to the lot of Supreme Court justices."

In 1913 Attorney General McReynolds (now a justice of the

placed by six new members; in either even giving the President leave to appoint six new Justices and so reconstruct at one stroke the highest Court in our land;—indeed to tear down the Court as it is and create a new Court in its stead — an action without precedent in our long history.

What are the grounds upon which this astonishing action is proposed?

In his message to the Congress presenting the legislation, the President undertook first to argue that the Court was behind with its work. But the fact is against him here. The Court is up with its work. His own Attorney General has made his annual report for the fiscal year ending last July 1st. In this report on page 9, the Solicitor General of the United States, who represents the Government before the Supreme Court, says: — I quote: "*The work of the Court is current and cases are heard as soon after records have been printed and briefs can be prepared.*"

This statement ends the argument that this radical change is proposed in order to expedite the determination of cases. It is conclusive testimony from the President's own witness. It is moreover a matter of record.

The President argued in the second instance that the Court had declined to allow petitions in many cases, and that this indicated necessity for six additional Justices. As to this let us hear his Solicitor General, in the same Report, page 13, in words as follows:

I quote—

"A very large majority of the cases on the appellate docket do not possess sufficient merit to warrant consideration on the merits. * * * Many petitions for writs of certiorari (i.e. appeals) are filed which in the light of settled practice must be regarded as entirely without merit."

To be sure that is a sufficient negation of the second of the alleged facts upon which the President seemed to base his recommendation. If petitions are without merit they ought to be declined and the reason for it lies in the petitions not the Court.

And how, anyway, could fifteen Justices hear and decide cases more quickly than nine men? As a rule the larger the number of participants in a discussion the longer and more difficult the consideration. It is easier for nine men to agree than for fifteen.

Just who misinformed the President I do not know. That he was not correctly informed in these essential matters of fact is only too plain from official statements I have quoted from his Solicitor General, and published in the latest Annual Report of his Attorney General.

The third consideration submitted by the President in support of his plan was that the lower federal courts and the Supreme Court) in his annual report for the Department of Justice urged that the Congress adopt a similar measure. Some judges, he argued, "have remained upon the bench long beyond the time when they were capable of adequately discharging their duties, and in consequence the administration of justice has suffered. I suggest an act providing when any judge of a Federal court below the Supreme Court fails to avail himself of the privilege of retiring now granted by law, that the President be required, with the advice and consent of the Senate, to appoint another judge, who shall preside over the affairs of the court and have precedence over the older one. This will insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court."

In 1914, 1915 and 1916, Attorney-General Gregory renewed his recommendation. Solicitor General John W. Davis aided in drafting legislation to carry out the proposal.

Instead of following this advice, however, the Congress in 1919 passed a measure providing that the President "may" appoint additional district and circuit judges, but only upon a finding that the incumbent judge over 70 "is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character." This legislation failed of its purpose, because it was indefinite and impossible of practical application.

The unsatisfactory solution of 1919 had been endorsed by former Justice Charles Evans Hughes, but in 1928 he made this further observation: "Some judges," he said in part, "have stayed too long on the bench. It is extraordinary how reluctant aged judges are to retire and to give up their accustomed work. I agree that the importance in the Supreme Court of avoiding the risk of having judges who are unable properly to do their work and yet insist on remaining on the bench is too great to permit chances to be taken, and any age selected must be somewhat arbitrary as the time of the failing in mental power differs widely."

Despite this long history of effort to obtain some measure of relief, we are now told in certain interested quarters that age has no relation to congestion in the courts. The verdict of experience and the testimony of those eminently qualified to speak from actual service on the bench are ignored.

Third: Attacks upon the constitutionality of measures enacted by the Congress have burdened the courts. The powers of government are suspended by the automatic issuance of injunctions commanding officers and agents to cease enforcing the laws of the United States until the weary round of litigation has run its course.

In the uncertain condition of our constitutional law it is not difficult for the skillful to devise plausible arguments and to raise technical objections to almost any form of legislation that may be proposed. Often times drastic injunctive remedies are applied without

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Memo from the Editor

In the early part of 1937, President Franklin D. Roosevelt laid before the Congress of the United States a comprehensive plan for the reorganization of the federal judiciary. Dubbed by the American press as Roosevelt's "court-packing plan," the presidential measure's most controversial feature was that which concerned the Supreme Court. Contained in the President's message and the bill which was subsequently filed in the Senate was the provision for the appointment of an additional justice for every Supreme Court justice who failed to retire within six months following the age of 70. The total number of justices under this provision was not, however, to exceed 15.

President Roosevelt's "court-packing" bill came in the wake of a number of Supreme Court decisions invalidating the administration's "New Deal" measures. In no other period of American history had the gap between the legislative and executive departments on the one hand and the judiciary on the other widened to unusual proportions. Of 25 major decisions relating to New Deal legislation or activities, in the period from 1935 to 1937 alone, the Supreme Court supported the administration only 14 times but declared its acts unconstitutional 11 times. Typical of important administration measures ruled unconstitutional by the Supreme Court were the National Industrial Recovery Act and the Agricultural Adjustment Act — spearheads of the New Deal program for economic reform. In the face of this trend in the Supreme Court decisions, New Dealers raised a clamor for either judicial reform by congressional act or by constitutional amendment. President Roosevelt's "court-packing" bill was the administration's answer to this demand.

When the bill for "reform" of the Supreme Court finally came up for discussion in the Senate, it precipitated a long series of debates so bitter that they threatened to disrupt the Democratic Party. In their zeal to maintain the independence of the judiciary,

port of the proposed legislation concerned the subject of age and mental and physical capacity — a subject, as he said, "of delicacy." It related to the two considerations I have just mentioned: The ages of the Justices was cited as the reason for conditions that do not exist. It is alleged that the Court's docket is congested because Justices are aged, but the docket is not congested! It is alleged that petitions for certiorari are refused because Justices are infirm, but the Solicitor General bears witness that they are refused because they are without merit!

He does not say that any one of the Justices is in any degree incapacitated. He is content to offer only the suggestion of "aged or infirm judges." But age is often the evidence of learning and wisdom. It is agreed that the nobler figures of the Senate have passed three score and ten. And with them the Vice President. Their eyes are not dimmed nor is their natural strength abated. Senatus connotes age. No country can afford to dispose of its greater servants by any rigid rule as to age. Give to youth all it may claim, the place of the elder statesmen in a Nation's life is universally recognized. And age ripens the Judge and becomes him as it becomes no other. The old saying "Young men for action, old men for counsel" has always held good. It is agreed that six of the present Justices are each more than seventy years of age. But the President's young Solicitor General, in constant contact with the Court, says that its work is current, that cases are heard and determined as rapidly as briefs are prepared. And the record in the latest year shows that 273 cases were heard and disposed of — a great amount of work done and the Court current.

The opinions in these cases are published in the Reports and have been submitted to the Bar of America. No one has been heard to say that, at any point or in any case, there is evidence of want of mental vigor. It has been a most difficult period. But there has been no complaint from any quarter of delay or deterioration. On the other hand, probably never before have the Court's opinions been so widely published or so closely studied or submitted to tests so searching.

There has been division in the Court — as there always has been when great questions were presented. But no one has attributed this division, on either side, to age or infirmity. We have seen the Court unanimous in the N.R.A. case, but that unanimity has not so far been attributed to weakness in the Court. It was unanimous in the Humphreys case, but no one has thought that that unanimity was due to any infirmity in the Court. We saw it divided 6 to 3 in the A. A. A. and Carter Coal cases, but none who read the opinions has said that the opinions of the Court or the dissenting opinions were due to age or infirmity, but rather all who have read them have been impressed with the vigor and high intelligence manifested in both.

notice to the government or without opportunity upon the part of its representatives to be heard in defense of the law of the land.

Fourth: If the Constitution is to remain a living document and the law is to serve the needs of a vital and growing nation, it is essential that new blood be infused into our judiciary.

The Constitution is not a legal code. In the words of the great Chief Justice Marshall, it was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Justice Story likewise pointed out long ago that "the Constitution inevitably deals in general language. Hence its powers are expressed in general terms, leaving to the Legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its power as its own wisdom and the public interests should require."

In short, the Constitution is not a dam erected to check the flow of the life of our people. It is a channel through which that life flows, directing, guiding, facilitating it, but at no point endeavoring to stop it. That the freedom of our people to direct their own destiny has been hampered, especially of late, by judicial action is scarcely open to debate. These limitations upon Congressional power have brought into challenge a wide range of projects and measures overwhelmingly approved by our people.

To confess that our institutions are not capable of serving our needs implies an admission we should be reluctant to make. Questions of vast significance are moving to their solution. The problems of America are insistent. We are a nation. Our people think as a nation. They act upon a nationwide front.

Industry has long since spread its arms beyond the boundaries of a single State — indeed, beyond the seas. Labor marches on the parade-ground of a continent. It is idle to say that agriculture is a local matter, or a question for the farmers alone. They know that nature has decreed it otherwise. The winds and the dust and the drought and the floods do not heed State lines. They have unmistakable jurisdictions of their own.

I trust it may not be deemed indelicate if I borrow the quaint phrase of Mr. Justice Holmes and suggest that some of our judges "need education in the obvious."

The judiciary is but a coordinate branch of the government. It is entitled to no higher position than either the Legislature or the Executive.

The President recognized this situation in his first message to the new Congress delivered on the 6th of January, when he said:

"With a better understanding of our purposes, and a more intelligent recognition of our needs as a nation, it is not to be assumed that there will be prolonged failure to bring legislative

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members of Congress crossed party lines and took turns to speak against the bill. After five months of bitter debate, it become quite obvious that despite President Roosevelt's tremendous popularity with congressional leaders and the Attorney General's brilliant defense of it, the bill would be voted down. In July, 1937, rather than risk repudiation, administration leaders in the Senate withdrew the Roosevelt plan for "reform" of the Supreme Court from the body's agenda.

In the light of recent events in contemporary Philippine political history, the Lawyers Journal *deems it worthwhile to publish in this issue the speech of Senator Bailey — a Democrat — against President Roosevelt's "court-packing" bill in the course of the protracted debates thereon, as well as the defense made thereof by Attorney-General Cummings.*

The following thought expressed by Senator Bailey in his speech may well serve as a source of inspiration for anyone interested in having the independence of the judiciary preserved in this country:

"Courts, in order to administer justice, must be independent. Grant that his motive is the purest—I deny a President's right to seek to mould the Supreme Court to his heart's desire. I deny the right of Congress to seek to form a Court that will interpret the Constitution to suit its interpretation, its judgment or its will. None may seek to influence the Court save by the accepted processes of Justice. President, Congress, and Court are each under the Constitution. It is the people's instrument; the charter of their rights; the sheet anchor of their liberties. And it must be interpreted, if it is to be of value, only by a Court of Justice, independent of all influence, free of all politics or personal will, free of all force, inducement of temptation, and upon the altars of Reason and Conscience under the oath duly taken before the God from whom our liberties and the great instrument of their preservation were alike derived. As was said of old, so must it be said now and ever more to all who minister in the People's Temple of Justice: 'What doth the Lord God require of Thee but to do Justice, love mercy and walk humbly before the Lord Thy God'?"

THE SUPREME COURT . . .

And at all times it has been recognized that the Court's opinions have been consistent with the Court's historic interpretation of the Constitution — with the reading of the language of that document which Marshall and Story, Miller, Fuller, White and Taft have made familiar, and which the whole country has approved in every generation.

So, while we have only the fact of age here to support the President's suggestion, the truth of the matter is against it. If there were a presumption on account of age, it is rebutted by the facts I have cited. The Supreme Court today is up with its work, is capable, is vigorous; and it is guarding the Constitution with a vigor and a courage worthy of all the great traditions of its noble history, and worthy no less of the great Republic which rests upon that history. If the Court has offended, the offense is that it has in a trying time maintained the interpretation of the Constitution which the people have received from their Court and approved in every period of their history.

I have now disposed of the three reasons the President gave in his message of February 5th for the proposed changes.

It is safe to say that no advocate of the President's proposition will offer to maintain it upon the considerations upon which the President relies in his message.

In view of their manifest inadequacy, one may be justified in looking a little beyond the express reasons set out in the President's message supporting this bill — to ascertain whether the President has other ground for his extraordinary action. But I would not look beyond the manifest facts, I would not risk opinion. I would draw no inferences. Let us see and consider only what the President himself said on the subject. He closed his message of February 5th with a significant remark that if the measures recommended "achieve their aim, we may be relieved of the necessity of considering any fundamental changes in the powers of the courts or the Constitution." This indicated a purpose other than merely improving the Judicial system.

I now recur to the President's message of January 6th. In this message he discussed certain of his measures which the Supreme Court had held to be unconstitutional. He advised against amending the Constitution. He argued the necessity for general laws of the same type as those which the Court had declared to be unconstitutional. He put his faith in a different judicial interpretation. I quote his words:

"With a better understanding of our purposes, and a more intelligent recognition of our needs as a nation, it is not to be assumed that there will be prolonged failure to bring legislative and judicial action into closer harmony. *Means must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world.*"

Thus the President made known his desire for general laws asserting the Federal power over activities heretofore throughout our history confined to State regulation, laws like the N.R.A., which the entire Court held to be unconstitutional. And quite plainly he seeks a Supreme Court which will hold such laws to be constitutional, notwithstanding all the precedents to the contrary. He says that if we reconstruct the Courts as he suggests, "we may be relieved of considering any fundamental changes in the powers of the courts or the Constitution." He would change the Court rather than amend the Constitution!

That is, he holds a differently constituted Court would sustain his views; and that, if given the opportunity, he may appoint six Justices and so reconstruct the Supreme Court as to reverse recent decisions, change the established meaning of the Constitution, and assert the power of the Congress to pass general laws like the National Recovery Act — regulating activities which from the beginning until now have consistently been held to be within the province of the several states.

And so, reading his message of January 6th last, together with his message of February 5, 1937, we have no difficulty in perceiving the reasons for the President's . . .

and judicial action into closer harmony. Means must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world."

In his message of Feb. 5 the President clearly and forcefully announced his considered and deliberate recommendation.

"Modern complexities," he said to the Congress, "call also for a constant infusion of a new blood in the courts, just as it is needed in executive functions of the government and in private business.

"Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an everchanging world."

These four outstanding defects of our judicial system — delays and congestion in the courts, aged and infirm judges, the chaos created by conflicting decisions and the reckless use of the injunctive power, and the need for new blood in the judiciary — are dealt with by the President in his message of the 5th of February, in which he submits a simple, well-rounded, comprehensive and workable system which covers all these points and meets all these needs.

The proposed bill which the President submitted with his recommendations provides in substance that whenever a Federal judge fails to resign or retire at the age of 70, another judge shall be appointed to share in the work of the court.

In no event, however, are more than fifty additional judges to be appointed, the Supreme Court is not to exceed fifteen in number, and there are limitations on the size of any one of the lower Federal courts.

It also provides for a flexible system for the temporary transfer of judges to pressure areas, under the direction of the Chief Justice.

The President further recommended the adoption of a proposal now pending in Congress to extend to the Justices of the Supreme Court the retirement privileges long ago made available to other Federal judges. He also recommended that the Congress provide that no decision, injunction, judgment, or decree on any constitutional question be promulgated by any Federal court without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard in behalf of the constitutionality of the law under attack.

He further recommended that in cases in which any District Court determines a question of constitutionality there shall be a direct and immediate appeal to the Supreme Court, and that such cases shall take precedence over all other matters pending in that court.

This is the sum and substance of what the President proposes. This is the so-called attack upon our judicial institutions.

Despite the manifest need of these reforms, despite the comprehensive and reasonable nature of these proposals, despite the long history which brought them forth, despite the eminent judges and statesmen who have either expressed views or actually proposed measures of substantially the same character, the President is now the storm center of a virulent attack. The technique of the last political campaign has been revived. We are solemnly assured that the courts are to be made mere appendages to the executive office, that the judges to be appointed cannot be trusted to support the Constitution, and the tragedies of despotism await only the adoption of the President's recommendations.

Yet, no serious objection has been made to any one of the purposes or to any part of the plan, except its application to certain members of the Supreme Court. Why the Supreme Court

ceiving the obvious fact that our President seeks to reconstitute the Supreme Court of the United States in the clear intention of bringing about a new interpretation of the Constitution, by decisions sustaining his view of the powers of the Congress and the rights of the people and the States. This is the "means" which he said on January 6th must be found "to adapt our judicial interpretation," and so avoid amendment to the Constitution.

In this, I submit with great respect, the zeal of the President has carried him far beyond wisdom and right.

The remedy is worse — infinitely worse — than the difficulty to which it is addressed. Grant that his motive is good, that his objective is worthy, he cannot afford to set such a standard or such a precedent.

It was never intended that any President or any Congress should control the Supreme Court of the United States, or any other Court. We settled that with the Stuart Kings of England 300 years ago. It is, if I may quote the President on another occasion, "more power than a good man should want or a bad should have."

Courts, in order to administer justice, must be independent. Grant that his motive is the purest — I deny a President's right to seek to mould the Supreme Court to his heart's desire. I deny the right of Congress to seek to form a Court that will interpret the Constitution to suit its interpretation, its judgment or its will. None may seek to influence the Court save by the accepted processes of Justice. President, Congress, and Court are each under the Constitution. It is the people's instrument; the charter of their rights; the sheet anchor of their liberties. And it must be interpreted, if it is to be of value, only by a Court of Justice, independent of all influence, free of all politics or personal will, free of all force, inducement of temptation, and upon the altars of Reason and Conscience under the oath duly taken before the God from whom our liberties and the great instrument of their preservation were alike derived. As was said of old, so must it be said now and ever more to all who minister in the People's Temple of Justice:

"What doth the Lord God require of Thee but to do Justice, love mercy and walk humbly before the Lord Thy God?"

Grant that the President's objective is desirable; his method is indefensible. It must be resisted because it is wrong; and also because there is a right way. If the President or the Congress or both ought to have more power, and the people and the States less, let an amendment to the Constitution be submitted to the people. Let us never seek to reconstruct a court to suit our wills. Upon proper grounds we may impeach and remove, but we cannot reconstruct a Court. Truth and Justice find their sources in a higher will than any man's or all men's. We interfere with the processes by which they are revealed at no less peril than that of the rash young men of old who laid hands upon the Ark of the Covenant of the Chosen People.

I know that this question is not a party question: It strikes throughout America far deeper than party lines or partisan predilection. But I am glad that I can invoke the Platform of my Party at this moment. Precisely on the point of the President's position, the Democratic Convention of 1936 has spoken. In full view of the opinions of the Supreme Court on the legislation of the Administration, and in the prospect of the campaign, the candidate, and the election, the Democratic Party gave its most solemn assurance. I quote:

"If these problems cannot be effectively solved by legislation within the Constitution, we shall seek such clarifying amendment as will assure to the legislatures of the several States and to the Congress of the United States, each within its proper jurisdiction, the power to enact those laws which the State and Federal legislatures, within their respective spheres shall find necessary in order adequately to regulate commerce, protect public health and safety, and safeguard economic security. *Thus we propose to maintain the letter and spirit of the Constitution.*"

should be granted a special exemption from the plan no one has been able to explain. If there were no judges on that court of retirement age there would be no substantial objection from any responsible quarter. What then is the real objection? It is simply this: Those who wish to preserve the status quo want to retain on the bench judges who may be relied upon to veto progressive measures.

Opponents of this measure assert that it is immoral. The reason they charge that it is immoral is because they are unable to charge that it is unconstitutional. Whether the plan is immoral or not must be tested by the results it produces. If it produces a wholesome result in a perfectly legal way it can scarcely be called immoral.

It is true that the President's proposal may possibly but not necessarily have the effect of increasing the size of the Supreme Court. But there is nothing new in that. Jefferson, Jackson, Lincoln and Grant, together with the Congresses of their respective periods, saw no objection to enlarging the court.

Again, it is loosely charged that the present proposal is a bold attempt to "pack" the court. Nothing could be farther from truth. Every increase in the membership of a court is open to that charge, and indeed every replacement is subject to the same objection. Under the President's proposal, if there is any increase in the total number of judges, it will be due entirely to the fact that judges now of retirement age elect to remain on the bench. If those judges think it would be harmful to the court to increase its membership, they can avoid that result by retiring upon full pay.

The Constitution imposes upon all Presidents the duty of appointing Federal judges, by and with the advice and consent of the Senate. Upon what ground, may I ask, do the opponents of the President justify the claim that he shall not perform the duty that all other Presidents have performed. George Washington appointed twelve members of the Supreme Court. Jackson appointed five. Lincoln appointed five. Grant appointed four. Harrison appointed four. Taft appointed five and elevated still another to be Chief Justice. Harding appointed four and Hoover appointed three. President Roosevelt has appointed none at all.

Out of every attack of hysteria on this question there comes a further charge that the President's proposals will lead to dictatorship, through the establishment of an evil precedent. But there have been far more significant precedents than this. Jefferson ignored a subpoena issued by Chief Justice Marshall. Jackson, in a stubborn moment, told the Supreme Court to try and enforce its own decrees. Lincoln totally disregarded Chief Justice Taney's demand that the privilege of the writ of habeas corpus be restored. No one of these Presidents was a dictator, but each illustrated how powerless the courts are unless the purity of their motives and the justice of their decisions win them the popular support. Indeed, the Supreme Court in its opinions has specifically recognized this fact.

Let us have done with irresponsible talk about dictatorship. Let us turn our minds to realities. We hear much about the perils that beset democracy. If we are to defend successfully our institutions against all comers from the right and from the left we must make democracy work.

Those who were violently opposing the President's recommendations insist that the reforms he seeks to bring about should be accomplished by amending the Constitution and by that method alone. This is the strategy of delay and the last resort of those who desire to prevent any action whatever. Thirteen State Legislatures can prevent the adoption of any constitutional amendment. The Child Labor amendment, submitted thirteen years ago, has not yet been ratified. Furthermore, if any amendment were secured, it would still have to run the gauntlet of judicial interpretation.

(*Continued on page 378*)

These are the words of the President's Party's Platform. This was his platform as recently as November 3, 1936.

I stand on this Platform, and I have the right to ask that my Party shall stand on this Platform. It is the Platform on which the President was a candidate, and on which he was standing in the campaign. It was accepted by the American people. It was good November 3, 1936. It is good at this moment. Not one word was said for the present proposition before the election. Had we offered a Platform in which we promised to reconstruct the Supreme Court and so reconstruct it as to change the historic interpretation of the Constitution, the campaign would have been fought out on that question. And yet, if this measure is to be considered, that is what we should have done. This at least would have given the people a chance to express their will in the matter. And it is a matter in which they have right to express their will.

If change in the meaning of the Constitution is desired, the way to bring that change about is to amend the Constitution, not the Court. That is what the Platform says. If a "modern" Constitution is desired, we can have it only one way — that is in the way we got the old Constitution, by the will of the people. It is their instrument. They made it, and only they may change it. We cannot alter the Ten Commandments by interpretation. The meaning they had the day they were given upon Sinai, that meaning they have had these five thousand years and will have until the end of time. We cannot change the meaning of the Magna Charta by interpretation; we cannot change the meaning of our Bill of Rights by interpretation. May they abide forever! We can change the language of the Constitution in the way provided, but we cannot ordain an interpretation of the language as it stands to suit ourselves, nor may we contrive a tribunal for such a purpose. One may attach to that language a different meaning from that which the Court has given it, but he cannot reconstruct a Court of Justice to bring about that meaning. To do so would put an end to the significance of the Constitution as the instrument of the Government's existence and stability, as the supreme law of the land and the charter of the people's rights. For if one Congress may add six members to the Court in order to validate its acts, another Congress may add ten more members to validate its acts. This would be to destroy the Court and the Constitution. And it would be better not to pretend to have either, but frankly confess that our Government has become a Government of men, not of laws.

Let me give you an illustration. Many of you have had law suits or served on juries. What sort of justice would we have if a litigant could increase the jury to suit his purposes, putting jurors thereon to do his will? What sort of jury would that be, if upon finding that it was divided, one might add to it six men to suit his purpose? Juries find the facts; Courts, i.e., Judges, find the law. It is just as important that the law be interpreted by an impartial Court as that the facts be found by an impartial jury. There is a process of Justice, and it is not political. It looks to the will of the law, not the will of men or any man.

A stacked jury, a stacked Court, and a stacked deck of cards are in the same moral category — one has no more confidence in one than in another of them.

Set the precedent for a good purpose, and it will be invoked for a thousand bad purposes.

We cannot put Congress or President above the Constitution. Like the Flag, it is over all. George Washington was our greatest man. He kept himself under the Constitution. But if he had not been willing to do so, the people would have broken down the Republic rather than put him above it. They loved him, they trusted him, he had served them as no mortal has ever served his fellow men; but his generation knew, as this generation knows, that no man, no Congress, is great enough or wise enough or good enough to be entrusted with unbridled power. No man should ask in our land, even with the highest motives and the best objectives, to be given leave so to reconstruct the Supreme Court as to give him power to determine the meaning of the Constitution. That would put him over it, not under it. There would be at once an end of Constitutional government, and the question with reference to legislation or any executive act would not be, is it within the powers granted by the people in the Constitution? — but only, is it within the purpose of a President or Congress which have taken over the power to mould the Constitution to their will? Under such conditions where would be that which we now know as the Judicial Power — in the Temple of Justice, where the people have placed it, or in the will of the President and the Congress? Under such conditions what sort of Republic would this Republic be?

Very plainly more is now involved than has been involved in our entire history. Court and Constitution are at stake. We cannot properly measure their value. But I must offer, as I conclude, a further word to that end.

The Supreme Court of the United States is not the creature of Congress. It is not the creature of a moment. It is their institution. It is not the creature of a moment. It has been in continuous existence nearly 150 years. We see it today embodied in nine learned and venerable men, but the Court consists of all who have ministered in its Temple, the dead as well as the living. Its voice is the voice of Past and Present. Its function is Truth and Righteousness, the ancient word for Justice. It does not rule. It merely affirms the will of the people in the instrument which they uttered to preserve their rights over against all powers of the government. It does not veto acts of the Congress: It declares only when those acts transgress the limits set upon the powers of the Congress by the people in their Constitution. This and no more. It does not pass on the wisdom of legislation. It does not determine economic questions.

It has no earthly power. Congress has the purse, the President is Commander-in-Chief of the Army and Navy, and the Executive of the Republic. The Supreme Court has neither purse nor sword. It cannot even defend itself against criticism. Its decrees prevail only by reason of the spiritual appeal of Justice in the human heart.

Beautiful to behold is the fact that now for 150 years without other aid, such has been the capacity of the American people for Justice, such their native feeling for its processes, that in all seasons and events, in war and peace, in poverty and prosperity, in the day of small things and the day of great things, whether agreeing or disagreeing, they have exalted this Court; they have kept it above politics; they have protected it against all who would tear it down; they have upheld it against all who would bring it low; they have accepted its decisions as the ultimate determination of controversies, civil or criminal, in high or low estate, in life and in death.

On the other hand, it has never failed them. It has stood between them and all who would impair their rights. It has succored rich and poor with equal hand. It has vindicated freedom of speech and of the press. The humble ex-slave has found refuge in its precincts against the power of mighty States; and States have found by means of it their rightful place in the Union the fathers brought forth. It has guarded the rights of the people, it has preserved the rights of the States, it has maintained the rights and the powers of the Union — and all without purse,

REASONS FOR THE PRESIDENT'S . . .

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The more thoroughly the President's plan is debated the more clearly will its merits appear. It meets legitimate need. It is reasonable, it is moderate, it is direct, it is constitutional. It works out our problems within the framework of our historic institutions and it guides us to a clear path away from our present difficulties.

The envious and the malicious may challenge the integrity of the President and the purity of his motives, but the only apostasy of which he could be guilty would be to break faith with the people who trust him to carry on.

DEBATE ON SENATE BILL NO. 170 AMENDING OR REPEALING CERTAIN SECTIONS OF THE JUDICIARY ACT OF 1948

May 5, 1954 — 11:00 A.M.

SENATOR PRIMICIAS. Mr. President, I now ask for immediate consideration of Senate Bill No. 170, the amendments to the Judiciary Act.

PRESIDENT. Consideration of Senate Bill No. 170 is in order.

SENATOR PRIMICIAS. The sponsor of the measure, Mr. President, is the distinguished Chairman of the Committee of Justice, the gentleman from Batangas, Senator Laurel. I ask that he be recognized.

PRESIDENT. The gentleman from Batangas has the floor.

SENATOR LAUREL. Mr. President and gentlemen of the Senate: Senate Bill No. 170 which is now the bill submitted for the consideration of this Honorable Body, is the result of what might be considered a compilation of the different measures submitted to the Committee on Justice, and to a very great extent, incorporates features taken from the reorganization bill submitted by Senator Mabanag as well as the recommendations made by the Department of Justice and likewise the recommendations at one time made by Associate Justice Ramon Diokno, now deceased. Senate Bill No. 170 is not a complete reorganization of the judiciary, but in the opinion of the Committee on Justice incorporates what might be called the principal features which need to be incorporated in a legislative measure in order to improve the present organization of the judiciary as well as certain features of fundamental character which must be inserted in the new reorganization measure. I am going to refer to the principal features which we have incorporated in this bill.

The first has reference, Mr. President, to the increase of the salaries of the Chief Justice and Associate Justices of the Supreme Court and the Chief or the Presiding Justice and Associate Justices of the Court of Appeals and also the judges of the courts of first instance. This feature of the bill is not a new one because, as the members of this body will recall, last year we approved the Senate bill concurred in by the House of Representatives providing for the increase of the salaries of the Justices of the Supreme Court and the Justices of the Court of Appeals and the judges of the courts of first instance. That bill, however, was vetoed by the chief executive then on the ground that the bill was unconstitutional because the bill treated of various matters and these matters are not mentioned or referred to in the title of the bill. So that the veto by the former chief executive was based more on a technical ground than on anything else and it seems that even the former executive was not opposed to the augmentation or increases of the salaries of the Justices of the Supreme Court and of the Justices of the Court of Appeals and the judges of the courts of first instance. It is hoped that we have eliminated even the technical objection of the former chief executive, and that is the reason why the increase is being reiterated in this measure which is practically a reproduction of the bill which was vetoed by the former chief executive. That is one feature, and it is not necessary for me to argue in favor of the increase because this Honorable Body having already approved the increase in last year's session, I suppose, unless conditions have changed or opinions have changed, this Body will likewise approve what it had approved last year.

The second feature of this reorganization bill is the abolition of judges at large and cadastral judges. The reason for the abolition is, first, to make the organization of courts of general jurisdiction which are the courts of first instance more simple. In other words there will only be one kind of judges of courts of first instance and these judges are the district judges of courts of first instance. While probably in the past there might have been a need for the appointment of cadastral judges and, perhaps, judges at large, or even at one time, auxiliary judges it seems that conditions have changed now, and even the cadastral judges do not devote their time exlusively to the hearing and trial of cadastral cases. With the conditions having changed and in view of the fact that all these different judges, whether district judges, judges at large, or cadastral judges, all belong to the same category, namely, they are judges of courts of first instance, it would be more simple in the plan of judicial reorganization to make all these judges district judges. So that in order to implement this provision which is intended to simplify our judicial organization, we provide for the absorption of the judges at large and the cadastral judges by considering them as judges of the district to be distributed and

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without patronage, without propaganda, without force; but not without Power — not without the power in it and in ourselves which makes for Righteousness. Our forefathers brought it forth, our fathers have preserved it for us; and we now will maintain it for ourselves, our children and our children's children.

And what is this Constitution of the United States?

It is the charter of the national existence and stability; and it is more. It is the charter of the powers given to the Republic, of the powers reserved to the States, of the inalienable rights in the people. It is their instrument. They made it. They made it not just to constitute a government, but also to preserve their rights — the blessings of liberty to ourselves and our posterity. They know that any sufficient government would become stronger than any one of themselves. They created a government, and gave it power — so much and no more — and they asserted rights in States which they could control, rights in themselves singly and as a whole which none could violate. They set up a Court to declare the metes and bounds of the powers they were vesting, and made it independent, to define, to declare, and to affirm the powers they were holding to themselves, or to their States.

The Constitution is no device to block the people's progress. It is the device of the people to preserve themselves, their States, their local self government, their inalienable rigats, their homes, and the future of their children. The people made it and only they can change it — and only in the way they provided. Let others denounce it; let others criticise it; the people will preserve it as the charter of their liberties, their rights, their votes, their democracy, their place in the life of their Republic. It stands between them and the possibility of a dictator. They require every public officer to take solemn oath to maintain and support it. They give no man power save upon this oath.

Sometimes we forget; sometimes impatience overcomes our better judgment. But at last we remember. Down in our hearts we know that so long as the Constitution stands, the Republic will stand; so long as the Constitution stands, our rights are secure our homes are our own and none may make us afraid. It restrains the over-reaching hand of power. It stops the army on the threshold of the cabin. It asserts the dignity of man, his place in the earth and the freedom of his soul.

Congress is mighty, but the Constitution is mightier. Presidents are powerful, but the Constitution is more powerful. Courts are great, but the Constitution is greater. Laws are strong, but the Constitution is stronger. And it is so because the Constitution is the expressed will of all of the people, the supreme law of the land, to be altered only by themselves, and therefore the living soul of democracy.

The Court and the Constitution: — They stand to fall together. The Constitution creates the Court, and the Court declares and maintains the Constitution. To weaken one is to weaken the other. To destroy one is to destroy the other. To weaken either is to weaken the foundations of our Republic; to destroy either is to destroy the Republic.

assigned to the different judicial districts which we have increased, as another feature of the reorganization, from sixteen judicial districts to thirty-three judicial districts. This is a logical proposal, because having provided for the abolition of cadastral judges and judges at large and converting them into district judges, we have to assign them to the different judicial districts and the assignment would be made by the Secretary of Justice with the approval of the Supreme Court. Another feature of this judicial reorganization is the increase of judicial districts from 16 to 33 as I have indicated. It has been suggested that we increase the number of judges of first instance. We are not increasing the number of judges of first instance. We have the same number of judges, around 107 or thereabouts. First, in the interest of economy; because after a careful study and after presenting the tabulated statement which is made a part of the explanatory note to Senate Bill 170, your Committee has reached the conclusion that with the proper apportionment and assignment of all the judges of districts these 107 or thereabouts number of judges if properly assigned and made to work in the different districts, would do away with the necessity of increasing the number of judges of first instance. That is the reason, Mr. President and Gentlemen of the Senate, why in one of the sections here we have increased the number of judges for the different judicial districts, and that is also the reason why we have increased the judicial districts from 16 to 33.... Now, Mr. President, there is another feature in this reorganization bill which I have forgotten to state. Under this bill, we are curtailing the powers of the Secretary of Justice in the transfer or assignment of judges not only from one district to another, but also from one province to another province within the district. Formerly there was a complaint — and, I think, well taken — that as the judges-at-large and the cadastral judges have no judicial districts, and as the Judiciary Act of 1948 permitted the transfer or assignment of these judges who have no districts, from one district to another, without the intervention of the Supreme Court, we have had quite a number of cases; but there was what we call handpicking of judges to try special cases or cases political in character perhaps; that from the point of view of the administration, would better be tried by these judges-at-large or cadastral judges specifically transferred from one province to another for the specific purpose.

Now, with the abolition of the judges-at-large and the cadastral judges and with each judge of the Court of First Instance having his own district, then the technical ground that these judges before have no districts, the judges-at-large and the cadastral judges, could no longer be invoked because all the judges are district judges and therefore fall within the prohibition of the Constitution that no judge of a regular district shall be transferred from one district to another without the approval of the Supreme Court.

We have gone further than that, and although this probably is not the time to complain against the policy of the present administration, we have gone further in the prohibition with reference to the transfer of judges from one district to another, Mr. President, but as I have indicated, we prohibit in this bill the transfer of judges from one province to another province within the district without the approval of the Supreme Court. x x x Now, unless the Senate is ready to consider amendments, personally, I would prefer that we postpone the consideration of this measure until tomorrow, to give way to the series of amendments that it seems the members of this Body would like to propose.

MOCION DE APLAZAMIENTO

SENATOR PRIMICIAS. Mr. President, in view of the fact that some members have amendments to make to this bill, I ask that further consideration of the same be postponed until tomorrow to enable said members to submit their amendments in proper form.

THE PRESIDENT. Is there any objection on the part of the Senate to postpone further consideration of this bill until tomorrow, in order that everybody could submit his respective amendments? (*Silence*) The Chair hears none. The motion is approved.

CONSIDERACION DEL SENATE BILL NO. 170
(*CONTINUACION*)

May 13, 1954 — 11:25 A.M.

SENATOR PRIMICIAS. Mr. President, I move for the resumption of the consideration of Senate Bill No. 170, the Judiciary Bill. The distinguished gentleman from Batangas, Senator Laurel, was the sponsor of the measure.

EL SEN. LAUREL CONTINUA SU PONENCIA

THE PRESIDENT. The gentleman from Batangas has the floor.

SENATOR LAUREL. Mr. President, I have very little to add to the explanation that I offered in sponsoring Senate Bill No. 170 providing for an amendment and revision of certain sections of the Judiciary Act of 1948. As I stated before, several measures were presented in connection with the Judiciary Act of 1948 and I understand that a few days ago the lower House just approved a measure on the same subject, although not exactly identical as to certain points with reference to the reorganization of the Judiciary Act of 1948. It is not necessary for me, Mr. President, to repeat what I have stated before regarding the importance of the judiciary particularly with reference to the maintenance of the faith and confidence of our people in the administration of justice. It is sufficient for me to state that faith in the administration of justice is only possible if the judicial department is manned by men who are competent, willing to work and actually work.

We also have in the Committee on Justice several measures the most important of which probably is the one presented by the distinguished gentleman from La Union from which bill we culled or took certain important features in order not to do away with but merely to postpone the consideration of matters which involve details with reference to the proposed amendment to the Judiciary Act of 1948. The former Justice of the Supreme Court, now deceased, Don Ramon Diokno, has also suggested certain amendments, and as I said, just a day or so ago, the House of Representatives likewise presented amendments to the judiciary act. But, Mr. President, as the members of this body well know, your Committee on Justice had centered the amendments around, I think, four important points, the first referring to the increase of compensation of the members of the judiciary from the Supreme Court to judges of the courts of first instance, increasing the salary of the chief justice from ₱16,000 to ₱21,000 per annum and the associate justices from ₱15,000 to ₱20,000 per annum, and the Presiding Justice of the Court of Appeals from ₱13,000 to ₱16,000 per annum and the associate members from ₱12,000 to ₱15,000 per anuum, and also the salary of judges of the courts of first instance from ₱10,000 to ₱12,000 per annum. That is the first point touched upon in this bill, namely, the increase of the salaries of the chief and associate justices of the Supreme Court and the presiding justice and the associate justices of the Court of Appeals and the judges of the courts of first instance.

The second feature which is important to mention in this connection has to do with the redistricting of judicial districts by increasing the number of judges in the different judicial districts without, however increasing the number of the judges of the courts of first instance. And the original bill which your humble servant sponsored the other day in cooperation with the Department of Justice, incorporated in the explanatory note a tabulated statement based on the number of cases pending in the different courts of first instance of the districts not disposed of, believing that for the purpose of determining the number of judges of the courts of first instance for the different judicial districts, it would perhaps be a good idea to send more judges to those districts where there are more pending cases undisposed of. However, as the members of this body will recall, at the suggestion of the distinguished gentleman from Quezon, another basis of classification or distribution was made. This time the basis is the number of docketed cases in the different courts of first instance; and, Mr. President, that is now the basis of the apportionment and assignment of the dif-

ferent judicial districts which are now, as I understand and if I remember correctly because I don't have the bill in my hand, 33 districts, so that while the districts under this measure have been increased, as I think, from sixteen or thereabouts to thirty-three, the number of judges in all the different districts by and large remains the same because not all districts have been increased on the basis suggested by the distinguished gentleman from Quezon. That is, we have increased not only the judges, but by and large as I have indicated, the number of judges assigned to the different districts without increasing the actual number of judges of the courts of first instance which, I understand and if I remember correctly, is around 107. That is the actual number of judges of first instance including of course the cadastral judges and judges-at-large and the judges of first instance occupying permanent and regular appointments in the different districts. This is the second feature of this bill.

The third feature is the general and almost complete prohibition regarding the transfer or assignment of judges from one district to another without the approval of the Supreme Court. Mr. President, I desire to invite attention to the fact that under the Constitution judges of first instance of regular district cannot be transferred or assigned from one district to another without the approval of the Supreme Court. But even under the provision of the Constitution prohibiting such assignment and transfer there were cadastral judges and judges-at-large who naturally have no districts and, therefore whose assignment and transfer could be effectuated from one district to another apparently without violating the Constitution, giving rise to what we have complained against in the past, namely, the practice of handpicking judges for the purpose of trying specific cases in which influential officials might be interested for the purpose of insuring certain definite results in connection with the trial of such cases.

SENATOR ZULUETA. Mr. President, will the gentleman yield?

THE PRESIDENT. The gentleman may yield if he wishes.

SENATOR LAUREL. I will be very happy to yield to the distinguished gentleman from Iloilo.

SENATOR ZULUETA. I want to know from the gentleman from Batangas whether when we approved the Constitution there were already cadastral judges?

SENATOR LAUREL. Mr. President, this idea of the classification of judges of first instance, if the gentleman will allow me to take a little more time, is not new. You will remember we have auxiliary judges before. We do not have them now. We call them judges-at-large, we call them cadastral judges. These cadastral judges existed even before the Constitution because one of the preponderant policies of the American administration then was to give emphasis to the disposition of land cases giving rise to what we call cadastral survey in the different provinces and municipalities and, therefore, the necessity of creating this special position which is known as cadastral judges, as part and parcel of what we had established as our judicial system. Is that clear to the Senator?

SENATOR ZULUETA. I still doubt if it was the real intention of our Constitutional Convention to approve a law protecting the immovability of judges by giving the Supreme Court the authority to transfer judges from one district to another. Don't you believe, Mr. Senator, that we are not protecting cadastral judges by transfering them from one place to another? If that is the case, Mr. Senator, why are we not proposing to make cadastral judges also district judges?

SENATOR LAUREL. That is the fourth point I will take up. I am just enumerating for the information of this Honorable Body the capital changes which we are introducing by the passage of this measure. I mentioned the increase in compensation of judges, then I mentioned the redistricting and the increase of judicial districts and the district judges without increasing the number of judges of first instance and then I am referring to this matter now which has reference to the prohibition of the transfer or assignment of judges from one district to another under the Constitution. And I was going to say, Mr. President, under the Constitution no transfer or assignment can be made of a regular judge of a district from his district to another judicial district without the approval of the Supreme Court. That was the law, that is still the law. But as we had experienced before there were judges in districts, that is to say, cadastral judges and judges-at-large, who have no districts and therefore the Secretary of Justice may take advantage of this point in the Constitution in certain cases by transferring cadastral judges and judges-at-large from the places they were assigned to for the purpose of trying specific cases in other districts where the powers-that-be are interested in securing effective action, whether of conviction or acquittal, in criminal cases. And that is the reason, Mr. Senator, why as one of the features of this bill we are abolishing cadastral judges and judges-at-large. We are establishing just district judges, but that is a point that I propose to take up later, perhaps the last point, in my explanation of the importance and the capital point of the bill that is now submitted to this Honorable Body for consideration.

SENATOR ZULUETA. Then, Mr. Senator, for your Honor and for everybody, is it not a good policy to maintain the immovability of judges, whether they are regular or cadastral judges? According to Your Honor, in this bill, you are creating cadastral judges too.

SENATOR LAUREL. Only, so that all of them will come under the prohibition of the Constitution that none of them can be transferred from one district to another judicial district without the approval of the Supreme Court.

SENATOR ZULUETA. I thank you for the assurance.

SENATOR LAUREL. We are following the pattern of the law in the protection of the immovability of the regular judges by creating district cadastral judges. That is one of the results. In addition the Secretary of Justice can no longer mobilize any so-called cadastral judges and judges-at-large for the purpose of trying specific cases in other parts of the archipelago.

SENATOR ZULUETA. But how about the cadastral judges?

SENATOR LAUREL. The district cadastral judges will try those cases and the jurisdiction will, of course, fall under the corresponding judges of the district. In a given district there may be many judges, for instance, in the district of Cebu, Cavite, Rizal and Palawan we may have three or four judges. So, at the basis of these number of cases that arise from year to year, there will be district judges assigned to the different districts. In that district you will find judges ready to take care of those cases without opening the way for the Secretary of Justice to pick judges to try those cases.

SENATOR ZULUETA. That means, Mr. Senator, that we are eliminating the judges-at-large.

SENATOR LAUREL. We want as far as possible to eliminate judges-at-large.

SENATOR ZULUETA. That is only what I want to know.

SENATOR LAUREL. (*Continuing.*) Mr. President, the handpicking of judges is a bad practice, it is not conducive to the proper administration of justice, and if it is conducive at all to anything, it is conducive to the absolute loss of confidence of the people in the administration of justice, and if we are fair to ourselves and just to ourselves, the remedy is in our hands then — we should close the door to anything that would give to the Secretary of Justice or even to ourselves the power to handpick a judge for the purpose of trying our political enemies, for all we know, because that is not justice. The administration of justice must take its ordinary course because justice has been pictured as a beautiful lady who is supposed to be blind, who is supposed to know the merits and demerits of the case, but is not supposed to see the parties. It is supposed to do justice and decide cases on

the basis of their own merits. If I am correct, Mr. President, in inserting in our law a provision which would make the hand-picking of judges impossible, then the fourth feature which I have mentioned, I think, is essential to the improvement of the administration of justice and therefore should be approved in that respect.

Now, Mr. President, this is quite important, — the fourth feature is quite important and I want to confess, Mr. President, that having been at one time a humble member of the judiciary and now a member of the legal profession, I have had my own difficulties in trying to remedy a situation in order not to be accused of having served as a political instrument for the purpose of asking certain people in the judiciary, particularly because it is of the essence of a good judicial system that the judges should remain in office during good behavior or for life, and then one of the conditions for the stability of judicial institutions is the permanent office or stability of judicial positions and that is why they call this the security of tenure. Not only the judges must be secure in their position, but they must be secure in their compensation. Not only must they be secure in their position and compensation but they must be secure in their official station, and that is the reason why it is more difficult and more so under this bill to transfer a judge of First Instance from one district to another, making all judges come under the prohibition of the Constitution that these judges can only be transferred from one district to another with the approval of the Supreme Court. And not only is the security of tenure and security of compensation and security of official compensation, as far as it is practicable to do so, important, but there are other guarantees and general principles intended to surround the members of the judiciary who have lost essential security and guarantee that would make the judiciary an independent, courageous and fearless instrumentality of the government in order to promote the welfare and establish permanently the faith of our people in the just and equal administration of law in our beloved country.

Mr. President, the reason why I have prepared the draft which is the four important innovations in the law is the following: As I look back to the fact and study the historical development of the administration of justice in our country since the inauguration of the Philippine Commission which enacted the original Act 136, generally known as the First Organic Law in the Philippines affecting the establishment of the judiciary, and as I watched the development of the law in its progress and in its growth up to the time we reached the period when we were permitted to draft our own Constitution, I notice that in establishing courts of general jurisdiction, which are the Courts of First Instance, after the classification and gradation of the different kinds of courts established in our country, while I realize that in those days probably it was conceivable to disintegrate and provide for the different classifications with reference to the Court of First Instance, I must be frank, Mr. President, to confess that now in this state, considering the fact that we are now in the position to establish a judicial system which is responsive to our needs and it is the result of our own experience as a free people in this country that when we establish a court of general jurisdiction, such as the Court of First Instance, we should not establish any classification or any gradation. The Court of First Instance and a judge of the Court of First Instance must be a judge of the Court of First Instance with the same compensation, with the same dignity and honor, with the same category. And there will no longer be established in this country a system where a cadastral judge receives ₱8,400 a year and a judge-at-large receives ₱9,000 and a judge of the district receives ₱10,000. If they are judges of First Instance, then they should be treated the same way because they are judges of the same jurisdiction. You cannot classify the capacity of people in the judiciary by simply calling them judge-at-large or cadastral judges. In point of fact if I may be allowed to say so, I know even of certain judges-at-large and cadastral judges who are better than certain district judges. If I am correct in that statement, then why do we classify the same group of judges? Why? — after making this classification, the Supreme Court, the Court of Appeals, the judges of First Instance — we make another classification of cadastral judges, auxiliary judges and judges-at-large. And now we come to the municipal judge or justice of the peace court. Therefore, Mr. President, rationally and scientifically speaking, from the science of law and legislation, I believe that there should be only one classification and one nomenclature for judges of First Instance with the same degree, with the same category, with the same rank, with the same honor and with the same privileges and the same compensation, and that is the Court of First Instance. That is my first plea for abolishing the judges-at-large and the auxiliary judges. In my second reason, Mr. President, I have almost hesitated. When we approved the Constitution in the Constitutional Convention, some of whose members are now members of this honorable body, when we approved that prohibition with reference to assignment and transfer of judges from one district to another, we never thought that some people would make use of the technical method of excluding the judges-at-large and the cadastral judges, so that while the powers were prohibited from transferring a judge of a judicial district from one district to another, they could do what they wanted with reference to the judges-at-large and the cadastral judges. And in order to be consistent and rationalize the philosophy which we have adopted through this measure, we will not give any effect, not even for our partymen in this government, to transfer these cadastral and auxiliary judges for purposes purely political. If I were to be a partymen, if I were to get up on this occasion as purely a partymen, why should I deprive the Secretary of Justice who is a Nacionalista of certain powers? Someday we might have to do what other people did in the past. Someday we might need to make use of oppression in order to win an election. But, Mr. President, I got up to speak to you all, gentlemen of the Senate, not as a Nacionalista, because I want to establish a system here that would work honestly, efficiently and well and a credit to our people, a system of judicial organization that would serve the great and paramount purpose not of my party whose interest undoubtedly is secondary, but to promote and enhance and protect and conserve their faith in the integrity and the impartiality of the administration of justice in the Philippines. That is the second reason. And for this and more, I can keep on explaining the great purpose. That is why I had to apologize, Mr. President, to Senator Mabanag when I just picked up certain features which if we could only approve, these features alone, without attending to details, then we shall be happy and in my opinion we shall have succeeded in having grasped the fundamental principles which are basic, which are essential and which are vital if we were to have a system of administration of justice which is to last, to last not for any given party, but a system that will secure and guarantee the interest of all litigants, of all lawyers and of all the people at large. This is among the reasons, Mr. President, why almost in the last paragraph of the provision I proposed the abolition of the position of judges at large and cadastral judges. I said that I have to emphasize this point because I shall appear perhaps, we shall all appear before the verdict of history, accused of having impaired and affected the tenure of office, the security of tenure of these people. But I have in my humble way studied very carefully the constitutional and legal problems involved, and I have reached the conclusion that the judges at large and the cadastral judges, as well as the judges of districts of first instance, are legislative courts and not constitutional courts. The Constitution provides, Mr. President, that the judicial power, under Article VIII, Section 1, shall be vested in one Supreme Court and such inferior courts as may be established by law. This, verbatim, or literal, is what the Constitution provides in its Section 1 of Article VIII. In other words, there is only, insofar as the Constitution is concerned, one Constitutional court, and that is the Supreme Court. Insofar, therefore, as the Constitution says, there shall be one Supreme Court. That is final. There cannot be two, there cannot be none. There must be one Supreme Court. How many inferior courts? The Constitution does not say, and wisely enough, Mr. President. I am happy to testify to the meaning of this portion of the Constitution. Happily enough, the Constitution leaves the determination of the inferior courts and the apportionment of their jurisdiction and the like to Congress. This is what I mean when I say that these inferior courts are legisla-

tive courts, and if they are legislative courts, while we should safeguard against impairing the security of tenure and compensation as long as the office is there, in our work and in our obligation to give our people a good and efficient government and therefore in the exercise of our powers to reorganize this government to serve our people, we can abolish positions which are not Constitutional. And I emphasize this point, Mr. President, because I know that this is a bold step on my part and I shall probably have to appear and defend my attitude, and I might just as well express my views so that I can refer to them in my public utterances.

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SENATOR SUMULONG. Mr. President, may I interrupt the gentleman for a few question? I should like to clarify this point about the effect of this bill on the incumbent judges of the courts of first instance.

THE PRESIDENT. The gentleman may yield if he so desires.

SENATOR LAUREL. Gladly.

SENATOR SUMULONG. Now, I understand Your Honor to say that this bill, if approved, would abolish the positions of judges at large and cadastral judges and that in the opinion of Your Honor that would be within the constitutional powers of Congress because those positions are legislative and not constitutional in character. I can say that I am entirely in accord with the gentleman from Batangas in abolishing the positions of judges at large to avoid the pernicious practice of allowing the Department of Justice to assign special judges for specific cases. But what is the effect of this bill, if approved, on district judges, will they need new appointments in order to continue as such district judges?

SENATOR LAUREL. If they are in one district and they are assigned to another district, I think they will need new appointments because I think, once a judge in one district, he cannot be a judge in any other district without being appointed anew. That has been decided by our Supreme Court and that is still a good law.

SENATOR SUMULONG. Let us take a concrete example. Suppose somebody is now a district judge, say in Pasig, Court of First Instance of Rizal. If we approve this bill, will that judge there continue to be a district judge in the Court of First Instance of Rizal without need of a new appointment or a new confirmation?

SENATOR LAUREL. Suppose you have the same district, because if there is a reorganization of these districts you have to have new appointments—let us take Rizal. We have not changed the district. This second district has the same district judges. Are you going to reappoint them when you have not touched them? But if your plan is to transfer a judge of the district of Rizal, let us say, to Pampanga, instead of making him a judge of the district where Rizal is, you make him a judge of the district where Pampanga is, it is my humble opinion that you need a new appointment.

SENATOR SUMULONG. In other words, even if we approve this bill, a district judge can continue to be a district judge of the same district, provided his territorial jurisdiction has not been changed by this bill.

SENATOR LAUREL. I think so.

SENATOR SUMULONG. But I notice, Your Honor — I am looking at the corrected copy, I don't know about the original copy —that we are changing also in this bill the qualifications of the judges of the courts of first instance—instead of five years of practice and five years residence in the Philippines, we are making it ten. Now when we change the qualifications of the district judges, does not Your Honor think that that might affect the tenure of the incumbent district judges?

SENATOR LAUREL. I don't think so. I am responsible for that because I thought that in order to elevate to some degree the standard of our judges, it might be a good idea that before one can be appointed judge to the court of first instance, he must have had ten years of law practice or service equivalent to law practice. But, of course, this is a new law. These people are already here on the basis of their previous qualification of five years. I don't think that we can make the law have a retroactive effect by applying it to judges holding their respective positions according to their former qualifications. That is my humble opinion.

SENATOR SUMULONG. But does Your Honor have any objection if, for purposes of clarity, to remove doubts on the matter, we approve a proviso that those who are now district judges shall continue to be such judges without the need of any new confirmation or appointment in their respective districts?

SENATOR LAUREL. Although it is not necessary in this bill, anything that will make our position certain and anything that will make the expression of our view and ideas effectively clear, I would favor, so that I will welcome any clarification on that point.

SENATOR SUMULONG. Now, turning to this matter of judges at large and cadastral judges whose positions we are going to abolish under this bill, if they are not extended appointments as district judges, will they be entitled to any gratuity under any law?

SENATOR LAUREL. That will depend on whether they have satisfied the requirements of the Osmeña Act or some other law in order that they may be entitled to the benefits of those laws, in point of age or in point of service, for instance.

SENATOR SUMULONG. Has the Senator inquired as to how many of these cadastral judges and judges at large will be affected adversely and would be left without any resource, retirement pay or gratuity if we approve this bill?

SENATOR LAUREL. I have made quite an inquiry, Mr. Senator, and I secured a complete list of the names and the records of services, and I even went further—I asked the Secretary of Justice who amongst them he would like to recommend and how many would he leave out if he were to decide this case, because I do not want to make people miserable. They will hate me or blame me. They will say: "I am jobless because Senator Laurel abolished my position." So I don't want to have enemies, not even political enemies. I am tired of having enemies. I want to live in peace now with people. And according to him there are very few, probably just around six.

SENATOR SUMULONG. So that only six will be without any...

SENATOR LAUREL. I am not assuring—please do not misunderstand me—I am not making a positive statement about the number of those who will be kicked out. I don't know. But I want to satisfy my own conscience that I did not do anything unjust. But out of thirty-three, more or less around six are on tab.

SENATOR SUMULONG. That is exactly the same feeling that I am entertaining, Your Honor, that if we are going to abolish the positions of these judges, at least, we should consider also what would be the future of those whose positions will be abolished. That is why I am asking, as from Your Honor's own words I heard Your Honor say that there are cadastral judges and judges-at-large who are more competent than the district judges, and following that same thought, I thought that we should inquire what will happen with these judges, especially those who are competent and who are efficient.

SENATOR LAUREL. Mr. Senator, I would also give you an expression of what had occurred in my mind in connection with

these cadastral judges and judges at large if we make them *ipso facto* district judges under this bill. The first difficulty is this. A name was mentioned who was no good and one who ought not to be in the judiciary because his reputation is so bad, and as a cadastral judge, he gets ₱8,400. Now you make him judge of the court of first instance. You promote him from ₱8,400 to ₱10,000, and then we promote the judges of the district with another promotion of two thousand pesos. Then you give him an increase of salary of four thousand pesos. That is the first observation, and the second observation is I think the observation made by the gentleman from Quezon, Senator Tañada. He asked me how we can automatically convert them into district judges because, he said, that needed legislative action. A judge is a judge made only by an appointment of the President and confirmed by the Commission on Appointments, and he suggested that the first thing for me to do even if I became unpopular is to absorb them, make them all judges. Then I could not answer the observation of the distinguished gentleman from Quezon. Here is a judge known to me as a bad one, almost known by everybody, and still you give him a promotion of four thousand pesos. It is not simply right to promote a bad judge. On the other hand, there is that legal and constitutional aspect raised by Senator Tañada. How can we convert them into district judges by simply enacting a law without executive appointment? And so I swore to the legality and constitutionality of the legislation abolishing this position. Not that we were discriminating. It is not my purpose, it is not with a lack of intention, it is not hatred, political or any character, which caused us to abolish this position. We abolished all these positions because we believe that the interest of our country and the interest of the people demand that we take such action on the part of Congress. I am revealing the mental process even when we were discussing this measure with the members of the Committee on Justice.

SENATOR SUMULONG. I am completely in accord with the opinion of Senator Tañada that if we abolish the positions of judges at large and cadastral judges we cannot provide in this bill that a former judge-at-large and former cadastral judge would not be district judges without new appointment because that will be encroaching upon the powers of the Executive and the Commission on Appointments. But I was thinking that if we are going to abolish the positions of judges at large and cadastral judges and some of them will not be appointed district judges perhaps it would be fair also to provide some sort of retirement pay for those who will not be reappointed.

SENATOR LAUREL. Many of them will be able to take advantage of some benefits. But I did not study that article. They will have to take advantage of any retirement benefits they are entitled to.

SENATOR SUMULONG. Because if they are not entitled to retirement under our general laws, they cannot receive any gratuity and they would think there is injustice or malice being committed against them.

SENATOR LAUREL. We will take care of those cases in the same manner we provided for the retirement of Justice Moran and some of those people who have left their positions to accept other government positions. I think we will take care of them.

SENATOR PERALTA. Mr. President, will the gentleman yield to a few questions?

THE PRESIDENT. The gentleman from Batangas may yield if he wishes.

SENATOR LAUREL. Gladly.

SENATOR PERALTA. It is in the role of a humble student of law that I have stood up to ask some questions to the foremost authority on Constitutional Law.

SENATOR LAUREL. Thank you, Mr. Senator, I do not deserve it.

SENATOR PERALTA. I am somewhat worried until I heard the gentleman from Batangas raise the doctrine of the independence of the judiciary. I was wondering whether the gentleman from Batangas stated a fact when he said that only thirty men will be affected by this bill. While it is only true there were only 33 judges at large and cadastral judges, yet under the same principle that the gentleman enunciated that inferior courts may be abolished by the congressional action we are indirectly threatening the tenure of office of the justices of the court of appeals, judges of the court of first instance and all judges of the peace, and I was wondering whether the gentleman from Batangas does not agree with me that this is an indirect manner of threatening all these members of our judiciary by abolishing now the offices of judges at large and cadastral judges implying that should certain members of the court of appeals be, by popular acclamation, deemed as what the gentleman from Batangas said "crooks" that we would abolish also the court of appeals. Now, would not the gentleman agree with me that this is an indirect way of threatening the independence of the judiciary?

SENATOR LAUREL. Mr. President, this very same argument was raised some years ago, I think it was 1938, because I happened to be in the supreme bench at the time, when the legislature enacted Act 4007 providing for the reorganization of the judiciary, and I think that was the second time the legislature reorganized the judiciary after Act 136 of the Philippine Commission which had been in force up to the time of the enactment of Act 4007. And then thereafter, that was the question involved in that case, the Commonwealth enacted Act 145 reorganizing again the judiciary particularly with reference to the district and one of the cases raised in that connection was the case of Sixto de la Costa who was appointed in lieu of Judge Francisco Zandueta as a result of that reorganization because whereas, Mr. President, the fourth district then occupied by Judge Zandueta was the branch corresponding to the district of Manila, when it was reorganized another province was added which was Palawan which became a separate and distinct district and De la Costa was appointed there. There was a quo warranto proceedings on the ground that it impaired the tenure of office and the same argument was made. If you destroy one branch of one court on the theory that it is a legislative court then you can destroy all legislative courts, then you have nothing left except the Supreme Court. I remember, Mr. President, that that same argument was brought up and yet there were many things that are inconceivable that we can imagine. We can imagine the suppression of the court of appeals, the suppression of the court of first instance, the suppression of the municipal courts and all courts and there will be no courts at all except the Supreme Court. But you must give some leeway, some allowance to the sense of fairness. The question is one of legal powers. Hence, the legislature has the power to reorganize the judiciary, and if it finds it necessary, to suppress the Court of Appeals. It could be suppressed. We did it at one time to improve the administration of justice, and we permitted transfer of the appeals directly from the Court of Appeals to the Supreme Court, and there was a time when there was no Court of Appeals at all. Considering our duty to give our people a system of administration of justice that will give them faith and confidence and hope, if we find it necessary to abolish the judges-at-large and the cadastral judges, could we or could we not? If we could, whether we have the legal power and whether we are justified in taking that action. Why not? As a patriotic Filipino you will share the glory of this body in having done something in exercising the legal power, which you are proud and happy to exercise with the other honorable members of this body.

SENATOR PERALTA. I remember very well the case of Zandueta versus De la Costa wherein the gentleman from Batangas was an Associate Justice of the Supreme Court and he gave

a concurring opinion on the result. I remember also that his decision in that case, evading the issue as to whether the Congress or National Assembly then may abolish what the gentleman from Batangas calls legislative court. And I do remember one of the constitutional authorities on the law and on the subject whom I revere, my esteemed professor, Dean Sinco in the College of Law, stating that in his opinion, in order to protect the tenure of office of judges, it is of doubtful constitutionality if the National Assembly or the Congress may abolish such inferior courts because of that constitutional provision under section 9 of Article VIII of our Constitution guaranteeing the tenure of office of members of the judiciary. I remember also that the gentleman from Batangas, then Justice, in his concurring opinion, made the distinction as to when the abolition of a certain court limiting the tenure of office, and when the abolition of courts was a matter of general policy.

SENATOR LAUREL. Right.

SENATOR PERALTA. Now, in this case do I understand that it is the intention of the gentleman from Batangas that the abolition of courts is a matter of general public policy?

SENATOR LAUREL. Yes, in a way. Exactly, there is nothing, as I said in the beginning. We are not motivated or prompted by any feeling that is personal, or we are not desirous to promote hatred or animosity through the passage of this law. We simply feel that these judges-at-large and cadastral judges should be suppressed, and all the judges should become judges of the Court of First Instance.

SENATOR PERALTA. Here, Mr. President, I have listened very carefully and very attentively to the distinguished gentleman from Batangas, and he gave two reasons, to my recollection, as to why he deemed it necessary to abolish the cadastral judges and the judges-at-large.

SENATOR LAUREL. The only two reasons that I am able to remember.

SENATOR PERALTA. I shall enumerate them in order that the gentleman from Batangas may correct me, if I am mistaken. The gentleman from Batangas believes that there should only be one classification of courts and judges of First Instance. With that I have no quarrel. The gentleman from Batangas is more experienced than I and he is in a position to judge what kind of courts we should have in this country.

SENATOR LAUREL. Thank you. But it does not mean that I am more brilliant than the gentleman.

SENATOR PERALTA. Now, the second reason that he gave is that there should prevail a certain type of judges to try certain cases, and for political reasons. With that again I am in utmost sympathy. But there is a third reason and it is in response to the question of the gentleman from Rizal wherein he stated that one reason for the abolition of the judges-at-large and cadastral judge is because of the presence of certain undesirable elements, and he stated specifically one cadastral judge who, by popular acclamation, may be dubbed as rather an inefficient judge, and it is for that reason that it is better to abolish all judges-at-large and cadastral judges in order that that man may not be reappointed. Now, analyzing the first two, does not the gentleman agree that the first two reasons may be subserved without necessarily abolishing the position sof judges-at-large and cadastral judges? In other words, can we not put up an amendment in the judiciary law that hereafter, judges-at-large and cadastral judges may not be assigned to try special cases outside of their official jurisdiction? May we not do that?

SENATOR LAUREL. Yes, but you don't make them district judges. In other words, you will have to classify them as cadastral judges or judges-at-large.

SENATOR PERALTA. Yes. In other words, I plead with the gentleman from Batangas that in addition to those two reasons that he gave, we can amend the law without necessarily abolishing the positions of judges-at-large and cadastral judges. Can we not do so?

SENATOR LAUREL. By keeping the positions you can extend the Constitution to them, of course, but that does not rationalize and harmonize in establishing a uniform system. And then another thing, Mr. Senator, for the purpose of the record. I did not make any reference to any undesirable or any crook or anything. I was simply referring in my answer to the gentleman from Rizal that in a case where a judge of the Court of First Instance is no good, probably it would be unreasonable to reappoint him. That is a matter that lies in the discretion of the President. But I am not launching any attack against any judge or accusation against anybody. So far as I am concerned, and the members of the Committee and the members of the Senate, including the Senator, that if we approve this bill, we are not prompted by any feeling of hatred or animosity against any of these judges who will probably be affected.

SENATOR PERALTA. I would like, of course, to believe that in all sincerity. The point that I am driving at is, that the gentleman from Batangas does not believe in amending the present Judiciary Act, in order to carry out the first two reasons that he gave, that we do not necessarily have to abolish the position of judges-at-large and cadastral judges.

SENATOR LAUREL. That is true, Mr. Senator. In that bill which we passed last year and which was vetoed by President Quirino, we included the transfer of judges-at-large and cadastral judges, but that would not make our judiciary system uniform because we have to make the classifications of judges of Court of First Instance and the judges-at-large and the cadastral judges which, I think, is not scientific nor advisable.

SENATOR PERALTA. Mr. President, I would like to reserve my turn to speak against the bill.

THE PRESIDENT. Let the record show.

SENATOR LAUREL. Mr. President, unless there are questions or remarks I do not want to delay the opportunity of anyone who wants to make use of the floor.

SENATOR PRIMICIAS. Mr. President, will the gentleman yield?

THE PRESIDENT. The gentleman may yield, if he so desires.

SENATOR LAUREL. With pleasure.

SENATOR PRIMICIAS. I would like to make particular reference now to that provision of the Constitution in Article VIII, Section 9, referred to just a moment ago by the Gentleman from Tarlac which has reference to the security of tenure of office. Section 9 of Article VIII reads as follows: "The members of the Supreme Court and all judges of inferior courts shall hold office during good behavior, until they reach the age of seventy years, or become incapacitated to discharge the duties of their office." Now, it seems from the questions of the gentleman from Tarlac that he has serious doubts as to whether or not this provision of the Constitution is violated if the positions of judges-at-large and cadastral judges are abolished because by so doing the present judges-at-large and cadastral judges are custed from office. What is your opinion on this matter, gentleman from Batangas?

SENATOR LAUREL. My humble opinion, Mr. President, is that the congress or the legislative department may exercise its legislative powers and one of these legislative powers which is necessarily implied, which is inherent, is the control over public offices. We can create and abolish public offices, increase their compensation, make the function of different offices into one or

into various other offices. In other words, do anything and everything that Congress, the legislative department, wants to do with reference to public offices, except one limitation and condition, except as to constitutional offices.

SENATOR PRIMICIAS. Now, does Your Honor agree with the recent opinion of the Supreme Court in the case of Manalang versus Quitoriano, et. al., recently decided about two weeks ago in Baguio, wherein the Supreme Court said, and I am quoting now from a clipping appearing in a Manila press:

"Removal implies the office exists after the ouster. Such is not the case of herein petitioner, for Republic Act No. 761 expressly abolished the Placement Bureau and by implication the office of the director thereof which obviously cannot exist without said bureau. By abolition of the latter and of the said office, the right thereto of this incumbent petitioner herein was necessarily extinguished thereby."

There are other considerations, but the gist is that according to the Supreme Court, in this case there can be no illegal ouster if the office no longer exists and there can only be illegal removal or violation of security of tenure where the office continues to exist after the alleged ouster. And this particular decision of the Supreme Court may be applicable in the case of judges-at-large and the cadastral judges if we abolish their positions expressly and they find themselves out of office.

SENATOR LAUREL. Mr. President, I have no doubt that that decision is correct, and just the other way or what they call: "sensu contrari," the reverse. The Supreme Court I think is also correct in the case of Brillo versus Enaje because almost the same question with a different twist in the law is involved, because Tacloban was converted into a city, they made it into a city, and there was a justice of the peace of the municipality of Tacloban. Now, when they converted it into a city, they appointed a new justice of the peace although there was already a justice of the peace there since 1937, Enage, but they changed him and appointed another. The Supreme Court said, "No, you cannot do that; there was no more office." Well, no more, the office has been abolished. In other words, if there has been an express legislation saying that there will be no more municipal judge but instead somebody else or the auxiliary judge is hereby created or some other arrangement was made, it would have been a different story, but the position not having been abolished because it was the same position of judge except that you changed the name, perhaps the same territory of Tacloban except that instead of calling it a municipality, you call it a city, it is the same judge, the same judge should continue as a municipal judge, and that was, I understand, the ruling of the Supreme Court. In other words, in that case there was abolition. No question. In this case there was no abolition and therefore no other fellow should leave.

SENATOR PRIMICIAS. May I ask Your Honor now to profound Section 7, Article VIII, which has reference to appointment of judges of inferior courts to particular districts, which judges would be transferred to another district without the consent of the Supreme Court? Your Honor was one of the leading members of the Convention and I understand had a leading vital role in drafting the provision of the Constitution relative to Judiciary. At the time that that provision was approved by the Convention, Your Honor was then aware of a vicious practice being observed at the time, of transferring one judge from one district to another, creating what was then vulgarly called "rigodon de jueces" and which provoked the decision of the Supreme Court in the case of Borromeo versus Mariano.

SENATOR LAUREL. There are many instances, but I do not want to make reference to them. Historically the old "El Renacimiento" case which was tried by Judge Bentley, they wanted to suppress the name and kill the paper because the "El Renacimiento" was a nationalistic paper always crying for independence and attacking Worcester in that famous article written by our "paisano' from Batangas, "Aves de Rapiña," and there was a suit and they wanted a judge to insure the destruction of the paper "El Renacimiento," and they got it. They appointed a judge, not from Manila, through some arrangement with the Secretary of Justice, they secured an American judge and they succeeded in destroying it. And that was not the only instance. Recently, you know, even our esteemed colleague here in the Senate, was assigned a judge. Well, I do not want to make reference. I want, if it were possible, for the wound to heal because what this country needs is integration, what this country needs is solidification in common interests and common desires, to serve not so much the interests of our party, but the common interests of our people, but you know, the Gentleman knows, and every lawyer knows what happened in the past, which we do not want to repeat, and precisely that is why we are trying to correct that.

SENATOR PRIMICIAS. I agree entirely with the gentleman from Batangas that we should not reopen old wounds, but at the same time, if we consider legislation of this nature, it would be wise to be guided by the lessons of history.

SENATOR LAUREL. I have a list of those cases.

SENATOR PRIMICIAS. I wanted only to get from the Gentleman from Batangas what were the reasons why this provision was inserted in the Constitution at the time, and I got my answer. Now, does not Your Honor, considering all these reasons and motives behind the insertion by the constitutional convention of that provision in the Constitution, believe that the creation subsequently of the positions of judges-at-large and cadastral judges, who could be transferred from one district to another at the pleasure of the Chief Executive without the consent of the Supreme Court, was a violation of the spirit at least of the provision of our Constitution and which later on would deprive us of the proper administration of justice which was envisaged at that time?

SENATOR LAUREL. Mr. President, Senator Primicias is correct. And it is, I dare say, one of the causes that gave rise to the almost complete destruction of the faith and confidence of the people in the administration of justice in this country.

SENATOR PRIMICIAS. And if we correct now that violation, at least in spirit, of the provision of our Constitution by abolishing the positions of these judges who can be transferred like pawns on a chessboard at the mercy of the Chief Executive in order to take cognizance of cases to prosecute political enemies, now that we are in power, we do not want to exercise that power because we want to restore the permanency of judges so that they may no longer be removed from their districts, does that violate the spirit of the Constitution or does that further the spirit of the Constitution?

SENATOR LAUREL. That does not violate the Constitution. It is in consonance and in harmony with the spirit of the Constitution, that gives it life. Now is the opportunity. Senator Primicias is correct. And in taking advantage of that opportunity, we are inviting all the members of all the political parties to join us in this great endeavor and, perchance, in the near future share in the great glory of this great undertaking which we have began this noon.

SENATOR PRIMICIAS. And now, Mr. President, the Nacionalista Party is in power together with the help of the Democratic Party. These judges-at-large and cadastral judges are now within our power, through the Secretary of Justice, to transfer from one district to another. It is a tremendous weapon for political purpose, and yet the gentleman from Batangas is championing this bill giving up this power in order to make real the independence of the judiciary in the administration of justice. I think the gentleman from Batangas deserves all the honor and the praise that our people could bestow upon him for his statements here.

SENATOR LAUREL. I am profoundly grateful, Mr. Pres-

ident, for those laudatory remarks made by the distinguished gentleman from Pangasinan, Senator Primicias.

DISCURSO EN CONTRA, DEL SEN. PERALTA

SENATOR PERALTA. Mr. President.

THE PRESIDENT. Gentleman from Tarlac.

SENATOR PERALTA. Mr. President, I was going to vote for the original bill because that bill did not in any sense threaten the independence of the members of the judiciary. However, Mr. President, when the Committee on Judiciary of this chamber changed its mind after a period of about ten days, finally decided that they would abolish the positions of judges-at-large and cadastral judges, I felt it my duty to stand up, humble as my voice may be, in order to restate my position on what I believe is the meaning of the Constitution on the independence of the judiciary.

It is denied, and yet hovering in the background is the real reason for this reorganization, namely, the charge that some of these judges-at-large and some of these cadastral judges are incompetent to hold their office, and the only way of getting rid of them is by abolishing all the positions, reappointing the good ones and leaving out the bad ones. But, Mr. President, our Constitution and our laws at present state a procedure of how we can get rid of the bad ones, because it is not fair, Mr. President, by gossip and by rumor to convict a judge of being a bad judge. That judge, if he is accused of being a bad judge, has every right like any other person accused of a crime to meet his accusers face to face, cross-examine them and before a competent court or tribunal, which is the Supreme Court, dare the accusers to prove the charge that he is a bad judge. It is so easy, Mr. President, to smear the character of a man by gossip and by rumor, making cowardly accusations in private that a man is a bad judge, that he does not know the law, or that he accepts bribes. But, Mr. President, accusation by gossip and by rumor, conviction by gossip and by rumor, is not the kind of justice that is guaranteed to us by the Constitution. And if in order to get rid of bad judges, we have to abolish all the positions of judges-at-large and judges of cadastral courts, where shall we end? Sooner or later, somebody will propose: "Let us abolish all the positions of district judges of first instance, because there are two or three bad judges there and we cannot get rid of them except by abolishing all these positions of judges of first instance, reorganizing the judiciary under the guise of public policy; then, let us reappoint the good ones and leave out the bad ones." That is the theory.

But, Mr. President, in the light of practical politics — and the trouble with this country is that there is too much politics —, unless you are a good Nacionalista, Mr. President, you probably will not be reappointed as judge of first instance or unless you know how to kiss the hand of the powers that be. I am told that this judiciary bill abolishing the positions of judges at large and cadastral judges is for public policy. Public policy? I was told two good reasons why there should not be any more judges-at-large and cadastral judges. But those good reasons, Mr. President, can be enforced by a little amendment to the judiciary act like what we did last year, and it would not result in the abolition of positions of judges-at-large and cadastral judges. Why am I so worried about thirty-three men? It is not thirty-three men that I am worried about. It is the principle, Mr. President, that if a certain judge antagonizes a powerful man in this government, he runs the risk of having his position abolished under the guise of the so-called, alleged, public policy; when in truth and in fact the real reason is that this judge has been convicted of nothing more than by mere gossip or rumor of incompetence, or for the more cogent reason that he antagonized a powerful official. Whether founded or unfounded, nobody will ever know, unless that judge meets his accusers face to face before his peers in the land. Now, Mr. President, what is the reason why Section 9 of Article VIII of our Constitution was placed? Is it a dead letter? That article states:

"The members of the Supreme Court and all judges of inferior courts shall hold office during good behavior, etc. etc."

Notice, Mr. President, that in this section judges of inferior courts are placed in the same footing and side by side with members of the Supreme Court and mentioned in the same breath; and both members of the Supreme Court and judges of inferior courts have the same rights under this same article and the same section is the source of their constitutional rights.

Mr. President, if we try to pass a law now stating that the term of the justices of the peace shall be limited to ten years, Mr. President, that law is clearly void and unconstitutional. Why? Because, Mr. President, this article states that all judges of inferior courts shall hold office during good behavior until they reach the age of 70 years or become incapacitated to discharge the duties of their office. In other words, Mr. President, we cannot limit the tenure of their office because what is prohibited by express direction cannot be done by indirect means.

It is argued, Mr. President, that we can abolish the office; that it is inherent in Congress to create and abolish all kinds of offices except constitutional offices. But, Mr. President, that is subject to one express limitation, that such abolition of offices shall not contravene any provision of the Constitution of the Philippines. And I maintain, Mr. President, when we abolish the position of judge of any inferior court for the express purpose of limiting the tenure of judges, then, Mr. President, we run counter to Section 9 of the Constitution which guarantees the tenure of office of the judiciary whether they belong to the Supreme Court or whether they belong to inferior courts.

Now, Mr. President, certain cases have been alluded to here: The cases of Zandueta vs. De la Costa, the cases of Brillo vs. Enage, and this last case which involves former Director Manalang. I submit, Mr. President, that in the case of Zandueta vs. De la Costa only Justice Laurel in his concurring opinion upheld the theory that we may abolish inferior courts. The rest of the Supreme Court evaded that issue and merely refused to issue quo warranto simply because Judge Zandueta was held in estoppel. In other words, inasmuch as Judge Zandueta had assumed another office incompatible with his office as Judge of Court of First Instance, Judge Zandueta could no longer question the constitutionality of the law under which he held his office. In the case of Brillo vs. Enage cited here, Mr. President, said decision was penned by Justice Ramon Diokno of revered memory but who, probably by coincidence, always agreed with the top-brains of the Nacionalista Party in political cases. And in his *ratio decidendi* Justice Diokno cited the case of Zandueta vs. De la Costa using that case as authority and doctrine that Congress may abolish inferior courts. The case of Zandueta vs. De la Costa never sustained such doctrine. Only one Justice of the Supreme Court upheld that doctrine that Congress may abolish inferior courts. The case of Zandueta vs. De la Costa in fact made no such ruling. And I submit that in spite of all the learned experience of Justice Diokno he was wrong in citing such a precedent because in the case of Zandueta vs. De la Costa the Supreme Court did not uphold that doctrine that the Congress may abolish the inferior courts. It should not be stated here, Mr. President, that Congress has the authority to abolish inferior courts because that is not the doctrine in this country. It is only a statement of one learned justice and such statements have been challenged by equally distinguished constitutional lawyers and there is no decision of the Supreme Court that I have been able to discover expressly stating that the Congress may abolish inferior courts.

Now, I am afraid, Mr. President, that if we pass this bill, its constitutionality will be challenged in the Supreme Court. It will have to be because this is a doctrine, Mr. President, which underlies the whole theory of democracy that the Judiciary shall be free and independent. One may not limit their tenure of office except for those reasons enumerated in the Constitution which are good be-

havior, incapacity to continue in office or until they reach the age of 70. Those are the only three reasons why a judge, whether a member of the Supreme Court or of an inferior court, may be removed from office, and if those are the only three reasons, Mr. President, stated by our Constitution, I plead that *inclusio unius est exclusio alterius*. What makes this bill very mischievous is not because there will be 33 men out of jobs. We have thrown out men from work but such did not involve doctrines and theories which underlie the very substance of democracy. When we challenge the independence of the judiciary, we challenge democracy's very foundation. It is hinted here, Mr. President, that there are six doubtful men who are at present judges-at-large and who may not be reappointed. Mr. President, it is better to bear with such six doubtful men than to destroy the very essence of the independence of the judiciary because, Mr. President, as every man knows in this country we take politics too much at heart. What is to prevent the insinuation — many of us here are lawyers — that if some powerful members of Congress are disappointed in some very big cases, especially when they refer to very big cases, what is to prevent the insinuation from circulating among the people that the real reason why a judicial office has been abolished is because that powerful member had been disappointed in losing the case. And human as we are, Mr. President, sometimes when a lawyer loses an important case, he begins circulating around, "Maybe, because that judge was fixed." That is human. I have heard those kinds of stories circulated by a disappointed lawyer who loses an important case, and who starts circulating the rumor that "that judge must have been fixed — must have been bribed." Or, also, he is grossly ignorant of the law. Repeat that often enough and people will start to believe. But if those are true, Mr. President, why do not these people who accuse these judges, go to the Supreme Court and make their accusations in public so that these judges may defend themselves, instead of having their character assassinated in public markets and other places? That is why, Mr. President, it is not for these thirty-three men that I plead today — I do not know most of these men — probably I know only one or two judges-at-large — at most three. I do not know the rest of these men. I do not probably know their names and their records, but I do know, Mr. President, that once we start threatening members of inferior courts, Mr. President, there is hardly any limit to what we may threaten later on.

Suppose, for example, Mr. President, that some powerful members were losing a case before the Court of Appeals? Very soon, Mr. President, there will be rumors circulating that those members of the Court of Appeals are grossly ignorant, or, they must have been fixed. This kind of character assassination will sooner or later circulate and pretty soon somebody in the halls of Congress will say, "Let us abolish the Court of Appeals on the ground of public policy." Let us create another court, which we shall call a court of appellate jurisdiction. Instead of putting there eleven men, let us put twenty-one in order that there will be more Nacionalistas employed for judicial jobs.

Now, Mr. President, I do not mind even a Nacionalista, provided that he is really competent, and I say there are many competent Nacionalistas who can be justices of the Supreme Court and justices of the Court of Appeals, judges in the Court of First Instance, and justices of the peace courts. There are many, competent Nacionalista Party members who would honor me even if I only shake their hands.

But, Mr. President, that is not the proper way of giving them jobs — To abolish positions of men who have done nothing wrong in order that new positions will be created and given to these worthy members of the majority party. That is not the correct procedure and if we follow such a procedure, Mr. President, sooner or later we will no longer be a democracy. We will follow the doctrines of Communist Russia, Mr. President, where only party members may hold important offices.

Mr. President, there is one more argument which I would like to leave in the minds of my colleagues in this chamber. I merely would like to quote Justice Laurel himself when he made a concurrent opinion in the case of Zandueta vs. De la Costa, which appears on p. 626, Vol. 66, Phil. Reports, 1938. I quote:

> "I am not insensible to the argument that the National Assembly may abuse its power and move deliberately to defeat the constitutional provision guaranteeing security of tenure to all judges. But, is this the case? One need not share the view of Story, Miller and Tucker on the one hand, or the opinion of Cooley, Watson and Baldwin on the other, to realize that the application of a legal or constitutional principle is necessarily factual and circumstantial and that fixity of principle is the rigidity of the dead and the unprogressive. I do say, and emphatically, however, that cases may arise where the violation of the constitutional provision regarding security of judicial tenure is palpable and plain, and that legislative power of reorganization may be sought to cloak an unconstitutional and evil purpose. When a case of that kind arises, it will be the time to make the hammer fall and heavily."

Now, Mr. President, I use those very same words of Justice Laurel, "Let the hammer fall and heavily" because, Mr. President, under the guise of reorganization, security of judicial tenure is violated and such security violated in plain and palpable terms.

I thank you, Mr. President.

SENATOR PRIMICIAS. Mr. President, I ask for a suspension of the consideration of this bill until this afternoon.

EL PRESIDENTE. Hay alguna objeción a la moción? (*Silencio.*) La Mesa no oye ninguna. Queda aprobada.

CONSIDERACION DEL S. NO. 170
(*Continuación*)

SENATOR PRIMICIAS. Mr. President, I now ask that we resume consideration of Senate Bill No. 170, the Judiciary Act.

THE ACTING PRESIDENT. Continuation of the consideration of Senate Bill No. 170 is in order.

SENATOR PRIMICIAS. Mr. President, the distinguished Minority Floor Leader woulld like to be heard on this measure, and I ask that he be recognized.

EL PRESIDENTE INTERINO. Caballero por Abra.

MANIFESTACIONES DEL SEN. PAREDES

SENATOR PAREDES. Mr. President, gentlemen of the Senate: Far be it from my intention to engage in a debate on this very important bill. I have such a high respect for the opinion of our distinguished colleague, Senator Laurel, that I will say without hesitation that whatever opinion I have on legal matters and whatever I say here this afternoon should not be construed as opposing his views but only as a compliance with the duty that I believe I owe to the Senate — to state some reasons which in my opinion might endanger the bill if ever its constitutionality is brought before the court.

There cannot be any quarrel, Mr. President, on the proposition that Congress has the absolute right to reorganize not only the executive departments, but all other departments of the government. Neither can there be any question that the Congress may change the jurisdiction of the courts, enlarge or reduce its territorial jurisdiction or its jurisdiction as to the cases that may be tried by them. It can also be granted that a reorganization that affects the tenure of office of the present incumbents of the judiciary may be constitutional or unconstitutional according to the motive behind the reorganization.

Senator Laurel, as a member of the Supreme Court, has laid the rule that should be followed, and I believe it is only proper to bring his ruling before the attention of this Senate. In the celebrated case of Zandueta cited here this morning, it was held by Justice Laurel that a reorganization that deprive a judge of his

office is not necessarily unconstitutional. But any reorganization may become unconstitutional if the circumstances are such as to show that the intention of the reorganization is to put out a member of the judiciary by legislation. I will not charge anybody with any hidden intention or improper motives in this bill, but if the question is ever presented to the Supreme Court by any judge who may be affected by the provisions of this bill which I suppose will be approved this afternoon, I feel, Mr. President, that if the circumstances — preceding, coetaneous and subsequent to the approval of the bill — are presented to the Supreme Court, the constitutionality of the bill will be seriously endangered. If the motives of the Congress in reorganizing are simply public policy, public welfare, public service, and the prestige or the protection of the judiciary and the members thereof, there can be little question about the constitutionality of the bill, but otherwise, the bill is unconstitutional.

Let us now, Mr. President, examine the circumstances attending this reorganization, and then ask ourselves whether or not our protestations of good motives are likely to be given credence by the courts. For the last seven years, the administration was controlled by the Liberal Party. The Nacionalista Party being then in the minority, had always been complaining against the acts of the Liberal Party administration. Right or wrong, there were alleged irregularities committed and which were the subject of attacks and complaints on the part of the members of the minority party, then the Nacionalista Party. The Judiciary was not free from these attacks and from these charges of irregularities. The Judiciary was also accused of having become a tool of the Chief Executive in the dispensation of justice. Comments were made, attacks were freely hurled during the campaigns against members of the Judiciary or the way in which the members of the Judiciary performed their duties. Main subject of attacks was the frequency with which the Secretary of Justice assigned judges to try specific cases and attributing to this action the ulterior motive of securing the conviction or the acquittal of the accused in criminal cases. Since the elections and after the new administration was installed into office, what did we notice in the matter of changing employees and reorganizing? In the Executive Department, not only have the high officials had to present their resignation out of propriety, but even those who were holding technical positions and who ordinarily would not be affected by changes in the leadership of the government, had to resign, and I say "had to" because they were asked to resign, or else ..... So they did resign one by one. They quit their positions, because they were asked to.

And that was not enough. In the provinces changes were made. I will not now say that legislative violations were made, changes were made in the Executive Department, governors, mayors, councilors, board members were changed from Liberals to Nacionalista. There seems to be a craze of changing personnel, ousting all the Liberals, all those who belong to the Liberal party, and putting in their places members of the Nacionalista Party. Very natural, that was to be expected. For so many years has the Nacionalista Party been deprived of the opportunity to control the government, and this being the first opportunity of the Nacionalistas, it is only naural that they should wish to place their own men in order to be able to carry out their promises. They did not have confidence in the members of the Liberal Party. It was their right and privilege and duty to themselves, I should say, to bring new men to carry out their policies.

Mr. President, this was done, not only in the executive and also the elective positions. In the Department of Foreign Affairs, soon after the assumption to office, the Secretary announced publicly and openly that all the members of the Department of Foreign Affairs should resign notwithstanding the fact that there is a law protecting them, the tenure of their office being assured on good behavior. Then investigations against members of the Foreign Service started, all with the end in view of removing incumbent Liberals.

The same was done in the bureaus. Chiefs of Bureaus were asked to resign. Some of them did others did not, but finally had to give up their place in favor of new ones, all belonging to the Nacionalista Party. This series of similar acts following the same standard will help discover the intention of this judiciary reorganization bill.

As to the Judiciary, there is no way of laying off the judges. The judges cannot be asked simply to resign because the Constitution protects them. There is a need to follow a different course if we want to change those who, during the former regime or administration, were suspected to being a tool of the Executive. A reorganization to get rid of them would be a most convenient course.

SENATOR PRIMICIAS. Mr. President, will the Gentleman yield?

THE PRESIDENT. The Gentleman may yield, if he so desires.

SENATOR PAREDES. With pleasure.

SENATOR PRIMICIAS. I regret to have to interrupt the distinguished Minority Floor Leader, but I wanted to ask him a few questions on the Department of Foreign Affairs.

SENATOR PAREDES. Yes, sir.

SENATOR PRIMICIAS. .... upon his statement that many were asked to resign and those who did not resign were investigated.

SENATOR PAREDES. I apply that to the other branches of the Executive. In the Department of Foreign Affairs, I say that there was a public statement that the members of the foreign service should resign.

SENATOR PRIMICIAS. No, sir; I am not referring now to public statements, but to actual acts allegedly committed by the Department of Foreign Affairs. Is it not a fact, Gentleman from Abra, that only those occupying ministerial positions voluntarily resigned, and no one was asked to resign in the Department of Foreign Affairs.

SENATORS PAREDES. I understand that has been the case, but I also know, because I have read in the newspapers, that there have been public statements made by the Secretary of Foreign Affairs saying that in his opinion any member of the Foreign Service should resign because, according to him, they must have the absolute confidence of the Chief of the Department.

SENATOR PRIMICIAS. I do not know if he actually made that statement or not. I have no means to verify if he actually made that statement, but we must be concerned not with alleged statements which might more or less be true, but with actual acts committed. Now, is it not true, actually until now, that there are ministers who have actually resigned, tendered their resignations, but their resignations are not yet accepted and they are continuing in the foreign service?

SENATOR PAREDES. I think you are right, Your Honor.

SENATOR PRIMICIAS. Now, as regards some foreign affairs officers in the consular service, I understand that there are two consular officers who are being investigated in the whole consular corps. Is it not true that these consular officers are being investigated for electioneering activities, because they actually abandoned their posts and came to the Philippines and electioneered?

SENATOR PAREDES. I do not know the reason for their being investigated.

SENATOR PRIMICIAS. But there is no member of the consular corps who did not come to the Philippines to campaign who is being investigated.

SENATOR PAREDES. I do not know about that.

SENATOR PRIMICIAS. Well, I was interested in asking these questions because Your Honor has made a sweeping statement that officers in the foreign service were either asked to resign and that if they did not resign they were actually investigated. I want to set the record straight that the sweeping statement is not in accordance with facts.

SENATOR PAREDES. If I am not mistaken, what I said and what I am going to say is in the executive depart-

ment, and then I singled out the foreign service — that even in the foreign service, the secretary announced that everyone should resign.

SENATOR PIRMICIAS. Now, actually, the members of the consular corps did not resign. They were not asked to resign.

SENATOR PAREDES. Maybe not.

SENATOR PRIMICIAS. Now, regarding the judiciary, Your Honor has just made a statement that after reorganizing the executive department, and as Your Honor has said, the Nacionalista Party which had made a commitment to the people had the right to do so. So, they have attempted to reorganize the foreign affairs department in spite of the law that assures the security of tenure and which, as I have just stated, is not correct as a sweeping statement. Your Honor now refers to the judiciary, and that the Nacionalista Party decided on reorganizing the judiciary in order to control again the judiciary.

SENATOR PAREDES. Pardon me, I am not charging anybody with bad intentions. I am simply presenting the circumstances in order later to conclude with a question. Now, under the circumstances, would the Supreme Court, in case these facts are presented to it, believe what we said here about a clear conscience and pure motives, or will the Supreme Court take a different view? If they take a different view, the bill will be considered unconstitutional.

SENATOR PRIMICIAS. Now, I would like to ask a question to the distinguished minority floor leader. I am sure his statements on the floor, in case this question is elevated to the Supreme Court, would be cited in the Supreme Court, and I would like to have him on the record. As a matter of constitutional power, legal power, granted by the Constitution, is Your Honor of the belief that Congress has the power to reorganize inferior courts, not the Supreme Court, but inferior courts, abolish positions in the inferior courts, or create new courts?

SENATOR PAREDES. I have started my brief statement recognizing these principles and these rights, and I even went to the extent of saying that we can legislate out in some respect. But if our legislation goes to such an extent that it may be construed as being motivated by a desire to get rid of judges rather than the good of the service, then our action goes beyond the limit. That is what I was saying. I am trying now to show the circumstances preceding and attending the presentation of this bill so as to conclude with the question that I would like to propound.

SENATOR PRIMICIAS. Your Honor is then of the opinion that the answer to the question depends upon the motive. If the motive is praiseworthy, the action would be perfectly legal.

SENATOR PAREDES. Yes.

SENATOR PRIMICIAS. But if the motive is purely political, there is serious doubt as to its validity.

SENATOR PAREDES. Exactly. That is why I agree with you.

SENATOR PRIMICIAS. But as a matter of academic question, irrespective of the motives, and I suppose this matter must be decided on legal or constitutional grounds ...

SENATOR PAREDES. And the surrounding circumstances.

SENATOR PRIMICIAS. Suppose we consider the matter purely from the academic point of view.

SENATOR PAREDES. Then there is no question, from the academic point of view, that this bill is constitutional. But as Justice Laurel said in his decisions in interpreting the Constitution, we should apply the Constitution with the particular circumstances of a given case.

SENATOR PRIMICIAS. Your Honor then is of the belief that in view of the series of circumstances that Your Honor has just mentioned, the Supreme Court might doubt the motives behind the approval of this bill if converted into law?

SENATOR PAREDES. Not those circumstances only, but other circumstances that I was about to mention, and I will say, with all these circumstances, even in a criminal case, there is sufficient ground to conclude guilt.

SENATOR PRIMICIAS. Does Your Honor also believe that in judging these motives one should take into account the fact that because of the creation of the positions of Judges at large and cadastral judges, who might be transferred and who were actually transferred from one district to another irrespective of the needs of the service, a serious situation has arisen destroying the faith and confidence of the people in the administration of justice, which situation must be remedied by the new party which has assumed power in order to restore the faith and confidence of the people?

SENATOR PAREDES. Yes, I agree with you that that might be necessary.

SENATOR PRIMICIAS. Thank you very much.

SENATOR PAREDES. Now, Mr. President, again I wish to clarify my position. I am not charging anybody with bad or ulterior motives. On the contrary, I believe that every member of Congress is moved by the best of intentions in voting for this bill. But I am simply presenting coetaneous circumstances that will naturally be brought before the Supreme Court if the case is ever presented there, and which coetaneous circumstances may outbalance the presumption that we are complying with our duties faithfully. It may outbalance the presumption that our motives, as we say, are good.

If I may resume now, in the judiciary, there is an absolute impossibility of asking any body to resign if he does not want to, because he is protected by the Constitution. That will be presented to the Supreme Court. Now, as for other coetaneous circumstances. What was done in the matter of the appropriation law in order to facilitate legislating out some of the employees, civil service men? Lump sum appropriations were requested for certain offices, but which were not granted by the Senate because the Senate, I am proud to say, represented by the distinguished gentlemen of the majority and also joined by a few members of the minority, saw fit to oppose that objectionable move, or at least saw fit to act in such a way as to avoid any possibility of suspicion. But other facts will also be brought up, Mr. President, which will add to the series of circumstances that will be used by those who may question the law, to change the Senate with ulterior motives. What are those facts, Mr. President? I was told right this afternoon, when I was on the floor of the Lower House, that no less than the floor leader of the majority stated that one of the purposes of the bill is to get rid of the judges that are no good. This is on record. With such a confession, how can we say to the Supreme Court, in all sincerity, that our intentions are purely to serve the judiciary. The Secretary of Justice is even quoted as having said that five or six judges will be affected. Take those circumstances into consideration, Mr. President, and again the other side will say, "What was the purpose of the reorganization, the evident purpose of the reorganization?" It has been said, *first*, to equalize, give the same rank, jurisdiction and salary to all judges. That same rank can be accomplished now if we only raise the salary of the lower judges. The cadastral judge will have the same jurisdiction as the district judge if he is assigned to try all kinds of cases. By administrative order, he can have the same rank, although not the same salary and the same name. The auxiliary judges now have the same privileges as a district judge except the salary. If that is the reason for the bill, why not simply raise the salary of these judges so that they may have the same rank as the others. *Second alleged motive*: To avoid the possibility of these judges being used and assigned from one district to another as they had allegedly been used and assigned in the past, to try special cases and to follow the wishes of the administration. I wish to pay a tribute of admiration to the gentlemen of the majority for having said that that is their purpose. I believed that is the purpose of the gentlemen who authored the bill and sponsored the bill, Senator Laurel. But, Mr. President, that same purpose can be accomplished by simply amending the law, by simply providing that the Secretary of Justice shall not do this hereafter without the consent of the

affected judge and the Supreme Court. That would have been a remedy. So, we cannot allege that as the reason for the amendment. Now, what is the other possible and alleged reason? To give all judges the same name. Mr. President, I believe this is too childish a reason for a wholesale reorganization of the judiciary.

These being the circumstances, I would ask the gentlemen of the Senate to kindly consider whether our protestation of clean conscience and clear motives are not outbalanced by the preceding and coetaneous circumstances, and whether or not if we approve this bill we will have any chance of having it sustained by the Supreme Court.

There is one part of the bill that may be the source of injustice in its application. I refer to the proviso that all auxiliary judges and all cadastral judges will vacate their offices upon approval of this bill. Now, that is an actual deprivation of these people's position. But this may create a situation that may be cited as departing from the avowed good intention of the law. There is a district judge, for instance, in Rizal, and there is the district of Manila where there are several cadastral judges. Suppose that this bill is approved, all judges, the second and third class, should vacate their positions and wait for a new appointment. In the case of the district judge of Rizal, he will not have to be reappointed. So, he remains as a judge of Rizal. But the cadastral judge who has to get new appointment in order to continue in the judiciary, is appointed to Manila. Result: the one in Rizal who has been serving for years as district judge will not be brought to Manila because he remains in his district, while the cadastral judge in the district has the opportunity to come and in fact comes to Manila.

SENATOR TAÑADA. Mr. President, will the gentleman yield on this point?

THE ACTING PRESIDENT. The gentleman may yield if he so desires.

SENATOR PAREDES. Gladly.

SENATOR TAÑADA. I regret that I cannot see the point of the distinguished gentleman from Abra because there is nothing in the bill, Mr. Senator, which would prevent the President from promoting the judge who is occupying a court in the district of the province of Rizal, to a court here in Manila. Therefore, the basis of the argument of the distinguished Senator will not be there.

SENATOR PAREDES. Except for this consideration, that the question of appointment is so ticklish a matter that the appointing power tries to avoid difficulties. By not removing anybody from his place, he has less headaches. Just let him stay where he is and get a new one. He will only have one problem. If he removes him, there will be another headache to find his successor. So, the best thing is to retain him where he is.

SENATOR TAÑADA. But there is no provision which prevents the President from exercising his appointing power. As the bill is drafted, there is nothing to prevent the President from promoting district judges who may be in the district of Pangasinan or Rizal. The chances are that he may lose his place if the appointment is not confirmed here, but the result is that on account of the reorganization law he would have to be placed in jeopardy of losing his place.

SENADOR PAREDES. But in the case of the judge-at-large who, according to you, may be promoted to the court here in Manila, he may also lose his job. It is not a question of losing his job that I am presenting now here, but whether these judges in the province, because of the operation of this bill, are deprived of the opportunity to be promoted to better courts.

SENATOR TAÑADA. Thank you.

SENATOR PAREDES. As I said to the gentleman from Quezon, the district judges take the risk or are placed in danger of losing their positions, while the judges-at-large and the cadastral judges lose definitely their positions unless they are reappointed and their reappointment confirmed. And that is the possible result.

With this statement, Mr. President, without any intention to oppose the bill as you gentlemen believe, but simply to point out that the circumstance I have mentioned may be more than sufficient to counterbalance or outbalance the protestations of our clean conscience and clear motives, I wish to conclude. The statements made by the Floor Leader of the majority in the lower house are too definite for any doubt. You know your motives. You will answer for the bill. You are the overwhelming majority. You will vote for this bill, of course, notwithstanding our fears that the same will not serve a good purpose.

SENATOR DELGADO. Mr. President, will the gentleman yield?

THE PRESIDENT. The gentleman may yiled if he wishes.

SENATOR PAREDES. Gladly.

SENATOR DELGADO. I understood from the gentleman that he is assuming that the motives both of the members of the majority of the Senate and the lower house as well as that of the Executive are of the very best. Is that correct?

SENATOR PAREDES. Yes, Mr. Senator.

SENATOR DELGADO. If Your Honor assumes that nothing but the very best of motive has induced the majority of the Senate and of the Lower House and also the Executive in the passage of the bill, may we not assume also that the Chief Executive will only eliminate the judges who should be eliminated and keep and promote those who are deserving of promotion?

SENATOR PAREDES. Which comes to prove my theory that this bill will be used to get rid of some who are supposed not to be good.

SENATOR DELGADO. Will Your Honor be agreeable to remove those who should be removed?

SENATOR PAREDES. Yes.

SENATOR DELGADO. And those that should be promoted should be promoted?

SENATOR PAREDES. Absolutely, but follow the constitutional and legal procedure. If they should be removed, why not bring charges against them. And if you cannot bring charges because you have no sufficient cause for removal, why do you remove them by this law?

SENATOR DELGADO. If you assume that the bad judges will be removed, as long as the undesirable ones are removed and the desirable ones are retained or promoted, what is the difference?

SENATOR PAREDES. May I ask you a question in answer to yours. If we know that somebody kills someone, but you cannot prove it, will you vote to send him to the gallows?

SENATOR DELGADO. You assume the good faith of the Chief Executive?

SENATOR PAREDES. I do assume.

SENATOR DELGADO. That he will not do anything that is not justified by the circumstances and that, therefore, only undesirable ones will be removed and the desirable ones will be not only preserved but even promoted to higher positions? I thank you.

SENATOR PAREDES. I assume and I accept and I will fight to defend the proposition that the Chief Executive and everyone here are acting with good intentions. But, Mr. President, we will not be the justices of the Supreme Court and our protestations may be outbalanced by the circumstances that I have mentioned. Mr. President, not all that should be in jail are in jail, and not all that are in jail should be there, simply because human justice has its limitations, and courts have to decide according to the proofs and according to the opinion of the justices. So, I comply with my duty by presenting these modest observations of mine to the consideration of the majority. If you decide to approve the bill, I will try to do my best to help you perfect it, if it has any defects that may be corrected. But I hope you will think twice before you approve the bill in the way it is.

EDITOR'S NOTE: — The *Lawyers Journal* has received numerous requests from the members of the bar to have the pleadings and memoranda in the "Judges' case" (*Felicisimo Ocampo, et al. vs. Secretary of Justice, et al., G. R. No. L-7910*) published. Due to space limitations and in view of the unusual length of the pleadings filed, the *Journal* regrets that it can not publish them. However, the *Journal* will publish in the next issue, the respective memoranda submitted by the attorneys for the petitioners-judges, and the Solicitor General.

STATEMENTS OF SECRETARY OF JUSTICE TUASON

THE STATEMENTS OF SECRETARY OF JUSTICE TUASON MADE DURING THE PUBLIC HEARING OF THE COMMITTEE ON JUDICIARY OF THE HOUSE OF REPRESENTATIVES HELD AT THE SESSION HALL ON MARCH 17, 1954, BEFORE HONORABLE AUGUSTO FRANCISCO; CHAIRMAN; DOMINGO VELOSO, VICE-CHAIRMAN; RODOLFO GANZON, MARIO BENGZON, JOSE R. NUGUID, ROGACIANO MERCADO, GUILLERMO SANCHEZ, ISIDRO C. KINTANAR, MEMBERS.

THE CHAIRMAN. The hearing is declared open . . . (It was 9:25 a.m.)

x x x x x

In order to avoid your having to come here on subsequent dates, we would like you to consider one of the bills presented during the last few days, namely: House Bill No. 1632 introduced by the Speaker, Congressman Corpus, and The chairman of the Committee on Judiciary with reference to the abolition of the positions of auxiliary judges, judges-at-large, and cadastral judges and the creation of positions of auxiliary district judges. May we request the Secretary of Justice to testify and give his comment on this bill?

SECRETARY TUASON. Yes, Mr. Chairman.

x x x x x

MR. ABOGADO. I would like to find out the opinion of the Secretary on House Bill No. 1632 regarding the abolition of the judges-at-large and cadastral judges. Is he in favor of that?

SEC. TUASON. I am in favor of that, because as I said, judges should be equal in rank. They do the same kind of work.

MR. ABOGADO. I understand that there are thirty-three (33) judges that will be affected by the approval of this Bill. Now, what will be your recommendation in order to protect these judges-at-large and cadastral judges who are performing their duties properly and efficiently?

SEC. TUASON. Well, I think that these judges cannot be removed. They cannot be legislated out. If the positions of judges-at-large and cadastral judges are abolished, these judges will have to be appointed to the districts.

MR. ABOGADO. So, upon approval of this bill, those judges-at-large and cadastral judges will have to be reappointed as district judges?

SEC. TUASON. Yes, because they cannot be removed in my opinion.

MR. ABOGADO. Thank you, Mr. Chairman.

THE CHAIRMAN. Even if the position is abolished?

SEC. TUASON. Even if the positions are abolished, because the positions are not abolished; only the names of the positions are changed. The positions are there. As a matter of fact, the positions are increased.

MR. BENGZON. Mr. Secretary, would you recommend a provision in this bill which would make possible the removal of these judges who are inefficient?

SEC. TUASON. I would, if that could be done. Unfortunately, under the constitution, we cannot do it because the constitution provides the causes for removal of judges.

THE CHAIRMAN. Mr. Secretary, do you remember the organization act approved during the time of Ex-President Quezon, wherein judges had to be reappointed?

SEC. TUASON. I doubt the constitutionality of that law, and I think that the constitutionality of that law was challenged in the case of Zandueta versus de la Costa. In that case, as I remember, Zandueta's removal was sustained not because the law was declared constitutional but because he voluntarily abided by the questioned provision.

MR. BENGZON. Don't you think this would be a good chance to eliminate inefficient judges?

SEC. TUASON. That would be a good chance, but as I say, the constitution is in the way, because the tenure of office is prescribed by the constitution, and it would be nullified, it would be a dead letter if the Congress at any time can say: "All positions of judges are hereby abolished and all judges are hereby declared out of office."

MR. BENGZON. In your opinion, Mr. Secretary, is there no way to remedy this situation by which these inefficient judges may be eliminated?

WHAT A WELLKNOWN ORATOR ONCE SAID ON THE DANGERS OF MIXING POLITICS WITH THE JUDICIARY

The year was 1934, the place was the old Manila Grand Opera House on Rizal Avenue. The occasion was the First Inter-University Oratorical Contest and the prize-winning oration was entitled: "For an Independent Judiciary."

From the winning orator's masterpiece, the following appeared:

"The fate of our judges should not be left to rise and fall with the galling insolence to which political parties are subjected. The fountain of justice should not be polluted and poisoned with the 'pestilential breath of faction.' Prostrate your judges at the feet of party and you break down the mounds which hold the protective embankment against the dashing torrents and waves of political passions and excitement. Make their tenure and compensation dependent upon the mercy of the Legislature and you destroy that without which justice is a mockery and popular government a farce." (*Prolonged applause.*)

"Courts should be the ready asylum, nay the indestructible cottas, of the people's rights and liberties. They should be the trusted guardians of individual securities and immunities. The present members of the constitutional convention should especially guard against legislative domination and encroachment." (*More applause.*)

"In a republic that is ours — ours to live, to honor and to defend — I envisage the day when it can safely and truly be said that if the right of the most humble citizen is trampled upon, indignant of the wrong, he will demand the protection of our tribunals and, safe, in the shadows of their wings, will laugh his oppressors to scorn." (*Very prolonged applause.*)

That was the year 1934. And it was merely an inter-university oratorical contest. Today, 20 years later, the orator who delivered that prize-winning piece, for which he was awarded a gold medal and his university a trophy, would have created a sensation if he had stood up in the last session of Congress and delivered the same speech while the controversial bill revamping the judiciary was under consideration.

As a result of that bill, now a law, over 30 judges-at-large and cadastral magistrates, supposed to hold office for life and during good behaviour, were "reorganized" out of their jobs. Some were reappointed. Eleven were left out in the cold. The eleven "revampees" were all appointees of the past administration.

But the orator who won a gold medal in 1934 for his moving speech on the sanctity of the judiciary did not repeat his prize-winning oration of 20 years ago. Then he was merely a university student orating for an audience. Today, he is Speaker of the House of Representatives. The prize-winning orator was Jose B. Laurel, Jr. (*Bullseye, August* 23, 1954)

SEC. TUASON. None, except the filing of charges for inefficiency, because gross inefficiency is one of the causes of removal.

THE CHAIRMAN. Which is hard to prove or establish.

Mr. Secretary, would you favor the presenting of charges against judges who are not only inefficient but have engaged in electioneering activities and have allowed themselves to be used as tools, with the final results in the loss of confidence by the people in the judiciary?

SEC. TUASON. Well, electioneering is a violation of law, and not only do I favor the filing of charges but I have hired lawyers to prosecute and asked public-spirited people to come forward, get evidence and file those charges, and in some cases I have taken a hand in the filing of those charges.

MR. VELOSO (D). Mr. Secretary, I understand from you that should the positions of judges-at-large are abolished, the judges cannot be ousted, is that right?

SEC. TUASON. Yes.

MR. VELOSO (D). Now, they may be re-appointed, to district judges, but suppose the Commission of Appointments do not confirm their appointments, what would be the status of those judges? Because this is a new appointment.

SEC. TUASON. Well, that is what I mean to say that such law should not require new appointment to be confirmed by the Senate, because if such a requirement were made, such requirement would be valid. The President could even refuse to appoint them, and they might be put out before reaching first base yet. But as I say, that would not be legal. I don't believe it would be legal and those judges could refuse any such appointment in order not to run the risk of being turned down. "No. I am not appointed as auxiliary judge. I am a judge-at-large," they can say. "I want to remain as judge-at-large," and any provision to the contrary notwithstanding. Now, if the law should provide that all these judges shall become district judges and their districts are to be determined by the President or by the Secretary of Justice, or anybody, that would be all right.

MR. VELOSO. (D). But suppose the bill as now proposed intends to abolish the judges-at-large and cadastral judges, would you think that this bill is unconstitutional?

SEC. TUASON. Well, that is why I say — in order to prevent the bill from being unconstitutional, the abolition must contain the proviso that these judges are not to be ousted, they are not to be re-appointed but they are to continue as district judges and their districts are to be determined by somebody or by the Department of Justice.

MR. VELOSO (D). So, practically, we are not here abolishing the judges-at-large and cadastral judges.

SEC. TUASON. No, we are not abolishing. *Only the names are abolished but not the position. We are not abolishing the tenure of office of these people.*

MR. VELOSO (D). Suppose there is no proviso as you have stated?

SEC. TUASON. If there is no such proviso the measure would be unconstitutional if its purpose or effect is to legislate judges out.

MR. BENGZON. Mr. Secretary, I have just heard your opinion here that even if these cadastral judges are converted into district judges, still they may remain and may not be eliminated even if they are inefficient. Supposing Congress deems it fit to strike out from the budget the salary corresponding to an inefficient judge, do you think he can still remain?

SEC. TUASON. The Congress cannot do indirectly what it cannot do directly. If the salary of a judge is eliminated from the budget, I think it would be the right of that Judge to go to the Supreme Court and ask it to order the corresponding office or the Budget Commissioner or whoever the official maybe, to provide money for the salary of that judge.

THE CHAIRMAN. May Congress be ordered by the Supreme Court to appropriate funds for the salary of a judge whose salary has been eliminated from the budget?

SEC. TUASON. It is not the Congress that the Supreme Court would order. It is the budget Commissioner or whoever has the money. The Congress does not hold the money. The Treasurer or somebody else does.

THE CHAIRMAN. But it is illegal for the President, I mean the Treasurer of the Philippines, to pay out funds unless he is authorized by law. How may the Supreme Court order the Treasurer to do so?

SEC. TUASON. It is not illegal if it is ordered by the Supreme Court which previously decides that it is in accordance with the constitution. It is the act of Congress that is illegal. After all, it is the Supreme Court that has the last word in that case.

MR. BENGZON. Now, the position is there but there is no money as there is no law permitting the appropriation of that money, may the Auditor General, the Budget Commissioner, or the Treasurer disburse from the public funds without action by Congress?

SEC. TUASON. That is what I said a while ago. The Supreme Court could protect the tenure of office of that particular judge by demanding from the officer who holds the money, to appropriate money to pay him that amount, and he cannot say that Congress has not appropriated, because the Court would say that the failure of the Congress to appropriate, if intentional, is unconstitutional, and if it is an oversight, it can be disregarded.

MR. BENGZON. In other words, Mr. Secretary, it is your considered opinion, even on the matter of the salary of such official, that he will be paid his salary? Because it is possible, Mr. Secretary, that this situation may arise, so we want to get your legal opinion on this point, because it seems to me that this is the sense of Congress: to weed out the inefficient judges.

SEC. TUASON. I wish you could do that in order to eliminate those who are really not deserving, but unfortunately, the constitution is very positive and very strong in that respect.

MR. BENGZON. Let us take an extreme case. Let us suppose that Congress should desire to abolish and eliminate all items for salaries of justices of the Supreme Court, what would happen?

SEC. TUASON. They could not do that because that will be interfering with the functions and abolishing another branch of the government which under the constitution, can not be done.

MR. BENGZON. But supposing there is no money appropriated, therefore, they may be acting without compensation.

SEC. TUASON. No; probably not, because if that were allowed, then they could legislate out the entire Supreme Court by not appropriating salaries.

MR. BENGZON. But there is a provision in the constitution which says that no money should be paid out of public funds except in pursuance of law.

SEC. TUASON. That is true, but that is subject to some qualification. In that case, as I said, the Supreme Court would step in and say, "No." When the Supreme Court orders the Treasurer to pay the salary of such judge, the Supreme Court does not order those officials to violate the law or do something against the law. As a matter of fact, the Court can say: "You should pay this because the constitution says that you should do it. If there is no law, then there is something above the law and it is the constitution. The constitution says that if the legislature

fails to make any appropriation for this man who, under the constitution, should stay in his office for life, then, it is my duty under the constitution to tell you to pay this man his salary as long as there is money from which that salary can be taken."

MR. BENGZON. Supposing, Mr. Secretary, that the Auditor General will say that he would not pay because there is no appropriation for the judge's salary provided by Congress?

SEC. TUASON. Well, they will go to jail for contempt of court and he will have to stay in jail until he pays the salary of that man. When the Supreme Court speaks, that is the last word and that is the thing to be obeyed and not what the President or the Congress tells them.

MR. BENGZON. Thank you, Mr. Secretary.

MR. VELOSO (D). Mr. Secretary, I agree that the tenure of office of judges is explicitly provided in the constitution, but are you aware that there is also that power of Congress to increase the number of judges, in the same manner that it can also decrease the number of judges of courts of first instance?

SEC. TUASON. Congress can increase, but it cannot decrease if by decreasing it would legislate out or put out of office judges who have already been appointed and who have already qualified.

MR. VELOSO (D). Don't you believe that that would be defeating the right or authority of Congress to increase the number of personnel that it sees fit to be provided in the budget?

SEC. TUASON. Well, I don't think so because it could not happen, if the reason is that there is no money, that the government of the Philippines does not have money to pay the salaries of the judges.

MR. VELOSO (D). Now, I think I remember that there was a time when the members of the Supreme Court have been increased and there was also a time when their number was decreased. What was the reason why the question of constitutionality was not raised when their number was decreased?

SEC. TUASON. Well, I am glad you asked me that question. The Congress can increase the number of the members of the Supreme Court say to eleven. Now, none of the eleven justices can be removed or can be put out of office because of lack of money. The Congress can reduce that number but not while all those eleven justices are there. It must wait until some of them resign and then say that the number of justices in the Supreme Court shall be like that number. And what I said with respect to Justices of the Supreme Court applies also with equal force in the case of judges of court of first instance. You can reduce the judges of court of first instance, or number of districts for that matter, but only according to the number of judges existing. You cannot reduce the number of judges if by doing so you have to eliminate or oust some of the judges.

MR. VELOSO. In other words, you are concerned with protecting the interests of judges once they are appointed, but are you not rather limiting the power of Congress to legislate out by striking out the item corresponding to a judge who has been abusive? Because that is the only way by which we can wipe out unnecessary elements in the judiciary.

SEC. TUASON. Well, I am only expressing my opinion as to the extent and intent of the constitution. What I say is that under the constitution, those things cannot be done. If there are judges that are unfit for one reason or another to stay in office, the only remedy, according to the constitution, is to file charges against them and let them be removed for cause.

MR. VELOSO. Without considering your opinion as correct, don't you believe that will be a limitation by the judiciary or the Supreme Court on the legislative powers of Congress to pass over the number of offices in accordance with its will? Because that is also a constitutional mandate to Congress.

SEC. TUASON. Well, the powers of the Supreme Court are defined by the constitution and so with the powers of Congress. At least, the constitution places a restriction on the power of Congress in certain respects. I beg to disagree with you when you say that the power of Congress is absolute or exclusive or something of that import, because the power of Congress with respect to judges is not absolute. It is restricted by the constitution itself and that restriction is that the Congress cannot by direct or indirect legislation remove any judge contrary to the tenure of office of judges.

MR. VELOSO. We don't believe that Congress can be limited by a mere opinion of the Supreme Court or even the President if it chooses to eliminate one position as we have done in the past in many instances.

SEC. TUASON. Yes, but this power is subject to the system of check and balances and subject to certain provisions of the constitution. There is no branch of the government that has absolute power. All powers are defined and are limited by the constitution.

MR. VELOSO. You mean to say, Mr. Secretary, that after the President has submitted the appropriation for the Department of Justice, Congress will just accept what has been so provided by the President?

SEC. TUASON. No, by no means. I don't intend to make that inference. It depends upon the nature of the item. The legislature can modify or reduce the budget submitted by the President. What I mean to say is that Congress cannot abolish a position of judge or cannot indirectly abolish that position by eliminating the item for salaries of that judge, because the constitution provides that such judge should hold office until he reaches 70 years of age.

MR. VELOSO. What would happen in this contingency wherein the Republic fails to realize its projected income for a definite fiscal year and Congress should see it fit to adjust its income to its expenses and it shall reduce the number of judges? Would you still limit the action of Congress just because these people are so provided with definite tenure of office or are occupying a position of such nature that it cannot be legislated out?

SEC. TUASON. In that case, it would be necessary to reduce items but I am afraid you can suppress the salary of the Secretary of Justice but not the salaries of the judges, because the Secretary of Justice is not officially provided by the constitution and you can do away with it as you please, and eliminate his position.

MR. VELOSO. Mr. Secretary, I have one more question. Actually, we have 16 judicial districts. Suppose we reduce the number of judicial districts, because this is within the competency of the power of Congress, we reduce the number to 12 from 16, and thereby reducing the number of judges in accordance with the wishes of Congress because it believes that the country cannot maintain 16 districts. Taking this as an example only, would you still insist that these people who are affected cannot be legislated out?

SEC. TUASON. Well, I think that unless there is really no money to pay the number of judges now existing, I am afraid that Congress will have to content itself with accommodating all the judges in the 16 judicial districts within the 12 judicial districts and wait until some of them resign or die. Not until then can the Congress reduce the number of judges.

MR. VELOSO. Thank you, Mr. Secretary.

THE CHAIRMAN. We thank you very much, Mr. Secretary for coming here.

SEC. TUASON. Thank you too. I was anxious to come here because I thought I might be able to say something that will erase the misgivings that might exist with reference to the proposed legislation. I hope I have accomplished that.

MR. CHAIRMAN. I can assure you that you have, Mr. Secretary. Thank you again.

I

STATE v. LEONARD
(86 Tenn. 485, 7 S.W. 453)

1. CONSTITUTIONAL LAW; CONSTITUTIONAL TENURE OF OFFICE CANNOT BE TERMINATED BY THE LEGISLATURE. — Acts Tenn. 1887, c. 84, repealed Acts Tenn. 1885, c. 71, under which defendant had been duly elected to the office of county judge of Marshall county, and conferred the power and duties incident to it on the chairman of the county court. *Held*: That this act could not deprive defendant of office for the remainder of the term for which he was elected, under Const. Tenn. art. 6, providing that the terms of office of the judges of such inferior courts as the legislature from time to time shall establish shall be eight years.

2. IBID.; IBID. — The act of 1887 did not attempt to abolish or diminish the powers and duties appertaining to the office. It simply repealed so much of the act as applies to Marshall county, (another county having had a similar chance made in its court system by the same act) and undertook to re-establish the office of chairman of the county court after the first Monday in April, 1887, and to vest in these officers all the rights, privileges, jurisdiction, duties, and powers pertaining to the officer as established and exercised by the county judge. If this legislation had merely named the defendant, and by name and title removed him from the position, and given it to another, it would not have more directly accomplished the purpose actually effected, if this be valid.

3. IBID.; PURPOSE OF THE CONSTITUTION IN FIXING THE TERMS OF JUDGES. — The constitution in fixing the terms of the judges of inferior courts elected by the people at eight years intended not only to make the judiciary independent, and thereby secure to the people the corresponding consequent advantages of courts free from interference and control, and removed from all necessity of being subservient to any power in the state, but intended also to prevent constant and frequent experimenting with county systems, than which nothing could be more injurious or vexatious to the public. It was intended when the legislature established an inferior court that it should exist such a length of time as would give opportunity for mature observation and appreciation of its benefits or disadvantages, and that the extent of its durability might discourage such changes as were not the result of most mature consideration.

4. IBID.; THE CONSTITUTION GUARDED THE JUDICIAL DEPARTMENT AGAINST BEING AT THE MERCY AND WHIM OF EACH RENEWING LEGISLATURE. — Realizing that a change, if made, to constitute an inferior court, would fix that court in the system of eight years, a legislature would properly consider and maturely settle the question as to the propriety and desirability of such change or addition to our system; and, conscious of the impropriety and the hazard of leaving the judicial department of the government at the mercy and whim of each renewing legislature — itself elected for but two years, — the framers of the constitution wisely guarded against these evils by the section referred to. Properly construed and enforced it is effectual for that purpose. Disregarded or impaired by such interpretation as leaves it to exist in form, without force or substance, and we have all the evils and confusion of insecure, changing, and dependent courts, frequent and constant experimenting with systems provided in haste, tried in doubt, and abolished before their merits or demerits were understood. It would be a mortifying reflection that our organic law makers intended any such result in their advanced efforts to make a government of three distinct independent departments; and still more humiliating, if we were driven to the conclusion that, while they did not intend it, they had been so weak or inapt, in the phraseology adopted, as to have accomplished it. Neither the intent nor the language of the constitution employed to express it fortunately bears any such construction.

5. IBID.; JUDGES ENTITLED TO THE PROTECTION AGAINST UNCONSTITUTIONAL LEGISLATION DEPRIVING THEM OF THEIR OFFICE. — When the court whose judge is elected by the people of one or more counties in district or circuit is constituted by the legislature, and an election had, and the officer commissioned and qualified, it is not in the power of the legislature to take from him the powers and emoluments of office during the term of eight years by devolving these intact upon another, or otherwise. The court so constituted, and judge elected, in this instance, was under the authority to establish inferior courts already quoted. The incumbent of the office was a judicial officer of this state, (State v. Gleen, 7 Heisk, 486; State v. McKey, 8 Lea, 24) and is entitled to the protection of the constitution as such, against unconstitutional legislation to deprive him of his office.

6. IBID.; THE CASE AT BAR DISTINGUISHED FROM STATE V. CAMPBELL AND STATE V. GAINES. — It is argued, however, that this act of removal is the same as the act abolishing a circuit court, with all its powers and jurisdiction, from the consequences of which it has been held by this court a circuit judge would be deprived of office. [State v. Campbell, (M.S.); State v. Gaines, 2 Lea, 316]. The act construed in these cases was one abolishing the Second circuit court on Shelby county, — the First and Second. As one was enough to do the business of the county, or supposed to be, the legislature abolished this court, leaving the entire business of both courts to be done by the first; thereafter to be styled "The Circuit Court of Shelby County." It was held in the cases referred to that the legislature might abolish a circuit court, held for a circuit or given territory, and that when the court was abolished the office of judge thereof terminated. Without desiring to be understood as assenting to the conclusion reached in those cases, (to the reasoning of which we do not subscribe) and which conclusions, we may remark in passing, were reached by a divided court, and against the weight of many opinions in other states, it is sufficient to say that the case here presents no such question as that determined there. The act of 1875 construed had abolished the court. It did not leave the court with all its powers, jurisdiction, rights, and privileges intact, and devolve them upon another, as in this case. Here the court was left as it existed, except the change made in its official head. He was simply removed by the operation of the act, if it could take effect according to its terms, and another put in his place.

7. IBID.; IBID. — It cannot be doubted that, if the legislature had said in the act of 1875, as in the act now being construed, that the office of the judge of the Second circuit court should be abolished, and that the court should remain, with like jurisdiction and duties, but these should be exercised by another officer, leaving the First circuit court also existing with its original jurisdiction and duties only, — that such would have been declared void. Nor can it be doubted that if the legislature should now declare that the office of a given circuit is hereby abolished, leaving the circuit and its court machinery as it, except the removal of the presiding judge, such act would be void. If this were not true, the legislature, at its next or any subsequent session, might pass a law setting out the circuits and chancery divisions by numbers, and declaring that the office of judge of each be abolished.

8. IBID.; CONSTITUTIONAL TEST.—It is no argument in answer to this to say that the legislature will not do this. It is not a question of what they will do that we are now considering; it is a question of constitutional power of what it can do. The question as to how such power is granted, or restraint imposed,

cannot be determined on the probability or improbability of its exercise. If it can abolish in this way the office of county judge, it can abolish the office of any inferior judge, as all are alike protected or not protected by the clause of the constitution referred to.

9. IBID.; THE INDEPENDENCE OF THE JUDICIARY MUST BE GUARDED AGAINST RASH AND CONSTANT EXPERIMENTS OF LEGISLATION. — For the honor of the framers of the constitution, the best interests of our people, the independence of the judiciary, and the security and order of our court system against rash and constant experiments of legislation, it offers us much satisfaction to give the constitution its plain, rational, and unobscure effect to invalidate legislation of this character, and be able to say that nothing as yet decided by our court stands as a precedent in the way of our doing so. But if there were, it would afford us pleasure to overrule it.

DECISION

SNODGRASS, J. By an act approved 30th of March, 1885, the legislature created the office of county judge for Marshall county. Acts 1885, p. 128. The defendant, Leonard, was duly appointed, commissioned, and qualified to fill said office, and entered upon the discharge of its duties. Subsequently, at the August election, 1886, he was elected to the position by vote of the people of the county, for the constitutional term, and was again commissioned and qualified, and continued to perform the duties of the office, without objection or interference, until the present bill was filed by the state on relation of D. C. Orr, to restrain him from so acting upon the ground that the act, in so far as it authorized the appointment of judge, had been repealed by an act of the legislature approved March 14, 1887, and the powers and duties of the office devolved upon the chairman of the county court to be elected to such position, and consequently sought in this proceeding to assert his authority, and to restrain defendant from interfering with him or from the usurpation of such power. A demurrer was overruled, the bill answered, and on final hearing the chancellor sustained the bill, and defendant appealed.

The question therefore is whether the legislature has power to terminate the office of a judge elected under a constitutional law, and for a constitutional term of eight years, within that term, leaving the court with its jurisdiction in existence and unimpaired, by simply transferring the duties of the office upon another official, namely, the chairman of the county court. In the act of 1885 creating the office of county judge, all the powers and jurisdiction vested in a chairman of the county court was vested in the county judge, (section 4, p. 129) and all the rights, powers, and jurisdiction that are conferred by existing law upon county judges, (section 3, p. 129). In the passage of this law the legislature acted under its constitutional authority to create originally, or by amendment of our existing court system, an inferior court. The first section of Article 6 of the state constitution provides "that the judicial power of this state shall be vested in one supreme court, and such circuit, chancery, and other inferior courts as the legislature shall from time to time ordain and establish, in the judges thereof, and in justices of the peace." The fourth section of the same article provides, among other things, that the judges of such inferior courts shall be elected by the qualified votes of the district or circuit to which they are to be assigned, and that their term of office shall be eight years. In the first section of the act of 1885 the term of the office is fixed at four years; but this is clearly a misprint or clerical error, for the next section, providing for the election of the judge after the first, fixes the period of eight years. This, however, is an immaterial matter. The act being otherwise valid, the constitution would regulate the term, although a different term was intentionally fixed; and the judge, being duly elected, would hold for eight years, — the constitutional term.

The question is, can the legislature subsequently, and within the term, deprive him of the office by devolving its powers and duties upon another? The act of 1887 did not attempt to abolish or diminish the powers and duties appertaining to the office. It simply repealed so much of the act as applies to Marshall county, (another county having had a similar chance made in its court system by the same act,) and undertook to re-establish the office of chairman of the county court after the first Monday in April, 1887, and to vest in these officers all the rights, privileges, jurisdiction, duties, and powers" pertaining to the officer as established and exercised by the county judge." If this legislation had merely named the defendant, and by name and title removed him from the position, and given it to another, it would not have more directly accomplished the purpose actually effected, if this be valid. The constitution in fixing the terms of the judges of inferior courts elected by the people at eight years intended not only to make the judiciary independent, and thereby secure to the people the corresponding consequent advantages of courts free from interference and control, and removed from all necessity of being subservient to any power in the state, but intended also to prevent constant and frequent experimenting with county systems, than which no thing could be more injurious or vexatious to the public. It was intended when the legislature established an inferior court that it should exist such a length of time as would give opportunity for mature observation and appreciation of its benefits or disadvantages, and that the extent of its durability might discourage such changes as were not the result of most mature consideration. Realizing that a change, if made, to constitute an inferior court, would fix that court in the system of eight years, a legislature would properly consider and maturely settle the question as to the propriety and desirability of such change or addition to our system; and, conscious of the impropriety and the hazard of leaving the judicial department of the government at the mercy and whim of each renewing legislature — itself elected for but two years, — the framers of the constitution wisely guarded against these evils by the section referred to. Properly construed and enforced it is effectual for that purpose. Disregarded or impaired by such interpretation as leaves it to exist in form, without force or substance, and we have all the evils and confusion of insecure, changing, and dependent courts, frequent and constant experimenting with systems provided in haste, tried in doubt, and abolished before their merits or demerits were understood. It would be a mortifying reflection that our organic law makers intended any such result in their advanced effort to make a government of three distinct independent departments; and still more humiliating, if we were driven to the conclusion that, while they did not intend it, they had been so weak or inapt, in the phraseology adopted, as to have accomplished it. Neither the intent nor the language of the constitution employed to express it fortunately bears any such construction.

When the courts whose judge is elected by the people of one or more counties in district or circuit is constituted by the legislature, and an election had, and the officer commissioned and qualified, it is not in the power of the legislature to take from him the powers and emoluments of office during the term of eight years by devolving these intact upon another, or otherwise. The court so constituted, and judge elected, in this instance, was under the authority to establish inferior courts already quoted. The incumbent of the office was a judicial officer of this state, (State v. Glenn, 7 Heisk, 486; State v. McKey, 8 Lea, 24) and is entitled to the protection of the constitution as such, against unconstitutional legislation to deprive him of his office.

It is argued, however, that this act of removal is the same as the act abolishing a circuit court, with all its powers and jurisdiction, from the consequences of which it has been held by this court a circuit judge would be deprived of office. (State v. Campbell, (M.S.); State v. Gaines, 2 Lea, 316). The act construed in these cases was one abolishing the Second circuit court of Shelby county, — the First and Second. As one was enough to do the business of the county, or supposed to be, the legislature abolished this court, leaving the entire business of both courts to be done by the First; thereafter to be styled "The Circuit Court of Shelby County." It was held in the cases referred to that the legislature

might abolish a circuit court, held for a circuit or given territory, and that when the court was abolished the office of judge thereof terminated. Without desiring to be understood as assenting to the conclusion reached in those cases, (to the reasoning of which we do not subscribe,) and which conclusions, we may remark in passing, were reached by a divided court, and against the weight of many opinions in other states, it is sufficient to say that the case here presents no such question as that determined there. The act of 1875 construed had abolished the court. It did not leave the court with all its powers, jurisdiction, rights, and privileges intact, and devolve them upon another, as in this case. Here the court was left as it existed, except the change made in its official head. He was simply removed by the operation of the act, if it could take effect according to its terms, and another put in his place. It cannot be doubted that, if the legislature had said in the act of 1875, as in the act now being construed, that the office of the judge of the Second circuit court should be abolished, and that the court should remain, with like jurisdiction and duties, but that these should be exercised by another officer, leaving the First circuit court also existing with its original jurisdiction and duties only, — that such would have been declared void. Nor can it be doubted that if the legislature should now declare that the office of a given circuit is hereby abolished, leaving the circuit and its court machinery as is, except the removal of the presiding judge, such act would be void. If this were not there, the legislature, at its next or any subsequent session, might pass a law setting out the circuits and chancery divisions by numbers, and declaring that the office of judge of each be abolished.

It is no argument in answer to this to say that the legislature will not do this. It is not a question of what they will do that we are now considering; it is a question of constitutional power of what it can do. The question as to how such power is granted, or restraint imposed, cannot be determined on the probability or improbability of its exercise. If it can abolish in this way the office of county judge, it can abolish the office of any inferior judge, as all are alike protected or not protected by the clause of the constitution referred to. For the honor of the framers of the Constitution, the best interests of our people, the independence of the judiciary, and the security and order of our court system against rash and constant experiments of legislation, it offers us much satisfaction to give the constitution its plain, rational, and unobscure effect to invalidate legislation of this character, and be able to say that nothing as yet decided by our court stands as a precedent in the way of our doing so. But if there were, it would afford us pleasure to overrule it.

The decree is reversed, and bill dismissed with costs.

II

STATE, ex rel. GIBSON v. FRIEDLEY
21 L. R. A., 634

1. CONSTITUTIONAL LAW; THE LEGISLATURE CANNOT LEGISLATE OUT A JUDGE. — The Constitution of Indiana provides that the circuit courts shall each consist of one judge, that the state shall, from time to time, be divided into judicial circuits, a judge for each circuit shall be elected by the voters thereof. He shall reside within his circuit and hold his office for a term of six years, if he so long behave well. The Constitution likewise provides that there shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for three years.

Held: It seems beyond the power of the legislature to legislate a judge and prosecuting attorney out of office, and if the legislature cannot by a direct act deprive them of their offices neither can it do so by the indirect mode of abolishing their circuit. The authors of our constitution well understood the long struggle for many years previous to secure the independence of the judiciary and the tenure of office of the judges; hence the Constitution divides the powers of the state government into three distinct co-ordinate departments, carefully excluding any control of one over another. If the legislature, by a special act, may remove one judge or one prosecuting attorney, it may remove any and all such officials in the state, and hence they would be at the mercy of any legislature whose enmity or illwill they may have incurred.

2. ID.; LEGISLATURE CANNOT TRANSFER THE ENTIRE CIRCUIT OF ONE JUDGE AND ATTACH IT TO ANOTHER CIRCUIT. — If the general assembly can transfer bodily the entire territory which constitutes the locality in which the judge or prosecuting attorney may lawfully exercise the functions and duties of his office, and attach that territory to another circuit, then it can strip the incumbents of their respective offices as effectually as it is possible to do so by any words that can be used. It is, in fact, as much a removal of the judge and prosecutor so deprived of all territory as would be a judgment of a supreme court removing either of them from his trust. It is not to be assumed that the framers of the constitution builded it so unwisely as to secure to a judge an office and its tenure, and the right to exercise all its prerogatives within a defined locality for a period of six years, if he so long behave well, and by the same organic law intended that the general assembly might remove him, at its will, from the exercise of all the privileges and duties pertaining thereto, without a hearing, without a conviction for misconduct, under the guise of "from time to time dividing the state into judicial circuits."

3. ID.; LIMITATIONS OF THE LEGISLATIVE POWER TO DIVIDE THE STATE INTO CIRCUITS.—The division of the state into judicial circuits may be exercised by the legislature, where the act does not legislate judges and prosecutors out of their respective offices, but not otherwise. The general assembly may add to, or may take from the territory constituting a circuit. It may create new circuits. It may abolish a circuit, if the act be made to take effect at, and not before the expiration of the terms of office of the judge and prosecutor of such office, as constituted, at the time of the act. The general assembly has the power, at its discretion, to divide a judicial circuit, at any time, during the terms of office of the judge and prosecuting attorney of such circuit, subject only to the restrictions that the legislature cannot, by any legislation, abridge the official terms of either of such officers, nor deprive either of them of a judicial circuit, wherein he may serve out the constitutional term for which he was elected.

D E C I S I O N

DAILEY, J., delivered the opinion of the court:

On the 28th day of August, 1893, the relator filed an information in the Jefferson circuit court against the appellee Friedley. By the information, it is averred that the relator is a judge of the fourth judicial circuit of the state of Indiana, and that said appellee has usurped and intruded into said office and detains the same from him, although he has demanded possession thereof, and judgment is prayed that the relator may be awarded the possession of said office and all other proper relief. To this information the appellee, in the court below, filed his answer, pleading especially the authority by virtue of which he holds the possession of said office as judge, as against the said relator. To this answer the appellant filed his demurrer, which was overruled, and exception being reserved to the decision of the court. There upon the appellant filed his reply, to which the appellee demurred, the demurrer being sustained and an exception reserved on the part of the appellant. The appellant standing by the reply and declining to plead further, judgment was rendered in favor of the defendant, from which the relator prosecutes this appeal. The errors assigned in this court are as follows:

1. That the answer of the appellee, William T. Friedley, in the court below, did not state facts sufficient to constitute a cause of defense.

2. That the court below erred in overruling the demurrer to said appelle's answer.

3. That the court below erred in sustaining the demurrer to appellant's reply.

It is not disputed that, on the 4th day of March, 1893, Clark county alone constituted the fourth judicial circuit of the state of Indiana. Elliott's supp. par. 263.

And the statute in force provided that the terms of court in said fourth judicial circuit should be held as follows: "On the first Monday in February, the third Monday in April, the first Monday in September and the third Monday in November of each year," to remain in session while the business of the court required. Acts 1891, p. 68. And at said date the county of Jefferson alone constituted the fifth judicial circuit of the state of Indiana, and it was provided by law that the terms of court in said fifth judicial circuit should be held as follows: "On the first Monday in January, the first Monday in April, the first Monday in September, and the first Monday in November of each year;" said terms to continue in session as long as the business of the court required. On the 4th day of March, 1893, the legislature of Indiana approved an act, which purports to abolish the fifth judicial circuit and annex territory heretofore constituting the fifth judicial circuit, and change of time of holding the courts in the countries of Clark and Jefferson. The act will be found in the Acts of 1893, on page 359, and is entitled "An act Defining the Fourth Judicial Circuit of the State of Indiana, Fixing the Times of Holding Courts in Said Circuit, Prescribing the Limits of the Terms thereof, Providing for the Judge thereof, and Abolishing the Fifth Judicial Circuit of the State of Indiana, and Repealing All Laws in Conflict therewith."

It will be observed that this title has no reference to or mention of courts in the fifth judicial circuit. The first section reads as follows: "Be it enacted by the general assembly of the state of Indiana, that on and after the first day of August, 1893, the fifth judicial circuit of the state of Indiana, which is now constituted of the county of Jefferson, shall be abolished." The second section provides that on and after the first day of August, 1893, the counties of Clark and Jefferson shall constitute the fourth judicial circuit of the state of Indiana, as the same is now constituted, shall be the judge of the fourth judicial circuit of the state of Indiana, as thereafter constituted by this act, and until his successor is elected and qualified.

This proceeding was instituted as a friendly one, with a view to testing the following questions:

1. What is the legal effect of the Act of March 4, 1893, in view of the fact that the act abolishes the appelle's entire circuit, the term for which he was elected and qualified not having expired?

2. If the Act of March 4, 1893, is unconstitutional or inoperative in so far as it undertakes to abolish the term for which appellee was elected, viz., from October 22, 1891, to October 22, 1897, will the same still have the effect of changing the terms of court in the counties of Clark and Jefferson?

At the time the Act of 1893 was approved, the relator, George H. D. Gibson, was the sole judge of the fourth judicial circuit, and the appellee, William T. Friedley, was the sole judge of the fifth judicial circuit. The appellee having declined to recognize the validity of the last-mentioned act of the legislature upon the ground that the same is unconstitutional and void, or, at any rate, is inoperative, has continued in possession of said office and in the discharge of the duties thereof in the county of Jefferson, and has declined to surrender the same to the relator.

The first question that naturally arises is as to the alleged error of the court on overruling the demurrer to appellee's answer; but as the questions attempted to be raised in all the assignments of error are the same, they may be disposed of together. The answer, omitting the caption and purely formal parts, reads thus: "The said defendant hereby enters his appearance to the above action, waives the issuing and service of process herein, and for answer to said information and complaint, says that he, said defendant, is a bona fide resident of Jefferson county, Indiana, and has been for more than thirty years last past; that he is now fifty-eight years old, and has been a voter and elector of said county aforesaid for the last thirty years or more, and during all of said time he has been eligible to be voted for, and to be elected to the office of circuit judge of the fifth judicial circuit of the state of Indiana, and eligible to take and hold said office; that prior to the general election of November, 1884, the fifth judicial circuit was composed of the counties of Jefferson and Switzerland, and so continued until February 4, 1891, when Switzerland, Ohio, and Dearborn counties were erected into the fifth judicial circuit; That on the 28th day of February, 1889, the county of Clark alone was created the fourth judicial circuit, and the relator was elected circuit judge of said fourth judicial circuit by the electors of Clark county alone, on the—day of November, 1892; that this defendant was duly and legally elected circuit judge of the fifth judicial circuit on the 4th day of November, 1884, for the term which was to commence on the 22nd day of October, 1885; that he was duly commissioned for said term, qualified and entered upon the discharge of the duties of said judge as aforesaid, and served the full term thereof; that he was again a candidate for election to said office of circuit judge of said fifth judicial circuit, at the general election held November, 1890, and had no opposition, and was the only person voted for to fill said office; that there were cast 2894 votes in Jefferson county, and 2100 votes in Switzerland county for Judge of the fifth judicial circuit of Indiana, at said election, and he received all of said votes so cast, and was duly elected circuit judge of said fifth judicial circuit of Indiana, at said election, for the term of six years, commencing October 22, 1891, and ending October 22, 1897; that said defendant accepted said office and commission, and took the oath of office, which is indorsed on his commission, and a certified copy thereof was forwarded to the secretary of state, and by him filed in his office, to wit, Nov...., 1890; that at the expiration of defendant's first term, he entered upon the discharge of the duties of the office aforesaid, and has tried to discharge the duties of said trust to the best of his skill and ability; that he accepted said office in good faith, and entered into the possession of it peaceably and as a matter of right, and has not forfeited, surrendered, nor resigned the same, but is still acting in the capacity as aforesaid. And he says that, at all times, he has discharged said duties of circuit judge as aforesaid, within the bonds of Jefferson county, Indiana, since it alone has been created into a circuit, and that at no time has he attempted to exercise any of the duties of the judge of the Clark circuit court (the fourth judicial circuit) since the relator has been judge as aforesaid. The defendant further avers that by an act approved March 4, 1893, the legislature attempted to abolish the fifth judicial circuit aforesaid, and consolidated Jefferson and Clark counties into the fourth judicial circuit, and provided that the judge of the fourth judicial circuit (of Clark county) should discharge the duties of circuit judge in the circuit court attempted to be formed by said act, (to wit, in the counties of Jefferson and Clark:) And they further provided that said act should not go into effect until the first day of August, 1893.

The defendant avers that said legislature utterly failed to provide by said act any circuit or county for defendant, in which he could exercise the functions of said office of circuit judge, or in which he could discharge the duties thereof, and attempted by said act to deprive him of his vested right to said office and its functions, in violation of the constitutional rights of the defendant,

which he had by virtue of said election, commission, and acceptance of said office and constitutional guarantees in reference thereto. The defendant says that the sole and only cause of complaint which the relator has against the defendant is, that the defendant has exercised the duties of circuit judge within Jefferson county (only) since the first day of August, 1893, claiming that such duties in said court devolve upon him, relator, by virtue of said Act of March 4, 1893, and said actions of this defendant are the same wrongful and unlawful acts of usurpation and intrusion into relator's office complained of, and none other. The defendant says that as to all other matters in said information and complaint, not controverted in this paragraph of the answer, he denies. He further says that said relator is assuming that he is the proper person to discharge the duties of circuit judge within Jefferson county, Indiana, and that defendant is not, and that by reason of said assumption, a cloud has been cast upon the title of defendant to said office and the functions thereof. Wherefore, he asked that the relator take nothing by this action; that said Act of March 4, 1893, be declared and adjudged void; that defendant's title to said office be quieted to him, and for all other proper relief as may be equitable and just."

In order to determine the sufficiency or insufficiency of this answer, an inquiry is involved as to what is the legal effect of the aforesaid Act of March 4, 1893. It is conceded by the appellant that, unless the said act was a valid and legal enactment, and became operative from and after the 1st of August, 1893, the relator's claim to the office of judge, in so far as Jefferson county is concerned, is not well founded. On the contrary, it is conceded by the appellee that his title to the office of judge of said court is based upon his previous election thereto, and the claim upon his part that the Act of March 4, 1893, is unconstitutional, or at least that the same is inoperative during the term for which he was elected.

The judge and prosecuting attorney are constitutional officers. They are also designated in the organic law, and are neither state nor county officers. The Constitution, (art. 3, Rev. Stat. 1881, par. 96) separates into three departments the powers of the state government as follows: legislative, executive, including administrative, and the judicial. Article 7 of the Constitution, (Rev. Stat. 1881, par. 161,) vests the whole judicial power of the state in the supreme court, in circuit courts and in such other courts as the general assembly may establish. Section 168, Rev. Stat. 1881, provides that the circuits courts shall each consist of one judge. Section 169, Rev. Stat. 1881, is as follows: "The state shall, from time to time, be divided into judicial circuits, and a judge for each circuit shall be elected by the voters thereof. He shall reside within his circuit, and shall hold his office for the term of six (6) years, if he so long behave well." Section 171, Rev. Stat. 1881, reads: "There shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for two (2) years." Section 172, Rev. Stat. 1881, reads: "Any judge or prosecuting attorney who shall have been convicted of corruption or other high crime, may, on information in the name of the state, be removed from office by the supreme court." Section 173 provides that the compensation of the judges of the supreme court or circuit courts shall not be diminished during their continuance in office. The first section of the act in controversy abolishes in express terms the fifth judicial circuit of this state, which circuit the section itself declares to be composed of the county of Jefferson alone; necessarily having a judge to preside over its courts, and a prosecuting attorney to prosecute the pleas of the state therein. The other four sections are builded upon the validity of the first section. If the first section be unconstitutional and void, then, all the other sections are likewise void. It seems beyond the power of the legislature to legislate a judge and prosecuting attorney out of office, and if the legislature cannot by a direct act deprive them of their offices, neither can it do so by the indirect mode of abolishing their circuit. Section 172, *supra*, which provides that judges and prosecuting attorneys may be removed from office by "conviction for corruption or other high crime," defines a plan which in itself involves a trial, a hearing by the accused, a day in court, and then the removal on information in the name of the state may be adjudged by the Supreme court. This section, however, provides that a removal may be effected in such other manner as may be provided by law. But the state has thus far failed to provide any other manner than the constitutional mode. The legislature, under this latter clause, we think, has the power to provide for the removal of judges and prosecuting attorneys in some additional or other manner than that prescribed in this constitutional section. It could only do so, however, by enacting a general law applicable to all judges and all prosecuting attorneys, and to be valid must provide for a trial, and must give to the accused a day in court, an opportunity to be heard and make defense, or the act would be unconstitutional for the failure to give the accused such opportunity and right. This clause does not authorize the legislature to enact a law, removing the judge or prosecutor from office, at its will, without giving him a day in court, Section 169, *supra*, is the only authority that can be found on which to base the legislative right of removal. But to give the first clause of that section such construction would nullify that part of the same section which provides that the judge of a circuit, when elected, shall hold his office for a term of six years, if he so long behave well. To construe this section to mean that the legislature can, at its own will, abolish the circuit, and thus legislate the judge and prosecuting attorney out of office, in addition to being in direct conflict with the other provisions of our organic law, would also put the official life of every judge and every prosecuting attorney of the state at the mercy of the legislature. It would subject the judiciary to the legislative power, and utterly destroy all judicial independence. Judges and prosecutors would be at the whim or caprice of the senators and representatives in their tenure of office. The authors of our constitution well understood the long struggle for many years previous to secure the independence of the judiciary and the tenure of office of the judges; hence section 96, *supra*, was enacted, dividing the powers of the state government into three distinct co-ordinate departments, carefully excluding any control of one over another. If the legislature, by a special act, may remove one judge or one prosecuting attorney, it may remove any and all such officials in the state, and hence they would be at the mercy of any legislature whose enmity or ill-will they may have incurred.

The office of circuit judge, as well as prosecuting attorney is a public trust, committed by the public to an individual the duties and functions of which he is bound to perform for the benefit of the public, and entitles him to exercise all the duties and functions of the office, and to take the fees and emoluments belonging to it. 2 Bovier, Law. Dict. title, *Office*. "Officers are required to exercise the functions which belong to their respective offices. The neglect to do so may in some cases subjects the offender to an indictment. 1 Yeates, 519."

There can be no such thing as an office without responsive duties and functions to be performed by the officer. It is not the mere right to receive an annual compensation without the exercise of any corresponding duties. If the general assembly can transfer bodily the entire territory which constitutes the locality in which the judge or prosecuting attorney may lawfully exercise the functions and duties of his office, and attach that territory to another circuit, then it can strip the incumbents of their respective offices as effectually as it is possible to so do by any words that can be used. It is, in fact, as much a removal of the judge and prosecutor so deprived of all territory as would be a judgment of a supreme court removing either of them from his trust. It is not to be assumed that the framers of the constitution builded it so unwisely as to secure to a judge an office and its tenure, and the right to exercise all its prerogatives within a defined locality for a period of six years, if he so long behave well, and by the same organic law intended that the general assembly might remove him, at its will, from the exercise of all the privileges and duties pertaining thereto, without a hearing, without a conviction for misconduct, under the

guise of "from time to time dividing the state into judicial circuits." Such division may be exercised by the legislature, where the act does not legislate judges and prosecutors out of their respective offices, but not otherwise. The general assembly may add to, or may take from the territory constituting a circuit. It may abolish a circuit, if the act be made to take effect at, and not before, the expiration of the terms of office of the judge and prosecutor of such office, as constituted, at the time of the act. This act abolishes the circuit on and after the first day of August, 1893, and therefore must be effectual to abolish the circuit and the offices on the day named, or not at all. As stated, the offices of judge and prosecuting attorney of the fifth judicial circuit expire on the 22nd day of October, 1897, and to abolish the circuit, it must be by law to take effect on the date last named. These positions are in line with the authorities. The judges and prosecuting attorneys are not state, county, or township officers. They are constitutional officers. *State* v. *Tucker*, 46 Ind. 359.

The case of State v. Noble, 118 Ind. 350, 4 L. R. A. 101, fully establishes the independence of the judiciary. The legislature cannot extend or abridge the term of an office, the tenure of which is fixed by the constitution. *Howard* v. *State*, 10 Ind. 99.

In *State* v. *Johnston*, 101 Ind. 223, which was also an information in the nature of a quo warranto filed by the appellant's relator, Howard, against the appellee, it is decided by the court that the general assembly has the power, at its discretion, to divide a judicial circuit, at any time, during the terms of office of the judge and prosecuting attorney of such circuit, subject only to the restrictions that the legislature cannot, by any legislation, abridge the official terms of either of such officers, nor deprive either of them of a judicial circuit, wherein he may serve out the constitutional term for which he was elected. This ruling is upon the theory that it is declared and ordained otherwise in section 9 of article 7 of the State Constitution, section 169, *supra*.

In *Hoke* v. *Henderson* (N.C.) 25 Am. Dec. 704, *note* 1, it is said: "It is without the power of the legislature to indirectly abolish the office by adding the circuit of the incumbent to another then existing, and this even if it be within the power of the legislature to create new or alter old circuits, for that power must be so exercised as to leave the incumbent his office." That the framers of the constitution intended that there should be no abridgment of the term of office as fixed by fundamental law, is indicated also by section 176, Rev. Stat. 1881, as follows: "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state other than a judicial office." This section appears, in terms, to guarantee to a judicial officer his term as fixed by the constitution. *People* v. *Bull*, 46 N. Y. 57 Am. Rep. 302; *People* v. *McKinney*, 52 N. Y. 374, 378.

"But if the constitution provides for the duration of an office, the legislature has no power, even for the purpose of changing the beginning of the term, to alter its duration. Where the constitution has created an office and fixed its term, and has also declared the grounds and mode for removal of an incumbent before the expiration of his term, the legislature has no power to remove or suspend the officer for any other reason or in any other mode." 7 Lawson, Rights, Rem. & Pr. p. 5970, par. 3797.

Judges of circuit courts can anly be removed from office by the ordained constitutional provisions. *Lowe* v. *Com.* 3 Met. (Ky.) 237.

The constitutional provision in respect to the terms and tenure of office (except as to duration or length of terms) and commissions of judges and the power of the legislature to create new judicial districts are substantially the same in Pennsylvania as in this state. The constitutional provision in the former state was construed in Com. v. Gamble, 52 Pa. 343. In the opinion, People vs. Dubois, 23 Ill. 547, is cited, in which the supreme court of Illinois holds that although the creation of new judicial districts was expressly authorized by the constitution, yet no new districts could be created by which the judge in commission could be deprived of a right to exercise the functions of his office during the continuance of his commission. The court says: "The question is, can the legislature expel the circuit judge from his office by creating a new district taking from him the territory which constituted his district? The bare reading of the constitution must convince every one that it was intended to prohibit such a proceeding." See also *State* v. *Messmore*, 14 Wis. 163.

In *Com.* v. *Gamble*, *supra*, the following propositions are established: "A judge having been elected and commissioned, is by the constitution to continue in office ten years, if he shall behave himself well; its duration is assured to him, subject to be determined only by death, resignation, or breach of condition. Such breach cannot be determined by the legislature, but only on trial by the senate on impeachment, or, in case the breach amounted to total disqualification, perhaps by address of two thirds of each branch of the legislature. A legislative act which empinges on the tenure of judges is invalid. The power and jurisdiction of a judge constitute the office, are of the essence of it, and inseparable from it. The grant of power is incapable of any limitation but that attached to it. The aggregate amount of the duties of a judge in any district may be diminished by the division of his district. Constitutional grants imply a prohibition of any limitation or restriction by legislative authority."

In the last-named case, the reasoning is so clear and strong that we copy the following extracts therefrom: "The Pennsylvania legislature established the twenty-ninth judicial district by the Act of the 28th of February, 1868, under which James Gamble was elected and commissioned president judge of the district. By an act passed March 16, 1869, the former act was repealed and the district was abolished . . . . The powers, authority, and jurisdiction of an office are inseparable from it. The legislature may diminish the aggregate amount of the duties of the judge but must leave the authority and jurisdiction pertaining to the office intact . . . . I see not how, for another reason, that the commission of a president judge could exist after the total abolition of his district. Every judge is elected in and for a district, defined and fixed by law, and then he is commissioned, and is required by the constitution to reside within the district. It seems to me it would be a logical conclusion to hold that, if no district exists to which the judge would be bound to reside, that there could not exist a commission for any purpose. This I think would be the inevitable deduction from such premises, and it would therefore follow, that if the legislature could blot out a district, it could limit the duration of the commission granted to a less period than ten years, if it might so choose. That it cannot shorten the tenure of the office of a judge, as fixed by the constitution, is certain and this ought to establish that it can pass no act to do by indirection that which may not be done directly." "Notwithstanding the constitutional provisions referred to, the legislature has not only attempted, by the act of the assembly in question, to expel *Judge* Gamble from his district, but, in fact, has appointed other judges to hold the courts therein, who were neither elected nor commissioned for that purpose. The legislature has, undeniably, by this act of assembly, assumed the power of appointment and removal of the judge for the district. The act displaces *Judge* Gamble as the president judge, and appoints Judge White and his law associate to hold the court therein. If such a thing can be done in one district, it can be done in all, and thus not only would the independence of the judiciary be destroyed, but the judiciary as a coordinate branch of the government be essentially annihilated."

Applying this reasoning and these fundamental principles to the case under consideration we do not see how the constitutionality of the Act of March 4, 1893, can be upheld, as much as we may desire to do so, it being in the interest of economy and retrenchment in public expeditures. But it is enough for this case to say that it was not in force to abolish the fifth judicial circuit, not being abolished by the act, is not attached to and made a part of the fourth judicial circuit. The provisions of the Act of March 4, 1893, changing the terms of court and the times of holding the

same in the counties of Clark and Jefferson are so interwoven with and dependent upon the other provisions therein that they do not have the effect of changing the terms of court or the times of holding the same, as provided by law prior to March 4, 1893. In other words, the terms of court and times of holding the same as fixed by the act in question were not intended for the counties of Clark and Jefferson as constituting separate judicial circuits; but were intended for them when both these counties constituted the fourth judicial circuit as provided by the act.

Judgment affirmed.

III

STATE V. MABRY
Supreme Court of Tennessee, Nov. 20, 1943
(178 S.W. 2d 379)

1. CONSTITUTIONAL LAW; ACT PURPORTING TO ABOLISH OFFICE OF COUNTY JUDGE INVALID. — Private Act purporting to abolish the office of County Judge by repealing the private act creating the court and undertaking to create and establish a new county court of Clay County and naming a chairman thereof was invalid as an attempt to defeat the right of the judge thereto elected and holding office in accordance with the existing law.

2. IBID.; A JUDGE CANNOT BE LEGISLATED OUT OF OFFICE. — We cannot close our eyes to the palpable effort to legislate the relator Bailey out of office and substitute in his place and stead another person who is designated in another private act to perform same official duties. Chapter 53 of the Private Acts of 1943 purports to abolish the office of County Judge by repealing the act that created it. Eight days after the repealing act was approved by the Governor the Re-Districting Act was passed in which defendant Mabry was named as "Chairman of the County Court." The duties of this office were identical with that of county judge under the act which was sought to be repealed. The jurisdiction was the same in all respect.

3. IBID.; LEGISLATURE CANNOT REMOVE A JUDGE BY ABOLISHING THE OFFICE. — The legislature cannot remove a county judge by abolishing the office and devolving the duties upon a chairman of the county court.

4. IBID.; DISTINCTION BETWEEN STATUTE INEFFECTIVE TO REMOVE A JUDGE FROM OFFICE AND STATUTES THAT ACCOMPLISH REMOVAL BY ABOLISHING THE TRIBUNAL. — The distinction between statutes ineffective to remove a judge from office, and statutes that accomplish removal by abolishing the tribunal and transferring its business to another was made clear by Mr. Justice Wilkes in Judges' Cases, 102 Tenn. 509, 560, 53 S.W. 134, 146, 46 L.R.A. 567.

D E C I S I O N

NEIL, *Justice.*

The relator J. B. Bailey was regularly elected to the office of County Judge of Clay County at the general election in August, 1942, for a term of eight years. A certificate of election was accordingly issued to him by the County Election Commissioners. He qualified by giving bond and taking the oath of office. No question is made as to his qualifications. The office to which relator was elected and now holds was created by the General Assembly of this state under Chapter 145 of the Private Acts of 1903. The act prescribed the duties and the jurisdiction of said county judge and fixed the salary of the incumbent. It appears that the term of office of relator will not expire until September 1, 1950.

The Legislature in January, 1943, passed an act, being Chapter 53 of the Private Acts of 1943, which purports to repeal Chapter 145 of the Private Acts of 1903 and to abolish the office of County Judge of Clay County. At the same session of said Legislature there was enacted Chapter 283 of the Private Acts of 1943, called the Re-Districting Act, which undertook to abolish the County Court of Clay County and to create and establish a new County Court for said county. The act named the defendant C. J. Mabry as chairman of said court.

The original bill in this case was filed by the relator attacking the constitutionality of the 1943 act upon the ground that said act was unconstitutional and void as it violated certain provisions of the Constitution of this state. The original bill was filed against defendant C. J. Mabry. The prayers of the bill were that Chapter 53 of the Private Acts of 1943 be declared unconstitutional and void; that an injunction be immediately issued enjoining the defendant from acting or interfering with complainant in the performance of his official duties as County Judge of said county; that at the hearing the injunction be made perpetual.

The defendant filed a demurrer to the bill upon the following grounds: (1) that chapter 53 of the Private Acts of 1943 was a valid and constitutional act and abolished the office of County Judge, now held by the complainant; (2) that the Re-Districting Act, Chapter 283 of the Private Acts of 1943, abolished the County Court of Clay County and created an established a new county court for said county, and named the defendant as chairman of said court in the bill; and that therefore the office of county judge was abolished and a new office of County Chairman was created: (3) that because of the two acts, viz., chapter 53 and chapter 283, the complainant had no right to maintain this suit and no right to restrain the defendant from acting as County Chairman of Clay County.

The cause was heard before the Chancellor, at chambers, by agreement of the parties, upon the demurrer of defendant and motion to hear same and dissolve the injunction therefore issued upon the fiat of the Chancellor. The Chancellor took the case under advisement and shortly thereafter overruled all the grounds of the demurrer, holding that chapter 53 of the Private Acts of 1943 was unconstitutional and void, and declined to dissolve the injunction. He granted a discretionary appeal from the decree.

The defendant duly perfected his appeal and has assigned the following errors:

(1) The Chancellor erred in overruling the first ground of defendant's demurrer, which is as follows:

"The bill shows on its face that Chapter 53 of the Private Acts of Tennessee of 1943, repealing Chapter 145 of the Private Acts of Tennessee of 1903, is a valid and constitutional enactment, and that the effect of said chapter 53 of the Private Acts of 1943 is to abolish the office of County Judge in Clay County, so that it results that the relator can no longer hold said office which is now non-existent."

(2) The chancellor erred in overruling the second ground of the defendant's demurrer, which is as follows:

"The bill shows on its face that Chapter 283 of the Private Acts of 1943, which redistricted Clay County, created and established a new County Court in Clay County, named a County Chairman to preside over said County Court to perform and discharge the duties imposed upon a County Chairman by the general law until the next regular meeting of the County Court, is a valid and constitutional enactment repealing by its express terms all laws or parts of laws in conflict therewith; and also repealing by implication the Act creating the office of County Judge of Clay County, Tennessee; so that it results that the relator under the terms and provisions of said Act is no longer the County Judge of Clay County in that a new County Court for Clay County has been created to be presided over by a County Chairman."

(3) The Chancellor erred in overruling the third ground of

the defendant's demurrer, which is as follows:

"That in view of the foregoing and the allegations of the bill incorporating by reference the several private Acts of Tennessee in question, defendant has no right to maintain this suit and no right to restrain the defendant from performing his duties as County Chairman of Clay County, Tennessee."

(4) The Chancellor erred in holding that chapter 53 of the Private Acts of 1943 is unconstitutional and void.

(5) The Chancellor erred in holding that the office of County Judge of Clay County, Tennessee was abolished by Chapter 283 of Private Acts of 1943, and that the defendant has no authority or right to act as Chairman of the County Court of Clay County under the terms and provisions of said act.

(6) The Chancellor erred in overruling the defendant's demurrer and in overruling and disallowing the defendant's motion to dissolve the writ of injunction.

It appears from the record that Chapter 53 of the Private Acts of 1943 was passed on January 20, 1943, and approved by the Governor on January 27, 1943; that the Re-Districting Act. Chapter 283 of the Private Acts of 1943, was passed on February 8, 1943. The latter act abolished all the civil districts of Clay County — four in number — and set up and established eight civil districts in the country. The act named the justices of the peace and also the constables for each civil district. Now the only portion of this act which directly affects the relator in the discharge of his duties as county judge is Section 5 of the act, which named C. J. Mabry to serve as Chairman of the County Court until the next regular meeting of the Quarterly County Court, his salary being fixed at $100.00 per month. The complainant does not attack the constitutionality of the aforesaid Re-Districting Act. It is insisted, however, that the defendant Mabry has no legal authority to act as a Chairman of the County Court, "or in any way to interfere with him in the performance of his official duties as County Judge." It is the contention of counsel for dependant Mabry that the Re-Districting Act repeals all laws and parts of laws in conflict therewith and abolishes the existing County Court of Clay County and establishes an entirely new County Court of said county. Able counsel for the defendant have sought to make a distinction between the instant case and other cases decided by this Court, particularly State v. Leonard, 86 Tenn. 485, 7 S.W. 453, State ex rel. v. Link, 172 Tenn. 258, 111 S.W. 2d 1024, and State ex rel. v. Lindsay, 103 Tenn. 625-636, 53 S.W. 950.

Passing to the consideration of the question now before us, we hold that the County Court is a constitutional court and cannot be abolished by legislative enactment. Prescott v. Duncan, 126 Tenn. 106, 126, 127, 148 S.W. 229. This Court has clearly made a distinction between Chancellors, Circuit Judges, and County Judges, holding that in the interest of economy the two former may be abolished, but that the office of County Judge cannot be abolished during the term of the office. See the Judges' Cases, 102 Tenn. 509, 543, 545, 53 S.W. 134.

In the Redistricting Cases, 111 Tenn. 234, 235, 80 S.W. 750, the court used the following language:

"The constitutional term of office, where there can be only one incumbent in a county, as in the case of the county register, the circuit court clerk, the sheriff and the county judge, cannot be shortened, nor can the incumbent of such constitutional offices be deprived of his office, during his term, by the legislature. The sheriff can not be deprived of a substantial part of his powers and functions."

We cannot close our eyes to the palpable effort to legislate the relator Bailey out of office and substitute in his place and stead another person who is designated in another private act to perform the same official duties. Chapter 53 of the Private Acts of 1943 purports to abolish the office of County Judge by repealing the act that created it. Eight days after the repealing act was approved by the Governor the Re-Districting Act was passed in which defendant Mabry was named as "Chairman of the County Court." The duties of this office were identical with that of county judge under the act which sought to be repealed. The jurisdiction was the same in all respects. We think the case of State v. Link, 172 Tenn. 258, 262, 111 S.W. 2d 1024, 1025, is directly in point and controlling in the instant case. In that case the office of County Judge of Stewart County was abolished by the Private Acts of 1937, c. 643. In a bill brought to test the constitutionality of the act it was alleged that it was a valid act and "it became the duty of the Quarterly Court under the general statute to elect a chairman of the County Court to succeed the defendant." This act was held to be invalid. The Court, speaking through Mr. Justice Cook, says:

"Public office cannot thus be transferred by statute from one official to another. Acklen v. Thompson, 122 Tenn. 43, 55, 126 S.W. 730, 135 Am. St. Rep. 851; State ex rel. v. Morris, 136 Tenn. 157, 161, 189 S.W. 67.

"The Legislature cannot remove a county judge by abolishing the office and devolving the duties upon a chairman of the county court. State v. Leonard, 86 Tenn. 485, 7 S.W. 453. The distinction between statutes ineffective to remove a judge from office, and transferring its business to another, was made clear by Mr. Justice Wilkes in Judges' Cases, 102 Tenn. 509, 560, 53 S.W. 134, 146, 46 L.R.A. 567."

Now it is clearly to be seen that the only difference between the Link case and the instant case is that the Legislature abolished Link's office and left it to the Quarterly County Court to elect his successor under the general law, whereas, in the instant case, the Legislature abolished relator Bailey's office and in a separate act created eight civil districts in Clay County instead of the four old districts, named the justices of the peace and constables for said districts, and C. J. Mabry, who was to take over the duties of County Judge. We fail to see any distinction whatever that merits serious consideration.

Adhering as we do to our former decisions, we hold that Chapter 53 of the Private Acts of 1943 is unconstitutional and void. The assignments of error are overruled and the decree of the Chancellor is affirmed.

IV

STATE EX REL. V. LINK

Supreme Court of Tenn. Jan. 15, 1938
111 S.W. 2d 1024

1. CONSTITIONAL LAW; ABOLITION OF COURT OPERATES TO VACATE OFFICE OF JUDGE. — The power to create the office of county judges or judge of other inferior courts was conferred on General Assembly by constitutional provision which authorized establishment of "inferior courts." Terms of all judges, including judges of inferior courts, are fixed by the Constitution at 8 years, and their tenure cannot be impaired except where Legislature finds it necessary to redistribute business of courts for purposes of economy and efficiency, and, when such rearrangement results in abolition of the tribunal, it operates to vacate office of judge who presided over such tribunal.

2. AN ACT WHICH ABOLISHED THE OFFICE OF JUDGE BUT DID NOT ABOLISH COURT OVER WHICH THE JUDGE PRESIDED IS UNCONSTITUTIONAL. — Where county judge for Stewart county was elected and commissioned according to law, an act which abolished the office and repealed act which created it, but which did not abolish court over which judge presided, was an unconstitutional exercise of legislative power.

DECISION

COOK, Justice.

This appeal involves the validity of a private act of 1937, designed to abolish the office of county judge in Stewart county. By chapter 3, Private Acts of 1921, the office of county judge was created for Stewart county. In addition to the ordinary duties of chairman of the county court, the act, section 6, subd. 3 as amended by chapter 454, Private Acts of 1933, clothed the county judge with the authority and jurisdiction of a justice of the peace and with authority to grant writs of habeas corpus, injunctions, and attachments.

At the August election, 1934, the defendant, N. A. Link, was elected and subsequently commissioned county judge for the term of eight years and was exercising the powers and performing the duties of the office when the Legislature passed chapter 643, Private Acts of 1937, under a caption which reads:

"An Act to abolish the Office of County Judge of Stewart County, Tennessee, and to repeal Chapter Number Three of the Private Acts of the General Assembly of Tennessee for 1921, passed January 12, 1921, and approved January 12, 1921, entitled 'An Act to create the Office of County Judge of Stewart County, to fix his Salary and to define his Duties and Jurisdiction'."

Section 1 under this caption declared the office abolished, and section 2, that the Act of 1921 was repealed.

After passage of the act, the defendant refused to vacate the office, and the bill, in the nature of quo warranto, was filed to remove him. It was alleged in the bill that the act is constitutional and effective to remove the defendant from office, and that it became the duty of the quarterly court, under general statutes, to elect a chairman of the county court to succeed the defendant. But, it is said in the bill that the justices of the peace of the county refused to elect a chairman by a vote of nineteen to two and that defendant continued to hold the office and exercise the powers conferred by the Act of 1921. The prayer of the bill was for injunction to restrain defendant from acting as judge, and for a declaration that the Act of 1937 is valid.

The chancellor was of the opinion that the act is unconstitutional and dismissed the bill upon defendant's demurrer. Relators appealed and assigned errors, through which it is insisted that the act was a valid exercise of legislative power and that the defendant should be enjoined from acting as county judge. The relators rely upon cases which sustain local legislation affecting counties in their governmental capacity, as in Haggard v. Gallien, 157 Tenn. 269, 8 S.W. 2d. 364, and Holland v. Parker, 159 Tenn. 306, 17 S.W. 2d 926; and upon cases which sustain acts which abolish state and county offices, as in State ex rel. v. Morris, 136 Tenn., 1 57, 189 S.W. 67, and House v. Creveling, 147 Tenn. 589, 250 S.W. 357.

The principles underlying those cases are not applicable. The power to create the office of county judge or judge of other inferior courts was conferred upon the general assembly by article 6, section 1, of the Constitution, authorizing the establishment of inferior courts. County courts presided over by a county judge are inferior courts within the meaning of the Constitution. State v. Maloney, 92 Tenn. 62, 20 S.W. 419; Scott v. Nashville Bridge Co., 143 Tenn. 86 122, 223 S.W. 844; Whitehead v. Clark, 146 Tenn. 660, 670, 244 S.W. 479.

Terms of all judges, including judges of inferior courts, are fixed by the Constitution, article 6, sec. 4, at eight years, and their tenure cannot be impaired except where the Legislature may find it necessary to redistribute the business of the courts for purposes of economy and efficiency. When in such instances the rearrangement results in the abolition of the tribunal, it operates to vacate the office of the judge who presided over the abolished tribunal.

The county court of Stewart county, over which the defendant presided as county judge, was not abolished, but the act if given effect would remove the judge from office, deprive him of its emoluments, leave the court in existence, and transfer its jurisdiction to a chairman of the county court to be elected from year to year under Code, sec. 10202. That is to say, the office would be transferred from the county judge to a chairman of the county court, another county judge under a different name. Code, secs. 763, 10202 et seq.; Johnson v. Brice, 112 Tenn. 59, 68, 83 S.W. 791; Malone v. Williams, 118 Tenn. 390, 479 103 S.W. 798, 121 Am. St. Rep. 1002; Murray v. State, 115 Tenn. 303, 89 S.W. 101, 5 Am. Cas. 687; State ex rel. v. Howard, 139 Tenn. 73, 77, 201 S.W. 139.

Public office cannot thus be transferred by statute from one office to another. Acklen v. Thompson, 122 Tenn. 43, 55, 126 S. W. 130, 135 Am. St. Rep. 851; State ex rel. v. Morris, 136 Tenn. 157, 161, 189 S.W. 67.

The Legislature cannot remove a county judge by abolishing the office and devolving the duties upon a chairman of the county courts. State v. Leonard, 86 Tenn. 485, 7 S.W. 453. The distinction between statutes ineffective to remove a judge from office, and statutes that accomplish removal by abolishing the tribunal and transferring its business to another, was made clear by Mr. Justice Wilkes in Judges' Cases, 102 Tenn. 509, 560, 53 S.W. 134, 146, 46 L.R.A. 567. After referring to the opinion in State v. Leonard, supra, and quoting from it, the opinion proceeds:

"The Leonard Case applies only to a county judge, where only one can exist in a county, and where his functions and duties cannot be devolved upon another, and is different from cases involving circuit, chancery, or other judicial officers, who preside over a system of courts common to the whole state. In the former class of cases the jurisdiction and business of the abolished court must necessarily go to a judge created especially by the legislature to receive them. In the latter class judges are judges for the state at large, and the transfer is not of jurisdiction but of business, not to a judge specially created, but to a judge already elected by the people, and clothed with authority and jurisdiction to act."

The decree of the chancellor is without error.

AFFIRMED.

V

IN RE OPINION OF THE JUSTICES

Supreme Judicial Court of Massachusetts, April 15, 1930
(271 Mass. 575, 171 N.E. 237)

CONSTITUTIONAL LAW; TENURE OF OFFICE DURING GOOD BEHAVIOR. — The tenure of office during good behavior imports not only the length of term but also the extent of service. When a constitution has made definite provision covering a particular subject, that provision is exclusive and final. It must be accepted unequivocally. It can neither be abridged nor increased by any or all of the departments of the government.

OPINION

As a part of this comprehensive grant of power the General Court may, according to its conceptions of the requirements of the general welfare, regulate and limit and change and transfer from one to another the civil and criminal jurisdiction of those courts. It may abolish existing courts, except the Supreme Judicial Court, and erect others in their place and in its wisdom distribute among them jurisdiction of all justiciable matters subordinate to the one court established by the Constitution. It may settle and increase or diminish the salaries of the judges of courts so erected. The amplitude of this legislative control over such courts, however, is bounded by other provisions of the Constitution. Commonwealth v. Leach, 246 Mass 464, 470-471, 141 N.E. 301, 317, 128 N.E. 429; Opinion of the Justices, 3 Cush. 584. Commonwealth v. Hawkes, 123 Mass. 525, 528-529. This grant of power to the General Court to erect and constitute courts, broad as it is, does not include the tenure of the judges of such courts. That is fixed by the Constitution itself. It is provided by part 2, c. 3, art. 1 of the Constitution that "all judicial officers, duly appointed, commissioned and

I

Rizal Surety & Insurance Co., Plaintiff-Appellee, vs. Marciano de la Paz, et al., Defendants-Appellants and Appellees. Marciano de la Paz and Domingo Leonor, Defendants-Appellants, G. R. No. L-6463, May 26, 1954, Paras, C.J.

1. OBLIGATIONS AND CONTRACTS; PREFERENCE OF CREDITS; INSOLVENCY. — Where the debtor is insolvent, article 1924 of the old Civil Code is not applicable, since it is considered repealed insofar as it referred to cases of bankruptcy and estates of deceased persons.

2. ID.; ID.; LAW ON ATTACHMENT AND LAW ON PREFERENCE OF CREDITS APPLIED TOGETHER. — The law on attachment and the law on preference of credits under article 1924 of the Civil Code had heretofore been applied hand in hand.

3. ID.; ID.; ID.; AMUSEMENT TAXES, SUPERIOR LIEN.— The claim of the Collector of Internal Revenue for amusement taxes on the theater insured, constitutes a lien superior to all other charges or liens, not only on the theater itself but also upon all property rights therein, including the insurance proceeds.

4. ID.; ID.; ORDER OF PREFERENCE UNDER ARTICLE 1924 OF CIVIL CODE. — The order of preference under article 1924, paragraph 3, of the Civil Code, is, first, in favor of credits evidenced by a public instrument and, secondly, in favor of credits evidenced by a final judgment, should they have been the subject of litigation, the preference among the two kinds of credits being determined by priority of dates.

5. ID.; ID.; ID.; PUBLIC INSTRUMENT; DATE IN BODY IS DATE OF ACKNOWLEDGMENT BY REFERENCE. — Where an instrument is dated in the body, and said date is referred to in the notarial acknowledgment, the date of the latter is deemed to be the date appearing in the body of the instrument.

6. ID.; ID.; ID.; CREDIT EVIDENCED BY PUBLIC INSTRUMENT NEED NOT BE REDUCED TO JUDGMENT. — A credit evidenced by a public instrument, though not reduced to a judgment, is entitled to priority, because article 1924 of the Civil Code distinguishes credits evidenced by a final judgment.

7. ID.; ID.; ID.; ID.: PREFERENCE UNDER PUBLIC INSTRUMENT NOT LOST BY REDUCTION THEREOF INTO JUDGMENT. — The preference under a public instrument is not lost by the mere fact that the credit is made the subject of a subsequent judicial action and judgment.

8. ID.; ID.; ID.; FINAL JUDGMENT; ABSENCE OF STAY OF EXECUTION. — A judgment upon which execution has not been stayed under the provisions of section 14 of Act 190, is entitled to the preference provided for in article 1924 of the Civil Code.

9. ID.; ID.; ID.; PREFERENCE DUE TO NOTICE OF ATTACHMENT OR GARNISHMENT. — A credit made the subject of notice of attachment or garnishment is entitled to preference as of the date of said notice, subject only to the priority of credits provided for by article 1924 of the old Civil Code.

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sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: provided nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature; "and [according to Amendment 58 ratified and adopted November 5, 1918] provided also that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement." The exception mentioned relates to justices of the peace and has no bearing upon the present question. The tenure of office of judges as thus settled by the Constitution is imperative and final. It cannot be enlarged, limited, modified, altered or in any way affected by the General Court.

In conformity to this provision of the Constitution the commissions of judges of the courts named in the proposed bill state in substance that the appointee is to hold said trust during his good behavior therein unless sooner removed therefrom in the manner provided in the Constitution.

The provision as to the tenure of all judges of the United States, both of the Supreme and of the inferior courts, in art. 3, sec. 1 of the Constitution of the United States, is in the same words as those in c. 3, art. 1 of the Constitution of this Commonwealth, viz., that they "shall hold their offices during good behavior." Respecting such inferior courts of the United States, it was said in Ex parte Bakelite Corp., 276 U.S. 438 at page 449 S. Ct. 411, 412, 73 L. Ed. 789: "They * * * have judges who hold office during good behavior, with no power in Congress to provide otherwise."

The inevitable effect of the part of sec. 4 of the proposed bill touching compulsory retirement of certain judges is to make something else than good behavior an element in judicial service. It is no evidence whatever of evil behavior or of want of good behavior to pass the age of three scores and ten. Age and good behavior are unrelated subjects. There is no connection between the two. And yet, under the proposed bill the compulsion of half-time service and half-time pay for judges of the designated courts arises when the age of seventy comes, regardless of every other circumstance or consideration.

Tenure of office during good behavior imports not only the length of the term but also the extent of service. The Constitution in this particular means that judges "shall hold their offices during good behavior," not that they shall hold half of their offices after a certain age and such other fractional part as some other person may determine. The Constitution itself, in the words already quoted, makes two provisions to relieve the judicial service of judges no longer competent to render efficient service. It contains a specific clause in art. 58 of the Amendments affording the means of retiring a judge "because of advanced age or mental or physical disability." The proposed bill adds another and diverse method to the same end. It would deprive such judge against his will of the right to render full-time service for full-time pay. That is beyond the power of the legislative department of government. When the Constitution has made definite provision covering a particular subject, that provision is exclusive and final. It must be accepted unequivocally. It can neither be abridged nor be increased by any or all of the departments of government.

It is our opinion that the provisions of the bill concerning permissive retirement of the judges of the serveral courts are not in conflict with the Constitution, but that all its provisions for compulsory retirement and for compulsory or voluntary retirement of the chief or presiding judges are in conflict with part 2, c. 3, art. 1, as amended by art. 58 of the Amendments of the Constitution.

Amelito R. Mutuc for the plaintiff and appellee.

Tolentino & Garcia for the defendant and appellant.

Padilla, Carlos & Fernando for the defendant and appellant D. Leonor.

F. A. Rodrigo for the interpleader-appellee Pablo Roman.

Solicitor General for the Collector of Internal Revenue.

Tanjuatco & Del Rosario for the appellees Jose Santos and D. Nepomuceno.

Alfonso G. Espinosa for S. D. Yñigo.

DECISION

PARAS, *C.J.*:

On March 22, 1950, the plaintiff Rizal Surety and Insurance Company filed a complaint in the Court of First Instance of Manila, alleging that the sum of ₱20,000.00 was due and payable to the Federal Films, Inc., as proceeds of fire insurance covering a theater situated in Marikina, Rizal, which was destroyed by fire on February 1, 1947; that as several creditors of the insured, namely, Marciano de la Paz, Domingo Leonor, Jose Santos and Dominador Nepomuceno, Pablo Roman, Serapion D. Yñigo, and the Collector of Internal Revenue, were claiming said proceeds from the plaintiff, the latter had no means of knowing definitely the order of preference among the various claimants; and praying that said creditors, named defendants in the complaint, be ordered to interplead and litigate their conflicting claims, and that the sum of ₱20,000.00 be ordered paid to the court for delivery to the proper parties, after deducting the costs of the suit. After the defendants had filed their respective answers, the Court of First Instance of Manila rendered a decision the dispositive part of which reads as follows:

> "WHEREFORE, judgment is hereby rendered in favor of the defendants, and the plaintiff is ordered to pay said defendants out of the ₱20,000.00 minus the costs in its favor, in the following order: first, the Collector of Internal Revenue to be paid the sum of ₱3,216.08; second, Jose Santos and Dominador Nepomuceno to be paid the sum of ₱10,000.00; third, the defendant Pablo Roman to be paid the sum of ₱9,000.00, with six per centum interest per annum from the date of the filing of complaint in Civil Case No. 73256 and his costs in said case out of the remaining balance; fourth, the defendant Domingo E. Leonor to be paid the sum of ₱20,000, with interest of six per centum per annum from the date of the filing of the complaint in Civil Case No. 1749, should there be any balance; and fifth, the defendant Marciano de la Paz to be paid the sum of ₱6,001.50 with interest of six per centum from February 5, 1947, the date of the demand, plus ₱545.00 as costs and Sheriff's fees should there by any balance left."

From this judgment, which applied section 315 of the National Internal Revenue Code and article 1924, paragraph 3, of the old Civil Code, the defendants Marciano de la Paz and Domingo Leonor appealed. Briefly the contention of appellant Marciano de la Paz is that his claim for ₱6,001.50 should enjoy first priority, because on February 5, 1947, he caused to be garnished the proceeds in question, said garnishment being prior to all other liens. The appellant Domingo Leonor in turn contends that his claim for ₱2,300.00 is superior, except with regards to the tax lien of the Collector of Internal Revenue, because it is evidenced by a public document dated July 19, 1946, in addition to the fact that he garnished the disputed insurance proceeds on February 17, 1947. Incidentally it is insisted for both appellants that, where priority of attachment is involved, article 1924 of the Civil Code is not applicable. Appellant de la Paz further argues that article 1924 may be invoked only when there is a showing of the debtor's insolvency.

In the first place, we may point out that, where the debtor was insolvent, article 1924 was held not applicable, since it was considered repealed insofar as it referred to cases of bankruptcy and estates of deceased persons. (Peterson vs. Newberry et al., 6 Phil. 260.)

In the second place, we find that the law on attachment and the law on preference of credits under article 1924 of the Civil Code had been applied by this Court hand in hand, as may be gleaned from the following pronouncements in the case of Kuenzle & Streiff vs. Villanueva, 41 Phil. 611, 614-615:

> "In other words, the question for consideration is whether an attachment levied on specific property gives to the attaching creditor a lien or a right to a preference in the nature of a lien, superior to the statutory right to a preference which is recognized in article 1924 of the Civil Code in favor of the owner of an after-acquired judgment.
>
> "In a long and unbroken line of decisions, running through our reports from the first volume down to the last, we have uniformly and steadfastly sustained and recognized the statutory preferences created by the provisions of title 17 of the Civil Code, save only in so far as they have been expressly or by necessary implication repealed or modified by Acts of the Commission or the Legislature.
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> x x x x x x
>
> "Upon full consideration of the provisions of the new Code of Civil Procedure by virtue of which levies of attachments are authorized, and of the circumstances under which that Code was enacted by a commission the majority of whose members were American lawyers, we are satisfied that it was the intention of the legislature to give an attaching creditor a lien or at least a right in the nature of a lien in the attached property; but we see no reason whatever for holding that this lien, or right in the nature of a lien, rises superior to any statutory preferences with which the property is affected at the time of its attachment."

We shall therefore proceed to determine the order of preference herein, in the light of priority both by reason of attachments and by reason of article 1924 of the Civil Code, subject however to the superior lien of the Collector of Internal Revenue in virtue of section 315 of the National Internal Revenue Code which provides as follows:

> "Every internal revenue tax on property or in any business or occupation, and every tax on resources and receipts, and any increment to any of them incident to delinquency, shall constituute a lien superior to all other charges or liens not only on the property itself upon which such tax may be imposed but also upon the property used in any business or occupation upon which tax is imposed and upon all property rights therein"

We are of the opinion that the trial court correctly ordered that the claim of the Collector of Internal Revenue be paid first. Said claim being for amusement taxes on the theater insured, constitutes a lien superior to all other charges or liens not only on the theater itself but also upon all property rights therein, including the insurance proceeds.

Under article 1924, paragraph 3, of the Civil Code, the order of preference is, first, in favor of credits evidenced by a public instrument, and, secondly, in favor of credits evidenced by a final judgment, should they have been the subject of litigation, the preference among the two kinds of credits being determined by priority of dates.

The trial court was also correct in placing the claim of Jose Santos and Dominador Nepomuceno second in the list of creditors, because their credit is evidenced by a public document dated May 23, 1946. Appellants, with appellee Pablo Roman, argue that said document cannot be classified as public, because its acknowledgment is not dated. This contention is not tenable, since an examination of the instrument shows that the body is dated at Manila on May 23, 1946, and in the acknowledgment the following appears: "Witness my hand and official seal in the date and placed above mentioned." This recital logically refers to the date and place specified in the preceding body of the document. There is no point in the observation that the credit of Santos and Ne-

pomuceno, not being reduced to a judgment, should not be entitled to any preference binding against the Federal Films, Inc., which is not a party hereto, because article 1924 of the Civil Code as a matter of fact distinguishes credits evidenced by a public document from those evidenced by a judgment. At any rate, in so far as the absence in this case of the common debtor is concerned, all the defendants are on equal footing.

The next in preference, in our opinion, is the credit of appellant Domingo Leonor because, although he caused a notice of garnishment to be served upon the plaintiff on February 17, 1947, or subsequent to the notice of garnishment of appellant Marciano de la Paz on February 5, 1947, the former's credit is none the less evidenced by a public instrument dated July 19, 1946, duly presented as exhibit. Preference claimed under a public document is not lost by the mere fact that the credit is made the subject of a subsequent judicial action and judgment. Even appellee Pablo Roman admits this proposition.

The next preferred credit is that of defendant-appellee Pablo Roman, evidenced by a judgment which became final on September 26, 1946. It is contended on the part of appellant Domingo Leonor that said judgment was not yet final then, because an appeal was taken therefrom to the Supreme Court which resolved it in favor of appellee Pablo Roman only on May 27, 1947. However, as correctly observed by counsel for the latter, the judgment of September 26, 1946, was not appealed, and the petition filed before the Supreme Court was one for certiorari against order of the trial court dismissing the appeal; and, indeed, two writs of execution had been issued during the pendency of the certiorari proceeding, one on December 24, 1946, and another on January 9, 1947. In McMicking vs. Lichauco, 27 Phil. 386, it was held that "a judgment upon which execution has not been stayed, under the provisions of section 144 of Act No. 190, is entitled to the preference provided for in article 1924 of the Civil Code."

The remaining credit to be paid is that of appellant Marciano de la Paz, whose notice of garnishment was served on the plaintiff of February 5, 1947, the appealed decision being correct on this phase of the case. Serapion D. Iñigo failed to present any evidence in support of his claim.

It being understood that the various claimants should be paid in the order indicated in this decision, and that none of them is entitled to receive any interest (as the plaintiff-appellee cannot be deemed as having defaulted in paying out the insurance proceeds in question), the appealed judgment, as thus modified, is hereby affirmed. So ordered without costs.

Pablo, Bengzon, Montemayor, Reyes, Jugo, Bautista Angelo, Labrador and *Concepcion, J.J.*, concur.

II

Republic of the Philippines, Plaintiff-Appellant, vs. Jose Leon Gonzales, et al., Defendant-Appellants, G. R. No. L-4918, *May* 14, 1954, *Bengzon, J.*

1. CONSTITUTIONAL LAW; EMINENT DOMAIN; JUST COMPENSATION, HOW DETERMINED. — In determining just compensation or the fair market value of the property subject of expropriation proceedings, evidence is competent of bona fide sales of other nearby parcels at times sufficiently near to the proceedings to exclude general changes of values due to new conditions in the vicinity.

2. ID.; ID.; ID.; RESALE TO INDIVIDUALS. — Whether, in expropriations for resale to individuals, a more liberal interpretation of "just compensation" should be adopted, *quaere.*

3. ID.; ID.; ENTRY OF PLAINTIFF UPON DEPOSITING VALUE; OWNER ENTITLED TO INTEREST. — In condemnation proceedings the owner of the land is entitled to interest, on the amount awarded, from the time the plaintiff takes possession of the property.

Angel M. Tesoro, Ramirez & Ortigas, Alberto V. Cruz, Guillermo B. Ilagan, Filemon I. Almazan and *Fortunato de Leon* for defendants and appellants.

Solicitor General Pompeyo Diaz and *Solicitor Antonio A. Torres* for the plaintiff and appellant.

DECISION

BENGZON, *J.*:

In January 1947, in the Court of First Instance of Rizal, the Republic started this proceedings under Com. Act No. 539 for the purpose of expropriating an extensive tract of land — over 87 hectares — for resale to the tenants thereof. Situated within the Maysilo Estate, Caloocan, and originally covered by Transfer Certificate of Title No. 35486 the property is now represented by seven Transfer Certificates of Title, numbered and owned respectivley: 1373 by Jose Leon Gonzalez; 1378 by Juan F. Gonzalez; 1369 by Maria C. Gonzalez-Hilario; 1372 by Concepcion A. Gonzalez-Virata; 1370 by Consuelo Gonzalez-Precilla; 1371 by Francisco Felipe Gonzalez; and 1374 by Jose Leon Gonzalez, et al.

Eight kilometers north of Plaza Santa Cruz, 1.7 kilometers east of Rizal avenue, and 2 kilometers above Highway 54, the estate is bounded by the Araneta Institute property, the Victoneta Inc., the Balintawak Estate Subdivision, the Seventh Day Adventists' land, and the Piedad Estate. It lies within the sites of the University of the Philippines and the Capitol and within the field of expansion of the City of Manila.

All the defendants at first opposed the compulsory sale; but subsequently they waived the objection, recognizing the social-justice aims of the Government, (there were about two-hundred tenants) and agreed to the designation of commissioner to determine the reasonable market value of the property to be taken. Wherefore, in June 1948, the court appointed the following commissioners: Atty. Erasmo R. Cruz, recommended by defendants, Assistant Fiscal Sugueco, suggested by plaintiff, and Deputy Clerk Benito Macrohon, selected by the judge.

In the performance of their duties, the Commissioners received oral and documentary evidence, inspected the premises, and thereafter submitted one majority report, plus one minority report by Commissioner Sugueco. The first divided the property into two parts: one portion previously occupied by the U. S. Army with roads, playground, water and sewerage system, and valued at 5 pesos per sq.m.; and another consisting of rolling lands and rice fields priced at fifteen centavos per sq.m. The report thereby fixed ₱1.75 per sq.m. as the average compensation for the entire estate. On the other hand Sugueco's minority opinion rated the whole parcel at ten centavos per square meter only.

The two reports provoked objections from both sides, whose oppositions were seasonably filed in writing. On May 6, 1949, obeying orders of the trial judge, Clerk of Court Severo Abellera repaired to the premises, made inquiries, and reported afterwards that the realty was fairly worth ₱1.90 per square meter.

Then on March 29, 1950, the Hon. Gabino Abaya, Judge, rendered his decision appraising the estate at ₱1.50 per square meter. It should be explained, in this connection, that all defendants agreed the entire property should be evaluated as a whole, for the purpose of facilitating the award.

The parties petitioned for reconsideration. Denial thereof motivated this appeal both by the plaintiff and by the defendants.

The plaintiff, in a series of assignments reaches the conclusion, and submits the proposition, that "there is no reliable standard for determining the reasonable worth of the defendants' land except the tax declaration Exh. B which puts its value at ₱28,850.00 x x x. Taking into account, however, that the assessed value is usually lower by 1/3 of 1/2 of the real market value, the defendants should be given an additional 30% of ₱28,850 or ₱8,655.00."

Such position is clearly untenable. The declaration was made

in 1927; and this Court can take judicial notice of the upward trend of values, particularly of lands in or near Manila. As a matter of fact, the revised assessment in 1948 valued the entire property at ₱366,150 i.e., 0.42 per sq.m.—which is more than ten times the 1947 assessment. And in its motion for reconsideration submitted to the lower court, plaintiff invoked, as "index of value" of the land, the sale made to Francisco R. Aguinaldo, one month before the expropriation, at one peso per sq.m. — thus giving the lot in question a total value of ₱871,982.00.

Another piece of evidence, indicative of prices in the vicinity, is Exh. M showing the Seventh Day Adventists purchased in 1927, at the rate of ₱0.25 per sq.m., a big lot adjoining the land to be expropriated. After twenty years the prices should be much higher. Yet the Government insists in compensating herein defendants at the rate of 0.04 per sq.m. Obviously unmeritorious contention.

Now as to the defendants' appeal. Although they took the view — in the court below that the land value could be reasonably fixed at ₱1.75 per sq.m., (1) the defendants here maintain they should be compensated at the rate of ₱2.50 per sq.m. They quote with approval His Honor's summary of their own evidence as follows:

> "On November 28, 1945, Lorenzo Buenaventura bought and paid at ₱2 per square meter a lot which is almost adjoining the lands in question — it being separated only by a street called Sta. Quitoria (Exh. "2"); that on July 29, 1949, the Balintawak Estate Inc. sold to Narciso T. Reyes a parcel of land at the rate of ₱₱2.84 per square meter (Exh. "3-K"); that on December 29, 1946, Concepcion Andrea Gonzalez sold to Francisco R. Aguinaldo a portion of the property in question at ₱1 per square meter (Exh. "3-L"); that on November 13, 1947, Jose M. Rato sold to the Araneta Institute of Agriculture 373, 377 (3,730) square meters at the rate of ₱1 and ₱1.60 per square meter (Exh. "3-N"); that on May 14, 1948, Ambrosio Pablo and Sons sold to Cromwell Cosmetic Export Company 20,764 square meters at the rate of ₱2.50 per square meter (Exh. "3-O"); that on November 14, 1947, the Manila Golf Club sold to the Ayala & Company 367,817 square meters at the rate of ₱1.08 per square meter (Exh. "3-P"); that on April 26, 1948, Ayala & Company sold to J. M. Tuazon & Company the property described in Exh. "3-P" at the rate of ₱2.50 per square meter; Julian Encarnacion, secretary of the Balintawak Estate Inc. subdivision, which adjoins the property in question, declared that the lots of said subdivision, are sold from ₱6 to ₱12 per square meter in cash and from ₱9 to ₱15 per square meter by installment."

And they rely principally on the prices in Exhibits 3-K, 3-O and 3-Q because they "were sufficiently near in point of time with the date of condemnation proceedings" to reflect true land values in the locality.

However such Exhibits cannot be taken as conclusive valuation. In Exh. 3-K, the parcel was purchased from the Balintawak Estate Inc. a real estate subdivision corporation. Prices in realty subdivisions are necessarily higher, because of improvements therein, such as roads, bridges, curbs etc. The sale in Exh. 3-O, though exhibiting a higher valuation, cannot be literally followed because it refers to a much smaller lot on the provincial highway. The prices in 3-Q of the Manila Golf Club, refer to a lot nearer Manila by a kilometer. Hence defendants-appellants' demand for ₱2.50 per square meter may not be upheld.

Now having found plaintiff's proposition as unreasonable, and defendants' claim for ₱2.50 as unfounded, we may proceed to examine whether the trial court's determination of the market value should be modified, on the basis of the evidence of record. It is needless to repeat that the Government, in eminent domain proceedings, must pay just compensation or the fair market value, that such value represents the price which the property will bring when offered for sale by one who desires, but is not obliged, to sell and is bought by one who is under no imperative necessity of having it (2) and that in determining such value, evidence is competent of bona fide sales of other nearby parcels at times sufficiently near to the proceedings to exclude general changes of values due to new conditions in the vicinity (3).

Parenthetically, in expropriations like this — for the benefit of other individuals, not directly benefiting the public — it might be interesting to inquire whether a more liberal interpretation of "just compensation" should be adopted in favor *of the owner who is compelled* to part with his private property for the exclusive benefit of a few. Consider that like other eminent domain proceedings, this does not directly benefit him as a part of the "public."

However, this is unnecessary, for the record yields sufficient elements of decision to make a just and equitable award.

The majority commissioners (4), rejecting the plaintiff's evidence, took into account the bona fide sales of nearby parcels and, aided by personal knowledge they gained thru inspection, arrived at the conclusion that the reasonable market value of the entire property was ₱1.75 per square meter. The dissenting commissioner's report, based mainly on the 1927 assessment values, proved too conservative to be of any help.

The Clerk of Court was specially instructed to make a new assessment, in view of conflicting reports and the objections of the parties. This officer after conducting an ocular inspection of the place and gathering information from people residing in the vicinity recommended ₱1.90 per sq. m. after hearing the parties, the trial judge, in his discretion, estimated that under the circumstances, one peso and fifty centavos per square meter was reasonable compensation for the hacienda.

We have not been shown wherein the trial judge abused his discretion in reducing the prices recommended by the court's referees. Two purchase-and-sale transactions in 1947, about neighboring realty may shed favorable light upon His Honor's valuation.

In Aug. 1947 Jose Ma. Rato sold to Victoneta Inc. 581,872 sq.m. of adjoining land at 0.85 sq.m. (Exh. 3-M).

In July 1947 Jose Ma. Rato sold to Araneta Institute of Agriculture four parcels of land totalling 373,377 sq.m. adjoining the land sold by Exh. 3-M at prices ranging from ₱1.00 to ₱1.60 per sq.m. No improvements were included in both sales.

These two parcels, being sufficiently large and located within the vicinity may afford some adequate bases of comparison. It is unimportant that the sales were consummated several months after these proceedings had begun, because unlike other eminent domain proceedings for public use — roads, bridges, canals, markets etc. — these do not tend to inflate prices of adjoining properties.

These two sales were made by a Spaniard residing in Madrid, thru a local agent. He was obviously anxious to liquidate his affairs here, as shown by the circumstance that in two months he disposed of two sizable parcels of real estate. Such disposition and such absence must have given him a natural disadvantage in the bargaining, so that a discount of 10 or 20 per cent was not improbable.

The topographical features of Rato's land do not appear. It probably is agricultural — sold to an agricultural institute. On the other hand, the defendants' hacienda is mostly high ground, rolling hills (p. 206 Record on Appeal) which, subdivided into residential lots, would command higher prices.

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(1) They said: "Wherefore, the herein defendants respectfully pray that the decision in question be reconsidered and amended by fixing the value for the purpose of compensation at an amount ranging from ₱1.75 to ₱2.50 per square meter. x x x" Such language means the property could be bought at ₱1.75 per sq.m. Some of defendants asserted ₱2.00 was just payment.

(2) Manila Railroad Co. v. Alan 36 Phil. 500; Manila Railroad Co. v. Caligrihan 49 Phil. 326.

(3) Manila Railroad Co. v. Velasquez 32 Phil. 286.

(4) One of them appointed by the court, and therefore presumably impartial.

Another thing: whereas defendants' land is served by Reparo Street, the Victoneta Inc. lot does not enjoy that advantage (Exh. 3).

But most significant is the admitted fact that one-third of defendants' land has permanent improvements, made by the U. S. Army, consisting of good paved roads, playgrounds, water system, sewerage, and general levelling of the land suitable for residential lots (p. 214 Record on Appeal) together with electric installations and buildings (p. 206 Record on Appeal).

Considering the above circumstances, in relation to the price of ₱2.50 paid for the Manila Golf Club by J. M. Tuason & Co., we do not feel justified to declare that the price of ₱1.50 is excessive. Neither is it too low. Two defendants, at least, admitted it was just and reasonable (p. 274 Record on Appeal).

Wherefore, on the question of just compensation, the trial judge's assessment has to be approved.

Yet there is one point on which defendants' appeal should be heeded. The Government deposited ₱20,850 and entered the premises by virtue of a court order, under Act No. 2826. The Rural Progress Administration took possession on or about Jan. 25, 1947. Defendants lost the control and use of their property as of that date. Their counsel now claim legal interest on the amount of compensation; and the plaintiff agrees, as it has to. In Philippine Railway v. Solon 13 Phil. 34 we held that in condemnation proceedings "the owner of the land is entitled to interest, on the amount awarded, from the time the plaintiff takes possession of the property."

Another assignment of error of the defendants is that the lower court failed to make the plaintiff pay the costs. The plaintiff appellee acknowledges this, in view of section 13, Rule 69. The last part of the section is not applicable, because the plaintiff appealed and lost.

Wherefore the decision of the court *a quo* will be affirmed as to the value to be paid by the plaintiff for the expropriated land. It is of course understood that the money already deposited and taken by defendants should be discounted. Said decision, however, will be modified by awarding interest to defendants at six per cent from Jan. 25, 1947 until the date of payment. Costs will be chargeable to the plaintiff. So ordered

Paras, Pablo, Montemayor, Reyes, Jugo, Bautista Angelo, Labrador and *Concepcion, JJ.* concur.

III

Ex-Meralco Employees Transportation Co., Inc., Petitioner-Appellant, vs. Republic of the Philippines, Respondent-Appellee, G. R. No. L-5953, *May* 26, 1954, *Jugo, J.*

MASTER AND SERVANT; MASTER'S LIABILITY FOR DAMAGES CAUSED BY HIS SERVANT IS DIRECT AND NOT SUBSIDIARY. — The liability of a master for damages caused by his employee or agent in a business enterprise is primary and direct and not subsidiary. Subsidiary liability of the employer takes place only when the action is brought under the provisions of the Revised Penal Code.

DECISION

JUGO, *J.*:

On July 26, 1951, the Republic of the Philippines, represented by the Solicitor General, filed in the Municipal Court of the City of Manila (Civil Case No. 16716 of said court), a complaint against the corporation, known as Ex-Meralco Employees Transportation Company, Inc., for the recovery of damages in the sum of ₱1,332.17, alleging that:

" x x x the plaintiff is the owner of a Ford Service Truck bearing Plate No. T.P.I.—875 assigned for the use of one of its instrumentalities, the Bureau of Telecommunications, Manila;

"That on January 10, 1951, while plaintiff's service truck was at full stop near a safety island in the middle of España Boulevard, it was bumped by a passenger truck bearing Plate No. T.P.U.—5112 belonging to and operated by the defendant corporation and driven by defendant's employee one 'Pakia Adona' who fled immediately after the collision."

The defendant corporation filed the following answer:

"What actually happened was that while the defendant's bus was heading toward Quiapo along the España Avenue, all of a sudden, the plaintiff's service truck, without making any sign on the part of its driver, unexpectedly, and instantly swerved to the left toward the front of defendant's bus for a U turn at the safety island at the intersection of España and Miguelin streets, without first taking necessary precaution, and violating thru street traffic rules and disregarding the stream of vehicles flowing along the thru España street or avenue, so sudden and swift and without clear distance that to evade the collision was physically and materially impossible on the part of the defendant's driver, although the latter tried to evade it, in vain, by immediately applying the brakes and at the same time swerving to the left as to swerve it to the right was impossible and fatal to the plaintiff's truck, so that the collision was absolutely due to the fault, recklessness, and omission of thru street traffic rules on the part solely of the plaintiff's driver, and without any fault on the part of the driver of the defendant; and defendant's driver fled due to threat of bodily harm shown by plaintiff's personnel on the spot."

On the date set for the trial, the defendant's (herein petitioner's) counsel objected to the trial because, as he alleged, there were sufficient ground for the dismissal of the complaint. On January 16, 1952, he filed a formal motion to dismiss on the ground that "the plaintiff's complaint was without any cause of action as the driver concerned had not as yet been adjudged liable for the damages, if any, complained of." The motion was denied.

The defendant (Petitioner herein) filed in the Court of First Instance of Manila a petition for certiorari and preliminary injunction, praying said court to annul the order of the municipal court denying the dismissal of the case for the reason that the latter acted in excess or abuse of discretion.

The Court of First Instance denied the petition for certiorari in the following language:

" x x x The facts alleged by the petitioner in its petition, and admitted by the respondents in their answer, cannot be the basis for the issuance of a writ of certiorari against the respondents, as prayed for by the petitioner, because it is within the power and jurisdiction of the respondent Judge to hear and decide Civil Case No. 16716 of the Municipal Court of the City of Manila, and that the said respondent Judge committed no abuse of discretion or excess of jurisdiction in denying petitioner's motion for the dismissal of said case."

The above order of the Court of First Instance is correct. The remedy of the petitioner should be a regular appeal filed in due time to the Court of First Instance. The ground that the complaint did not state facts sufficient to constitute a cause of action is not jurisdictional. The allegation that a criminal information should have been filed previously against the driver is, besides not being jurisdictional, untenable for the reason that the liability of a master for damages caused by his employee or agent in a business enterprise is primary and direct and not subsidiary. Subsidiary liability of the employer takes place only when the action

is brought under the provisions of the Revised Penal Code.

In view of the foregoing, the decision appealed from the Court of First Instance is affirmed, with costs against the petitioner.

IT IS SO ORDERED.

Paras, Bengzon, Reyes, Labrador, Pablo, Montemayor, Bautista Angelo and *Concepcion, J.J.*, concur.

IV

Silvestre M. Punsalan, et al., Plaintiffs-Appellants, vs. The Municipal Board of the City of Manila, et al., Defendants-Appellants, G. R. No. L-4817, *May* 26, 1954, *Reyes, J.*

1. TAXATION; LEGISLATIVE DEPARTMENT DETERMINES WHAT ENTITIES SHOULD BE EMPOWERED TO IMPOSE OCCUPATION TAX.—It is not for the courts to judge what particular cities or municipalities should be empowered to impose occupation taxes in addition to those imposed by the National Government. That matter is peculiarly within the domain of the political departments and the courts would do well not to encroach upon it.

2. ID.; DOUBLE TAXATION.—There is no double taxation where one tax is imposed by the state and the other is imposed by the city, it being widely recognized that there is nothing inherently obnoxious in the requirement that license fees or taxes be exacted with respect to the same occupation, calling or activity by both the state and the political subdivisions thereof. (Citing 1 Cooley on Taxation, 4th ed., p. 492 and 51 Am Jur., 341.)

Calanog and *Alafriz* for the plaintiffs and appellants.

City Fiscal Eugenio Angeles and *Assistant Fiscal Eulogio S. Serrano* for the defendants and appellants

DECISION

REYES, *J.*:

This suit was commenced in the Court of First Instance of Manila by two lawyers, a medical practitioner, a public accountant, a dental surgeon and a pharmacist, purportedly "in their own behalf and in behalf of other professionals practicing in the city of Manila who may desire to join it." Object of the suit is the annulment of Ordinance No. 3398 of the city of Manila together with the provision of the Manila charter authorizing it and the refund of taxes collected under the ordinance but paid under protest.

The ordinance in question, which was approved by the municipal board of the city of Manila on July 25, 1950, imposes a municipal occupation tax on persons exercising various professions in the city and penalizes non-payment of the tax "by a fine of not more than two hundred pesos or by imprisonment of not more than six months, or by both such fine and imprisonment in the discretion of the court." Among the professions taxed were those to which plaintiffs belong. The ordinance was enacted pursuant to paragraph (1) of section 18 of the Revised Charter of the city of Manila (as amended by Republic Act No. 409), which empowers the Municipal Board of said city to impose a municipal occupation tax, not to exceed ₱50.00 *per annum*, on persons engaged in the various professions above referred to.

Having already paid their occupation tax under section 201 of the National Internal Revenue Code, plaintiffs, upon being required to pay the additional tax prescribed in the ordinance, paid the same under protest and then brought the present suit for the purpose already stated. The lower court upheld the validity of the provision of law authorizing the enactment of the ordinance but declared the ordinance itself illegal and void on the ground that the penalty therein provided for non-payment of the tax was not legally authorized. From this decision both parties appealed to this Court, and the only question they have presented for our determination is whether this ruling is correct or not, for though the decision is silent on the refund of taxes paid plaintiffs make no assignment of error on this point.

To begin with defendants' appeal, we find that the lower court was in error in saying that the imposition of the penalty provided for in the ordinance was without the authority of law. The last paragraph (kk) of the very section that authorizes the enactment of this tax ordinance (section 18 of the Manila Charter) in express terms also empowers the Municipal Board *"to fix penalties for the violation of ordinances which shall not exceed to (sic) two hundred pesos fine or six months' imprisonment, or both such fine and imprisonment, for a single offense."* Hence, the pronouncement below that the ordinance in question is illegal and void because it imposes a penalty not authorized by law is clearly without basis.

As to plaintiffs' appeal, the contention in substance is that this ordinance and the law authorizing it constitute class legislation, are unjust and oppressive, and authorize what amounts to double taxation.

In raising the hue and cry of "class legislation," the burden of plaintiffs' complaint is not that the professions to which they respectively belong have been singled out for the imposition of this municipal occupation tax; and in any event, the Legislature may, in its discretion, select what occupations shall be taxed, and in the exercise of that discretion it may tax all, or it may select for taxation certain classes and leave the others untaxed. (Cooley on Taxation, Vol. 4, 4th ed., pp. 3393-3395.) Plaintiffs' complaint is that while the law has authorized the city of Manila to impose the said tax, it has withheld that authority from other chartered cities, not to mention municipalities. We do not think it is for the courts to judge what particular cities or municipalities should be empowered to impose occupation taxes in addition to those imposed by the National Government. That matter is peculiarly within the domain of the political departments and the courts would do well not to encroach upon it. Moreover, as the seat of the National Government and with a population and volume of trade many times that of any other Philippine city or municipality, Manila, no doubt, offers a more lucrative field for the practice of the professions, so that it is but fair that the professionals in Manila be made to pay a higher occupation tax than their brethren in the provinces.

Plaintiffs brand the ordinance unjust and oppressive because they say that it creates discrimination within a class in that while professionals with offices in Manila have to pay the tax, outsiders who have no offices in the city but practice their profession therein are not subject to the tax. Plaintiffs make a distinction that is not found in the ordinance. The ordinance imposes the tax upon every person "exercising" or "pursuing" — in the city of Manila naturally — anyone of the occupations named, but does not say that such person must have his office in Manila. What constitutes exercise or pursuit of a profession in the city is a matter for judicial determination.

The argument against double taxation may not be invoked where one tax is imposed by the state and the other is imposed by the city (1 Cooley on Taxation, 4th ed., p. 492), it being widely recognized that there is nothing inherently obnoxious in the requirement that license fees or taxes be exacted with respect to the same occupation, calling or activity by both the state and the political subdivisions thereof. (51 Am. Jur., 341.)

In view of the foregoing, the judgment appealed from is reversed in so far as it declares Ordinance No. 3398 of the city of Manila illegal and void and affirmed in so far as it upholds the validity of the provision of the Manila charter authorizing it. With costs against plaintiffs-appellants.

Pablo, Bengzon, Montemayor, Jugo, Bautista Angelo, Labrador and *Concepcion, JJ.*, concur.

Padilla, J., did not take part.

PARAS, *C.J., dissenting*:

I am constrained to dissent from the decision of the majority upon the ground that the Municipal Board of Manila cannot outlaw what Congress of the Philippines has already authorized. The plaintiffs-appellants — two lawyers, a physician, an accountant, a dentist and a pharmacist — had already paid the occupation tax under section 201 of the National Internal Revenue Code and are thereby duly licensed to practice their respective professions throughout the Philippines; and yet they had been required to pay another occupation tax under Ordinance No. 3398 for practising in the City of Manila. This is a glaring example of contradiction — the license granted by the National Government is in effect withdrawn by the City in case of non-payment of the tax under the ordinance. If it be argued that the national occupation tax is collected to allow the professional residing in Manila to pursue his calling in other places in the Philippines, it should then be exacted only from professionals practising simultaneously in and outside of Manila. At any rate, we are confronted with the following situation: Whereas the professionals elsewhere pay only one occupation tax, in the City of Manila they have to pay two, although all are on equal footing insofar as opportunities for earning money out of their pursuits are concerned. The statement that practice in Manila is more lucrative than in the provinces, may be true perhaps with reference only to a limited few, but certainly not to the general mass of practitioners in any field. Again, provincial residents who have occasional or isolated practice in Manila may have to pay the city tax. This obvious discrimination or lack of uniformity cannot be brushed aside or justified by any trite pronouncement that double taxation is legitimate or that legislation may validly affect certain classes.

My position is that a professional who had paid the occupation tax under the National Internal Revenue Code should be allowed to practice in Manila even without paying the similar tax imposed by Ordinance No. 3398. The City cannot give what said professional already has. I would not say that this Ordinance, enacted by the Municipal Board pursuant to paragraph 1 of Section 18 of the Revised Charter of Manila, as amended by Republic Act No. 409, empowering the Board to impose a municipal occupation tax not to exceed ₱50.00 per annum, is invalid; but that only one tax, either under the Internal Revenue Code or under Ordinance No. 3398, should be imposed upon a practitioner in Manila.

V

Fortunato Halili, Plaintiff-Appellee, vs. Maria Lloret and Ricardo Gonzales Lloret, Administrator of the Intestate Estate of Francisco A. Gonzales, Defendants-Appellants, G. R. No. L-6306, May 26, 1954, Bautista Angelo, J.

1. OBLIGATIONS AND CONTRACTS; SALE OF PROPERTIES SUBJECT TO JUDICIAL ADMINISTRATION; SALE WITHOUT APPROVAL OF COURT CANNOT SERVE AS BASIS FOR ACTION OF SPECIFIC PERFORMANCE. — The sale of properties subject to judicial administration can not have any valid effect until it is approved by the court. Where the terms that were made to appear in the document of sale differ substantially from the conditions prescribed in the authorization given by the court for the sale of the properties, the document cannot have any binding effect upon parties nor serve as basis for an action for specific performance in the absence of judicial approval.

2. ID.; ID.; RESCISSION OF CONTRACT OF SALE. — Plaintiff's attitude in suspending the payment of the two checks issued in favor of the defendants, in view of the latter's refusal to sign the documents of sale, clearly indicates that the understanding between the parties was merely in the stage of negotiation for otherwise the plaintiff could not have withdrawn legally from a transaction which had ripened into a consummated contract. And even if the transaction had reached the stage of perfection, it became rescinded when plaintiff withdrew from his part in the transaction.

3. ID.; ID.; AMBIGUITY IN A CONTRACT OF SALE. — Where the receipt merely recited the fact of receipt of the two checks without mentioning the purpose for which they were delivered. it cannot be said that the checks were delivered as advance payment of the consideration of the sale of the lands in question Such ambiguity shall be construed against the party who had drafted the receipt in view of the rule that an obscure clause in a contract can not favor the one who has caused the obscurity.

4. ID.; ID.; CONSENT OF CO-OWNERS INDISPENSABLE. — Where the lands subject of the contract of sale are owned *pro-indiviso* by the defendants, the consent of each co-owner to the terms of the sale is indispensable.

5. ID.; ID.; PURCHASE PRICE TO BE RETURNED WHEN TRANSACTION IS CALLED OFF. — Where one of the defendants had received the check representing the value of the purchase price of the lands in question and had deposited the same in his current account and the transaction was called off, the mere offer to return the money cannot relieve him from liability. His duty was to consign the amount in court and his failure to do so makes him answerable therefor to the plaintiff.

M. G. Bustos for the plaintiff and appellee.
Diokno and *Diokno* for the defendant and appellant.

DECISION

BAUTISTA ANGELO, *J.*:

This is an action brought by plaintiff against the defendants to compel the latter to execute a deed of sale of certain parcels of land described in the complaint, and to recover the sum of ₱50,000 as damages.

The lower court decided the case in favor of the plaintiff, and the case is now before us because it involves an amount which is beyond the jurisdiction of the Court of Appeals.

The evidence for the plaintiff discloses the following facts:

The six parcels of land subject of the present action were owned *pro-indiviso* by Maria Lloret and the estate of Francisco A. Gonzales, of which Ricardo Gonzales Lloret is the judicial administrator. On May 8, 1944, the judicial administrator filed a motion in the intestate proceedings praying for authority to sell the said parcels of land for a price of not less than ₱100,000, to which Maria Lloret and the other heirs of the estate gave their conformity. The court granted the motion as requested. Plaintiff became interested in the purchase of said parcels of land and to this effect he sought the services of Atty. Teofilo Sauco who readily agreed to serve him and took steps to negotiate the sale of said lands in his behalf. Sauco dealt on the matter with Ricardo Gonzales Lloret. After several interviews wherein they discussed the terms of the sale, especially the price, Gonzales Lloret told Sauco that if plaintiff would agree to pay the sum of ₱200,000 for the lands, he may agree to carry out the transaction. Sauco broached the matter to plaintiff who thereupon agreed to the proposition, and so, on June 17, 1944, Sauco went to see Gonzales Lloret in his office in Manila wherein, according to Sauco it was agreed between them, among other things, that the lands would be sold to the plaintiff for the sum of ₱200,000 and that, after the execution of the sale, the plaintiff would in turn resell to Ricardo Gonzales Lloret one of the parcels of land belonging to the estate for an undisclosed amount. It was also agreed upon that since the lands subject of the sale were then in litigation between the estate and one Ambrosio Valero, the deed of sale would include a clause to the effect that, if by March, 1945, the vendors would be unable to deliver to the purchaser the possession of the lands peacefully and without encumbrance, said lands would be substituted by others belonging to the estate, of equal area, value, and conditions. It was likewise agreed upon that Sauco would prepare the necessary documents, as in fact he did in the same office of Gonzales Lloret.

After preparing the documents, Sauco gave an account to the plaintiff of the result of his negotiations, and having signified his conformity thereto, plaintiff gave to Sauco two checks, one for the sum of ₱100,000 drawn against the Philippine National Bank in favor of Maria Lloret (Exhibit B), and another for the same amount drawn against the Philippine Trust Co. in favor of Ricardo Gonzales Lloret. With these checks, Sauco returned on the same date to the office of Gonzales Lloret to consummate the transaction, but as Maria Lloret was not then present, Gonzales Lloret told Sauco that he could leave the documents with him as he would take care of having them signed by his mother, Maria, and that he could return the next Monday, June 19, to get them which by then would be signed and ratified before a notary public. Since Sauco was then in a hurry to return to Malolos, and besides he had confidence in Gonzales Lloret, who was his friend, the former agreed and left the two checks with the latter. But before receiving the checks, Gonzales Lloret issued a receipt therefor, which was marked Exhibit A. Of this development, Sauco informed the plaintiff in the afternoon of the same day, emphasizing the fact that he would return to the office of Gonzales Lloret to get the documents on June 19.

Sauco, however, was not able to return as was the understanding because he fell sick, and apprehensive of such failure, plaintiff went on the next day, June 20, to the Philippine National Bank to inquire whether the check he had issued in favor of Maria Lloret had already been collected, and having been informed in the affirmative, he next went to the Philippine Trust Co. to make the same inquiry with regard to the other check he issued against said bank in favor of Ricardo Gonzales Lloret, and when he was informed that the same had not yet been collected, he suspended its payment informing the bank that, should the party concerned execute the deed of sale for which it had been issued, he would reissue the check. The bank accordingly suspended the payment of the check as requested.

On the occasion of a visit which plaintiff paid to Sauco in Malolos, the latter handed over to him the receipt Exhibit A with the request that, in view of his sickness, he take charge of getting the deed of sale from Gonzales Lloret. Plaintiff tried to do so, but when he interviewed Gonzales Lloret, the latter refused to give him but with Sauco intimating that he would just wait until the latter recover from his sickness. When Sauco got well he tried to renew his dealing with Gonzales Lloret in an attempt to get from him the documents duly signed and ratified before a notary public, but the latter at first gave excuses for his inability to do his part as agreed upon until he finally said that he could not carry out the agreement in view of the fact that he had received other better offers for the purchase of the lands among them one for the sum of ₱300,000, plus a vehicle called *dokar* with its corresponding horse. This attitude was taken by the plaintiff as a refusal to sign the deed of sale and so he instituted the present action making as party defendants Maria Lloret and her son Ricardo Gonzales Lloret.

Ricardo Gonzales Lloret denied that a definite understanding had ever been reached between him and the plaintiff or his representative relative to the sale of the lands in question. He testified that the documents marked Exhibits D and D-1 do not represent the agreement which, according to Teofilo Sauco, was concluded between them, intimating the said documents were already prepared when Sauco went to his office to take up with him the matter relative to the sale on June 17, 1944; that Sauco, on that occasion, had already with him the two checks referred to in the receipt Exhibit A, who insisted in leaving them with him because he was in a hurry to return to Malolos, and so he accepted them by way of deposit and deposited them in his current account with the Philippine National Bank in order that they may not be lost; and that sometime in the morning of the succeeding Monday, June 19, a messenger of the Philippine National Bank came to see him to return the check issued in his favor against the Philippine Trust Co. with the information that the same had not been honored by the bank for the reason that the plaintiff had suspended its payment, which act he interpreted as an indication that the plaintiff had decided to call off the negotiation. In other words, according to Gonzales Lloret, when plaintiff suspended the payment of the two checks on June 19, 1944, as in fact one of them had been actually suspended because it had not yet been actually collected from the Philippine Trust Co., the understanding he had with Teofilo Sauco regarding the sale did not pass the stage of mere negotiation, and, as such, it did not produce any legal relation by which the defendants could be compelled to carry out the sale as now pretended by plaintiff in his complaint.

After a careful examination of the evidence presented by both parties, both testimonial and documentary, we are persuaded to uphold the contention of the defendants for the following reasons:

1. According to Teofilo Sauco, representative of plaintiff, his agreement with defendant Gonzales Lloret was that the price of the lands subject of the sale would be ₱200,000 so much so that he delivered to said defendant two checks in the amount of ₱100,000 each issued in favor of each defendant against two banking institutions. On the other hand, in the document Exhibit D, which is claimed to be the one drawn up by Sauco in the very office of defendant Gonzales Lloret and which, according to Sauco, contained the precise terms and conditions that were agreed upon between them, the amount which appears therein as the consideration of the sale is ₱100,000. This discrepancy, which does not appear sufficiently explained in the record, lends cogency to the claim of Gonzales Lloret that when Sauco went to his office to discuss the transaction, he had already with him the document Exhibit D with the expectation that defendants might be prevailed upon to accept the terms therein contained, or with the intention of leaving the document with Gonzales Lloret for his perusal and for such alteration or amendment he may desire to introduce therein in accordance with his interest.

2. Both plaintiff and the defendants knew well that the properties were subject to judicial administration and that the sale could have no valid effect until it merits the approval of the court, so much so that before the lands were opened for negotiation the judicial administrator, with the conformity of the heirs, secured from the court an authorization to that effect, and yet, as will be stated elsewhere, the terms that were made to appear in the document Exhibit D differ substantially from the conditions prescribed in the authorization given by the court, which indicates that said document cannot have any binding effect upon the parties nor serve as basis for an action for specific performance, as now pretended by the plaintiff, in the absence of such judicial approval.

3. It is a fact duly established and admitted by the parties that the plaintiff suspended the payment of the two checks of ₱100,000 each on June 19, 1944 (or June 20 according to plaintiff) in view of the failure of defendants to sign the documents, Exhibits D and D-1 which were delivered to them by Teofilo Sauco, and in fact plaintiff succeeded in stopping the payment of one of them, or the check issued against the Philippine Trust Co. This attitude of the plaintiff clearly indicates that the understanding between the parties was merely in the stage of negotiation for otherwise the plaintiff could not have withdrawn legally from a transaction which had ripened into a consummated contract. And even if the transaction had reached the stage of perfection, we may say that it became rescinded when plaintiff withdrew from his part in the transaction.

4. It should be recalled that when Sauco handed over to defendant Gonzales Lloret the two checks referred to above, the latter was made to sign a receipt therefor, which was marked Exhibit A. This receipt was prepared by Sauco himself, and it merely recited the fact of the receipt of the two checks, without mentioning the purpose for which the checks were delivered. If it is true that those checks were delivered as advance payment of the consideration of the sale referred to in the contract Exhibit D, no reason is seen why no mention of that fact was made in the receipt. This ambiguity cannot but argue against the pretense of Sauco who drafted the receipt in view of the rule that an obscure clause in a contract cannot favor the one who has caused

the obscurity (Article 1288, Old Civil Code.)

5. One of the documents turned over by Sauco to defendant Gonzales Lloret is Exhibit D-1 which represents the resale by the plaintiff to the latter of one of the parcels of land originally included in the sale contained in the document Exhibit D, and, according to Sauco, said document Exhibit D-1 was delivered to defendant Gonzales Lloret for ratification before a notary public. An examination of said document Exhibit D-1 will reveal that it contains many blank spaces intended to be filled out later on, and the same does not bear the signature of the plaintiff. This indicates that said document Exhibit D-1 was but a mere draft and corroborates the statement of Gonzales Lloret that it was given to him, together with the document Exhibit D, merely for his perusal and possible amendment or alteration. And

6. It should be noted that the lands subject of negotiation were owned *pro-indiviso* by Maria Lloret and the estate of Francisco A. Gonzales, and in that negotiation defendant Gonzales Lloret was merely acting in his capacity as judicial administrator. Being a co-owner of the lands, the consent of Maria Lloret to the terms of the sale is evidently indispensable, and yet there is nothing in the evidence to show that she has ever been contacted in connection with the sale, nor is there any proof that Gonzales Lloret had been authorized to conduct negotiations in her behalf. What the record shows was that Gonzales Lloret would take up the matter with Maria Lloret on the date subsequent to that when the two documents were delivered by Sauco to him (June 17, 1944), but this never materialized because of the unexpected sickness of Teofilo Sauco.

Let us now examine the terms of the authorization given by the court relative to the sale of the lands in question, and see if the same had been observed in the preparation of the deed of sale Exhibit D. Let us note, at the outset, that the authorization of the court refers to the sale of certain parcels of land of an area of 20 hectares situated in the *barrio of Sabang*, municipality of Baliuag, province of Bulacan, for a price of not less than ₱100,000, with the express condition that the encumbrance affecting those lands would first be paid. Analyzing now the terms appearing in the document Exhibit D, we find that among the lands included in the sale are lands situated in the *barrio of San Roque*. This is a variation of the terms of the judicial authorization. The document Exhibit D also stipulates that the sale would be free from any encumbrance, with the exception of the sum of ₱30,000 which is indebted to Ambrosio Valero, but said document likewise stipulates that the possession of the lands sold should be delivered to the purchaser sometime in March of the next year and that if this could not be done the lands would be substituted by others of the same area and value, belonging to the estate of Francisco A. Gonzales. This is an onerous condition which does not appear in the authorization of the court. Of course, this is an eventuality which the plaintiff wanted to forestall in view of the fact that the lands subject of the sale were then pending litigation between the estate and Ambrosio Valero, but this is no justification for departing from the precise terms contained in the authorization of the court. And we find, finally, that the authorization calls for the sale of six parcels of land belonging to the estate, but in the document as drawn up by Sauco it appears that only five parcels would be sold to the plaintiff, and the other parcel to Ricardo Gonzales Lloret. Undoubtedly, this cannot legally be done for, as we know, the law prohibits that a land subject of administration be sold to its judicial administrator.

The foregoing discrepancies between the conditions appearing in the document Exhibit D and the terms contained in the authorization of the court, plus the incongruencies and unexplained circumstances we have pointed out above, clearly give an idea that all that had taken place between Sauco and defendant Gonzales Lloret was but mere planning or negotiation to be threshed out between them in the conference they expected to have on June 19, 1944 but which unfortunately was not carried out in view of the illness of Teofilo Sauco. Such being the case, it logically follows that action of the plaintiff has no legal basis.

Before closing, one circumstance which should be mentioned here is that which refers to the delivery by Sauco to Gonzales Lloret of the check in the amount of ₱100,000 drawn against the Philippine National Bank which Lloret deposited in his current account with that institution. According to the evidence, when the transaction was called off because of the failure of Sauco to appear on the date set for his last conference with Lloret, the latter attempted to return the said amount to Sauco on August 2, 1944 who declined to accept it on the pretext that he had another buyer who was willing to purchase the lands for the sum of ₱300,000 and that if that sale were carried out Lloret could just deduct that amount from the purchase price. That offer to return, in our opinion, cannot have the effect of relieving Lloret from liability. His duty was to consign it in court as required by law. His failure to do so makes him answerable therefor to the plaintiff which he is now on duty bound to pay subject to adjustment under the Ballentyne Scale of Values.

Wherefore, the decision appealed from is reversed, without pronouncement as to costs. Defendant Ricardo Gonzales Lloret is ordered to pay to the plaintiff the sum of ₱100,000 which should be adjusted in accordance with the Ballentyne Scale of Values.

Parás, Pablo, Bengzon, Montemayor, Reyes, Jugo, Labrador and *Concepcion, J.J.* concur.

VI

Martina Quizana, Plaintiff and Appellee, vs. Gaudencio Rodugerio and Josefa Postrado, Defendants and Appellants, G. R. No. L-6220, May 7, 1954, Labrador, J.

1. OBLIGATION AND CONTRACTS; ACTIONABLE DOCUMENT; ABSENCE OF LEGAL PROVISION GOVERNING IT. — An agreement whereby the obligors bound themselves to pay their indebtedness on a day stipulated, and to deliver a mortgage on a property of theirs in case they failed to pay the debt on the day fixed, is valid and binding and effective upon the parties. It is not contrary to law or public policy, and notwithstanding the absence of any legal provision at the time it was entered into governing it, as the parties had freely and voluntarily entered into it, there is no ground or reason why it should not be given effect.

2. ID.: FACULTATIVE OBLIGATION, ENFORCEABLE IMMEDIATELY. — The obligations entered into by the parties is what is known as a facultative obligation. It is not provided by the old Spanish Civil Code; it is a new right which should be declared effective at once, in consonance with the provisions of article 2253 of the Civil Code of the Philippines.

Samson and *Amante* for the defendants and appellants.
Sabino Palomares for the plaintiff and appellee.

DECISION

LABRADOR, *J.*:

This is an appeal to this Court from a decision rendered by the Court of First Instance of Marinduque, wherein the defendants-appellants are ordered to pay the plaintiff-appellee the sum of ₱550.00, with interest from the time of the filing of the complaint, and from an order of the same court denying a motion of the defendants-appellants for the reconsideration of the judgment on the ground that they were deprived of their day in court.

The action was originally instituted in the justice of the peace court of Sta. Cruz, Marinduque, and the same is based on an actionable document attached to the complaint, signed by the defendants-appellants on October 4, 1948 and containing the following pertinent provisions:

> Na alang-alang sa aming mahigpit na pangangailangan ay kaming magasawa ay lumapit kay Ginang Martina Quizana, balo, at naninirahan sa Hupi, Sta. Cruz, Marinduque, at kami ay umutang sa kanya ng halagang Limang Daan at Limang Pung Piso (₱550.00), Salaping umiiral dito sa Filipinas na aming tinanggap na husto at walang kulang sa kanya sa condicion

na ang halagang aming inutang ay ibabalik o babayaran namin sa kanya sa katapusan ng buwan ng Enero, taong 1949.

Pinagkasunduan din naming magasawa na sakaling hindi kami makabayad sa taning na panahon ay aming ipifrenda o isasangla sa kanya ang isa naming palagay na niogan sa lugar nang Cororocho, barrio ng Balogo, municipio ng Santa Cruz, lalawigang Marinduque, kapuluang Filipinas at ito ay nalilibot ng mga kahanganang sumusunod:

Sa Norte — Dalmacio Constantino
Sa Este — Catalina Reforma
Sa Sur — Dionisio Ariola
Sa Weste — Reodoro Ricamora

na natatala sa gobierno sa ilalim ng Declaracion No. ..... na nasa pangalan ko, Josefa Postrado.

The defendants-appellants admit the execution of the document, but claim, as special defense, that since the 31st of January, 1949 they offered to pledge the land specified in the agreement and transfer possession thereof to the plaintiff-appellee, but that the latter refused said offer. Judgment having been rendered by the justice of the peace court of Sta. Cruz, the defendants-appellants appealed to the Court of First Instance. In that court they reiterated the defense that they presented in the justice of the peace court. The case was set for hearing in the Court of First Instance on August 16, 1951. As early as July 30 counsel for the defendants-appellants presented an "Urgent Motion for Continuance," alleging that on the day set for the hearing (August 16, 1951), they would appear in the hearing of two criminal cases previously set for trial before they received notice of the hearing on the aforesaid date. The motion was submitted on August 2, and was set for hearing on August 4. This motion was not acted upon until the day of the trial. On the date of the trial the court denied the defendants-appellants' motion for continuance, and after hearing the evidence for the plaintiff, in the absence of the defendants-appellants and their counsel, rendered the decision appealed from. Defendants-appellants, upon receiving copy of the decision, filed a motion for reconsideration, praying that the decision be set aside on the ground that sufficient time in advance was given to the court to pass upon their motion for continuance, but that the same was not passed upon. This motion for reconsideration was denied.

The main question raised in this appeal is the nature and effect of the actionable document mentioned above. The trial court evidently ignored the second part of defendants-appellants's written obligation, and enforced its last first part, which fixed payment on January 31, 1949. The plaintiff-appellee, for his part, claims that this part of the written obligation is not binding upon him for the reason that he did not sign the agreement, and that even if it were so the defendants-appellants did not execute the document as agreed upon, but, according to their answer, demanded the plaintiff-appellee to do so. This last contention of the plaintiff-appellee is due to a loose language in the answer filed with the Court of First Instance. But upon careful scrutiny, it will be seen that what the defendants-appellants wanted to allege is that they themselves had offered to execute the document of mortgage and deliver the same to the plaintiff-appellee, but that the latter refused to have it executed unless an additional security was furnished. Thus the answer reads:

> 5. That immediately after the due date of the loan Annex "A" of the complaint, *the defendants made efforts to execute the necessary documents of mortgage and to deliver the same to the plaintiff, in compliance with the terms and conditions thereof*, but the plaintiff refused to execute the proper documents and insisted on another portion of defendants' land as additional security for the said loan; (Underscoring ours)

In our opinion it is not true that defendants-appellants had not offered to execute the dead of mortgage.

The other reason adduced by the plaintiff-appellee for claiming that the agreement was not binding upon him also deserves scant consideration. When plaintiff-appellee received the document, without any objection on his part to the paragraph thereof in which the obligors offered to deliver a mortgage on a property of theirs in case they failed to pay the debt on the day stipulated, he thereby accepted the said condition of the agreement. The acceptance by him of the written obligation without objection and protest, and the fact that he kept it and based his action thereon, are concrete and positive proof that he agreed and consented to all its terms, including the paragraph on the constitution of the mortgage.

The decisive question at issue, therefore, is whether the second part of the written obligation, in which the obligors agreed and promised to deliver a mortgage over the parcel of land described therein, upon their failure to pay the debt on a date specified in the preceding paragraph, is valid and binding and effective upon the plaintiff-appellee, the creditor. This second part of the obligation in question is what is known in law as a facultative obligation, defined in Article 1206 of the Civil Code of the Philippines, which provides:

> Art. 1206. When only one prestation has been agreed upon, but the obligor may render another in substitution, the obligation is called facultative.

This is a new provision and is not found in the old Spanish Civil Code, which was the one in force at the time of the execution of the agreement.

There is nothing in the agreement which would argue against its enforcement It is not contrary to law or public morals or public policy, and notwithstanding the absence of any legal provision at the time it was entered into governing it, as the parties had freely and voluntarily entered into it, there is no ground or reason why it should not be given effect. It is a new right which should be declared effective at once, in consonance with the provisions of Article 2253 of the Civil Code of the Philippines, thus:

> Art. 2253. x x x. But if a right should be declared for the first time in this Code, it shall be effective at once, even though the act or event which gives rise thereto may have been done or may have occurred under the prior legislation, provided said new right does not prejudice or impair any vested or acquired right, of the same origin.

In view of our favorable resolution on the important question raised by the defendants-appellants on this appeal, it becomes unnecessary to consider the other question of procedure raised by them.

For the foregoing considerations, the judgment appealed from is hereby reversed, and in accordance with the provisions of the written obligation, the case is hereby remanded to the Court of First Instance, in which court the defendants-appellants shall present a duly executed deed of mortgage over the property described in the written obligation, with a period of payment to be agreed upon by the parties with the approval of the court. Without costs.

Paras, Pablo, Bengzon, Montemayor, Jugo, Bautista Angelo and *Concepcion, J.J.*, concur.

VII

Clotilde Mejia Vda. de Alfafara, Petitioner-Appellant, vs. Placido Mapa, in his capacity as Secretary of Agriculture and Natural Resources, Benita Compana, et al., Respondents-Appellees. G. R. No. L-7042, May 28, 1954, Bautista Angelo, J.

1. PUBLIC LAND LAW, DISPOSITION OF PUBLIC LANDS; DIRECTOR OF LANDS CAN NOT DISPOSE LAND WITHIN THE FOREST ZONE. — Where the land covered by the homestead application of petitioner was still within the forest zone or under the jurisdiction of the Bureau of Forestry, the Director of Lands had no jurisdiction to dispose of said land under the provisions of the Public Land Law and the petitioner acquired no right to the land.

2. ID.; ID.; EFFECT OF CONTRACT OF LANDLORD AND TENANT EXECUTED IN GOOD FAITH. — Even if the permit granted to petitioner's deceased husband by the Bureau of

Forestry to possess the land and work it out for his benefit was against the law and as such could have no legal effect. yet where he had acted thereon in good faith honestly believing that his possession of the land was legal, and had entered into a contractual relation of landlord and tenant with the respondents in good faith, the contract had produced as a necessary consequence the relation of landlord and tenant; therefore, his widow should be given the preference to apply for the land for homestead purposes.

3. ID.; DECISION RENDERED BY DIRECTOR OF LANDS AND APPROVED BY THE SECRETARY OF AGRICULTURE AND NATURAL RESOURCES, CONCLUSIVE EXCEPTIONS. — The doctrine that "a decision rendered by the Director of Lands and approved by the Secretary of Agriculture and Natural Resources, upon a question of fact is conclusive and not subject to be reviewed by the courts, in the absence of a showing that such decision was rendered in consequence of fraud, imposition, or mistake, other than error of judgment in estimating the value or effect of evidence" does not apply to a decision of the Director of Lands which has been revoked by the Secretary of Agriculture and Natural Resources. Even if there is unanimity in the decision, still the doctrine would not apply if the conclusions drawn by the Secretary from the facts foun dare erroneous or not warranted by law.

Mariano M. Florido for the petitioner and appellant.

Abundio A. Aldemita for respondents and appellees Benito Campana, et al.

Assistant Solicitor General Guillermo E. Torres and Solicitor Jaime de los Angeles for respondent and appellee Placido Mapa.

DECISION

BAUTISTA ANGELO, *J.*:

This is a petition for certiorari filed in the Court of First Instance of Cebu in which petitioner seeks to nullify a decision rendered by the Secretary of Agriculture and Natural Resources in D.A.N.R. Case No. 224 concerning lot No. 741 of the Carcar cadastre on the ground that he acted in excess of his jurisdiction or with grave abuse of discretion.

It appears that petitioner and respondents filed separately with the Bureau of Lands an application claiming as homestead lot No. 741 of the Carcar Cadastre. After an investigation conducted in accordance with the rules and regulations of said Bureau, a decision was rendered in favor of petitioner thereby giving course to her application and overruling the application and protests of respondents. In due course, respondents appealed to the Secretary of Agriculture and Natural Resources, who reversed the decision of the Director of Lands. And her motion for reconsideration having been denied, petitioner interposed the present petition for certiorari.

Respondents in their answer alleged that, under Section 3 of the Public Land Law, the Secretary of Agriculture and Natural Resources is the executive officer charged with the duty to carry out the provisions of said law relative to the administration and disposition of the lands of the public domain in the Philippines; that the decision which is now disputed by petitioner was rendered after a formal investigation conducted in accordance with the rules and regulations of the Department of Agriculture and Natural Resources and on the basis of the evidence adduced therein and, therefore, said Secretary has not abused his discretion in rendering it; and that the decision of the Secretary of Agriculture and Natural Resources on the matter is conclusive and not subject to review by the courts, in the absence of a showing that it was rendered in consequence of fraud, imposition, or mistake other than an error of judgment in estimating the value or effect of the evidence presented, citing in support of this contention the case of Ortua vs. Singson Encarnacion, 59 Phil., 440.

The lower court, after the reception of the evidence, upheld the contention of respondents, and dismissed the petition, whereupon petitioner took the case on appeal to the Court of Appeals. The case, however, was certified to this Court on the ground that the appeal involves purely questions of law.

The facts of this case as found by the Director of Lands are: By virtue of an application filed by Maximo Alfafara, the Bureau of Forestry granted him a permit on February 1, 1923, by virtue of which he was authorized to construct and maintain a fishpond within lot No. 741 of the Carcar cadastre. Said permittee constructed fishpond dikes along the side of the land facing General Luna street and running parallel to the river. Said dikes were destroyed by the flood which occurred in the same year. In 1926, the permittee abandoned the idea of converting the land into a fishpond and, instead, he decided to convert it into a ricefield. To this effect, the permittee entered into an agreement with respondents whereby the latter would convert the land into a ricefield on condition that they would take for themselves the harvests for the first three years and thereafter the crop would be divided share and share alike between the permittee and the respondents. In 1930, the permittee ceded his rights and interests in the land to his son, Catalino Alfafara, who continued improving the same by constructing more rice paddies and planting nipa palms along its border. Having converted the land into a ricefield, Catalino Alfafara filed a homestead application therefor in his name while at the same time continuing the same arrangement with respondents as share croppers. Upon the death of Catalino Alfafara in 1945, the respondents, after the harvest in 1946, began asserting their own right over the land and refused to give the share corresponding to Catalino Alfafara to his widow, the herein petitioner.

The claim of respondents that they improved the land in their own right and not with permission of petitioner's predecessors-in-interest, was not given credence by the Bureau of Lands, for its agents found, not only from the evidence presented, but also from their ocular inspection, that the land has been under the rightful possession of Maximo Alfafara since 1923, and that respondents were only able to work thereon upon his permission on a share basis. By virtue of these findings of the Director of Lands, the homestead application of petitioner was given due course.

On appeal however to the Secretary of Agriculture and Natural Resources, this official reversed the decision of the Director of Lands invoking the ruling long observed by his department in connection with the disposition of public lands which are formerly within the forest zone or under the jurisdiction of the Bureau of Forestry. He held that neither petitioner nor any of her predecessors-in-interest had acquired any right under the homestead application filed by each inasmuch as the land covered by them was still within the forest zone when applied for and that, for that reason, the Director of Lands had no jurisdiction to dispose of said land under the provisions of the Public Land Law. He likewise held that, inasmuch as the Alfafaras have not established any right to the land at the time they entered into the contract with respondents to work on the land on a share basis, the relation of landlord and cropper between them did not legally exist and as such did not produce any legal effect. Consequently, —he held— the Alfafaras cannot be considered as landlords of respondents, and between an actual occupant of an agricultural land which is released from the forest zone and certified as dispcsable under the Public Land Law, and an applicant whose application expired prior to its certification, the actual occupant is given preferential right thereto over the applicant.

The ruling above adverted to reads as follows:

"It is the rule in this jurisdiction which has been followed consistently in the disposition of forest land which have been declared agricultural lands that occupation of a forest land prior to the certification of the Director of Forestry that the same is released from the forest zone and is disposable under the provisions of the Public Land Law does not confer upon the occupant thereof the right of preference thereto under the said law. In the same manner, this office does not give and does not recognize any right of preference in favor of homestead whose applications were filed prior to the certification that the

land covered thereby has already been released from the forest zone and is disposable under the provisions of the Public Land Law. In other words, prior to the certification by the Bureau of Forestry that a parcel of forest land is already released from the forest zone and is disposable under the provisions of the Public Land Law, this Department does not recognize any right of preference in favor of either the actual occupant thereof or any homestead applicant therefor. The reason for this is that any permit or license issued by the Bureau of Forestry for a parcel of forest land can not bind the Bureau of Lands to recognize any right in favor of the Public Land Law; and any homestead application filed prior to the certification by the Director of Forestry is ineffective and subject to rejection. From the time, however, that a parcel of forest land is released from the forest zone and certified as disposable under the provisions of the Public Land Law, the occupation of the actual occupant becomes effective and is recognized by the Public Land Law under Section 95 thereof. Also the homestead application filed prior to the certification by the Director of Forestry will become effective from the date of the certification, if the same had not been rejected prior to such certification. But, between the actual occupant of a parcel of agricultural land and an applicant therefor whose application was filed prior to its certification as such by the Director of Forestry, this Office always recognizes the preferential right thereto of the actual occupant thereof. In a long line of decisions in appealed cases, this Office always recognizes the preferential right thereto of the actual occupant thereof. In a long line of decisions in appealed cases, this Office always maintains that agricultural lands already and actually occupied and cultivated cannot be applied for under the homestead law except by the actual occupant thereof." (Vicente Ruiz et al. v. H. A. [New], Mariano Ba. Mancao, Isabela, City of Zamboanga, decision dated April 13, 1949 and order dated July 22, 1949.)

The question now to be determined is: Has the Secretary of Agriculture and Natural Resources abused his discretion in reversing the decision of the Director of Lands?

At the outset, it should be stated that the findings of fact made by the Director of Lands had been substantially upheld by the Secretary of Agriculture and Natural Resources. They only differ on the conclusions derived therefrom and on the effect upon them of the law regarding the disposition of public lands which formerly were within the forest zone or under the jurisdiction of the Bureau of Forestry.

Thus, the first question decided by the Secretary of Agriculture and Natural Resources is: Has petitioner or any of her predecessors-in-interest acquired any right to the land under the provisions of the Public Land Law? And the Secretary, following the ruling above stated, answered in the negative. His reasoning follows: "Neither Clotilde Mejia Vda. de Alfafara nor any of her predecessors-in-interest could acquire any right under the homestead application filed by each of them inasmuch as the land covered thereby was still within the forest zone and that for that reason, the Director of Lands had no jurisdiction to dispose of said land under the provisions of the Public Land Law." To this we agree, for it appears that the land was released from the forest zone only on August 10, 1949, and the permit granted to Maximo Alfafara to possess the land for the purposes of homestead was in 1923. And with regard to Catalino Alfafara, his son, his application was filed only in 1930.

The second question decided by the Secretary is: What is the legal effect of the contractual relation of landlord and tenant existing between the Alfafaras and the respondents? The answer of the Secretary is: "Considering that none of the Alfafaras has established any right whatsoever to the land in question at the time the contractual relation began, this office is of the opinion and so holds that the relation of landlord and cropper could not and did not produce any legal effect because the supposed landlords, the Alfafaras, have no title or right to the land in question under the provisions of the Public Land Law. In other words, this office cannot see how any of the Alfafaras could be considered landlord of the claimants on the land in question when none of them has any right over said land under the Public Land Law."

With this conclusion we disagree. Even in the supposition that the permit granted to Maximo Alfafara by the Bureau of Forestry to possess the land and work it out for his benefit be against the law and as such can have no legal effect, the fact however is that Maximo Alfafara has acted thereon in good faith honestly believing that his possession of the land was legal and was given to him under and by virtue of the authority of the law. Likewise, it cannot be reasonably disputed that when Maximo Alfafara entered into a contract with the respondents for the conversion of the land into a ricefield with the understanding that the respondents, as a reward for their service, would get for themselves all the harvests for the first three years, and thereafter the harvests would be divided between them and Maximo Alfafara share and share alike, both Alfafara and respondents have acted in good faith in the honest belief that what they were doing was legal and in pursuance of the permit granted to Alfafara under the authority of the law. Having entered into that contractual relation in good faith no other conclusion can be drawn than that such contract has produced as a necessary consequence the relation of landlord and tenant so much so that the respondents worked the land only on the basis of such understanding. And this relation continued not only when Maximo Alfafara assigned his right under the permit to his son Catalino, but also when the latter died and his widow, the herein petitioner, took over and continued possessing the land as successor-in-interest of her husband. And it was only in 1946, after the death of Catalino Alfafara, that respondents got wise and, taking advantage of the helplessness of his widow, coveted the land and decided to assume the right over it by filing their own application with Bureau of Lands. Such a conduct cannot be said as one done in good faith, and, in our opinion, cannot be a basis for a grant of public land under the ruling invoked by the Secretary of Agriculture and Natural Resources.

The possession therefore of the land by respondents should be considered as that of a tenant and in this sense that possession cannot benefit them but their landlord, the widow, in contemplation of the rule. As such, the widow should be given the preference to apply for the land for homestead purposes.

We are not unmindful of the doctrine laid down in the case of Ortua vs. Singson Encarnacion, 59 Phil., 440, to the effect that the decision rendered by the Director of Lands and approved by the Secretary of Agriculture and Natural Resources, upon a question of fact is conclusive and not subject to be reviewed by the courts, in the absence of a showing that such decision was rendered in consequence of fraud, imposition, or mistake, other than error of judgment in estimating the value or effect of evidence." But we hold that this doctrine does not apply here because we are not concerned with a decision of the Director of Lands which was approved by the Secretary of Agriculture and Natural Resources, but one which has been revoked. The philosophy behind this ruling is that if the decision of the Director of Lands on a question of fact is concurred in by the Secretary of Agriculture and Natural Resources, it becomes conclusive upon the courts upon the theory that the subject has been thoroughly weighed and discussed and it must be given faith and credit, but not so when there is a disagreement. And even if there is unanimity in the decision, still we believe that the doctrine would not apply if the conclusions drawn by the Secretary from the facts found are erroneous or not warranted by law. These conclusions can still be the subject of judicial review. These are questions of law that are reserved to the courts to determine, as can be inferred from the following ruling laid down in the same case of Ortua:

> "There is, however, another side to the case. It certainly was not intended by the legislative body to remove from the jurisdiction of courts all right to review decisions of the Bureau of Lands, for to do so would be to attempt something which could not be done legally. Giving force to all possible intendments regarding the facts as found by the Director of Lands,

yet so much of the decision of the Director of Lands as relates to a question of law is in no sense conclusive upon the courts, but is subject to review. In other words, any action of the Director of Lands which is based upon a misconstruction of the law can be corrected by the courts." (Shepley v. Cowan [1876], 91 U.S., 330; Moore v. Robbins [1878], 96 U.S. 530; Marquez vs. Frisbie [1879], 101 U.S., 473; Black v. Jackson [1900], 177 U.S., 349; Johnson v. Riddle, *supra*.)

Wherefore, the decision appealed from is reversed. The court sets aside the decision of the Secretary of Agriculture and Natural Resources dated September 15, y949 as well as his order dated January 3, 1950, reaffirming said decision. The court revives the decision of the Director of Lands dated March 18, 1948 and orders that it be given due course. No pronouncement as to costs.

Bengzon, Montemayor, Jugo, Labrador and *Concepcion, J.J.*, concur.

Mr. Justice Alex. Reyes took no part.

PARAS, *C.J.*, dissenting:

It is true that Maximo Alfafara was granted on February 1, 1923, a permit to construct and maintain a fishpond within lot No. 741 of the Carcar cadastre, but it nevertheless appears that said permit was cancelled in 1926 after said fishpond was destroyed by a typhoon. In said year, Maximo Alfafara induced the respondent Benita Campana, et al. to convert the former fishpond into a riceland, the agreement being that the crops for the first three years would be for said respondents and that thereafter the crops would be divided equally between the former and the latter. According to the findings of the Secretary of Agriculture and Natural Resources, not contradicted in any way by those of the Director of Lands, Maximo Alfafara and his successors-in-interest never worked on the land or spent, anything for the improvements thereon. The question that arises is, after the land was declared available for homestead purposes by certification of the Director of Forestry in 1949, or long after the permit of Alfafara had been cancelled, whether the Alfafaras should be preferred to those who actually worked on the land. After the cancellation of his permit, Maximo Alfafara ceased to have any right or authority to continue holding the land. Yet, he was given for several years one half of the crop harvested by the respondents who took over the land in good faith and could already occupy it in their own right. It may fairly be considered that the original holder had impliedly parted with his rights, if any, for valuable consideration. It is plainly unjust, under the circumstances, to deprive the respondents of their priority to the portion of the land actually held by them as a homestead. It appears, however, that there were occupants of other portions of the lot who did not apply for homesteads, with the result that said portions may be awarded to the Alfafaras if they are still entitled thereto under the law.

I vote for the affirmance of the appealed decision.

Concurro con esta disidencia.

(*Fdo.*) *Guillermo F. Pablo*

VIII

Luis Manalang, Petitioner, vs. Aurelio Quitoriano, Emiliano Morabe, Zosimo G. Linato, and Mohamad de Venancio, Respondents, G. R. No. L-6898, April 30, 1954, Concepcion J.

1. LAW ON PUBLIC OFFICERS; REMOVAL OF PUBLIC OFFICERS. — Where the petitioner has never been commissioner of the National Employment Service, he could not have been, and has not been, removed therefrom.

2. ID.; ID.; ABOLITION OF OFFICE. — To remove an officer is to oust him from his office before the expiration of his term. A removal implies that the office *exists* after the ouster. Such is not the case of petitioner herein, for Republic Act No. 761 expressly abolished the Placement Bureau and, by implication, the office of director thereof, which petitioner held.

3. CONSTITUTIONAL LAW; ABOLITION OF BUREAU EXTINGUISHES RIGHT OF INCUMBENT TO THE OFFICE OF DIRECTOR THEREOF; NO VIOLATION OF CONSTITUTIONAL MANDATE ON CIVIL SERVICE. — Where the law expressly abolished the Placement Bureau, by implication, the office of director thereof, which cannot exist without said Bureau, is deemed abolished. By the abolition of said Bureau and of the office of its director, the right thereto of petitioner was necessarily extinguished thereby. There being no removal or suspension of the petitioner, but abolition of his former office of Director of the Placement Bureau, which is within the power of Congress to undertake by legislation, the constitutional mandate to the effect that "no officer or employee in the civil service shall be removed or suspended except for cause as provided by law" is not violated.

4. ID.; ID.; TRANSFER OF QUALIFIED PERSONNEL FROM ONE OFFICE TO ANOTHER. — Where the law abolishing the Placement Bureau explicitly provided for the transfer, among others, of the qualified personnel of the latter to the National Employment Service, such transfer connotes that the National Employment Service is different and distinct from the Placement Bureau, for a thing may be transferred only from one place to *another*, not to the same place. Had Congress intended the National Employment Service to be a mere amplification or enlargement of the Placement Bureau, the law would have directed the *retention* of the "qualified personnel" of the latter, not their *transfer* to the former.

5. ID.; ID.; NECESSITY OF NEW APPOINTMENT; EFFECT ON RIGHT OF INCUMBENT TO THE OFFICE. — Where, as it is admitted by petitioner, there is necessity of appointing Commissioner of the National Employment Service, it follows that he does not hold or occupy the latter's item, inasmuch as the right thereto may be acquired only by appointment.

6. ID.; SCOPE OF TERM "QUALIFIED PERSONNEL". — If the Director of the Placement Bureau were included in the phrase "qualified personnel" and, as a consequence, he automatically became Commissioner of the National Employment Service, the latter would have become organized *simultaneously* with the approval of Republic Act. No. 761, and the same would not have conditioned the transfer to the Service of the "qualified personnel" of the Placement Buureau "upon the organization of the Service." which connotes that the new office would be established at some *future* time. In common parlance, the word "personnel" is used generally to refer to the subordinate officials or clerical employees of an office or enterprise, not to the managers, directors or heads thereof.

7. ID.; PUBLIC OFFICERS; POWER OF CONGRESS TO APPOINT COMMISSIONER OF NATIONAL EMPLOYMENT SERVICE; APPOINTING POWER EXCLUSIVE PREROGATIVE OF PRESIDENT; LIMITATIONS ON POWER TO APPOINT. — Congress can not, either appoint the Commissioner of the Service, or impose upon the President the duty to appoint any particular person to said office. The appointing power is the exclusive prerogative of the President, upon which no limitations may be imposed by Congress, except those resulting from the need of securing the concurrence of the Commission on Appointments and from the exercise of the limited legislative power to prescribe the qualifications to a given appointive office.

8. ID.; ID.; RECORD OF PUBLIC SERVANT DOES NOT GRANT COURT POWER TO VEST IN HIM LEGAL TITLE; DUTY OF COURT. — Petitioner's record as a public servant — no matter how impressive it may be as an argument in favor of his consideration for appointment either as Commissioner or as Deputy Commissioner of the National Employment Ser-

vice — is a matter which should be addressed to the appointing power, in the exercise of its sound judgment and discretion, and does not suffice to grant the Court, whose duty is merely to apply the law, the power to vest in him a legal title which he does not have.

Luis Manalang in his own behalf.,

Solicitor General Juan Liwag and *Assistant Solicitor General Francisco Carreon* for the Respondents.

D E C I S I O N

CONCEPCION, *J.*;

Petitioner Luis Manalang contests, by quo warranto proceedings, the title of the incumbent Commissioner of the National Employment Service, and seeks to take possession of said office as the person allegedly entitled thereto.

The original respondent was Aurelio Quitoriano, who, at the time of the filing of the petition (August 4, 1953), held said office, which he assumed on July 1, 1953, by virtue of a designation made, in his favor, as Acting Commissioner of the National Employment Service, by the Office of the President of the Philippines. Subsequently, or on October 22, 1953, petitioner included, as respondents, Emiliano Morabe, who, on September 11, 1953, was designated Acting Commissioner of National Employment Service, and Zosimo G. Linato, the Collecting Disbursing and Property Officer of said National Employment Service — hereinafter referred to, for the sake of brevity, as the Service — in order to restrain him from paying, to respondent Morabe, the salary of the Commissioner of said Service. Still later, or on January 21, 1954, Mohamad de Venancio, who was designated Acting Commissioner of said Service, and assumed said office, on January 11 and 13, respectively, of the same year, was included as respondent.

It appears that, prior to July 1, 1953, and for some time prior thereto, petitioner Luis Manalang, was Director of the Placement Bureau, an office created by Executive Order No. 392, dated December 31, 1950 (46 Off. Gaz. No. 12, pp. 5913, 5920-5921), avowedly pursuant to the powers vested in the President by Republic Act No. 422. On June 20, 1952, Republic Act No. 761, entitled "An Act To Provide For the Organization Of A National Employment Service," was approved and became effective. Section 1 thereof partly provides:

> "x x x In order to ensure the best possible organization of the employment market as an integral part of the national program for the achievement and maintenance of maximum employment and the development and use of productive resources, there is hereby established a national system of free public employment offices to be known as the National Employment Service, hereinafter referred to as the Service. The Service shall be under the executive supervision and control of the Department of Labor, and shall have a chief who shall be known as the Commissioner of the National Employment Service hereinafter referred to as Commissioner. Said Commissioner shall be appointed by the President of the Philippines with the consent of the Commission on Appointments and shall receive compensation at the rate of nine thousand pesos *per annum*. A Deputy Commissioner shall also be appointed by the President of the Philippines with the consent of the Commission on Appointments and shall receive compensation at the rate of seven thousand two hundred pesos *per annum*."

On June 1, 1953, the then Secretary of Labor, Jose Figueueras, recommended the appointment of petitioner Luis Manalang as Commissioner of the Service. On June 29, 1953, respondent Aurelio Quitoriano, then Acting Secretary of Labor, made a similar recommendation in favor of Manalang, upon the ground that " he is best qualified" and "loyal to service and administration." Said Acting Secretary of Labor even informed Manalang that he would probably be appointed to the office in question. However, on July 1, 1953, Quitoriano was the one designated and sworn in, as Acting Commissioner of the Service. Such designation of Quitoriano — like the subsequent designation, first, of Emiliano Morabe, and, then, of Mohamad de Venancio — is now assailed by Manalang as "illegal" and "equivalent to removal of the petitioner from office without cause."

This pretense can not be sustained. To begin with, petitioner has never been Commissioner of the National Employment Service and, hence, he could not have been, and has not been, removed therefrom. Secondly, to remove an officer is to oust him from office before the expiration of his term. A removal implies that the office exists after the ouster. Such is not the case of petitioner herein, for Republic Act No. 761 *expressly abolished* the Placement Bureau, and, by implication, the office of director thereof, which, obviously, cannot exist without said Bureau. By the abolition of the latter and of said office, the right thereto of its incumbent, petitioner herein, was necessarily extinguished thereby. Accordingly, the constitutional mandate to the effect that "no officer or employee in the civil service shall be removed or suspended except for cause as provided by law" (Art XII, Sec. 4, Phil. Const.), is not in point, for there has been neither a removal nor a suspension of petitioner Manalang, but an abolition of his former office of Director of the Placement Bureau, which, admittedly, is within the power of Congress to undertake by legislation.

It is argued, however, in petitioner's memorandum, that

> "x x x there is no abolition but only fading away of the title Placement Bureau and *all* its functions are continued by the National Employment Service because the two titles cannot coexist. The seemingly additional duties were only brought about by the additional facilities like the district offices, Employment Service Advisory Councils, etc."

The question whether or not Republic Act. No. 761 abolished the Placement Bureau is one of legislative intent, about which there can be no controversy whatsoever, in view of the explicit declaration in the second paragraph of Section 1 of said Act reading:

> "Upon the organization of the service, the existing Placement Bureau and the existing Employment Office in the Commission of Social Welfare shall be abolished, and all the files, records, supplies, equipment, qualified personnel and unexpended balances of appropriations of said Bureau and Commission pertaining to said bureau or office shall thereupon be *transferred* to the Service." (Underscoring supplied.)

Incidentally, this transfer connotes that the National Employment Service is different and distinct from the Placement Bureau, for a thing may be transferred only from one place to *another*, not to the same place. Had Congress intended the National Employment Service to be a mere amplification or enlargement of the Placement Bureau, Republic Act No. 761 would have directed the *retention* of the "qualified personnel" of the latter, not their *transfer* to the former. Indeed, the Service includes, not only the functions pertaining to the former Employment Office in the Commission of Social Welfare, apart from other powers, not pertaining to either office, enumerated in Section 4 of Republic Act No. 761.

Again, if the absorption by the Service of the duties of the Placement Bureau, sufficed to justify the conclusion that the former and the latter are identical, then the Employment Office in the Commission of Social Welfare, would logically be entitled to make the same claim. At any rate, any possible doubt, on this point, is dispelled by the fact that, in his sponsorship speech, on the bill which later became Republic Act No. 761, Senator Magalona said:

> "Como ya he dicho al caballero de Rizal, *esta es una nueva oficina* que tiene su esfera de accion *distinta* de la de cualquiera de las divisiones de la Oficina de Trabajo. Ademas, como he dicho, es muy importante la creacion de esta oficina, porque con ella se trata de buscar remedio para esos dos millones de desempleados filipinos que hay ahora." (Vol. 111, Congressional Record, Senate, No. 56, April 23, 1952; underscoring supplied.)

It is next urged in petitioner's memorandum "that the item of National Employment Service Commissioner is not new and is occupied by the petitioner" and that the petitioner is entitled to said

office "automatically by operation of law," in view of the above quoted provision of Section 1 of Republic Act No. 761, relative to the transfer to the service of the "qualified personnel" of the Placement Bureau and of the Employment Office in the Commission of Social Welfare.

This contention is inconsistent with the very allegations of petitioner's pleadings. Thus, in paragraph 11 of his petition, it is alleged "that increasing the item and elaborating the title of a civil servant, although *necessitating a new appointment*, does not mean the ousting of the incumbent or declaring the item vacant." In paragraph 12 of the same pleading, petitioner averred that "on or about June 25, 1953, two days before the departure of President Quirino to Baltimore, petitioner wrote a confidential memorandum to his Excellency reminding him of the necessity of appointing anew the petitioner as head of the National Employment Service."

Having thus admitted — and correctly — that he needed a *new appointment* as Commissioner of the National Employment Service, it follows that petitioner does not hold — or, in his own words, occupy — the latter's item, inasmuch as the right thereto may be acquired only by appointment. What is more, Republic Act No. 761 requires specifically that said appointment be made by the President of the Philippines "with the consent of the Commission on Appointments." How could the President and the Commission on Appointments perform these acts if the Director of the Placement Bureau automatically became Commissioner of the National Employment Service?

Neither may petitioner profit by the provision of the second paragraph of Section 1 of Republic Act No. 761, concerning the transfer to the Service of the "qualified personnel" of the Placement Bureau and of the Employment Office in the Commission of Social Welfare, because:

1. Said transfer shall be effected only "upon the organization" of the National Employment Service, which does not take place until *after* the appointment of, at least, the commissioner thereof. If the Director of the Placement Bureau were included in the phrase "qualified personnel" and, as a consequence, he automatically became Commissioner of the Service, the latter would have become organized simultaneously with the approval of Republic Act No. 761, and the same would not have conditioned the aforementioned transfer "upon the organization of the Service," which connotes that the new office would be established at some future time. Indeed, in common parlance, the word "personnel" is used generally to refer to the subordinate officials or clerical employees of an office or enterprise, not to the managers, directors or heads thereof.

2. If "qualified personnel" included the heads of the offices affected by the establishment of the Service, then it would, also, include the chief of the Employment Office in the Commission of Social Welfare, who, following petitioner's line of argument, would, like petitioner herein, be, also, a Commissioner of the National Employment Service. The result would be that we would have either two commissioners of said Service or a Commission thereof consisting of two persons — instead of a Commissioner — and neither alternative is countenanced by Republic Act No. 761.

3. Congress can not, either appoint the Commissioner of the Service, or impose upon the President the duty to appoint any particular person to said office. The appointing power is the exclusive prerogative of the President, upon which no limitations may be imposed by Congress, except those resulting from the need of securing the concurrence of the Commission on Appointments and from the exercise of the limited legislative power to prescribe the qualifications to a given appointive office.

Petitioner alleges in paragraph 2 of his petition, which has been admitted by the respondents:

> "That he started as clerk in 1918 in the Bureau of Labor by reason of his civil service second grade eligibility; that he was appointed public defender, Incharge of the Pampanga Agency, in 1937 likewise, as a result of his civil service public defender eligibility and has successively held the positions of Chief of Social Improvement Division, Senior Assistant in the Office of the Secretary of Labor, Chief of the Wage Claims Division, Attorney of Labor (Incharge of Civil Cases), Chief of the Administrative Division, Chief of the Labor Inspection Division and Director of the Placement Bureau, also under the Department of Labor."

The many years spent by petitioner in the service of the Government have not escaped the attention of the Court. For this reason, we have even considered whether or not he should be held entitled to the position of Deputy Commissioner of the National Employment Service, which carries a compensation of ₱7,200.00 *per annum*, identical to that of Director of the Placement Bureau. However, it is our considered opinion that we can not make said finding, not only because the office of Deputy Commissioner of the National Employment Service is beyond the pale of the issues raised in this proceedings, which are limited to the position of Commissioner of said Service, but, also, because the reason militating against petitioner's claim to the latter position, apply equally to that of Deputy Commissioner. At any rate, petitioner's record as a public servant — no matter how impressive it may be as an argument in favor of his consideration for appointment either as Commissioner or as Deputy Commissioner of the Service — is a matter which should be addressed to the appointing power, in the exercise of its sound judgment and discretion, and does not suffice to grant the Court, whose duty is merely to apply the law, the power to vest in him a legal title which he does not have.

WHEREFORE, the petition is hereby dismissed and the writ prayed for denied, without costs.

Pablo, Bengzon, Reyes, Jugo, Bautista Angelo and *Labrador, J.J., concur.*

Mr. Justice Padilla did not take part.

MONTEMAYOR, J. concurring:

I fully concur in the learned opinion of Mr. Justice Concepcion. Its legal considerations and conclusions are based on and supported by the law which sometimes is harsh (dura lex), as it now has turned out to be with respect to petitioner.

Considering all the circumstances surrounding this case, I am convinced, and from what I could gather from the discussion during our deliberations, even my respected colleagues or many of them, agree with me that all the equities are with the petitioner. He fully and truly deserved a high and important office in the National Employment Service. Not only did he, for many years, prepare himself for the special and technical service to direct or assist direct the functions and activities of the National Employment Service, by his previous training and experience, but the Government itself prepared him for said service by sending him abroad to study and observe social legislation and employment, and later on his return even had him assist in the drafting of the very legislation that abolished his office of Director of Placement Bureau and created the National Employment Service. There is every reason to believe that at the time, petitioner was intended to head the new office or at least, be one of its chief officials, and he was given that understanding and expectation. Unfortunately, however, thru a quirk of Fate and at the last hour, he was not appointed. Result — he lost his chance; and what is worse, he lost his civil service post which was abolished, all thru no fault on his part.

This short concurring opinion is never intended to embarrass or serve as a reflection on the appointing power, particularly the present administration, which is not to blame. If a suitable post, preferably in his line, could be found for Petitioner, a wrong would be righted, the harshness of the law softened and tempered, and the interests of justice and equity served.

Chief Justice Paras and *Justice Bautista Angelo*, concur.

Fulgencio Vega and Leon Gellada, Plaintiffs-Appellees, vs. The Municipal Board of the City of Iloilo et al., etc., Defendants Appellants, G. R. No. L-6765, May 12, 1954, Concepcion, J.

1. MUNICIPAL CORPORATIONS; POWERS AND DUTIES OF; POWERS STRICTLY CONSTRUED. — Municipal corporations in the Philippines are mere creatures of Congress. As such, said corporations have only such powers as the legislative department may have deemed fit to grant them. By reason of the limited powers of local governments and the nature thereof, said powers are to be construed strictly and "any doubt or ambiguity arising out of the terms used in granting" said powers "must be resolved against the municipality."

2. ID.; POWERS AND DUTIES OF THE MUNICIPAL BOARD OF THE CITY OF ILOILO. — Section 21 of Commonwealth Act No. 158, creating the charter of the City of Iloilo, limits the power of the Municipal Board to regulate "any business or occupation"; obviously, the use of a street, road or highway by a motor vehicle is neither a business nor an occupation.

3. ID.; POWER TO INSPECT MOTOR VEHICLES; COMMONWEALTH ACT NO. 158 SUBJECT TO LIMITATIONS OF ACT NO. 3992.—Act No. 3992, as amended by Republic Act No. 587, grants the Director of Public Works, among others, the power to determine whether a motor vehicle is in such a condition as to be safe for its passengers and the public in general. Considering the general tenor of the provisions of said Act, as well as those of the Charter of the City of Iloilo, Congress did not intend to clothe the latter with authority to impose certain requirements — in addition to those provided in Act No. 3992, as amended — as a condition precedent to the use of motor vehicles within the limits of the City of Iloilo.

Filemon Resureccion for the defendants and appellants.
Luis G. Hofileña for the plaintiffs and appellees.

D E C I S I O N

CONCEPCION, *J.*:

This is an action for a declaratory relief (under Rule 66 of the Rules of Court) to test the validity of Municipal Ordinance No. 35 of the City of Iloilo, enacted on July 12, 1951, which provides:

"Section 1. No motor vehicles, whether for public or private use, with the exception of those owned and operated by the Republic of the Philippines, the Provinces of Iloilo, Capiz and Antique, and the municipalities thereto appertaining, the City of Iloilo, and those new motor vehicles offered for sale by dealers, but not used for transportation purposes by such dealers, shall use any street, road or highway within the territorial limits of the City of Iloilo without being provided with certificate issued by the Traffic Division of the Police Department of this City, stating that said vehicle has been inspected by said Traffic Division, and found to be provided with safe brakes and appurtenances making the use of the same travel worthy and safe for passengers and pedestrians alike. The certificate shall be attached or posted in a conspicuous place in the corresponding motor vehicle, preferably on the windshield glass facing the front.

"Section 2. All owners and/or operators of the motor vehicles hereinabove mentioned must submit his motor vehicles for inspection by the Traffic Division of the Police Department of this City within ten days upon acquisition of the same from the original owner, and within the period from January 1 to February 28, and from July 1 to August 30 of each year if the same has previously been inspected and certified to be travel worthy by said Traffic Division.

"Section 3. For the services rendered by the Traffic Division in the inspection and certification of any motor vehicle the owner or operator of the same shall pay to the City Treasurer a fee as follows:

"For every automobile, jeep, or station wagon for each semester	₱3 00
"For every truck per semester	5.00
"For every motorcycle per semester	1.00

"Provided, however, that no more than two inspection fees shall be charged within one year and all other inspections on the same vehicle shall be free of charge.

"Section 4. All motor vehicles coming from outside of the territorial limits of this City for the first time shall immediately report for inspection to the Traffic Division, and the payment of the required fee may be made within ten days from the date of said inspection, and the issuance of the certificate shall not be delayed for non-payment when and if said motor vehicles are found to be travel worthy and a sufficient personal bond for the payment of the required fee is filed with and accepted by the Chief of Police or his authorized agent.

"Section 5. Failure to comply with the provisions of this ordinance shall be punished with a fine not less than ten pesos (₱10.00) but not more than two hundred pesos (₱200.00) or an imprisonment not exceeding six (6) months or both fine and imprisonment at the discretion of the court."

"Section 6. This ordinance shall take effect upon approval." (pp. 12-15, Record on Appeal.)

The case was commenced in the Court of First Instance of Iloilo by Fulgencio Vega and Leon Gellada, who own motor vehicles and are affected by the enforcement of said ordinance. They question the validity thereof upon the ground that the Municipal Board of the City of Iloilo — which was made defendant, in addition to the City Mayor — has no authority to promulgate it. On motion of the plaintiffs, and without objection on the part of the defendants, the case was submitted for decision on the pleadings, the only issue raised therein being one purely of law. Thereafter, said court, presided over by Honorable Querube Makalintal, then Judge, rendered judgment for the plaintiffs. Hence, this appeal, taken by the defendants, who maintain that the municipal Board of the City of Iloilo is empowered to pass ordinance in question, under section 21 of its charter Commonwealth Act No. 158. The provisions thereof relied upon by appellants read:

"SEC. 21. *General powers and duties of the Board.* — Except as otherwise provided by law, and subject to the conditions and limitations thereof, the Municipal Board shall have the following legislative powers:

x x x x x x x x

"(aa) To enact all ordinances it may deem necessary and proper for the sanitation and safety, the furtherance of the prosperity and the promotion of the morality, peace, good order, comfort, convenience, and general welfare of the city and its inhabitants, and such others as may be necessary to carry into effect and discharge the powers and duties conferred by this charter; and to fix penalties for the violation of ordinances, which shall not exceed a fine of two hundred pesos or six months' imprisonment, or both such fine and imprisonment, for each offense.

x x x x x x x x

"(cc) To regulate any business or occupation and to require license from persons engaged in the same or who exercise privileges in the city, by requiring them to secure a permit for a license at the rate fixed by the Municipal Board, and to prescribe the conditions under which said permits for licenses may be revoked."

The foregoing paragraph (cc) is limited, however, to the power to regulate "any business or occupation" whereas, obviously, the use of a street, road or highway by a motor vehicle is neither a business nor an occupation. Hence, it is clear that said paragraph (cc) is not in point.

As regards paragraph (aa), the same is a counterpart of section 2238 of the Revised Administrative Code, otherwise known as the "General Welfare Clause" for regularly organized municipalities. In the case of People vs. Esguerra et al. (45 Off. Gaz. 4949), it was held that a municipal council may not validly enact an ordinance "prohibiting," among other things, the manufacture, production, sale, barter, giving or possession of intoxicating liquor, the power of

said body being limited, by section 2242(g) of the Revised Administrative Code, to the "regulation" — which does not include the "prohibition" — of said acts, and that the police power under the general welfare clause does not amplify said authority or remove the limitation thus imposed by specific provision of law. Under Commonwealth Act No. 158, the authority of the Municipal Board of the City of Iloilo in relation to motor vehicles, is found in subdivision (m) of section 21 of said Act which grants said board the power

> "(m) To tax motor and other vehicles, notwithstanding provisions to the contrary contained in Act Numbered Thirty-nine hundred and ninety-two, and draft animals not paying any national tax: *Provided*, however, That all automobiles and trucks belonging to the National Government, and also automobiles or trucks not regularly kept in the City of Iloilo shall be exempt from such tax."

This power of taxation is distinct and different from the police power, under which, appellants claim, the ordinance in question was allegedly approved. Moreover, said Commonwealth Act No. 158 explicitly empowers the Municipal Board of the City of Iloilo to require inspection and to charge fees therefor in certain specified cases. Thus, said section 21 authorizes said board:

> "(n) To regulate the method of using steam engines and boilers, other than marine or belonging to the Federal or National Government; *to provide for the inspection thereof, and a reasonable fee for such inspection*, and to regulate and fix the fees for the licenses of the engineers engaged in operating the same. (Underscoring supplied.)
>
> x x x x x x x
>
> "(s) To regulate the inspection, weighing, and measuring of brick, coal, lumber, and other articles of merchandise.
>
> "(t) x x x to provide for the inspection of, fix the license fees for and regulate the openings in the same for the laying of gas, water, sewer, and other pipes, the building and repair of tunnels, sewers, and drains, and all structures in and under the same, and the erecting of poles and the stringing of wires therein; x x x.
>
> x x x x x x x
>
> "(w) To regulate, *inspect*, and provide measures preventing any discrimination or the exclusion of any race or races in or from any institution, establishment, or service open to the public within the city limits or in the sale and supply of gas or electricity, or in the telephone and street-railway service; to fix and regulate charges therefor where the same have not been fixed by laws of the National Assembly; to *regulate and provide for the inspection* of all gas, electric, telephone, and street-railway conduits, mains, meters, and other apparatus, and provide for the condemnation, substitution or removal of the same when defective or dangerous."

Among these cases, the inspection of motor vehicles and the collection of fees therefor is not included. Consequently, the power to authorize same must be considered denied under the principle *expressio unius est exclusio alterius*.

Indeed, the powers enumerated in said section 21 of Commonwealth Act No. 158, including, therefore, the police power under the general welfare clause therein incorporated, are granted "except as otherwise provided by law and subject to the conditions and limitations thereof." In this connection, section 70(b) of Act No. 3992, as amended by section 17 of Republic Act No. 587, positively ordains that:

> "No other taxes or fees than those prescribed in this Act shall be imposed for the registration or operation or on the ownership of any motor vehicle, or for the exercise of the profession of chauffeur, by any municipal corporation, the provisions of any city charter to the contrary notwithstanding: *Provided, however*, That any provincial board, city or municipal council or board, or other competent authority may exact and collect such reasonable and equitable toll fees for the use of such bridges and ferries, within their respective jurisdictions, as may be authorized and approved by the Secretary of Public Works and Communications, and also for the use of such public roads, as may be authorized by the President of the Philippines upon recommendation of the Secretary of Public Works and Communications, but in none of these cases, shall any toll fees be charged or collected until and unless the approved schedule of tolls shall have been posted legibly in a conspicuous place at such toll station."

The qualification "the provisions of any city charter to the contrary notwithstanding" leaves no room for doubt that the provisions of Commonwealth Act No. 158, and its general welfare clause, under section 21(aa), are subject to limitations thus imposed by Act No. 3992, as amended by Republic Act No. 587. This construction becomes even more imperative when we consider that, pursuant to said Act No. 3992,

> "No motor vehicle shall be used or operated on, or upon any public highway of the Philippine Islands unless the same is properly registered for the current year in accordance with the provisions of this Act" (Sec. 5[a]),

and that section 4 of the same Act places the Director of Public Works "in charge of the administration" of its provisions, and grants him, among others, the power

> "(h) x x x at any time to examine and inspect any motor vehicle, in order to determine whether the same is unsightly, unsafe, overloaded, improperly marked or equipped, or otherwise *unfit* to be operated because of possible danger to the chauffeur, to the passengers, or the public; or because of possible excessive damage to the highways, bridges or culverts." (Sec. 5, Act No. 3992.)

Thus, the power to determine whether a motor vehicle is in such a condition as to be safe for its passengers and the public in general, is vested by Act No. 3992 in the Director of Public Works. Considering the general tenor of the provisions of said Act, as well as those of the charter of the City of Iloilo, we are not prepared to hold that Congress intended to clothe the latter with authority to impose certain requirements — in addition to those provided in Act No. 3992, as amended — as a condition precedent to the use of motor vehicles within the limits of the City of Iloilo. It is even harder to believe that the latter was sought to be invested with authority to ordain that the police department of Iloilo shall check whether an officer of the National Government, namely the Director of Public Works, has complied with his duty to test the mechanical proficiency of the safety devices of motor vehicles, on which the latter is supposed to be better qualified.

Municipal corporations in the Philippines are mere creatures of Congress. As such, said corporations have only such powers as the legislative department may have deemed fit to grant them. By reason of the limited powers of local governments and the nature thereof, said powers are to be construed strictly and "any doubt or ambiguity arising out of the term used in granting" said powers "must be resolved against the municipality. x x x (Cu Unjieng vs. Patstone, 42 Phil., pp. 818, 830; Pacific Commercial Co. vs. Romualdez, 49 Phil., pp. 917, 924; Batangas Transportation Co. vs. Provincial Treasurer of Batangas, 52 Phil., pp. 190, 196; Baldwin vs. Coty Council, 53 Ala., p. 437; State vs. Smith, 31 Iowa, p. 493; 39 Am. Jur., pp. 68, 72-73)." (Icard vs. The City Council of Baguio and The City of Baguio, 46 Off. Gaz., Supplement No. 11, pp. 320, 323.) Accordingly, the lower court did not err in declaring that the ordinance in question is *ultra vires*.

WHEREFORE, the decision appealed from is hereby affirmed, without special pronouncement as to costs.

IT IS SO ORDERED.

Paras, Pablo, Bengzon, Montemayor, Reyes, Jugo, Bautista Angelo and *Labrador, J.J.*, concur.

Mr. Justice Padilla did not take part.

Rehabilitation Finance Corporation, Petitioner, vs. The Honorable Court of Appeals, Estelito Madrid and Jesus Anduiza, Respondents, G. R. No. L-5942, May 14, 1954, Concepcion, J.

1. OBLIGATION AND CONTRACTS; PROMISSORY NOTE PAYABLE IN INSTALLMENT. — Where the makers of the promissory note promised to pay the obligation evidenced thereby "on or *before* October 31, 1951," although the full amount of said obligation was not demandable prior to October 31, 1951, in view of the provision of the note relative to the payment in ten annual installments, the makers or debtors were entitled to make a complete settlement of the obligation at any time before said date.

2. ID.; RIGHT OF CREDITOR. — The Bank, as creditor, has no other right than to exact payment, after which the obligation in question, as regards said creditor, and, hence, the latter's status and rights as such, become automatically extinguished.

3. ID.; PAYMENTS MADE BY THIRD PERSONS. — Under article 1158 of the Civil Code of Spain, which was in force in the Philippines when the payments under consideration were made, "payment may be made by any person, whether he has an interest in the performance of the obligation or not, and whether the payment is known and approved by the debtor or whether he is unaware of it."

4. ID.; ID.; PAYMENTS MADE AGAINST WILL OF DEBTOR. —The provision that the payor "may only recover from the debtor insofar as the payment has been beneficial to him," when made against his express will, is a defense that may be availed of only by the debtor, not by the Bank-creditor, for it affects solely the rights of the former. Besides, in order that the rights of the payor may be subject to said limitation, the debtor must oppose the payments before or at the time the same were made, not subsequently thereto.

5. ID.; ID.; EFFECTS OF PAYMENT DETERMINED AT THE TIME IT WAS MADE; RIGHTS ACQUIRED BY PAYOR DEPEND UPON LAW. — The effects of payment must be determined at the time it was made and the rights acquired by the payor should not be dependent upon, or subject to modifications by, subsequent unilateral acts or omissions of the debtor. The question whether the payments were beneficial or not to the debtor, depends upon the law, not upon his will.

Sixto de la Costa for the petitioner.
Zacarias Gutierrez Lora for the respondent Jesus de Anduiza.

DECISION

CONCEPCION, J.:

This is an appeal by certiorari, taken by the Rehabilitation Finance Corporation, hereinafter referred to as the Bank, from a decision of the Court of Appeals. The pertinent facts are set forth in said decision, from which we quote:

> "On October 31, 1941, Jesus de Anduiza and Quintana Cano executed the following promissory note —
>
> ₱13,800.00 *Legaspi, Albay, October* 11, 1941
>
> On or before October 31, 1951 for value received, I/we, jointly and severally, promise to pay the AGRICULTURAL AND INDUSTRIAL BANK, or order, at its office at Manila or Agency at Legaspi, Albay, Philippines, the sum of THIRTEEN THOUSAND EIGHT HUNDRED PESOS (₱13,800.00), Philippine currency, with interest at the rate of six per centum (6%), per annum, from the date hereof until paid. Payments of the principal and the corresponding interest are to be made in ten (10 yrs.) equal Annual installments of ₱1,874.98 each in accordance with the following schedule of amortizations:
>
> x x x x x
>
> All unpaid installments shall bear interest at the rate of six per centum (6%), per annum.
>
> (Sgd.) QUINTANA CANO (Sgd.) JESUS DE ANDUIZA
> Mortgagor Mortgagor"
>
> (Exhibit "C")

Mortgagors Anduiza and Cano failed to pay the yearly amortizations that fall due on October 31, 1942 and 1943. As plaintiff Estelito Madrid, who was at the outbreak of the last war the manager of the branch office of the National Abaca and other Fiber Corporation in Sorsogon, and who temporarily lived in the house of Jesus de Anduiza in said province during the Japanese occupation, learned of the latter's failure to pay the aforesaid amortizations due the creditor Agricultural and Industrial Bank, he went to its central office in Manila on October, 1944, and offered to pay the indebtedness of Jesus de Anduiza. Accordingly, he paid on October 23, 1944, ₱7,374.83 for the principal, and ₱2,265.17 for the interest, or a total of ₱10,000.00 (Exh. 'A'), thereby leaving a balance of ₱6,425.17 which was likewise paid on October 30th of the same year (Exh. 'B').

Alleging that defendant Jesus de Anduiza has failed to pay the plaintiff in the amount of ₱16,425.17 inspite of demands therefore, and that defendant Agricuultural and Industrial Bank (now R.F.C.) refused to cancel the mortgage executed by said Anduiza, Estelito Madrid instituted the present action on July 3, 1948, in the Court of First Instance of Manila, praying for judgment (a) declaring as paid the indebtedness amounting to ₱16,425.17 of Jesus de Anduiza to the Agricultural and Industrial Bank; (b) ordering the Agricultural and Industrial Bank (now R.F.C.) to release the properties mortgaged to it and to execute the corresponding cancellation of the mortgage; (c) condemning defendant Jesus de Anduiza to pay plaintiff the amount of ₱16,425.17, with legal interest from the filing of the complaint until completely paid, declaring such obligation a preferred lien over Anduiza's properties which plaintiff freed from the mortgage, and sentencing the defendants to pay the plaintiff the sum of ₱2,000.00 as damages and the costs, without prejudice to conceding him other remedies just and equitable.

On July 14, 1948, defendant Agricultural and Industrial Bank (now R.F.C.) filed its answer, alleging that the loan of ₱13,800.00 had not become due and demandable in October, 1944, as the same was payable in ten years at ₱1,874.98 annually; that up to October 30, 1944, plaintiff delivered the total sum of ₱16,425.17 to the Agricultural and Industrial Bank and which accepted the same as deposit pending proof of the existence of Jesus de Anduiza's authority and approval which plaintiff promised to present; that it was agreed that if plaintiff could not prove said authority the deposit will be annulled; and that the Agricultural and Industrial Bank and its successor the Rehabilitation Finance Corporation cannot release the properties mortgaged because defendant Anduiza refused to approve, authorize or recognize said deposit made by plaintiff. It is further averred, as special defense, that the amount of ₱16,425.17, in view of the refusal of defendant Jesus de Anduiza to approve and authorize same for payment of his loan, was declared null and void by Executive Order No. 49 of June 6, 1945; that on June 4, 1948, defendant Anduiza personally came to the office of the Rehabilitation Finance Corporation, apprising it that he did not authorize the plaintiff to pay for his loan with the Agricultural and Industrial Bank; and that on June 4, 1948, he paid the sum of ₱2,000.00 on account of his loan and interest in arrears. Defendant Agricultural and Industrial Bank (now R.F'C.) therefore prayed (1) to dismiss the complaint and to declare plaintiff's deposit in the sum of ₱16,425.17 null and void in accordance with the provisions of Executive Order No. 49, series of 1945; (2) to concede to defendant Agricultural and Industrial Bank such other legal remedies which may be justified in the premises; and (3) to order plaintiff to pay the costs.

Defendant Jesus de Anduiza filed his answer on August 9, 1948, with special defenses and counterclaim, alleging that when plaintiff paid the total amount of ₱16,425.17 to the Agricultural and Industrial Bank his indebtedness thereto was not yet due and demandable; that the payment was made without his knowledge and consent; that the Agricultural and Industrial Bank did not accept the amount of ₱16,425.17 from Estelito Madrid as payment of his loan but as mere deposit to be applied later as payment in the event he would approve the same; that said deposit was declared null and void by Executive Order No. 49 of June 6, 1945; that on June 4, 1948, he personally informed the officials of the Rehabilitation Finance Corporation that he did not authorize the plaintiff to pay the Agricultural and Industrial Bank for his loan; and that on the same date he paid the corporation the sum of ₱2,000.00 on account of his loan and the interest in arrears.

On June 20, 1949, the trial court rendered in favor of the plaintiff a judgment which was set aside later on upon motion of counsel for the Rehabilitation Finance Corporation on June 28th, in which it was alleged that his failure to appear at the hearing on June 9, 1949, was due to a misunderstanding. Consequently, and after defendant corporation had introduced its evidence, the court on August 11, 1949, rendered decision dismissing plaintiff's complaint without pronouncement as to costs.

On or about September 7, 1949, defendant Jesus de Anduiza filed an amended answer which the trial court, upon considering the same as well as his co-defendant's opposition thereto, denied its admission on September 20, 1949. The motion for new trial filed by defendant Anduiza and plaintiff Estelito Madrid was likewise denied for lack of merit on the same date, September 20th. Consequently, plaintiff Estelito Madrid and defendant Jesus de Anduiza brought this case to this Court by way of appeal, x x x." (pp. 1-6, Decision, C.A.)

Upon the foregoing facts, the Court of Appeals rendered the aforementioned decision, the dispositive part of which reads as follows:

"WHEREFORE, the judgment appealed from is hereby reversed, directing the Rehabilitation Finance Corporation, successor in interest of the Agricultural and Industrial Bank, to cancel the mortgage executed by Jesus de Anduiza and Quintana Cano in favor of said bank; and ordering Jesus de Anduiza to pay plaintiff Estelito Madrid the amount of ₱16,425.17 without pronouncement as to costs." (pp. 17-18, idem.)

The Bank assails said decision of the Court of Appeals upon the ground that payments by respondent Estelito Madrid had been made against the express will of Anduiza and over the objection of the Bank; that the latter accepted said payments, subject to the condition that a written instrument, signed by Anduiza, authorizing the same, would be submitted by Madrid, who has not done so; that the payments in question were made by Madrid in the name of Anduiza and, therefore, through misrepresentation and without good faith; that said payments were not beneficial to Anduiza; and that the obligation in question was not fully due and demandable at the time of the payments aforementioned.

At the outset, it should be noted that the makers of the promissory note quoted above promised to pay the obligation evidenced thereby "on or before October 31, 1951." Although the full amount of said obligation was not demandable prior to October 31, 1951, in view of the provision of the note relative to the payment in ten (10) annual installments, it is clear, therefore, that the makers or debtors were entitled to make a complete settlement of the obligation at any time *before* said date.

With reference to the other arguments of petitioner herein, Article 1158 of the Civil Code of Spain, which was in force in the Philippines at the time of the payments under consideration and of the institution of the present case (July 3, 1948), reads:

"Payment may be made by any person, whether he has an interest in the performance of the obligation or not, and whether the payment is known and approved by the debtor or whether he is unaware of it.

"One who makes a payment for the account of another may recover from the debtor the amount of the payment, unless it was made against his express will.

"In the latter case he can recover from the debtor only in so far as the payment has been beneficial to him."

It is clear therefrom that respondent Madrid was entitled to pay the obligation of Anduiza irrespective of the latter's will or that of the Bank, and even over the objection of either or both. Commenting on said Article 1158, Manresa says:

"Si es amplio el principio declarado en el art. 1158 por razón de las personas a que se extiende, no lo es menos por la ausencia de restricciones basadas en la voluntad del deudor. La primera parte de dicho artículo parece limitar la posibilidad del pago por un tercero a los casos en que el deudor conozca y apruebe tal hecho o lo ignore. Pero los dos párrafos siguientes extienden tal posibilidad al caso en que el deudor desapruebe el pago y *aun se oponga* a que lo verifiquen, puesto que determinando la ley los efectos, si bien parciales, limitados, que un pago hecho en tales condiciones puede producir contra el mismo deudor *que a él se opuso*, es claro que al atribuirle tales efectos le atribuye plena eficacia respecto del acreador, que *no esta autorizado para hacer oposicion alguna*.

"Menos duda aún puede ofrecer la validez del pago, conociendolo el deuder y omitiendo expresar su conformidad; hipótesis menos extrema que la anterior, y en la cual puede verse incluso una aprobacion tacita, aprobacion que autoriza, incluso la subrogación misma del tercero, segun veremos al hablar de la novación.

"Tenemos, por tanto, que sea cual fuere la situación en que esté o se coloque el deudor respecto del pago hecho por un tercero, no impide a éste verificarlo con eficacia respecto del acreedor, y aún tambien respecto de aquél mismo, segun se expresa luego.

"La jurisprudencia, confirmando el sentido de la ley, ha venido a declarar también que no es necesario para el pago el concurso del deudor; así vienen a establecerlo la sentencia de 4 de Noviembre de 1897, que ratifica los preceptos contenidos en el art. 1158 y en el siguiente, y la de 5 de Abril de 1913, declarativa de que, siendo el pago de una deuda el medio más directo de extinguir la obligación, acto que mejora la situación del prestatario, puede realizarlo cualquiera *aun contradiciendolo o ignorándolo aquél*. En la jurisprudencia hipotecaria hay una resolución de la Dirección general de los Registros de 22 de Marzo de 1893, muy explícita e importante, en las cual se declara respecto de esta cuestión que 'el pago es un acto jurídico tan *independiente del deudor*, que puede ser firme y valedero hecho por tercera persona que no tenga interés en la obligación, y aún cuando el deudor lo ignore totalmente, segun el art. 1158 del Código civil'; que 'de ese principio legal se deduce que no cabe reputar nulo el pago de una obligación porque falte el consentimiento del deudor, ni menos estimar nula la escritura en que el pago conste, por carecer de la firma de éste'; que 'en ese modo de extinguirse las obligaciones, lo verdaderamente capital es la voluntad del acreedor, y así lo ha entendido el articulo 82 de la ley Hipotecaria, al no exigir para la cancelación de las hipotecas más que el consentimiento de aquel en cuyo favor se hallen constituídas'; y por ultimo, que 'aunque el art. 27 de la ley del Notariado exige bajo pena de nulidad que se firmen las escrituras, se refiere a los que en ellas intervienen en calidad de otorgantes, denominación que en los actos unilaterales cuadra tan sólo al que en virtud de los mismos queda obligado'.

"No ha sido menos explícita y fundada la jurisprudencia en cuanto a declarar que *tampoco el acreedor puede impedir válidamente el pago hecho por un tercero*, declarándose en la sentencia de 4 de Noviembre de 1897, a que antes se hizo referencia, que ni estos preceptos que comentamos, ni los demas de esta

seccion o de otros lugares del Código, aplicables a la materia, 'ni el art. 1161 de la ley Procesal, requieren el consentimiento del acreedor para la eficacia del pago y para la consiguiente subrogación, *porque su derecho, que no va más alla del cumplimiento de las obligaciones, se acaba o extingue con el pago'.* Pudiera creerse que la doctrina de dicha sentencia era opuesta a la de la Dirección, que antes hemos transcrito, y que está reconocía la facultad del acreedor para consentir o impedir el pago; pero *lejos de ser así* no hay contradicción, limitándose dicho Centro directivo a exponer el evidente requisito de que para los efectos del registro no pueden considerarse extinguidos los derechos del acreedor sin que éste intervenga en al pago, pero *esto no excluye que los le pueda imponer la admisión de este contra su voluntad."* (8 Manresa, 4th ed., pp. 242-243; underscoring supplied.)

This is in line with the view of Mucius Scaevola, which is as follows:

"En efecto; *el unico derecho del acreedor en las obligaciones es el de que se le pague.* No puede, por lo tanto, oponerse a que la obligación le sea cumplida por una persona distinta del deudor. Por otra parte, el deudor queda libre de su compromiso desde el momento en que el credito esta satisfecho, puesto que a partir de entonces, nada se debe. Podran, pues, discutirse los efectos del pago hecho por una tercera persona en cuanto a la relacion que de esto se deduzca para lo sucesivo *entre el tercero y el deudor;* pero negar que la deuda queda liberada, desatado el vinculo, perdida en el acreedor la facultad de reclamar e insubsistente sobre el deudor el pago de su compromiso seria de todo punto temerario.

"Lo presumible es que tenga interes en el cumplimiento de la obligación quien trata de sustituirse al deudor en el pago; es natural la defensa de los intereses propios, y poco corriente y poco acostumbrado, que por pura generosidad, se satisfaga la deuda de otros sin algun beneficio por parte del que de estas manera procede. En este sentido, el fiador, que es, si no un deoudor principal, deudor al fin, puesto que ha enlazado sus intereses, con su cuenta y razon, a los de la persona obligada, y se ha comprometido subsidiariamente con ella al pago de lo que se debia, se adelantara muchas veces, por distintos motivos a pagar la deuda, teniendo en ello propio y legitimo beneficio. A parte del interes juridico, motivos particulares de otro orden, que implican un genero cualquiera de provecho, pueden mover tambien el animo de una tercera persona para sustituirse en el lugar del deudor.

"Pero ni siquiera se necesita que esto suceda. *Las doctrinas jurídicas han permitido que haga el pago cualquiera persona,* tenga o no interes en el cumplimiento de la obligación, segun expresamente determina el art. 1158 del Código. Es de suponer el interés, naturalmente, por lo que decimos más arriba; pero la ley se reconoce sin facultades para entrar en este terreno, y obediciendo a las meras consideraciones jurídicas de la satisfacción del compromiso por la entrega de la cosa o prestación del hecho y de la liberación consiguiente del deudor, prescinde del genero de motivos interesados o desinteresados, incluso de mera liberalidad, que hayan pedido producir la determincion de la tercera persona que ofrece al acreedor la realización del compromiso.

"Y no para en esto; sino que el mismo art. 1158 establece que podra hacer el pago cualquiera persona, ya lo conozca o lo apruebe, ya lo ignore el deudor. Anticipándose, además, a la pregunta de lo que sucederá en el caso de que el deudor lo conozca y no lo apruebe, añade a continuación que el que pague por cuenta de otro podra reclamar del deudor lo que hubiese pagado, a no haberlo hecho contra su expresa voluntad. Es lo que se decia en la ya citada *ley de Partidas:* 'aunque el deudor lo supiese *y lo contradijese'.*

"Ahora bien; en algun caso de estos, podrá el acreedor negarse a recibir la deuda? *Yo hemos dicho que no.* Su derecho se reduce en todo caso a pedir y a recibir lo que se le debe. Es indiferente para el la cualidad de la persona que llega a su presencia, poniendo en sus manos el hecho o lo cosa que son debidas. Habra ocasiones en que, por motivos de índole particular, el acreedor se sienta contrariado en recibir la presentación de un tercero. El prestamista, por ejemplo, que crea haberse asegurado el disfrute perpetuo de las rentas de su deudor, se vera amargamente sorprendido con el pago hecho por un tercero, que da al traste de esta manera en un segundo con las risueñas esperanzas de toda la vida. Motivos de este orden, y tambien otras veces algunos mas elevados, impulsaran al acreedor a resistir el pago de lo que se le debe. Sin embargo, el derecho no ha podido tomar en cuenta ninguna de tales consideraciones, con las que se iria en definitiva contra el principio de haber de aceptarse todo aquello que resulte favorable para el deudor. Por lo tanto en caso de resistencia, el tercero que ofrece el pago tendrá derecho a consignor la cosa debida como si fuese el deudor mismo, dando a la consignación cuantos efectos le estan asignados por la ley." (19 Soaevola, pp. 881-883; underscoring supplied.)

The opinion of Sanchez Roman is couched in the following language:

"Los terceros extraños a la obligación pueden pagar, ignorándolo el deudor, sabiéndolo y no contradiciéndolo *o sabiéndolo y contradiciéndolo.* En el primer caso existe una gestion de negocios; en el segundo, un mandato tácito; y en el tercero, se produce una cesión de credito, x x x."

x x x x

"En el caso de pago hecho por un tercero, el acreedor *no* puede negarse a recibirlo, y cualquiera resistencia le constituira en la responsabilidad de la mora accipiendi. Cierto que esta no es regla expresa de ley ni de jurisprudencia, pero es buena doctrina de Derecho cientifico, generalizada entre los escritores, y de la cual dice Goyena, con razon: La ley no puede permitir que el acreedor se obstine maliciosamente en conservar la facultad de atormentar a su deudor, que un hijo no pueda extinguir la obligación de su padre, ni esta la de su hijo o su amigo, o un hombre benefico la de un desgraciado ausente. Y no se diga que el tercero no tiene mas que entregar el dinero al deudor para que haga directamente el pago; pues en el caso de ausencia esto es imposible, y en otras ocasiones la delicadeza frustraria las miras del hombre bienhechor." (4 Sanchez Roman, 259-260; underscoring supplied.)

It may not be amiss to add that, contrary to petitioner's pretense, the payments in question were not made against the objection either of Anduiza or of the Bank. And although, *later on,* the former questioned the validity of the payments, subsequently, he impliedly, but clearly, acquiesced therein, for he joined Madrid in his appeal from the decision of the Court of First Instance of Manila, referred to above. Similarly, the receipts issued by the Bank acknowledging said payments without qualification, belie its alleged objection thereto. The Bank merely demanded a signed statement of Anduiza sanctioning said payments, as a condition precedent, not to its acceptance, which had already been made, but to the execution of the deed of cancellation of the mortgage constituted in favor of said institution.

Needless to say, this condition was null and void, for, as pointed out above, the Bank, as creditor, had no other right than to exact payment, after which the obligation in question, as regards said creditor, and, hence, the latter's status and rights as such, become automatically extinguished.

Two consequences flow from the foregoing, namely:

1) The good or bad faith of the payor is immaterial to the issue before us. Besides, the exercise of a right, vested by law without any qualification, can hardly be legally considered as tainted with bad faith. Again, according to Sanchez Roman "para que el pago hecho por el tercero extinga la obligación, *es preciso que se realice a nombre del deudor."* (4 Sanchez Roman, 260.) Accordingly, the circumstance that payment by Madrid had been effected in the name of Anduiza, upon which the Bank relies in support of its aforesaid allegation of bad faith, does not prove the existence of the latter.

SUPREME COURT HEARS "JUDGES' CASE"

The above photo, a *Journal* exclusive, shows the Supreme Court* during the hearing of the "Judges' case" (*Felicisimo Ocampo, et al. vs. The Secretary of Justice, et al., G. R. No. L-7910*). At issue is the constitutionality of Section 3 of Republic Act No. 1186 which abolished the positions of judges-at-large and cadastral judges. Ten judges-at-large and cadastral judges who were eased out of the judiciary in virtue of this provision alleged violation of the constitutional guarantee of judicial tenure.

Shown standing at the extreme right is former Senator Vicente J. Francisco, chief counsel for the ten judges, as he pleaded the cause of judicial independence and the inviolability of judicial tenure. The former senator contended that the office of judges-at-large and cadastral judges is the exercise of jurisdiction in Courts of First Instance throughout the country. Since, he argued, Republic Act No. 1186 maintained all the Courts of First Instance established under the Judiciary Act of 1948, the office of judges-at-large and cadastral judges still exists and consequently, the ouster of the ten judges amounted to their removal from office, in violation of the constitutional guarantee of tenure of judicial office.

Other lawyers who appeared for the judges were former Ambassador Proceso Sebastian who maintained that Republic Act No. 1186 "virtually convicted the ten judges before the bar of public opinion without due process," and Professor Amado G. Salazar of the Francisco College Law Faculty who stressed the limitations on the power of Congress to abolish judicial offices.

Congressmen Ferdinand Marcos, Diosdado Macapagal and Cornelio Villareal, as *amici curiae*, deplored the political motives which they alleged brought about the enactment of the controversial Act.

On the other hand, Solicitor General Ambrosio Padilla who appeared in behalf of the respondents, upheld the constitutionality of the law, invoking the right of Congress to abolish courts as corollary to its power of creating the same. He argued that the Act in question was intended to put an end to "rigodon de jueces," or the practice of arbitrary assignments of judges from one province to another.

Other members of the bar who argued before the Court were ex-Justice of the Court of Appeals Mariano de la Rosa and Attorneys Mariano Nicomedes and Abelardo Subido.

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* Left to Right: Justice Bautista Angelo, Justice Alex Reyes, Justice Sabino Padilla, Justice Guillermo F. Pablo, Chief Justice Ricardo Paras, Justice Cesar Bengzon, Justice Marcelino Montemayor, Justice Fernando Jugo, Justice Alejo Labrador and Justice J. B. L. Reyes. Not seen in the picture is Justice Roberto Concepcion.

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2) The Bank can not invoke the provision that the payor "may only recover from the debtor insofar as the payment has been beneficial to him," when made against his express will. This is a defense that may be availed of by the debtor, not by the Bank, for its affects solely the rights of the former. At any rate, in order that the rights of the payer may be subject to said limitation, the debtor must oppose the payments before or at the time the same were made, not subsequently thereto.

"Entendemos como evidente, que los preceptos del art. 1158 que comentamos, y las distintas hipótesis que establece, giran sobre la base de que la oposición del deudor al pago ha de mostrarse con anterioridad a la realización de este pues de ser aquélla posterior, no cabe estimar verdadera y eficaz oposición de buena fe, ya que en el caso de que antes hubiera conocido el proyecto de pago, habría en su silencio una aprobación tácita que autorizaría incluso la subrogacion del tercero, y si lo había ignorado antes de realizarse, se estaría en la situacion distinta prevista y regulada en los dos primeros párrafos del articulo 1158 y en el 1159." (8 Manresa, 4th ed., pp. 248-249.)

Indeed, it is only fair that the effects of said payment be determined at the time it was made, and that the rights then acquired by the payor be not dependent upon, or subject to modification by, subsequent unilateral acts or omissions of the debtor. At any rate, the theory that Anduiza had not been benefited by the payments in question is predicated solely upon his original refusal to acknowledge the validity of said payments. Obviously, however, the question whether the same were beneficial or not to Anduiza, depends upon the law, not upon his will. Moreover, if his former enimosity towards Madrid sufficed to negate the beneficial effects of the payments under consideration, the subsequent change of front of Anduiza, would constitute an admission and proof of said beneficial effects.

Being in conformity with law, the decision appealed from is hereby affirmed, therefore, *in toto*.

Paras, Pablo, Bengzon, Montemayor, Reyes, Jugo and *Bautista Angelo, J.J.*, concur.

Mr. Justice Padilla did not take part.

Mr. Justice Labrador did not take part.

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