from that of the agency agreement of 7 November and accepted on 22 November 1946 by the defendant, because in a letter dated 2 January 1947 addressed to the plaintiff, referring to the transaction of 1,000 metric tons of coconut oil emulsion, the defendant says—

> x x x I am doing everything possible to fulfill these 1,000 tons of emulsion, and until such time that we completed this order I do not feel it very sensible on my part to accept more orders. I want to prove to Fortrade, yourself and other people that we deliver our goods. Regarding your commission, it is understood to be 2-1/2% of all prices quoted by me plus 50-50 on over price. (Schedule B.)

In another letter dated 16 January 1947 to the plaintiff, speaking of the same transaction, the defendant says—

> As per our understanding when I was in the States the overprice is subject to any increase in the cost of production. I am not trying to make things difficult for you and I shall give your 2-1/2% commission plus our overprice provided you can give me substantial order in order for me to amortize my loss on this first deal. Unless such could be arranged I shall remit to you for the present your commission upon collection from the bank. (Schedule C.)

In a telegram sent by the defendant to the plaintiff the former says—

> x x x YOUR MONEY PENDING STOP UNDERSTAND YOU AUTHORIZED SOME LOCAL ATTORNEYS AND MY RELATIVES TO INTERVENE YOUR BEHALF. (Schedule D.)

The defendant's claim that the agreement for the sale of 1,000 metric tons of coconut oil emulsion was agreed upon in a document, referring to the letter of 16 October 1946, is again disproved by his letter dated 2 December 1946 to Fortrade Corporation where he says:

> The purpose of this letter is to confirm in final form the *oral agreement* which we have heretofore reached, as between ourselves, during the course of various conversations between us and our respective representatives upon the subject matter of this letter.
>
> It is understood that I am to sell to you, and you are to purchase from me, one thousand (1,000) tons of coconut oil soap emulsion at a price of four hundred dollars ($400.) per metric ton, i.e., 2,204.6 pounds, F.O.B. shipboard, Manila, P.I. (Exhibit S, Special. Underscoring supplied.)

The contention that as the contract was executed in New York, the Court of First Instance of Manila has no jurisdiction over this case, is without merit, because a non-resident may sue a resident in the courts of this country [1] where the defendant may be summoned and his property leviable upon execution in case of a favorable, final and executory judgment. It is a personal action for the collection of a sum of money which the courts of first instance have jurisdiction to try and decide. There is no conflict of laws involved in the case, because it is only a question of enforcing an obligation created by or arising from contract; and unless the enforcement of the contract be against public policy of the forum, it must be enforced.

The plaintiff is entitled to collect ₱7,589.88 for commission and ₱50,000 for one-half of the overprice, or a total of ₱57,589.88, lawful interests thereon from the date of the filing of the complaint, and costs in both instances.

As thus modified the judgment appealed from is affirmed, with costs agains the appellant.

(1) Marshall-Wells Co. vs. Henry W. Elser & Co., 46 Phil. 70; Western Equipment and Supply Co. vs. Reyes, 51 Phil. 115.

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

IV

The Shell Company of P.I., Ltd., Plaintiff-Appellant, vs. E. E. Vaño, as Municipal Treasurer of the Municipality of Cordova, Province of Cebu, Defendant-Appellee, G. R. No. L-6093, February 24, 1954, Padilla J.

PLEADING AND PRACTICE; ACTION FOR REFUND OF MUNICIPAL TAXES; REAL PARTY IN INTEREST. — In an action for refund of municipal taxes claimed to have been paid and collected under an illegal ordinance, the real party in interest is not the municipal treasurer but the municipality concerned that is empowered to sue and be sued.

C. D. Johnston and *A. P. Dean* for appellant.

Provincial Fiscal Jose C. Borromeo and *Assistant Provincial Fiscal Ananias V. Mariabao* for appellee.

DECISION

PADILLA, *J.*:

The Municipal Council of Cordova, province of Cebu, adopted the following ordinances: No. 10, series of 1946, which imposes an annual tax of ₱150 on occupation or the exercise of the privilege of installation manager; No. 9, series of 1947, which imposes an annual tax of ₱40 for local deposits in drums of combustible and inflammable materials and an annual tax of ₱200 for tin can factories; and No. 11, series of 1948, which imposes an annual tax of ₱150 on tin can factories having a maximum annual output capacity of 30,000 tin cans. The Shell Company of P.I. Ltd., a foreign corporation, filed suit for the refund of the taxes paid by it, on the ground that the ordinances imposing such taxes are *ultra vires*. The defendant denies that they are so. The controversy was submitted for judgment upon stipulation of facts which reads as follows:

> Come now the parties in the above-entitled case by their undersigned attorneys and hereby agree to the following stipulation of facts:
>
> 1. That the parties admit the allegations contained in Paragraph 1 of the Amended Complaint referring to residence, personality, and capacity of the parties except the fact that E. E. Vaño is now replaced by F. A. Corbo as Municipal Treasurer of Cordova, Cebu;
>
> 2. That the parties admit the allegations contained in Paragraph 2 of the Amended Complaint. Official Receipts Nos. A-1280606, A-3760742, A-3760852, and A-21030388 are herein marked as Exhibits A, B, C, and D, respectively, for the plaintiff;
>
> 3. That the parties admit that payments made under Exhibits B, C, and D were all *under protest* and plaintiff admits that Exhibit A was *not* paid under protest;
>
> 4. That the parties admit that Official Receipt No. A-1280606 for ₱40.00 and Official Receipt No. A-3760742 for ₱200.00 were collected by the defendant by virtue of Ordinance No. 9, (Secs. E-4 and E-6, respectively) under Resolution No. 31, Series of 1947, enacted December 15, 1947, approved by the Provincial Board of Cebu in its Resolution No. 644, Series of 1948. Copy of said Ordinance No. 9, Series of 1947 is herein marked as Exhibit "E" for the plaintiff, and as Exhibit "1" for the defendant;

5. That the parties admit that Official Receipt No. A-3760852 for ₱150.00 was paid for taxes imposed on Installation Managers, collected by the defendant by virtue of Ordinance No. 10 (Sec. 3, E-12) under Resolution No. 38, series of 1946, approved by the Provincial Board of Cebu in its Resolution No. 1070, Series of 1946. Copy of said Ordinance No. 10, Series of 1946 is marked as Exhibit "F" for the plaintiff, and as Exhibit "2" for the defendant;

6. That the parties admit that Official Receipt No. A-21050388 for ₱5,450.00 was paid by plaintiff and that said amount was collected by defendant by virtue of Ordinance No. 11, Series of 1948 (under Resolution No. 46) enacted August 31, 1948 and approved by the Provincial Board of Cebu in its Resolution No. 115, Series of 1949, and same was approved by the Honorable Secretary of Finance under the provisions of Sec. 4 of Commonwealth Act No. 472. Copy of said Ordinance No. 11, Series of 1948 is herein marked as Exhibit "G" for the plaintiff, and as Exhibit "3" for the defendant. Copy of the approval of the Honorable Secretary of Finance of the same Ordinance is herein marked as Exhibit "4" for the defendant.

WHEREFORE, aside from oral evidence which may be offered by the parties and other points not covered by this stipulation, this case is hereby submitted upon the foregoing agreed facts and record of evidence.

Cebu City, Philippines, January 20, 1950.

THE SHELL CO. OF P.I. LTD.	THE MUNICIPALITY OF CORDOVA
By (Sgd.) L. de C. Blechynden	By (Sgd.) F. A. Corbo
Plaintiff	Defendant
C. D. JOHNSTON & A. P. DEEN	(SGD.) JOSE C. BORROMEO
By (Sgd.) A. P. Deen	Provincial Fiscal
Attys. for the plaintiff	Attorney for the defendant

(Record on Appeal, pp. 15-18.)

The parties reserved the right to introduce parole evidence but no such evidence was submitted by either party. From the judgment holding the ordinances valid and dismissing the complaint the plaintiff has appealed.

It is contended that as the municipal ordinance imposing an annual tax of ₱40 for "minor local deposit in drums of combustible and inflammable materials," and of ₱200 "for tin factory" was adopted under and pursuant to section 2244 of the Revised Administrative Code, which provides that the municipal council in the exercise of regulative authority may require any person engaged in any business or occupation, such as "storing combustible or explosive materials" or "the conducting of any other business of an unwholesome, obnoxious, offensive, or dangerous character," to obtain a permit for which a reasonable fee, in no case to exceed ₱10 per annum, may be charged, the annual tax of ₱40 and ₱200 are unauthorized and illegal. The permit and the fee referred to may be required and charged by the Municipal Council of Cordova in the exercise of its regulative authority, whereas the ordinance which imposes the taxes in question was adopted under and pursuant to the provisions of Com. Act No. 472, which authorizes municipal councils and municipal district councils "to impose municipal license taxes upon persons engaged in any occupation or business, or exercising privileges in the municipality or municipal district, by requiring them to secure licenses at rates fixed by the municipal council or municipal district council," which shall be just and uniform but not "percentage taxes and taxes on specified articles." Likewise, Ordinance No. 10, series of 1946, which imposes an annual tax of ₱150 on "installation manager" comes under the provisions of Com. Act No. 472. But it is claimed that "installation manager" is a designation made by the plaintiff and such designation cannot be deemed to be a "calling" as defined in section 178 of the National Internal Revenue Code (Com. Act No. 466), and that the installation manager employed by the plaintiff is a salaried employee which may not be taxed by the municipal council under the provisions of Com. Act No. 472. This contention is without merit, because even if the installation manager is a salaried employee of the plaintiff, still it is an occupation "and one occupation or line of business does not become exempt by being conducted with some other occupation or business for which such tax has been paid" (1) and the occupation tax must be paid "by each individual engaged in a calling subject thereto." (2) And pursuant to section 179 of the National Internal Revenue Code, "The payment of x x x occupation tax shall not exempt any person from any tax, x x x provided by law or ordinance in places where such x x x occupation is x x x regulated by municipal law, nor shall the payment of any such tax be held to prohibit any municipality from placing a tax upon the same x x x occupation, for local purposes, where the imposition of such tax is authorized by law." It is true, that, according to the stipulation of facts, Ordinance No. 10, series of 1946, was approved by the Provincial Board of Cebu in its Resolution No. 1070, series of 1946, and that it does not appear that it was approved by the Department of Finance, as provided for and required in section 4, paragraph 2, of Com. Act No. 472, the rate of municipal tax being in excess of ₱50 per annum. But as this point on the approval by the Department of Finance was not raised in the court below, it cannot be raised for the first time on appeal. The issue joined by the parties in their pleadings and the point raised by the plaintiff is that the municipal council was not empowered to adopt the ordinance and not that it was not approved by the Department of Finance. The fact that it was not stated in the stipulation of facts justifies the presumption that the ordinance was approved in accordance with law.

The contention that the ordinance is discriminatory and hostile because there is no other person in the locality who exercises such "designation" or occupation is also without merit, because the fact that there is no other person in the locality who exercises such a "designation" or calling does not make the ordinance discriminatory and hostile, inasmuch as it is and will be applicable to any person or firm who exercises such calling or occupation named or designated as "installation manager."

Lastly, Ordinance No. 11, series of 1948, which imposes a municipal tax of ₱150 on tin can factories having a maximum annual output capacity of 30,000 tin cans which, according to the stipulation of facts, was approved by the Provincial Board of Cebu and the Department of Finance, is valid and lawful, because it is neither a percentage tax nor one on specified articles which are the only exceptions provided for in section 1, Com. Act No. 472. Neither does it fall under any of the prohibitions provided for in section 3 of the same Act. Specific taxes enumerated in the National Internal Revenue Code are those that are imposed upon "things manufactured or produced in the Philippines for domestic sale or consumption" and upon "things imported from the United States and foreign countries", such as distilled spirits, domestic denatured alcohol, fermented liquors, products of tobacco, cigars and cigarettes, matches, mechanical lighters, firecrackers, skimmed milk, manufactured oils and other fuels, coal, bunker fuel oil, Diesel fuel oil, cinematographic films, playing cards, saccharine. (3) And it is not a percentage tax because it is tax on business and the maximum annual output capacity is not a percentage, because it is not a share or a tax based on the amount of the proceeds realized out of the sale of the tin cans manufacture therein but on the business of manufacturing tin cans having a maximum annual output capacity of 30,000 tin cans.

In an action for refund of municipal taxes claimed to have

(1) Section 178, National Internal Revenue Code (Com. Act No. 466.)
(2) Supra.
(3) Sections 123 to 148, National Internal Revenue Code (Com. Act No. 466).

been paid and collected under an illegal ordinance, the real party in interest is not the municipal treasurer but the municipality concerned that is empowered to sue and be sued. (4)

The judgment appealed from is affirmed, with costs against the appellant.

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

(4) Tan vs. De la Fuente et al., G. R. No. L-3925, 15 December 1951.

V

Claro Rivera, Rizalina S. Rivera, Lope K. Sarreal y Associated Insurance & Surety Co., Inc., Recurrentes, contra El Hon. Felicisimo Ocampo, Cathay Ceramics, Inc. Y. Jesus L. Uy, Recurridos. G. R. No. L-5968, August, 1953, *Pablo, M.*

1. CIVIL PROCEDURE; INTERPLEADER; MONEY WHICH IS THE SUBJECT-MATTER OF INTERPLEADER DEPOSITED WITH CLERK OF COURT CANNOT BE WITHDRAWN BY SUBSTITUTING IT WITH A SURETY BOND.—Atkins, Kroll and Co. deposited the sum of ₱21,792.49 with the Clerk of Court and asked the court to decide who among the Cathay Ceramics Co., Inc., Lope Sarreal, the Associated Insurance and Surety Co., Rizalina Rivera, Claro Rivera and Jesus Uy, had a right to the said sum. Cathay Ceramics Co. Inc., presented a motion asking the court to withdraw the sum of ₱21,792.49 and to substitute it with a surety. This was opposed by Rizalina Rivera and the Associated Insurance and Surety Co. The Court, however, authorized the Clerk of Court to deliver out of the sum of ₱21,782.49 deposited, the sum of ₱19,800 to Jesus L. Uy and the balance of ₱1,992.49 to the defendant Cathay Ceramics Inc. upon the filing of the Cathay Ceramics Inc. of a surety in the amount of ₱25,000.00, "one of the conditions of which shall be that the surety shall pay to the claimants herein upon the adjudication of their several claims by this court immediately and without the necessity of any further suit in court to enforce collection upon such bond." HELD: There is a great difference between the amount of ₱21,792.49 deposited with the Clerk of Court, disposable at any moment by said clerk upon orders of the court, and a surety of ₱25,000 borrowed to insure a case. The value of the surety is not the amount which can be distributed by the Clerk of Court at any moment that the court orders, because it is not in his possession. In order that the clerk of court may deliver or distribute it, the court has to order first the guarantor to deposit the sum of money with the clerk of court. If the surety company on account of technicality or because there is no fund disposable or on account of other motives does not comply immediately with the order of the court, the claimants are left to wait for the goodwill of the guarantor. How many cases have been brought to the court because the sureties did not comply with the terms of the contract.

2. CIVIL CODE; DEPOSIT; OBLIGATION OF DEPOSITARY.—The depositary, according to the Civil Code may not use the thing deposited without the permission of the depositor (1766 Spanish Civil Code and Art. 1977, Civil Code of the Philippines). As a corollary, the depositary may not dispose of the thing deposited so that others may use it.

MR. JUSTICE TUASON, *dissenting.*

(1) The law does not provide that the subject-matter of interpleader be deposited with the clerk of court. By Section 2 of Rule 14 the bringing of the money or property into court is left to the sound judgment of the judge handling the case. In other jurisdictions it is held that it is not necessary to offer to bring money into court, but only to bring in before other proceedings are taken. (33 C.J. 455). It has also been held that the stake-holder may be made the bailee of the fund pending the litigation. (33 C.J. 451; Wagoner v. Buckley, 13 N.Y.S. 599).

(2) The sole ground of objection to the questioned order by two of the defendants, to wit: "the surety bond can not be an adequate substitute for money" — is, flimsy; and the fears expressed by this court regarding the delays and difficulties of enforcing a bond could easily be overcome by the selection of a solvent surety of good standing and adequate provisions in the undertaking insuring prompt payment when the money was needed. If the court can allow the plaintiff to keep the fund in his possession during the pendency of the suit without obligation to give any security, why can it not make a responsible third party, with good and sufficient bond, the bailee of the money?

(3) It is of interest to note that the remedy by interpleader is an equitable one (33 C.J. 419), and that even in making the final award the court is not necessarily circumscribed by the legal rights of the parties. Thus, "where the court has properly acquired jurisdiction of the cause as between defendants, it is not bound to award the fund or other thing in dispute wholly to him who has the legal title, but may so shape its decree as to do complete equity between the parties." (33 C.J. 467).

Josefino O. Corpus for petitioners.
Benjamin Relova and *S. Emiliano Calma* for respondents.

DECISION

PABLO, *M.:*

En la causa civil No. 17111, titulada Atkins, Kroll & Co., Inc., demandante, contra Cathay Ceramics, Inc., Jose Sarreal, Associated Insurance & Surety Co., Inc., Rizalina S. Rivera, Claro Rivera y Jesus L. Uy, demandados, presentada en 29 de Julio de 1952 en el Juzgado de Primera Instancia de Manila, la demandante pidió que el Juzgado decidiese quién o quiénes, entre los demandados, tienen derecho a la suma de ₱21,792.49 que dicho demandante depositó en la escribania del Juzgado. Esta suma representa el valor de la segunda remesa de rieles de acero vendida a la demandante Atkins, Kroll & Co., Inc. por la Cathay Ceramics, Inc. en virtud de un contrato habido entre ambas en 25 de abril de 1952; y de acuerdo con dicho contrato, la primera remesa se envió a la demandante por la Ceramics, Inc. en 20 de Junio de 1952, con un costo total de ₱25,789.45, y la segunda remesa que monta a ₱21,792.49, se envió en 17 de Julio del mismo año.

Según la demanda, Jesús L. Uy, por medio de su abogado José L. Uy, reclamó derecho preferente sobre el importe de la segunda remesa con exclusión de Rizalina S. Rivera y la Associated Insurance & Surety Co., Inc.; que estos dos recurrentes, a su vez, reclamaron derecho preferente, admitiendo, sin embargo, la Associated Insurance & Surety Co., Inc. que de los ₱21,792.49 debe pagarse antes la reclamación de Rizalina S. Rivera y que el saldo se la pague a ella.

Estas reclamaciones contrarias son las que dieron lugar a que Atkins, Kroll & Co., Inc. se viera obligada a presentar la demanda de *interpleader* y a depositar la suma de ₱21,792.49 en la escribania del juzgado.

En 30 de Julio de 1952, un día después de presentada la demanda, la Cathay Ceramics, Inc. presentó una moción urgente pidiendo que se la permitiera retirar el depósito de ₱21,792.49 para sustituirla con una fianza, señalando el 31 de julio para la vista de la moción, a la que se opusieron Rizalina S. Rivera y la Associated Insurance & Surety Co., Inc. La moción fué vista ante el Hon. Juez Zulueta que entonces presidía temporalmente la Sala 7. a del Juzgado de Primera Instancia de Manila; pero, en vez