no necessity for the taking of the deposition. It will simply delay the proceedings. The court will deny or set aside the taking of the deposition and the counsel for the plaintiffs can test the validity of the ruling of the court in the appellate court.

x x x x

As the court stated from the beginning, the court will issue a formal order directing that no deposition will be taken because that will not be necessary. The court finds that such taking of the deposition will lead the parties or the court to no practical result. I will have the order made in due form."

Cojuangco moved for the reconsideration of said order, but his motion was denied.

Section 16, of Rule 18, provides that "after notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, etc." It is clear from this section that the taking of a deposition is discretionary with the trial court. We do not find that the court abused its discretion in ordering that the deposition be not taken, the reasons given by it being plausible and cogent. In certain cases, there may be sufficient grounds for taking the deposition of a party or witness, such as his impending departure from the country, or that certain pertinent facts could not be elicited except by means of a deposition. No such grounds exist in the present case. There is no showing that the respondent is fleeing from the country or that he is in possession of any data which may not be obtained from him at the trial itself, with the same coerceive remedies at the disposal of the petitioner.

As there has been no excess of jurisdiction or abuse of discretion on the part of the respondent court, the remedy of certiorari does not lie; nor may the writ of mandamus be issued, for the reason that this remedy is available only to compel the performance of a mandatory and ministerial act on the part of an officer.

In the case of Frank & Co. vs. Clemente, (44 Phil., 30), it was held that the taking of a deposition rests largely in the sound discretion of the court. Although that decision was rendered under the provisions of the old Code of Civil Procedure (Act No. 190), it is also applicable in the present case, in view of the provisions of section 16 of Rule 18.

In view of the foregoing, the petition is denied with costs against the petitioner. It is so ordered.

Paras, Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes, and *Labrador, J. J.*, concur.
Mr. Justice Bautista Angelo takes no part.

IX

Manuel Lara, et al., Plaintiffs-Appellants, vs. Petronilo del Rosario, Jr., Defendant-Appellee, G. R. No. L-6339, *April* 20, 1954.

1. EMPLOYER AND EMPLOYEE; SECTION 3 OF COMMONWEALTH ACT 444 COMMONLY KNOWN AS THE EIGHT HOUR LABOR LAW CONSTRUED.—The last part of Section 3 of Commonwealth Act 444 provides for extra compensation for overtime work "at the same rate as their *regular wages or salary*, plus at least twenty-five per centum additional," and that section 2 of the same act excludes from the application thereof laborers who preferred to be on *piece work basis*. This connotes that a laborer or employee with no fixed salary, wages or remuneration but receiving as compensation from his employer an uncertain and variable amount depending upon the work done or the result of said work (piece work) irrespective of the amount of time employed, is not covered by the Eight Hour Labor Law and is not entitled to extra compensation should he work in excess of 8 hours a day.

2. IBID; IBID; DRIVER IN TAXI BUSINESS NOT ENTITLED TO OVERTIME COMPENSATION.—A driver in the taxi business of the defendant, like the plaintiffs, in one day could operate his taxi cab eight hours, or less than eight hours or in excess of 8 hours, or even for 24 hours on Saturdays, Sundays and holidays, with no limit or restriction other than his desire, inclination and state of health and physical endurance. He could drive continuously or intermittently, systematically or haphazardly, fast or slow, etc. depending upon his exclusive wish or inclination. One day when he feels strong, active and enthusiastic he works long, continuously, with diligence and industry and makes considerable gross returns and receives much as his 20% commission. Another day when he feels despondent, run down, weak or lazy and wants to rest between trips and works for a less number of hours, his gross returns are less and so is his commission. In other words, his compensation for the day depends upon the result of his work, which in turn depends on the amount of industry, intelligence and experience applied to it, rather than the period of time employed. In short, he has no fixed salary or wages.

3. IBID; IBID; IBID.—In an opinion dated July 1, 1939 (Opinion No. 115) modified by Opinion No. 22, series 1940, dated January 11, 1940, the Secretary of Justice held that chauffeurs of the Manila Yellow Taxicab Co. who "observed in a loose way certain working hours daily," and "the time they report for work as well as the time they leave work was left to their discretion," receiving no fixed salary but only 20% of their gross earnings, may be considered as piece workers and therefore not covered by the provisions of the Eight Hour Labor Law.

4. IBID; IBID; IBID.—"The provisions of this bulletin on *overtime compensation* shall apply to all persons employed in any industry or occupation, whether public or private, with the *exception* of farm laborers, non-agricultural laborers, or employees who are paid on piece work, contract, pakiao, task or *commission basis*, domestic servants and persons in the personal service of another and members of the family of the employer working for him."

Manansala and *Manansala* for appellants.
Ramon L. Resurreccion for appellee.

DECISION

MONTEMAYOR, *J.*:

In 1950 defendant PETRONILO DEL ROSARIO, Jr., owner of twenty-five taxi cabs or cars, operated a taxi business under the name of "WAVAL TAXI." He employed among others three mechanics and 49 chauffeurs or drivers, the latter having worked for periods ranging from 2 to 37 months. On September 4, 1950, with but giving said mechanics and chauffeurs 30 days advance notice, Del Rosario sold his 25 units or cabs to LA MALLORCA, a transportation company, as a result of which, according to the mechanics and chauffeurs abovementioned they lost their jobs because the La Mallorca failed to continue them in their employment. They brought this action against Del Rosario to recover compensation for overtime work rendered beyond eight hours and on Sundays and legal holidays, and one month salary (mesada) provided for in Article 302 of the Code of Commerce because of the faliure of their former employer to give them one month notice. Subsequently, the three mechanics unconditionally withdrew their claims. So, only the 49 drivers remained as plaintiffs. The defendant filed a motion for the dismissal of the complaint on the ground that it stated no cause of action and the trial court for the time being denied the motion saying that it will be considered when the case was heard on the merits. After trial the complaint was dismissed. Plaintiffs appealed from the order of dismissal to the Court of Appeals which Tribunal after finding that only questions of law are involved, certified the case to us.

The parties are agreed that the plaintiffs as chauffeurs received no fixed compensation based on the hours or the period or time that they worked. Rather, they were paid on the commission basis, that is to say, each driver received 20% of the gross returns or earnings from the operation of his taxi cab. Plaintiffs claim that as a rule, each driver operated a taxi 12 hours a day

with gross earnings ranging from ₱20.00 to ₱25.00, receiving therefrom the corresponding 20% share ranging from ₱4.00 to ₱5.00, and that in some cases, especially during Saturdays, Sundays and Holidays when a driver worked 24 hours a day, he grossed from ₱40.00 to ₱50.00, thereby receiving a share of from ₱8.00 to ₱10.00 for the period of twenty-four hours.

The reasons given by the trial court in dismissing the complaint is that the defendant being engaged in the taxi or transportation business which is a public utility, came under the exception provided by the Eight Hour Labor Law (Commonwealth Act No. 444); and because plaintiffs did not work on a salary basis, that is to say, they had no fixed or regular salary or remuneration other than the 20% of their gross earnings, "their situation was therefore practically similar to piece workers and hence, outside the ambit of article 302 of the Code of Commerce."

For purposes of reference we are reproducing the pertinent provisions of the Eight Hour Labor Law, namely, sections 1 to 4.

> "SECTION 1. The legal working day for any person employed by another shall be of not more than eight hours daily. When the work is not continuous, the time during which the laborer is not working and can leave his working place and can rest completely shall not be counted.
>
> "SEC. 2. This Act shall apply to all persons employed in any industry or occupation, whether public or private, with the exception of farm laborers, laborers who prefer to be paid on piece work basis, domestic servants and persons in the personal service of another and members of the family of the employer working for him.
>
> "SEC. 3. Work may be performed beyond eight hours a day in case of actual or impending emergencies caused by serious accidents, fire, flood, typhoon, earthquake, epidemic, or other disaster or calamity in order to prevent loss of life and property or imminent danger to public safety; or in case of urgent work to be performed on the machines, equipment, or installations in order to avoid a serious loss which the employer would otherwise suffer, or some other just cause of a similar nature; but in all such cases the laborers and employees shall be entitled to receive compensation for the overtime work performed at the same rate as their regular wages or salary, plus at least twenty-five per centum additional.
>
> "In case of national emergency the Government is empowered to establish rules and regulations for the operation of the plants and factories and to determine the wages to be paid the laborers.
>
> "SEC. 4. No person, firm, or corporation, business establishment or place or center of labor shall compel an employee or laborer to work during Sundays and legal holidays, unless he is paid an additional sum of at least twenty-five per centum of his regular remuneration: Provided however, That this prohibition shall not apply to public utilities performing some public service such as supplying gas, electricity, power, water, or providing means of transportation or communication."

Under section 4, as a public utility, the defendant could have his chauffeurs work on Sundays and legal holidays without paying them an additional sum of at least 25% of their regular remuneration; but that, with reference only to work performed on Sundays and holidays. If the work done on such days exceeds 8 hours a day, then the Eight Hour Labor Law would operate, provided of course that plaintiffs came under section 2 of the said law. So that the question to be decided here is whether or not plaintiffs are entitled to extra compensation for work performed in excess of 8 hours a day, Sundays and holidays included.

It will be noticed that the last part of Section 3 of Commonwealth Act 444 provides for extra compensation for overtime work "at the same rate as their *regular wages or salary*, plus at least twenty-five per centum additional," and that section 2 of the same act excludes from the application thereof laborers who preferred to be on *piece work basis*. This connotes that a laborer or employee with no fixed salary, wages or remuneration but receiving as compensation from his employer an uncertain and variable amount depending upon the work done or the result of said work (piece work) irrespective of the amount of time employed, is not covered by the Eight Hour Labor Law and is not entitled to extra compensation should he work in excess of 8 hours a day. And this seems to be the condition of employment of the plaintiffs. A driver in the taxi business of the defendant, like the plaintiffs, in one day could operate his taxi cab eight hours, or less than eight hours or in excess of 8 hours, or even for 24 hours on Saturdays, Sundays and holidays, with no limit or restriction other than his desire, inclination and state of health and physical endurance. He could drive continuously or intermittently, systematically or haphazardly, fast or slow, etc. depending upon his exclusive wish or inclination. One day when he feels strong, active and enthusiastic he works long, continuously, with diligence and industry and makes considerable gross returns and receives much as his 20% commission. Another day when he feels despondent, run down, weak or lazy and wants to rest between trips and works for a less number of hours, his gross returns are less and so is his commission. In other words, his compensation for the day depends upon the result of his work, which in turn depends on the amount of industry, intelligence and experience applied to it, rather than the period of time employed. In short, he has no fixed salary or wages. In this we agree with the learned trial court presided by Judge Felicisimo Ocampo which makes the following findings and observations on this point.

> " x x x. As already stated, their earnings were in the form of commission based on the gross receipts of the day. Their participation in most cases depended upon their own industry. So much so that the more hours they stay on the road, the greater the gross returns and the higher their commissions. They have no fixed hours of labor. They can retire at pleasure, they not being paid a fixed salary on the hourly, daily, weekly or monthly basis.
>
> "It results that the working hours of the plaintiffs as taxi drivers were entirely characterized by its irregularity, as distinguished from the specific and regular remuneration predicated on specific and regular hours of work of factors and commercial employees.
>
> "In the case of the plaintiffs, it is the result of their labor, not the labor itself, which determines their commissions. They worked under no compulsion of turning a fixed income for each given day. x x x x."

In an opinion dated July 1, 1939 (Opinion No. 115) modified by Opinion No. 22, series 1940, dated January 11, 1940, the Secretary of Justice held that chauffeurs of the Manila Yellow Taxicab Co. who "observed in a loose way certain working hours daily," and "the time they report for work as well as the time they leave work was left to their discretion," receiving no fixed salary but only 20% of their gross earnings, may be considered as piece workers and therefore not covered by the provisions of the Eight Hour Labor Law.

The Wage Administration Service of the Department of Labor in its INTERPRETATIVE BULLETIN No. 2 dated May 28, 1952, under "Overtime Compensation," in Section 3 thereof entitled COVERAGE, says:

> "The provisions of this bulletin on *overtime compensation* shall apply to all persons employed in any industry or occupation, whether public or private, with the *exception* of farm laborers, non-agricultural laborers, or employees who are paid on piece work, contract, pakiao, task or *commission basis*, domestic servants and persons in the personal service of another and members of the family of the employer working for him."

From all this, to us it is clear that the claim of plaintiffs-appellants for overtime compensation under the Eight Hour Labor Law has no valid support.

As to the month pay (mesada) under Art. 302 of the Code of Commerce, Article 2270 of the new Civil Code (Republic Act 386) appears to have repealed said Article 302 when it repealed the provisions of the Code of Commerce governing Agency. This repeal

took place on August 30, 1950, when the new Civil Code went into effect, that is, one year after its publication in the Official Gazette. The alleged termination of services of the plaintiffs by the defendant took place according to the complaint on September 4, 1950, that is to say, after the repeal of Article 302 which they invoke. Moreover, said Article 302 of the Code of Commerce, assuming that it were still in force, speaks of "salary corresponding to said month," commonly known as "mesada." If the plaintiffs herein had no fixed salary whether by the day, week or the month, then computation of the month's salary payable would be impossible. Article 302 refers to employees receiving a fixed salary. Dr. Arturo M. Tolentino in his book entitled "Commentaries and Jurisprudence on the Commercial Laws of the Philippines," Vol. I. 4th edition, p. 160, says that Article 302 is not applicable to employees without fixed salary. We quote —

> *"Employees not entitled to indemnity.*—This article refers only to those who are engaged under salary basis, and not to those who only receive compensation equivalent to whatever service they may render. (1 Malagarriga 314, citing decision of Argentina Court of Appeals on Commercial Matters.)"

In view of the foregoing, the order appealed from is hereby affirmed, with costs against appellants.

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

In the result.—*Paras*

X

Pedro Calano, Petitioner-Appellant vs. Pedro Cruz, Respondent-Appellee, G. R. No. L-6404, January 12, 1954.

1. ELECTION; PETITION FOR QUO WARRANTO; DISMISSAL THEREOF FOR FAILURE TO STATE SUFFICIENT CAUSE OF ACTION; APPEAL.—In the past we had occasion to rule upon a similar point of law. In the case of Marquez v. Prodigalidad, 46 O. G. Supp. No. 11, p. 264, we held that Section 178 of the Revised Election Code limiting appeals from decisions of Courts of First Instance in election contests over the offices of Provincial Governor, Members of the Provincial Board, City Councilors and City Mayors, did not intend to prohibit or prevent the appeal to the Supreme Court in protests involving purely questions of law, that is to say, that protests involving other offices such as municipal councilor may be appealed provided that only legal questions are involved in the appeal. Consequently, the appeal in the present case involving as it does purely questions of law is proper.

2. ID.; ID.; CONTESTANT CANNOT BE PROCLAIMED ELECTED; OFFICE SHOULD BE DECLARED VACANT.—In the case of Llamoso vs. Ferrer, 47 O. G. No. 2p, p. 727, wherein petitioner Llamoso who claimed to have received the next highest number of votes for the post of Mayor, contested the right of respondent Ferrer to the office for which he was proclaimed elected, on the ground of ineligibility, we held that Section 173 of the Revised Election Code while providing that any registered candidate may contest the right of one elected to any provincial or municipal office on the ground of ineligibility, it does not provide that if the contestee is later declared ineligible, the contestant will be proclaimed elected.

J. R. Nuguid for petitioner-appellant.

Emilio A. Gangcayco for respondent-appellee.

DECISION

MONTEMAYOR, *J.*:

For purposes of the present appeal the following facts, not disputed, may be briefly stated. As a result of the 1951 elections respondent PEDRO CRUZ was proclaimed a councilor-elect in the municipality of Orion, Bataan, by the Municipal Board of Canvassers. Petitioner Pedro Calano filed a complaint or petition for quo warranto under Section 173 of the Revised Election Code (Republic Act No. 180) contesting the right of Cruz to the office on the ground that Cruz was not eligible for the office of municipal councilor. In his prayer petitioner besides asking for other remedies which in law and equity he is entitled to, asked that after declaring null and void the proclamation made by the Municipal Board of Canvasser in November, 1951, to the effect that Cruz was councilor-elect, he (Calano) be declared the councilor elected in respondent's place.

Acting upon a motion to dismiss the petition, the Court of First Instance of Bataan issued an order of December 27, 1951, dismissing the petition for quo warranto on the ground that it was filed out of time, and also because petitioner had no legal capacity to sue as contended by respondent. On appeal to this Court by petitioner from the order of dismissal, in a decision promulgated on May 7, 1952, we held that the petition was filed within the period prescribed by law; and that although the petition might be regarded as somewhat defective for failure to state a sufficient cause of action, said question was not raised in the motion to dismiss because the ground relied upon, namely, that petitioner had no legal capacity to sue, did not refer to the failure to state a sufficient cause of action but rather to minority, insanity, coverture, lack of juridical personality, or any other disqualification of a party. As a result, the order of dismissal was reversed and the case was remanded to the court of origin for further proceedings.

Upon the return of the case to the trial court, respondent again moved for dismissal on the ground that the petition failed to state a sufficient cause of action, presumably relying upon the observation made by us in our decision. Further elaborating on our observation that the petition did not state a sufficient cause of action, we said that paragraph 3 and 8 of the petition which read thus —

> "8. Que el recurrente tenia y tiene derecho a acupar el cargo de concejal de Orion, Bataan, si no habia sido proclamado electo concejal de Orion, Bataan, al aqui recurrido.
>
> "3. Que el recurrente era candidato a concejal del municipio de Orion, Bataan con el Certificado de candidatura debidamente presentado, y registrado asi como tambien fue votado *y elegido* para dicho cargo, en la eleccion del 13 de Noviembre de 1951." (Underscoring ours)

were conclusions of law and not statement of facts.

The trial court sustained the second motion to dismiss in its order of September 30, 1952, on the ground that the petition failed to state a sufficient cause of action. Again petitioner has appealed from that order to this Court.

Appellant urges that the trial court erred not only in not holding that the motion to dismiss was filed out of time but also in declaring that the complaint failed to state a sufficient cause of action. In answer respondent-appellee contends that the appeal should not have been given due course by the trial court because under the law there is no appeal from a decision of a Court of First Instance in protests against the eligibility or election of a municipal councilor, the appeal being limited to election contests involving the offices of Provincial Governor, Members of the Provincial Board, City Councilors and City Mayors, this under Section 178 of the Revised Election Code.

In the past we had occasion to rule upon a similar point of law. In the case of Marquez v. Prodigalidad, 46 O. G. Supp. No. 11, p. 264, we held that Section 178 of the Revised Election Code limiting appeals from decisions of Courts of First Instance in electoin contests over the offices of Provincial Governor, Members of the Provincial Board, City Councilors and City Mayors, did not intend to prohibit or prevent the appeal to the Supreme Court in protests involving purely questions of law, that is to say, that protests involving other offices such as municipal councilor may be appealed provided that only legal questions are involved in the appeal. Consequently, the appeal in the present case involving as it does purely questions of law is proper.

Going to the question of sufficiency of cause of action, it should be stated that our observation when the case came up for the first time on appeal was neither meant nor intended as a rule or doc-