

In case of appeal, the appeal bond is hereby fixed at P500.00."

From the order last above quoted, the plaintiff has appealed to this court.

The judgment involved here requires the plaintiff "to vacate the premises and deliver the possession thereof to the said defendants Alex F. Magtibay and Paulina B. de la Cruz." Under section 8 (d) of Rule 39, if the judgment be for the delivery of the possession of real property, the writ of execution must require the sheriff or other officer to whom it must be directed to deliver the possession of the property, describing it, to the party entitled thereto. This means that the sheriff must dispossess or eject the losing party from the premises and deliver the possession thereof to the winning party. If subsequent to such dispossession or ejection the losing party enters or attempts to enter into or upon the real property, for the purpose of executing acts of ownership or possession, or in any manner disturbs the possession of the person adjudged to be entitled thereto then and only then may the loser be charged with and punished for contempt under paragraph (h) of section 3, Rule 64.

In *United States vs. Ramayrat*, 22 Phil. 183, a similar writ of execution was invoked to punish the defendant for contempt of court. The defendant, who had been adjudged in a civil case to deliver the possession of a certain parcel of land to the plaintiff, manifested to the sheriff in writing that he was not willing "to deliver to Sabino Vayson (the plaintiff) or to the deputy sheriff of this municipality, Cosme Nonoy, the land in my possession, as I have been directed to do by the said sheriff, in order that, in the latter case, he might deliver the same to the aforementioned Vayson, in conformity with the order issued by the justice of the peace of this municipality." In affirming the order of the Court of First Instance acquitting the defendant of contempt, this court, interpreting the provisions of the Code of Civil Procedure from which paragraph (d) of section 8, Rule 39, was taken, held:

"According to these sections, it is exclusively incumbent upon the sheriff to execute, to carry out the mandates of the judgement in question, and, in fact, it was he himself, and he alone, who was ordered by the justice of peace who rendered that judgment, to place the plaintiff, Vayson, in possession of the land. The defendant in this case had nothing to do with that delivery of possession, and, consequently, his statements expressing his refusal or unwillingness to effect the same, are entirely officious and impertinent and therefore could not hinder, and much less prevent, the delivery being made, had the sheriff known how to comply with his duty. It was solely due to the latter's fault, and not to the alleged disobedience of the defendant, that the judgment was not duly executed. For that purpose the sheriff could even have availed himself of the public force, had it been necessary to resort thereto."

In the present case it does not even appear that the plaintiff had been required by the sheriff, and had refused, to vacate the premises described in the writ of execution. All that appears in the return of the sheriff is that he contacted the occupants of the ground floor of the house and explained to them the writ of execution, and that after determining the boundaries as described in the execution he delivered the premises to Mr. Alejandro Magtibay, the son of the winning parties. Who those occupants of the ground floor were, has not been specified. For all we know, they may be strangers to the case.

Appellant cannot be punished for contempt under paragraph (b) of section 3, Rule 64, for disobedience or resistance to the judgment of the trial court because said judgment is not a special judgment enforceable under section 9 of Rule 39, which reads as follows

"Sec. 9. *Writ of execution of special judgment.*—When a judgment requires the performance of any other act than the payment of money, or the sale or delivery of real or personal property, a certified copy of the judgment shall be attached to the writ of execution and may be served by the officer upon the party against whom the same is rendered, or upon any other person required thereby, or by law, to obey the same, and such

party or person may be punished for contempt if he disobeys such judgment."

In other words, when as in this case, the judgment requires the delivery of real property, it must be executed not in accordance with section 9 above quoted but in accordance with paragraph (d) of section 8, Rule 39, and any contempt proceeding arising therefrom must be based on paragraph (h) of section 3, Rule 64, and not on paragraph (b) of the same section in relation to section 9 of Rule 39.

Acquitting appellant of contempt of court, we reverse the order appealed from with costs against the appellees Alex F. Magtibay and Paulina B. de la Cruz.

*Moran, Paras, Bengzon, Tuason, Reyes, Pablo, Padilla, Montemayor, Torres, J.J. concur.*

## XVI

*Pedro P. Villa, Petitioner vs. Fidel Ibañez et al., Respondent, G. R. L-3413, March 20, 1951.*

1. **PLEADING & PRACTICE; EXTRAORDINARY LEGAL REMEDIES; WHEN PETITION FOR CERTIORARI MAY BE CONSIDERED AS ONE FOR PROHIBITION.**—A petition for certiorari which is in reality one for prohibition, may be regarded as a petition for the latter remedy.
2. **ADMINISTRATIVE LAW; APPOINTMENT OF ADDITIONAL COUNSEL TO ASSIST FISCAL.**—Appointments by the Secretary of Justice in virtue of the provisions of section 1686 of the Administrative Code, as amended by section 4 of Commonwealth Act No. 144, were upheld in *Lo Cham vs. Ocampo* (L-831, Nov. 21, 1946), *Canape et al. vs. Jugo et al.* (L-876, Nov. 21, 1946), *People v. Dinglasan* (44 O.G. 458), and *Ko Cam et al. v. Gatmaitan et al.* (L-2856, Mar. 27, 1950). But in those cases, the appointees were officials or employees in one or another of the bureaus or offices under the Department of Justice, and were rightly considered subordinates in the office of the Secretary of Justice within the meaning of section 1686, *ante*. An attorney who is a regular officer or employee in the Department of the Interior, belongs to the class of persons disqualified for appointment to the post of special counsel. The obvious reason is to have appointed only lawyers over whom the Secretary of Justice can exercise exclusive and absolute power of supervision.
3. **CRIMINAL PROCEDURE; JURISDICTION; MOTION TO QUASH.**—The chief of the division of investigation in the office of the City Mayor, was appointed by the Secretary of Justice as special counsel to assist the City Fiscal in the cases of city government officials he had investigated. In pursuance of that appointment, he subscribed, swore to and presented an information charging a criminal offense. The defendant had pleaded to the information before he filed a motion to quash. It is contended that by his plea he waived all objections to the information. *Held:* The contention is correct as far as formal objections to the pleading are concerned. But by clear implication, if not by express provision, of section 10 of Rule 113 of the Rules of Court, and by a long line of uniform decisions, questions of want of jurisdiction may be raised at any stage of the proceedings. Now, the objection to the special counsel's actions goes to the very foundations of jurisdiction. It is a valid information signed by a competent officer which, among other requisites, confers jurisdiction on the court over the person of the accused and the subject matter of the accusation. In consonance with this view, an infirmity of the nature noted in the information can not be cured by silence, acquiescence, or even by express consent.  
*Macario M. Peralta* for petitioner.  
*City Fiscal Eugenio Angeles, Assistant Fiscal of Manila Lorenzo Relova and Abelardo Subido* for respondents.

## DECISION

*TUASON, J.:*  
Attorney Abelardo Subido, chief of the division of investigation

in the office of the Mayor of the City of Manila, was appointed by the then Secretary of Justice, Honorable Ricardo Nepomuceno, as special counsel to assist the City Fiscal of Manila in the cases of city government officials or employees he had investigated; and in pursuance of that appointment, he subscribed, swore to and presented an information against Pedro P. Villa, the present petitioner, for falsification of a payroll of the division of veterinary service, Manila health department. Attorney Subido's authority to file the information was thereafter challenged by the accused but was sustained by His Honor, Judge Fidel Ibañez. Hence this petition for certiorari, which is in reality a petition for prohibition and will be so regarded.

Chief ground of attack, the resolution of which will dispose of the other and to which this opinion will therefore be confined, has to do with Attorney Subido's legal qualifications for the appointment in question under Section 1686 of the Revised Administrative Code, as amended by Section 4 of Commonwealth Act No. 144, which reads as follows:

Sec. 1686. *Additional counsel to assist fiscal*.—The Secretary of Justice may appoint any lawyer, being either a subordinate from his office or a competent person not in the public service, temporarily to assist a fiscal or prosecuting attorney in the discharge of his duties, and with the same authority therein as might be exercised by the Attorney General or Solicitor General.

Appointments by the Secretary of Justice in virtue of the foregoing provisions of the Revised Administrative Code, as amended, were upheld in *Lo Cham vs. Ocampo et al.*, *Canape et al. v. Jugo et al.*, *People v. Dinglasan et al.*, 44 O. G. 458, and *Ko Cam et al. v. Gatmaitan et al.*, G. R. No. L-2856. But in those cases, the appointees were officials or employees in one or another of the bureaus or offices under the Department of Justice, and were rightly considered subordinates in the office of the Secretary of Justice within the meaning of Section 1686, *ante*.

The case at bar does not come within the rationale of the above decisions. Attorney Subido was a regular officer or employee in the Department of Interior, more particularly in the City Mayor's office. For this reason he belongs to the class of persons disqualified for appointment to the post of special counsel.

That to be eligible as special counsel to aid a fiscal the appointee must be either an employee or officer in the Department of Justice is so manifest from a mere reading of Section 1686 of the Revised Administrative Code as to preclude construction. And the limitation of the range of choice in the appointment or designation is not without reason.

The obvious reason is to have appointed only lawyers over whom the Secretary of Justice can exercise exclusive and absolute power of supervision. An appointee from a branch of the Government outside the Department of Justice would owe obedience to, and be subject to orders by, mutually independent superiors having, possibly, antagonistic interests. Referring particularly to the case at hand for illustration, Attorney Subido could be recalled or his time and attention be required elsewhere by the Secretary of Interior or the City Mayor while he was discharging his duties as public prosecutor, and the Secretary of Justice would be helpless to stop such recall or interference. An eventuality or state of affairs so undesirable, not to say detrimental to the public service and specially the administration of justice, the legislature wisely intended to avoid.

The defendant had pleaded to the information before he filed a motion to quash, and it is contended that by his plan he waived all objections to the information. The contention is correct as far as formal objections to the pleading are concerned. But by clear implication if not by express provision of Section 10 of Rule 113 of the Rules of Court, and by a long line of uniform decisions, questions of want of jurisdiction may be raised at any stage of the proceeding. Now, the objection to the respondent's actions goes

to the very foundations of jurisdiction. It is a valid information signed by a competent officer which, among other requisites, confers jurisdiction on the court over the person of the accused and the subject matter of the accusation. In consonance with this view, an infirmity of the nature noted in the information can not be cured by silence, acquiescence, or even by express consent.

The petition will therefore be granted and the respondent Judge ordered to desist from proceeding with Criminal Case No. 11963 upon the information filed by Attorney Abelardo Subido, without costs.

*Moran, Paras, Pablo, Bengzon, Padilla; Reyes; Jugo and Bautista. Montemayor did not take part.*  
*Paras* voted to grant the petition.

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