The LAWYERS JOURNAL

MANILA, PHILIPPINES

VOLUME XVII | DECEMBER 31, 1952 | NUMBER 12

THE LAWYERS JOURNAL is published monthly by Sen. Vicente J. Francisco, former delegate to the Constitutional Convention, practising attorney and President of the Francisco Law School.

SUBSCRIPTION AND ADVERTISING RATES: Subscription: ₱24.00 a year. Advertising: Full page—105.00; Half page—₱65.00; One-fourth page—₱45.00; One-eight page—₱35.00; One-sixteenth page—₱25.00. Entered as second class mail matter at the Post Office.

EDITORIAL AND BUSINESS OFFICE: 1192 Taft Avenue, Manila. Tel. 5-43-55

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Christmas Messages

Apart from its religious significance, Christmas brings a natural feeling of joy and generosity. Those who enjoy life in material abundance are at least relieved from the regular tension of self-satisty by being in some measure induced by the spirit of the occasion to give even a little to their less fortunate fellow men. The Christian world is thus made to experience a sense of general goodwill.

The members of the Bench and the Bar may well divert their attention from serious and painstaking judicial or legal work, to be able to reflect and meditate upon the chances of utilizing their chosen profession as an effective means for promoting peace and contentment among all men, instead of for creating confusion and misunderstanding. A prosperous and happy nation cannot thrive on litigations.

Merry Christmas and Happy New Year to all.

(Sgd.) RICARDO PARAS
Chief Justice
Supreme Court

I believe that Christmas is not a time to expect new blessings. Rather, it is a time of counting what we have, life, health, and whatever we are privileged to enjoy of earthly goods and happiness. It is a season of giving, not so much of material gifts, as of those of the spirit — forgiveness to our enemies, compassion to the unfortunate, goodwill to all men. In this way we should celebrate Christmas, in a spirit of thanksgiving for what we have, giving of ourselves, not from a sense of obligation, but in imitation of Him whose day it is, who gave Himself because He loved us. "He gives nothing but worthless gold, who gives from a sense of duty."

To all readers of the Lawyers Journal and, in particular, to all members of the profession, a merry Christmas and a happy New Year.

(Sgd.) POMPEYO DIAZ
Presiding Justice
Court of Appeals

I am deeply appreciative of the opportunity afforded me to extend to my colleagues in the law profession, through the pages of the Lawyers Journal, my warmest and sincerest greetings of the season. Perhaps more than to any other group of people, the spirit of Christmas I daresay conveys a truer meaning and purpose to the members of the legal profession.

It is part and parcel of the exercise of our common profession that rivalries and differences of opinion should exist among us. It is likewise undeniable that animosities, grudges and ill-feelings have been created in the desire to win the case for one's client. In the ardor of espousing a case, we are apt to forget the Christian virtues of charity and goodwill to our fellowmen.

I consider it most gratifying, therefore, that the Christmas season should come around regularly every year if but to remind us that above being lawyers we are true Christians enjoined to love one another and to feel ill against nobody. If we could be made to appreciate better and practice the virtues of Christ, there is no denying that the legal profession shall acquire a more honored reputation and thereby assure itself of a healthier respect and admiration by the rest of our fellowmen. Concomitantly, its standards will inevitably be raised to higher levels and make us earn the name of true guardians of law and justice.

I wish you all a Merry Christmas and a Happy New Year.

(Sgd.) OSCAR CASTELO
Secretary of Justice

The publication of the Lawyers Journal is coupled with public interest.

To the bar it is a reminder that law is not static — it progresses with the march of time. It opens for the lawyers an unending vista of the law in its various ramifications and the jurisprudence interpretative of the law. The treatises of renowned authors give ample food for thought for those who, having embraced the noblest of all professions, have evinced a desire to improve both law and jurisprudence.

To us of the bench the Lawyers Journal has been, as today it is, a guidepost pointing to us the course to pursue in the diverse legal matters brought to the courts for resolution. Time and again courts of justice were benefited by publications in the Lawyers Journal on interesting points of law. There is no gainsaying the fact that court decisions there are, published and unpublished, which have made reference to citations from the Lawyers Journal.

The year is about to end. Heavier tasks for the Lawyers Journal are ahead. Let the Season bring to the editors of the Lawyers Journal and to those who unselfishly have dedicated their time and energy and have contributed materials for the publication thereof, the satisfaction that the signal service that they are rendering to the bench, to the bar and to the nation at large will find adequate compensation in the thought that their work is well done.

Senator Vicente J. Francisco the hand that guides the Lawyers Journal, commands the respect and the faith both of the bench and the bar.

To Senator Francisco and the Lawyers Journal the future is a challenge. We hope for their success.

(Sgd.) CONRADO V. SANCHEZ
Acting Executive Judge
Court of First Instance of Manila

Editorial

The Peace and Love of Christmas

And thus, again, Christmas.

The chill of the December air is over the land, the short day is dull and damp, and at dawn it is sometimes cold enough to see your breath. The rice harvest is being gathered, and in the far-off villages, the peasants are still simple enough to celebrate the event with songs and dances which the city folk have long forgotten. From Aparri to Jolo the bright clothes to be worn at midnight mass are being sewn by the women; the men are busy making the colored lanterns that will hang from the windows or around the big *belen* in the town plaza. The air is redolent of chestnuts roasted over charcoal and of the sharp reek of acetylene lamps that light up the fruit stands in the church patio. The new shipyard in Bataan will soon build and service big ships, and a jute factory is busily turning out thousands of jute bags that were formerly brought in and paid for in scarce dollars. There is much to be thankful for on Christmas, 1952.

And yet,—

The rich land is not everywhere fruitful, many farms will yield no harvest this year. The Head of the State, surveying the Bicol penninsula by air, noted the devastation caused by two typhoons coming one after the other and decided not to collect taxes from the Bicolanos this year. In Central Luzon, great tracts of fertile land lie abandoned to cogon, for one cannot raise crops where there is no peace and order. In Manila the stores announce extension of their office hours and the Blue Sunday Law is suspended so that the people can go to the stores to buy their Christmas presents. The crowds that throng the streets look briefly into the glass windows and pass on, searching for something that can be purchased with the Minimum Monthly Wage. In the streets at night, small bands of hopeful boys try to make music with their piping voices, a home-made bamboo flute and a pair of incongruous castanets, but the people remain deaf to their Christmas carols or their mambos, and the windows remain closed. Down in Jolo a band of outlaws which the Army, with its planes and tanks and flame throwers and specially trained police dogs could not capture, finally surrenders and drives a hard bargain. Convicted by a court of law for "rebellion, with multiple murders", the band is pardoned before they even enter the prison gate. Perhaps there will be peace in Jolo this Christmas.

Far away from the Philippines, everywhere in the world, there is "not peace, but a sword." The newly elected American President has just finished a tour of the European battle front and bravely admits that he has no easy solution to the problem. In the middle East, not far from the hills where the shepherds first saw the Star of Betlehem, a conflagration whose brightness may outshine that star, threatens every day. Somewhere in the watery wastes of the Pacific Ocean, on a God forsaken coral reef, the radioactive debris left by the explosion of the first hydrogen bomb lies strewn on the beach, marking the graves of the animal and vegetable life that it has exterminated. And in the United States, the highest court of the land affirmed the death sentence on a man and his wife, convicted of disclosing the secrets of the atomic bomb to another country.

"Glory to God in the highest, and on earth peace to men of good will."

Almost two thousand years later, peace is farther anyway than ever, and men of good will are outdoing each other trying to build the bigger bomb, the faster plane, the more lethal weapon with which to wipe out man from the face of the earth. Will this be the last Christmas in this world?

It will be, at that precise moment that man uses the hydrogen bomb (or any other nuclear fusion bomb) against his neighbor in order to settle a dispute.

It will be, as long as men look on their neighbors as enemies, not as brothers.

It will be as long as they believe that might makes right, and that the end justifies the means.

This may indeed be the last Christmas, if we forget the meaning of the First Christmas. For men who do not have faith in man will ultimately make mankind extinct, and men who do not believe in the miracle of love and faith cannot have any idea of the worth of human life. There is no defense against an atomic bomb, not even another atomic bomb, and those who live by the sword shall die by the sword. Nineteen centuries is a long time, long enough to prove the immutability of certain truths. But man's memory is short and his understanding pathetically simple.

And so, on Christmas day, on Triangle Hill and Sniper Ridge, men will greet each other with bullet and bayonet. In many a farm in Pampanga, and Nueva Ecija, the doors and windows will be closed and barred on Christmas Eve. Along Escolta and Plaza Santa Cruz the neon signs will turn night into day, lighting up the sky for miles around, eyes, even the caves of Intramuros and the *barong-barong* along the esteros. And any day now, Malacanan will put up a Christmas party for the poor, and the First Lady of the land will distribute her gifts with a gracious smile. The big companies will give their faithful employees a month's bonus, and the Social Welfare Administration will send out its field workers to look for the Ten or Hundred Neediest Cases.

Thus, again, Christmas.

Is a Lawyer Bound to Support an Unjust Cause?

by A. S. CUTLER*

The layman's question which has most tormented the lawyer over the years is: "How can you honestly stand up and defend a man you know to be guilty?"

Or, as to civil cases: "How can you defend a case when you know you client is wrong and really owes the money sought?"

At the outset we must remember that in a democratic country even the worst offender is entitled to a legal defender. If a person accused of crime cannot afford a lawyer, the court will assign one to defend him without cost.

Many lawyers however, believe the right to defend means the duty to employ any means, including the presentation of testimony the lawyer knows to be false.

Should the Lawyer Blindly Reflect His Client?

Such an attorney argues the lawyer has no right to judge his client to be guilty or to appraise a civil action by deciding his client is in the wrong. Such a lawyer argues that before one knows a person to be guilty in a criminal matter or wrong in a civil action there must be a judgment of the court to that effect. Judgments are notoriously uncertain when applied to conflicting evidence.

In support of this position, advocates enjoy reciting the following colloquy attributed to Samuel Johnson by his famous biographer, James Boswell:

> BOSWELL: But what do you think of supporting a cause you know to be bad?
>
> JOHNSON: Sir, you do not know it to be good or bad till the judge determines it. You are to state facts clearly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But Sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.
>
> BOSWELL: Why, no, Sir. Everybody knows you are paid you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?
>
> JOHNSON: But, Sir, does not affecting a warmth when for affecting warmth for your client, and it is therefore properly no dissimulation: the moment you come from the Bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the Bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble on his hands when he should walk upon his feet.

It is argued that what a lawyer says is not the expression of his own mind and opinion, but rather that of his client. A lawyer has no right to state his own thoughts. He can only say what his client would have said for himself had he possessed the proper skill to represent himself. Since a client is deemed innocent until proved guilty, a lawyer's knowledge that his client is guilty does not make him so.

As one attorney put it:

> The lawyer is indeed only the mouthpiece and prosecutor of his client, and the underworld, in their characteristically graphic manner, indeed call their lawyers the mouthpiece. It is well to remember that an advocate should never become a litigant, as it were, and must never inject his own thoughts and opinions into a case.

It is asked:

> How can a lawyer, or any person for that matter, know whether a person is guilty before his guilt is established? "To be guilty" under our concepts of due process means to be so adjudged after a trial by a jury or court as due process in the particular case may require. A person charged with crime might be completely deprived of counsel. For all the lawyers in the community might believe him guilty and wash their hands of him.

Again:

> How does such prejudgment of guilt differ from the lynch mob, which is equally so convinced of guilt that it considers a trial an idle ceremony? True, to be strung up by the lynch mob without a trial may be somewhat more embarrassing to the victim than to submit to a trial without counsel, but, if defense counsel plays the important role which lawyers like to think he does, a person charged with crime is indeed in an unhappy position if he has to rely on his own knowledge of the law and wits to counter an experienced prosecutor bent on conviction and whose success is measured by his percentage of convictions.

Another lawyer contends:

> On undertaking a client's cause, he must wipe out the villainy of the defendant with all the resources at his command. Are not the facts that are unfavorable to his client to be left for the prosecution?
>
> If the lawyer may see the better way and approve (not to foster claims that are wrong) the circumstances that compel him, especially in criminal cases, to follow the lesser. Thus the lawyer lives with the maxim: "*Video meliora proboque deteriora sequor*".

Such an attitude we submit entirely overlooks the bifurcated robes of a lawyer. The duty is not simply one which he owes his client. Just as important is the duty which the lawyer owes the court and society.

Great as is his loyalty to the client, even greater is his sacred obligation as an officer of the court. He cannot ethically, and should not by preference, present to the court assertions he knows to be false.

The Canons of Professional Ethics of the American Bar Association are clear, succinct and unambiguous:

> The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.
>
> The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong.
>
> His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

The American Bar Association recommends this oath of admission:

> I will not counsel or maintain any suit or proceeding

* The author is a member of the New York Bar (New York City); this piece is taken from the American Bar Assn. Journal, April 1952.—The Editors.

which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.

It is only when a lawyer really believes his client is innocent that he should undertake to defend him. All our democratic safeguards are thrown about a person accused of a crime so that no innocent man may suffer. Guilty defendants, though they are entitled to be defended sincerely and hopefully, should not be entitled to the presentation of false testimony and insincere statements by counsel.

It is too glibly said a lawyer should not judge his own client and that the court's province would thus be invaded. In more than 90 per cent of all criminal cases a lawyer knows when his client is guilty or not guilty. The facts usually stand out with glaring and startling simplicity.

If a lawyer knows his client to be guilty, it is his duty in such case to set out the extenuating facts and plead for mercy in which the lawyer sincerely believes. In the infrequent number of cases where there is doubt of the client's guilt and the lawyer sincerely believes his client is innocent, he of course should plead his client's cause to the best of his ability.

In civil cases, the area of doubt is undoubtedly considerably greater. At a guess, only one-third the cases presented to a lawyer are pure black or pure white. In only one-third of the cases does the lawyer indubitably know his client is wrong or right. In the other two-thirds gray is the predominant color. It is the duty of the advocate to appraise the client's cause in his favor, after giving due consideration to the facts on the other side. In such a case, it is of course the duty of the advocate to present his client's case to the best of his ability.

Where the lawyer is convinced, after studying the law and the facts, that his client cannot succeed, his duty is to obtain the best settlement he can, fairly and expeditiously.

Every hour of the day, the lawyer is a persuader. His success must be measured by the ability he possesses to make other see situations in the same light that he does.

That does not mean, however, that the lawyer should fool himself. He should not be such a partisan that he blinks at the true facts and views the situation through the rose-colored glasses of hopefulness, partisanship, or his own self-interest.

A lawyer should worship truth and fact. He should unhesitatingly cast out the evil spirits of specious reasoning, of doubtful claims, of incredible or improbable premises.

Truly, the best persuader is one who has first really persuaded himself after a careful analysis of the facts that he is on the right side. Some assert that lawyers must be actors. That is only partially true. An actor can portray abysmal grief or ecstatic happiness without having any such corresponding feeling in his own heart. A young actor can well portray the tragedy of King Lear, though his face is unwringled and unmarred after has makeup is removed

A good actress can portray the anguish of a doting mother over the death of a child, even though the actress herself is a mere girl whose only relationship with children has been with her own sisters and brothers.

The good lawyer cannot make such quick changes as the actor.

The true lawyer can only be persuasive when he honestly believes he is right. Then the able advocate is invincible. His persuasiveness is so powerful that it can pierce through rock and steel. Indeed, it is so strong that it can change the mind of a judge who has already decided to find to the contrary.

Ofttimes a lawyer has argued against his better judgment, has allowed himself to be persuaded against himself. Sometimes too, he has won. Yet, no matter how great the man, the true lawyer cannot dissemble. If he has no confidence in his own facts and in the truth and righteousness of his client's cause, then no matter how hard he tries and how good an actor he may be, his auditors will perceive that he himself does not really believe what he utters. That way lies disaster.

In this search for the ascertainment of the truth, however, the lawyer should not hypnotize himself. Merely because his client retains him for a fee, the lawyer should not permit himself to be overpersuaded.

It has often been suspected that the more gold with which you cross the palm of the fortune-telling gypsy, the better might be the fortune she would predict.

It hardly need be said that lawyers, however, should be above the itinerant and nomadic status of gypsies. Their power to look the facts in the eye should not be affected or weakened merely by the size of the fee involved.

It is to be noted that in this discussion, the lawyer always acts with sincerity and honesty. His partisan position predisposes him to believe in his client's cause. He is not insincere enough, however, to tender facts that he knows to be false or take a position in which he does not believe sincerely.

A lawyer who signs his name to a set of papers, should in effect vouch for the honesty and fairness of his client's cause. Otherwise strike and blackmail suits based upon improper motives would clutter up the court calendars to such an exent that honest and fair causes would be seriously delayed in trial.

It is as much the lawyer's duty to brush off and refuse to participate in cases that are mouldy and can only add destructive fungus growth to the tree of justice, as it is to refuse to assist in the subornation of perjury. A lawyer should strive to do his bit towards pruning and keeping alive the indispensable flower of justice as the gardener tends and nurtures his plants.

All lawyers know everyone is entitled to the best defense he can muster. This does not mean every lawyer must take every case, including those in which he has no belief in his client's contention.. For instance, a well-known public figure, very active at the Bar, refuses to represent alleged bootleggers, counterfeiters or rapists. Should he be censured because of such prejudices?

There are thousands of others at the Bar who could have represented defendants accused of those three crimes, when indeed they were innocent.

The matter of duty and personal preference is not to be confused. A lawyer has the right to represent in civil courts the husband or wife accused of adultery. He does not have to do so unless he sincerely believes that his client is innocent of the offense charged.

Of course, when a lawyer is assigned by the court, he must fulfill his obligation to the court. This does not include, however, presenting false or improper testimony. Nor does it justify dissimulation and insincerity, even where the lawyer is consummating a court order to act in defendant's behalf.

Rather it is the duty of such an advocate to present all the relevant facts and circumstances. If he can show the prosecution is mistaken and his client is innocent, that is his duty. If he knows his client to be guilty, then it is his duty merely to pre-

(Continued on page 676)

The Minimum Wage Law

(REPUBLIC ACT No. 602)

(Continued from the November issue)

(g) If in a particular industry a Wage Board appointed by the Secretary of Labor within one year after the effective date of this Act recommends that a further extension of time before the application of the full statutory minimum is justified in such industry to avoid undue hardship to the industry, the board may recommend and the Secretary may approve an extension not to exceed six months and at a minimum wage not less than the rate provided to take effect on the effective date of this Act.

(h) With respect to piece-work or contract work, on petition of an interested party, the Secretary of Labor shall use all available devices of investigation to determine whether the work is being compensated in compliance with this Act, and shall issue findings and orders in connection therewith.

SECTION 3

MINIMUM WAGE

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Incorporation of statute.

The provisions of this section fixing the minimum measure of the employer's liability to pay for services rendered by an employee must be read into and form a part of every employment contract to which the section applies. *Fletcher v. Grinnell Bros., D. C. Mich. 1946, 64 F. Supp. 778.*

Employer liable notwithstanding belief of non-liability.

The burden on employer to comply with wage provisions of this section cannot be shifted elsewhere notwithstanding that employer believed he was not covered by this section and was subjected to an unanticipated liability and penalty. *Berry v. 34 Irving Place Corporation, D.C.N.Y. 1943, 52 F. Supp. 875.*

Reason for minimum wage of ₱3 outside Manila or environs.

The reason for fixing the minimum wage of ₱3 for industrial workers outside of Manila or its environs is explained by the Chairman of the Committee on Labor, Congressman Espinosa, in the following discussions.

"MR. VELOSO (D). All right. What is the reason of the Committee in fixing at ₱3 the minimum wage for industrial workers outside of Manila or its environs?

"MR. ESPINOSA (P). The reason is predicated upon the generally accepted fact that the cost of living in Manila is higher than the cost of living in the provinces; besides, in Manila there is a conglomeration of many industries and there is plenty of employment, and, naturally, the industries are flourishing in Manila; business in Manila is given better opportunity to flourish.

"MR. VELOSO (D). That is not my question. My question is, why does the Committee recommend ₱3 as the minimum wage in the provinces when we know very well that the actual . . .

"MR. ESPINOSA (P). (Interposing.) That is a compromise.

"MR. VELOSO (D). Wage is only ₱2. Whereas in Manila the actual wage is ₱5 or ₱6 and you are recommending a lesser wage than that, or ₱4? Why is it that the Committee, when it comes to Manila, recommends a minimum that is less than the actual wage, whereas in the provinces the recommendation is above the actual wage?

"MR. ESPINOSA (P). The intention is to cure an existing evil that exists in the country today. In Manila we have militant labor organizations; we have practically almost all the facilities whereby working men can be protected to the extent some industries are even paying higher wages than the statutory minimum, and there is still a strong possibility of giving higher wages than the prevailing wages in Manla. But in the provinces there is no such militant spirit; there are no such militant labor organization; they are still in the process of reaching that goal, and we want to provide them with the adequate assistance they need. It is about time that we do so.

"MR. VELOSO (D). Thank you." *Journal of the House of Representatives, Session of March 17, 1951 (Debates on House Bill No. 1732)*

"Manila or its environs", explained.

"MR. LAUREL. In Section 3 of the proposed measure, it is provided that not less than ₱3 shall be given as wages, if the enterprise is located outside of Manila or its environs. When we use the word "environs" do we have any definite geographical area? What are we to understand by the phrase "Manila or its environs"? Are we to know that by a certain geographical measure? Starting from Plaza Goiti, for instance, how are we to determine what we mean in this measure when we speak of "environs"?

"MR. ESPINOSA (P.). The sense of the Committee, when we took up that word "environs", was that it would cover such municipalities of the province of Rizal that are adjacent to Manila. If we did not specify that particular

delimination it was because there were some fears expressed in the Committee that there may be certain unscrupulous employers who, in order to go around the provisions of this measure, will transfer their place of business to a region adjacent to those municipalities and to the City of Manila, and we thought it wise to leave it to the courts to decide whether such contingency comes within the definition of "environs".

"MR. LAUREL. That is precisely my point. Are we to permit an industrial establishment for instance to go just a foot outside of the confines of Malabon which we might regard to be an environ of the City of Manila to set up its establishment there and then regard that particular place as an environ of the City of Manila?

"MR. ESPINOSA (P.). That is precisely the reason that we placed "environs" instead of making it definitely municipalities adjacent to the City of Manila. We preferred environs because we are giving our courts a chance to decide whether such particular cases, such a situation that you have mentioned, may come within the purview of environs.

"MR. LAUREL. Would it not be better to define the term "environ" in order not to permit abuse, in order not to enable a particular industry or establishment to give not ₱4 but ₱3 to its industrial employees? Would it not be better for us to determine what that phrase means, because it seems to me it is vague, instead of giving its future determine to the agents outside of Congress?

"MR. ESPINOSA (P.). I would appreciate an amendment to clarify that point from the gentleman from Batangas." *Journal of the House of Representatives, Session of March 16, 1951. (Debates on House Bill 1732)*

* * *

"MR. VELOSO (D). On page 3, line 17, the words "Manila or its environs" are used. What does this term "or its environs" include? That is quite vague.

"MR. ESPINOSA (P). "Manila or its environs" was intended to mean those municipalities in the province of Rizal which are adjacent or contiguous to Manila.

"MR. VELOSO (D) San Juan, Rizal, is it included?

"MR. ESPINOSA (P). I am not very certain about the geographical position of the municipalities adjacent to Manila.

"MR. VELOSO (D). What about Caloocan?

"MR. ESPINOSA (P). If it is adjacent to Manila, yes.

"MR. VELOSO (D). What about Olongapo, Zambales, where the cost of living is very high?

"MR. ESPINOSA (D). What about Cavite, where the U.S. Navy is making the cost of living high?

"MR. ESPINOSA (P). That is not included." *Journal of the House of Representatives, Session of March 17, 1951 (Debates on House Bill No. 1732).*

Reason for excluding retail and service enterprises regularly employing not more than five employees.

"MR. VELOSO (D). On the same page, line 23, we find the words "does not regularly employ more than five employees." What is the reason of the Committee in requiring five employees? Why not one only?

"MR. ESPINOSA (P).[1] The reason of the Committee in making it five in the City of Manila is that there are minor repair or service establishments capitalized with only, say ₱20; like the small coffee shops that we see in some remote sections of the city. In those cases, as you know this country is so poor that we have so many small service establishments where people make only a small nominal amount everyday, such undertakings cannot survive the statutory minimum wage as provided in this measure. So it was the sense of the Committee to exclude such service establishments in order to permit them to exist." *Journal of the House of Representatives, Session of March 17, 1951. (Debates on House Bill 1732).*

Meaning of retail establishment.

"Retail establishment" as used in subsection (a) (2) of this section means a business making retail sales. *Walling v. Consumers Co., C. C. A. Ill. 1945, 149 F. 2d 626.*

A "retail establishment" under this section is one that sells goods in small quantities for profit and a manufacturer engaged primarily in the production of goods does not come within the terms of the exemption. *Collins v. Kidd Dairy & Ice Co., C. C. A. tex. 1942, 132 F. 2d 79.*

Meaning of service establishment.

The term "service establishment" within provision of subsection (a) (2) of this section applies to establishments which sell services instead of goods. *New Mexico Public Service Co., v. Engel, C. C. A. N. M. 1944, 145 F. 2d 636.*

The "service establishments" contemplated by subsection (a) (2) of this section creating exemption in favor of certain operators of retail or service establishments must, on the principle "noscitur a sociis," be of the same sort as the "retail" establishment, that is, one selling services to consumers, and the exemption should be limited to those who serve consumers directly. *Guess v. Montague, C. C. A. S. C. 1943, 140 F. 2d 500.*

A "service establishment" within provision of this section means an establishment which has ordinary characteristics of retail establishments except that services instead of goods are sold, and is an establishment the principal activity of which is to furnish service to the consuming public. *Fleming v. A. B. Kirschbaum Co., C. C. A. Pa. 1941, 124 F. 2d 567, affirmed 62 S. Ct. 1116, 316 U. S. 517, 86 L. Ed. 1638.*

Agricultural employer owning twelve hectares or less is not subject to the Minimum Wage Law.

"MR. ABORDO. I am not against the bill, but I just want to be clarified on certain points. Now, coming to the provision of Section 3, especially paragraph (b), referring to employers who operate farm enterprises, do I get from the gentleman from Iloilo that in order that the minimum wage law may be applicable that the employer must own no less than twelves hectares?

"MR. ESPINOSA (P.). In this particular provision

[1] Congressman Espinosa is the Chairman of the House Committee on Labor. Author's note.

we exempt from the operation of the statutory minimum wage employers in agricultural and industrial enterprises who have only twelve hectares.

"MR. ABORDO. So that, in other words, even if the owner of an agricultural enterprise or employer thereof owning twelve hectares is employing during the kaingin season, for example, or during the planting season, more than six or seven men, the fact is that they do not fall under this minimum wage law?

"MR. ESPINOSA (P.). That is right.

"MR. ABORDO. Thank you." *Journal of the House of Representatives, Session of March 16, 1951. (Debates on House Bill No. 1732).*

Domestic servants and tenants are not covered by the law.

PREGUNTAS DEL SEN. FRANCISCO

EL SEN. FRANCISCO. Señor Presidente, para algunas preguntas al ponente.

EL PRESIDENTE. El ponente puede contestar si le place.

EL SEN. TORRES.[1] Con gusto.

EL SEN. FRANCISCO. El título del proyecto dice así: "An act to provide for the establishment of minimum wages for agricultural and other employees, and for the enforcement of the provisions thereof and for other purposes," y el Art. 2, sobre definiciones usadas, párrafo (c) dice: "Employee' includes any individual employed by an employer." ¿Podría decirnos ahora si este proyecto incluye a los domésticos, a la servidumbre en una casa privada?

EL SEN. TORRES. Si trabajan en una casa privada, no están incluídos en este proyecto.

EL SEN. FRANCISCO. ¿Y que dice Vuestra Señoría con respecto a los choferes?

EL SEN. TORRES. Sí estos choferes trabajan en empresas industriales y agrícolas y se dedican a acarrear efectos, están incluídos en el proyecto.

SEN. FRANCISCO. ¿Y si prestan servicio exclusivamente a personas particulares?

EL SEN. TORRES. No están incluídos.

EL SEN. FRANCISCO. Los jardineros, y cocineros, ¿están incluídos?

EL SEN. TORRES. Si trabajan en casas privadas, no sirven más que una familia particular, no están incluídos.

EL SEN. FRANCISCO. Parece que intención del proyecto es excluír a los choferes y a los domesticos que no prestan servicios en las industrias.

EL SEN. TORRES. Así es.

PREGUNTAS DEL SEN. SUMULONG

EL SEN. SUMULONG. Señor Presidente, para algunas preguntas al ponente.

EL PRESIDENTE. El ponente puede contestar, si le place.

EL SEN. TORRES. Con gusto.

EL SEN. SUMULONG. Yo quisiera saber de Vuestra Señoría si los aparceros que trabajan en terrenos de otros están incluídos en este proyecto de ley.

EL SEN. TORRES. No, esos aparceros caen bajo las disposiciones de la Ley de Aparcería.

Senate Journal No. 17, Session of January 5, 1951. (Debates on Senate Bill No. 202).

Laborers hired by tenants are subject to the law.

"MR. CUENCO. Immediately after the last word of the amendment of Congressman Macapagal that was carried out, add a new sub-section (c): "PROVIDED THAT THIS ACT SHALL NOT APPLY TO TENANCY OR CROP-SHARING CONTRACTS COVERED BY EXISTING LAW."

"MR. MACAPAGAL. I move to amend the amendment by deleting the word 'Provided, That.'

"THE SPEAKER. Is there any objection?

"MR. CONFESOR. Objection, Mr. Speaker.

"MR. MACAPAGAL. Does the gentleman from Cebu accept the amendment to the amendment?

"MR. ESPINOSA (P). The amendment is accepted, Mr. Speaker.

"MR. CONFESOR. I withdraw my objection.

"MR. CASES. Mr. Speaker, for a clarification. How would that stand with the viewpoint of the gentleman from Pangasinan that the tenants are employing laborers? Granting that there are 3 hectares under cultivation by a tenant, those 3 hectares cannot be worked by that one tenant alone so he has to hire laborers according to the gentleman from Pangasinan. In that case, those laborers will not be covered by any minimum wage law?

"MR. CUENCO. I refer to persons who are working as tenants; that is, they are compensated with participation in the products.

"MR. CASES. That is true, but there are big tenants occupying a big tract of land and these tenants by necessity will have to employ laborers to help them carry on the work in the farm. Now, will they be free to employ laborers, to keep laborers without the benefit of this law?

"MR. CUENCO. The Committee of which I am a humble member is not called upon to answer for the gentleman from Pangasinan.

"MR. CASES. No; but here is a very good question because even if a tenant can employ a laborer, is he exempted from the provisions of this bill?

"MR. CUENCO. The word "tenancy' and 'crop sharing contract' are words that have legal acceptance in this country.

"MR. CASES. I know but a tenant can also be an employer if he occupies a big tract of land, like a sugarcane planter.

"For example, I get ten hectares of land on the basis of the 30-70. I give the owner of the land 30% and I keep the 70%. But in order to work on these 10 hectares, I have to hire laborers, even 20 or 30 laborers. Now, will these laborers be beyond the protection of this law, if your amendment is inserted?

"MR. CUENCO. In my humble opinion, the question will be this: How will the employee be compensated? Will

[1] Senator Torres was the Chairman of the Senate Committee on Labor. Author's note.

it be through the participation in the products of the land or not? If he has participation, then he is a tenant.

"MR. CASES. If he has a share in the crop or product of the land, he is a tenant. But he may be compelled to employ additional labor in order to work on the land he has leased from the landlord.

"MR. CUENCO. If those workers hired by the tenant do not have participation in the crop but are compensated with a daily wage, then they should be considered as agricultural workers, and therefore, they are covered by this Act.

"MR. CASES. Therefore, the amendment of the gentleman from Cebu is not necessary, if that is the explanation given to it.

"MR. CUENCO. It is necessary.

"MR. CASES. I do not see any connection there.

"MR. CUENCO. It is necessary because the word *'tenancy'* or *'contracto de arrendamiento'* are provided for in different laws.

"MR. CASES. It is unnecessary because that is already provided in the 'tenancy law".

"MR. CUENCO. Well, that is a question of interpretation, and at least my humble self will not presume to give the definition of tenancy.

"MR. CASES. Now, why is it that this law proposes to cover something that has already been covered by the Tenancy Law which we have passed long time ago?

"MR. CUENCO. Yes, because with this amendment of the gentleman from Tarlac and the gentleman from Iloilo and my humble self, the farm workers under tenancy basis will be excluded from this Minimum Wage Law.

"MR CASES. No, it is already covered by previous laws; this is only supplementary.

MR. CUENCO. I will give the floor to the gentleman from Tarlac.

"MR. ROY. I do not think there will be any inconsistency with respect to the rights of tenants in the crop-sharing system if wage shares will be included in this provision here to clarify doubts as to the rights of the tenants to the fruits of his toil when entering into a partnership with the landlord. Now, if a tenant employs laborers, naturally he falls under this provision of the proposed amendment. We have to include this amendment because there is that relation between tenant and landlord. With respect to the laborer receiving wages, because he receives his wages in the form of share of the crop, from the definition of wage here and remuneration, it can be expressed in money and it will be considered as wages under the provision of this law. So, there is really doubt whether the share of the tenants may be considered as wages. Hence the necessity of including them in here; anyway, there is no harm in putting that here.

"MR. CASES. The share of the tenant is a remuneration of his labor, and the meaning of the word *wage* is but a remuneration of his labor.

"MR. ROY. Right.

"MR. CASES. And the gentleman from Tarlac is the author of the Tenancy Law which provided for 70-30 crop sharing.

"MR. ROY. Yes, are you going to include that under the provision of this law now?

"MR. CASES. No more.

"MR. ROY. Precisely, that is the purpose of this amendment.

"MR. CASES. Do you think this law nullifies the tenancy law or supplements it?

"MR. ROY. This supplements the tenancy law with respect to those laborers employed by tenants who are lazy to work on their own farm, so they hire laborers to work. This amendment will clarify the doubt, because it clearly states that such laborers fall under the provisions of this law.

"MR. CASES. So any laborer employed by a tenant is covered by this Act?

"MR. ROY. Yes; that's right.

"THE SPEAKER. Is there any objection on the part of the House? *(After a pause)* The Chair does not hear any. The amendment to the amendment is approved." *Journal of the House of Representatives, Session of March 17, 1951. (Debates on House Bill No. 1732).*

Minimum wage for crew of vessels of Philippine Registry regularly calling at Manila.

"MR. CUENCO. I have another amendment. This is in connection with another section of the Macapagal amendment. I move that after the last word of the Macapagal amendment, the following proviso be inserted, a new sub-section (d) "PROVIDED, FURTHER, THAT THE CREW OF VESSELS OF PHILIPPINE REGISTRY CALLING REGULARLY AT MANILA SHALL BE SUBJECT TO THE MINIMUM WAGE FOR NON-AGRICULTURAL WORKERS IN MANILA, AS PROVIDED FOR IN THIS ACT.'

"MR. ESPINOSA. (P.) I accept the amendment.

"MR. MACAPAGAL. Amendment to the amendment. Delete the words: "Provided, further, That.'

"MR. CUENCO. Accepted.

"THE SPEAKER. Is there any objection to the amendment to the amendment on the part of the House? *(After a pause.)* The Chair does not hear any. Approved.

"MR. CALO. Please restate the amendment.

"MR. CUENCO. That was already approved. Just insert this sub-section 'd). THE CREW OF VESSELS OF PHILIPPINE REGISTRY CALLING REGULARLY AT MANILA SHALL BE SUBJECT TO THE MINIMUM WAGE FOR NON-AGRICULTURAL WORKERS IN MANILA AS PROVIDED FOR IN THIS ACT.'

"MR. CONFESOR. Mr. Speaker, I register my objection to the amendment presented by the gentleman from Cebu. The amendment of the gentleman from Cebu is a reproduction of the last sentence that has been amended already by the amendment which has been presented by the gentleman from Pampanga. And I cannot see any justification for presenting that amendment again, unless the gentleman from Cebu wants to present a motion for the reconsideration of the amendment presented by the gentleman from Pampanga. That particular amendment that the gentleman from Cebu has presented, as I have said, is a reproduction of the part of the bill that

has been substituted by the amendment that has been presented and approved by the House. That has been amended already; that has been taken out from the bill by virtue of the amendment presented by the gentleman from Pampanga. What is the purpose of the gentleman from Cebu in presenting the amendment?

"MR. CUENCO. Mr. Speaker, I am proposing a new subsection after the Macapagal amendment which has been approved. The distinguished Members of this Chamber are aware that the Macapagal amendment has two rates of wages: one for agricultural workers and another for non-agricultural workers. Now, the shipping business is considered as an industry the laborers of which are non-agricultural laborers or industrial laborers. The Macapagal amendment provides a minimum wage of four pesos for Manila and a minimum wage of three pesos on the effectivity of this Act, for places outside of Manila. There are vessels of Philippine registry that have as their home ports any place outside of Manila. For example, take the case of the vessel SS. Don Julio. That vessel has for its home port the port of Iloilo, but that vessel calls regularly at Manila. It is but just for the crew of this vessel that they be given the rate of wage for industrial workers for Manila, that is, four pesos.

"MR. CONFESOR. Do I understand that the crew of this vessel of Philippine registry that calls at Manila should be given a minimum wage for agricultural workers outside of Manila or in Manila?

"MR. CUENCO. My amendment is that these crew of vessels of Philippine registry that have for their home ports outside of Manila but calling regularly at Manila be given wages for industrial workers in Manila. In other words, my amendment improves the lot of these workers.

"MR. CONFESOR. Does the gentleman mean not agricultural wages?

"MR. CUENCO. My amendment is to the effect that these crew should be given a minimum wage for industrial workers in Manila.

"MR. CONFESOR. Mr. Speaker, I withdraw my objection.

"THE SPEAKER. The House will now vote again on the amendment of the gentleman from Cebu as amended. Is there any objection? *(After a pause.)* The Chair does not hear any. Approved." *Journal of the House of Representatives, Session of March 17, 1951. (Debates on House Bill No. 1732).*

Allowance for two meals or more.

"MR. CALO. Mr. Speaker, on page 4, Section 3, subsection (c), I should like to find out from the Committee whether under this sub-section (c) which is still intact, there can be allowance for two meals?

"MR. ESPINOSA (P). Why not?

"MR. CALO. Supposing the laborer is supplied with two meals or more?

"MR. ESPINOSA (P). Yes.

"MR. CALO. I should like to propose this amendment that on line 8, delete the word 'one' before the word 'meal' and add 's' to the word 'meal', so that it would be 'meals'. And then on line 9, between 'centavos' and 'for', insert the words 'per meal'.

"MR. ESPINOSA (P). The Committee accepts the amendment.

"THE SPEAKER. Is there any objection? *(After a pause.)* The Chair does not hear any. The amendment is approved." *Journal of the House of Representatives, Session of March 17, 1951. (Debates on House Bill No. 1732).*

Reason for the provision fixing the amount allowed for meals.

"MR. VELOSO (D). Very good. On page 4, we find that the value of the meal to be furnished by the employer to the employee is only thirty centavos. Does not the gentleman think that that is very small? Why do we not make it fifty centavos, so that the laborer will be given a better meal by the landowner? I think thirty centavos is very miserable.

"MR. ESPINOSA (P.)[1] We placed the amount of thirty centavos as the value of one meal for agricultural employees...

"MR. VELOSO (D). One egg costs thirty centavos.

"MR. ESPINOSA (P).... and forty centavos for non-agricutural employees, because we have in mind not only the existing, actual, current conditions; but also that this will have some permanent effect. All these prevailing high prices are simply caused by temporary conditions. Before the war a thirty centavo meal will entitle you to eat in a first class restaurant, even in Manila. That is the intention of your Committee." *Journal of the House of Representatives, Session of March 17, 1951. (Debates on House Bill No. 1732).*

SEC. 4. **Wage investigation: Appointment of Wage Board.**—(a) The Secretary of Labor shall have the power, and it shall be his duty upon petition of six or more employees in any industry, to cause an investigation to be made of the wages being paid to the employees in such industry and their living conditions, to ascertain if any substantial number of such employees are receiving wages which are less than sufficient to maintain them in health, efficiency and general well-being. If, after such investigation, the Secretary of Labor is of the opinion that any substantial number of such employees are receiving such wages, he shall appoint a Wage-Board to fix a minimum wage for such industry.

(b) A minimum wage to be established under this Act shall be as nearly adequate as is economically feasible to maintain the minimum standard of living necessary for the health, efficiency, and general well-being of employees. In the determination of a minimum wage, the Secretary of Labor and a Wage Board shall, among other retevant factors, consider the following:

(1) The cost of living;

(2) The wages established for work of like or comparable character by collective agreements or arbitration awards;

(3) The wages paid for work of like or comparable character by employers who voluntarily maintain reasonable standard; and

(4) Fair return of the capital invested.

(c) The Secretary of Labor shall make rules and regulations governing the appointment of a Wage Board, its public hearings and mode of procedure, consonant with the requirements of due process of law.

(c) The appointment of Wage Board shall not preclude the Secretary of Labor from subsequently appointing new Wage Board for the same industry.

(e) The Secretary may appoint a Wage Board for any industry, whether it is named in section three of this Act or not.

SECTION 4

WAGE INVESTIGATION: APPOINTMENT OF WAGE BOARD

Several wage boards may be established.
Reason for requiring at least six petitioners.
Minimum wage law involving delegation of legislative power.
Test of a reasonable wage.
"Fair return of the capital invested", explained.
Purpose of provision providing for adoption of regulations governing creation of Wage Board.

Several wage boards established.

"MR. CALO. Now, I should like to proceed. Is it the sense of this bill to establish several wage boards in certain localities where there are several industries?

"MR. ROY. Mr. Speaker, I now yield the floor to the gentleman from Iloilo.

"MR. ESPINOSA (P). It depends upon the presence of various industries in the different regions. It depends upon the existence of industries which will need the assistance of the wage board for the implementation of the provisions of this law.

"MR. CALO. Is it obligatory upon the Department of Labor to establish right away a wage board in every locality?

"MR. ESPINOSA (P). No. The language of the measure provides the powers of the wage board....

"MR. CALO. Upon petition.

"MR. ESPINOSA (P). That is one. And even if there is no petition, it has the power to create the wage board if it finds out that a substantial number of employees are not receiving adequate wages to maintain their efficiency and general well-being, then it becomes mandatory to to create a wage board?

"MR. CALO. So, it is not mandatory?

"MR. ESPINOSA (P.). No; it is not mandatory, but it is within its power." *Journal of the House of Representatives, Session of March 17, 1951. (Debates on House Bill No. 1732.)*

Reason for requiring at least six petitioners.

"MR. VELOSO (D). Now, in Section 4, page 5, line 24, the petition, in order to merit the attention of the Department of Labor should be signed by six or more employees in any industry. Why do we require six, and not only one?

"MR. ESPINOSA (P). The reason is that in retail establishments there are only five employees exempted, or not included in the operation of this law. So we have to require six petitioners, because if we exempt five in retail establishments, to harmonize or to be in consonance with that exception, this must at least to be six because if the number is less than six that cannot harmonize with that particular provision wherein we exempt retail establishments with employees numbering not more than five." *Journal of the House of Representatives Session of March 17, 1951. (Debates on House Bill No. 1732).*

Minimum wage law involving delegation of legislative power.

A minimum wage law under which the wage standard is fixed by an administrative board or commission does not involve an unconstitutional delegation of legislative power. But a statute delegating the power to fix minimum wages, without any standards or limitations, to a part of the concerns engaged in an industry, and compelling the minority to submit thereto, is a legislative delegation of power in its most obnoxious form. *31 Am. Jur., Sec. 503, p. 1081.*

Test of a reasonable wage.

It was held that in determining what is fair and reasonable in fixing a minimum wage, there is no standard more appropriate than the normal needs of the average employee regarded as a human being living in a civilized community. *State. v. Crowe, 130 Ark. 272, 197 SW 4, L.R.A. 1918A 567. Ann. Cas. 1918D 460.*

"Fair return of the capital invested", explained.

"MR. VELOSO (D). What is the meaning of "fair return of the capital invested?"

"MR. ESPINOSA (P). "Fair return of the capital invested" is a necessary safeguard to the management of an enterprise. Naturally, we must admit the premise that people who invest in industries have in their minds the return or profit from their investment. This is not all exclusive; it is only one of the factors to be considered in the determination because if we do not put it there, we might fix the minimum wage in such a way as to disregard the inherent right of an investor to gain from his investment.

"MR. VELOSO (D). What is considered by the Commitee as a fair return of the capital? Is it ten per cent, or twenty per cent, or thirty per cent?

"MR. ESPINOSA (P). From what I know there are established and recognized practices in the evaluation of fair return of capital invested.

"MR. VELOSO (D). No, but I should like to have a categorical answer to this point because, if we do not define that phrase, it will not enlighten the parties concerned. That point is very important here.

"MR. ESPINOSA (P). Yes, I am aware of that.

"MR. VELOSO (D). What is considered by the Committee as a fair return of capital invested?

"MR. ESPINOSA (P). There are many factors involved in determining what is a fair return of the invested capital. The amount of capital invested, the risk involved in the industry, whether the business is new or old, and many other similar matters.

"MR. VELOSO (D). How much profit, on percentage basis, is considered as a fair return of the capital invested?

"MR. ESPINOSA (P). As I said, it depends on the nature of the business.

"MR. VELOSO (D). Can not the gentleman give a definite percentage?

"MR. ESPINOSA (P). That is what I said. Along these lines we have established practices and precedents governing precisely this particular phrase. There are decisions in our Supreme Court, in our Court of Industrial Relations, as well as in the United States, which have a persuasive effect in the determination of such matter." *Journal of the House of Representatives, Session of March 17, 1951. (Debates on House Bill No. 1732).*

Purpose of provision providing for adoption of regulations governing creation of Wage Board.

"MR. VELOSO (D). Again, in the succeeding letter (c), "the Secretary of Labor shall make rules and regulations governing the appointment of a Wage Board and its mode of procedure." Why do you put this provision here, since in the preceding section we have already provided for the constitution of the Wage Board.

"MR. ESPINOSA (P). But it cannot be denied that in the composition and actual operation of the Wage Board there will be matters in which we need to facilitate the work of that body, and the person best qualified to assist in that is the Secretary of Labor. The fact that the Department is in an advantageous position to do, makes it advisable and necessary but ask that Department to assist the Wage Board.

"MR. VELOSO (D). I think that refers to the procedure to be followed in the hearing of cases involving wages but not in the creation of the board, for the creation of the Board is already provided here.

"MR. ESPINOSA (P). Yes, that is provided here and the law will have its way." *Journal of the House of Representatives, Session of March 17, 1951. (Debates on House Bill No. 1732).*

SEC. 5. **Wage Board; Powers and duties: Recommendation.**—(a) A Wage Board appointed under the provisions of this Act shall be composed of a member representing the public who shall act as chairman of the Board, two representatives of employees in the industry, and two representatives of employers in the same industry. The representatives of the employees and employers shall be selected from nominations submitted by employees and employers, or organizations thereof, in such industry. Three members of a Wage Board shall constitute a *quorum* and its recommendations shall require a vote of not less than a majority of all its members. The members of a Wage Board shall not be entitled to compensations except to *per diems* not exceeding seven pesos for each day of actual attendance and shall be reimbursed for all necessary travelling expenses incurred in the performance of their duties. The chairman, if a government employee, shall not be entitled to any *per diem.*

(b) The Secretary of Labor shall present to a Wage Board all the evidence and information in his possession relating to the wages in the industry for which the Wage Board was appointed and all other information which he deems relevant to the establishment of a minimum wage for such industry and shall cause to be brought before the Board any witness when he deems material. A Wage Board may summon other witnesses or call upon the Secretary to furnish additional information to aid in its deliberations.

(c) Within thirty days of its organization, a Wage Board shall submit to the Secretary of Labor its recommendations as to a minimum wage to be paid by employers in the industry or for the various branches of the industry considered.

The Wage Board shall not recommend for any agricultural or non-agricultural industry a minimum wage of less than the prevailing wage obtaining on the effective date of this Act, and in no case less than the minimum wage rates set in section three of this Act. These wages may include minimum wages varying with localities, if in the judgment of the Board conditions make such local differentiation proper and necessary to effectuate the purpose of this Act and such differentiation does not give an undue competitive advantage to any locality; and may include terms and conditions relating to part-time employment and suitable treatment of other cases or classes of cases which, because of the nature and character of the employment, in the judgment of the Board, justify special treatment, including, in the case of persons employed as industrial homeworkers, the highest minimum rate which is economically feasible and which will not result in substantial curtailment of employment opportunities for such employees, and which shall not be less than seventy-five per cent of the minimum wage rates established in three of this Act. Home industries covered by this Act shall include apparel, embroidery, other needle trades, shoes, weaving, basketry and other handicrafts. The Secretary may add specific home industries to the coverage of this Act by regulation, when he deems it necessary to further the purposes of this Act. If the report of the Wage Board is not submitted within thirty days, the Secretary of Labor may appoint a new Wage Board.

(To be continued)

MORRIS LELAND, Appellant,
v.
STATE OF OREGON

SUMMARY OF DECISION

Oregon criminal law provides that "morbid propensity" to commit a crime is no defense. It also casts upon a defendant the burden of proving his defense of insanity "beyond a reasonable doubt." At defendant's trial for murder in the first degree, the court instructed the jury in accordance with these statutory rules, but also charged that the state had the burden of proving beyond a reasonable doubt every element of the crime, including premeditation, deliberation, malice, and intent. Defendant's conviction was affirmed by the Oregon Supreme Court. He raised due process objections.

In an opinion by Clark, J., seven members of the United States Supreme Court held that due process was not violated either by the state's casting upon the defendant the burden of proving insanity "beyond a reasonable doubt" or by its choosing "the right and wrong" test rather than the "irresistible impulse" test of insanity.

Frankfurter and Black, JJ., dissented on the ground that due process was violated by the state's requiring the defendant to prove his insanity "beyond a reasonable doubt."

HEADNOTES

Constitutional Law—due process—burden of proof as to accused's insanity.

1. A state statute which casts upon a defendant, including one charged with murder in the first degree, the burden of proving his defense of insanity "beyond a reasonable doubt" does not violate due process, where, under other statutory requirements and the trial court's instructions to the jury in accordance therewith, the state has the burden of proving every element of the crime charged beyond a reasonable doubt, including, in the case of first degree murder, premeditation, deliberation, malice, and intent.

Constitutional Law—due process—criminal law—practice adopted by many states.

2. The fact that in the administration of criminal justice a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of the nation as to be ranked as fundamental.

Constitutional Law—due process—criminal procedure.

3. The criminal procedure of a state does not violate the Fourteenth Amendment because another method may seem fairer or wiser or give a surer promise of protection to a defendant.

Appeal and Error; Constitutional Law—due process—deference to judgment of state court.

4. The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of merely personal judgment. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.

Trial—instructions as to burden of proof—accused's insanity.

5. Instructions charging the jury at a trial in a state court for murder in the first degree that the state has the burden of proof of guilt, and of all the necessary elements of guilt and that the defendant should be found not guilty if the jury found his mental condition to be so diseased that he could formulate no plan, design, or intent to kill in cool blood, coupled with instructions, given in accordance with the pertinent statute, that the jurors were to consider separately the issue of legal sanity per se and that on that issue the defendant had the burden of proving his insanity beyond a reasonable doubt, are not subject to the objection that they might have confused the jury as to the distinction between the state's burden of proving premeditation and the other elements of the charge on one hand and defendant's burden of proving insanity on the other.

Constitutional Law—due process—"morbid propensity" to commit crime.

6. Due process is not violated by a state statute providing that a "morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor."

Constitutional Law—due process—accused's insanity—"right and wrong" test.

7. Due process does not require a state to eliminate the "right and wrong" test of insanity and to adopt the "irresistible impulse" test.

Constitutional Law—due process—defendant's confession—availability to defense counsel before trial.

8. A trial court's refusal to require the district attorney to make defendant's confession of crime available to his counsel before trial is not contrary to due process, where the confession was produced in court five days before defendant rested his case, and, in addition, the trial judge offered further time both for defense counsel and expert witnesses to study the confession; and this is particularly so where no assignment of error was made on that score in defendant's motion for a new trial.

POINTS FROM SEPARATE OPINION

Constitutional Law—due process—government's burden of proof in criminal case.

9. The government's duty to establish a defendant's guilt beyond a reasonable doubt is a requirement of due process in the procedural content of the term. [Per Frankfurter and Black, JJ.]

Constitutional Law—due process—insanity of accused.

10. Without violating due process, a state may require that the defense of "insanity" be specially pleaded, or that he on whose behalf the claim of insanity is made should have the burden of showing enough to overcome the assumption and presumption that normally a man knows what he is about and is therefore responsible for what he does, that the issue be separately tried, or that a standing disinterested expert agency advise court and jury. [Per Frankfurter and Black, JJ.]

[No. 176.]

Argued January 29, 1952. Decided June 9, 1952.

Appeal by defendant from a judgment of the Supreme Court of Oregon affirming a conviction of murder in the Circuit Court of Multnomah County. Affirmed.

Thomas H. Ryan, of Portland, Oregon, argued the cause for appellant.

J. Raymond Carskadon and Charles Eugene Raymond, both of Portland, Oregon, argued the cause for appellee.

Mr. Justice Clark delivered the opinion of the Court.

Appellant was charged with murder in the first degree. He pleaded not guilty and gave notice of his intention to prove insanity. Upon trial in the Circuit Court of Multnomah County, Oregon, he

was found guilty by a jury. In accordance with the jury's decision not to recommend life imprisonment, appellant received a sentence of death. The Supreme Court of Oregon affirmed. 190 Or 598, 227 P2d 785. The case is here on appeal. 28 USC § 1257 (2).

Oregon statutes required appellant to prove his insanity beyond a reasonable doubt and made "a morbid propensity" no defense.[1] The principal questions in this appeal are raised by appellant's contentions that these statute deprive him of his life and liberty without due process of law as guaranteed by the Fourteenth Amendment.

The facts of the crime were revealed by appellant's confessions, as corroborated by other evidence. He killed a fifteen-year old girl by striking her over the head several times with a steel bar and stabbing her with a hunting knife. Upon being arrested five days later for the theft of an automobile, he asked to talk with a homicide officer, voluntarily confessed the murder, and directed the police to the scene of the crime, where he pointed out the location of the body. On the same day, he signed a full confession and, at his own request, made another in his own handwriting. After his indictment, counsel were appointed to represent him. They have done so with diligence in carrying his case through three courts.

One of the Oregon statutes in question provides:

"When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt . . ."[2]

Headnote 1

Appellant urges that this statute in effect requires a defendant pleading insanity to establish his innocence by disproving beyond a reasonable doubt elements of the crime necessary to verdict of guilty, and that the statute is therefore violative of that due process of law secured by the Fourteenth Amendment. To determine the merit of this challenge, the statute must be viewed in its relation to other relevant Oregon law and in its place in the trial of this case.

In conformity with the applicable state law,[3] the trial judge instructed the jury that, although appellant was charged with murder in the first degree, they might determine that he had committed a lesser crime included in that charged. They were further instructed that his plea of not guilty put in issue every material and necessary element of the lesser degrees of homicide, as well as of the offense charged in the indictment. The jury could have returned any of five verdicts:[4] (1) guilty of murder in the first degree, if they found beyond a reasonable doubt that appellant did the killing purposely and with deliberate and premeditated malice; (2) guilty of murder in the second degree, if they found beyond a reasonable doubt that appellant did the killing purposely and maliciously, but without deliberation and premeditation; (3) guilty of manslaughter, if they found beyond a reasonable doubt that appellant did the killing without malice or deliberation, but upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible; (4) not guilty, if, after a careful consideration of all the evidence, there remained in their minds a reasonable doubt as to the existence of any of the necessary elements of each degree of homicide; and (5) not guilty by reason of insanity, if they found beyond a reasonable doubt that appellant was insane at the time of the offense charged. A finding of insanity would have freed appellant from responsibility for any of the possible offenses. The verdict which the jury determined—guilty of first degree murder—required the agreement of all twelve jurors; a verdict of not guilty by reason of insanity would have required the concurrence of only ten members of the panel.[5]

It is apparent that the jury might have found appellant to have been mentally incapable of the premeditation and deliberation required to support a first degree murder verdict or of the intent necessary to find him guilty of either first or second degree murder, and yet not have found him to have been legally insane. Although a plea of insanity was made, the prosecution was required to prove beyond a reasonable doubt every element of the crime charged, including, in the case of first degree murder, premeditation, deliberation, malice and intent.[6] The trial court repeatedly emphasized this requirement in its charge to the jury.[7] Moreover, the judge directed the jury as follows:

"I instruct you that the evidence adduced during this trial to prove defendant's insanity shall be considered and weighed by you, with all other evidence, whether or not you find defendant insane, in regard to the ability of the defendant to premeditate, form a purpose, to deliberate, act wilfully; and act maliciously; and if you find the defendant lacking in such ability, the defendant cannot have committed the crime of murder in the first degree.

"I instruct you that should you find the defendant's mental condition to be so affected or diseased to the end that the defendant could formulate no plan, design, or intent to kill in cool blood, the defendant has not committed the crime of murder in the first degree."[8]

These and other instructions, and the charge as a whole, make it clear that the burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State. As the jury was told, this burden did not shift, but rested upon the State throughout the trial, just as, according to the instructions, appellant was presumed to be innocent until the jury was convinced beyond a reasonable doubt that he was guilty.[9] The jurors were to consider separately the issue of legal sanity per se—an issue set apart from the crime charged, to be introduced by a special plea and decided by a special verdict.[10] On this issue appellant had the burden of proof under the statute in question here.

1 Or Comp Laws, 1940, §§ 26-929, 23-122.

2 Id, § 26-929.

3 Id, §§ 26-947, 26-948.

4 Six possible verdicts were listed in the instructions, guilty of murder in the first degree being divided into two verdicts: with, and without, recommendation of life imprisonment as the penalty. Since the jury in this case did not recommend that punishment, the death sentence was automatically invoked under Oregon law. Id, § 23 431.

5 The agreement of ten jurors would also have been sufficient for a verdict of not guilty, a verdict of guilty of second degree murder, or a verdict of guilty of manslaughter, R 333-334.

6 Id, §§ 23-401, 23-414, 26-933; of State v. Butchek, 121 Or 141, 253 P 367, 254 P 805 (1927).

7 R 321, 323, 324, 330, 331, 332.

8 R 330. Again:

"I instruct you that to constitute murder in the first degree, it is necessary that the State prove beyond a reasonable doubt, and to your moral certainty, that the defendant's design or plan to take life was formed and matured in cool blood and not hastily upon the occasion.

"I instruct you that in determining whether or not the defendant acted purposely and with premeditated and deliberated malice, it is your duty to take into consideration defendant's mental condition and all factors relating thereto, and that even though you may not find him legally insane, if, in fact, his mentality was impaired, that evidence bears upon these factors, and it is your duty to consider this evidence along with all the other evidence in the case." R 332.

9 R 321, 324.

10 Or Comp Laws, 1940, § 26-846 (requiring notice of purpose to show insanity as defense); id, § 26-955 (providing for verdict of not guilty by reason of insanity and consequent commitment to asylum by judge). After defining legal insanity, the trial court instructed the jury:

"In this case, evidence has been introduced relating to the mental capacity and condition of the defendant . . . at the time (the girl) is alleged to have been killed, and if you are satisfied beyond a reasonable doubt that the defendant killed her in the manner alleged in the indictment, or within the lesser degrees included therein, then you are to consider the mental capacity of the defendant at the time the homicide is alleged to have been committed." R 327 (emphasis supplied).

By this statute, originally enacted in 1864,[11] Oregon adopted the prevailing doctrine of the time—that, since most men are sane, a defendant must prove his insanity to avoid responsibility for his acts. That was the rule announced in 1843 in the leading English decision in M'Naghten's Case:

"[T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing . . ."[12]

This remains the English view today.[13] In most of the nineteenth-century American cases, also, the defendant was required to "clearly" prove insanity,[14] and that was probably the rule followed in most states in 1895,[15] when Davis v. United States was decided. In that case this Court, speaking through Mr. Justice Harlan, announced the rule for federal prosecutions to be that an accused is "entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime."[16] In reaching that conclusion, the Court observed:

"The views we have expressed are supported by many adjudications that are entitled to high respect. If such were not the fact, we might have felt obliged to accept the general doctrine announced in some of the above cases; for it is desirable that there be uniformity of rule in the administration of the criminal law in governments whose Constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty."[17]

The decision obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts. As such, the rule is not in question here.

Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion.[18] While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof. In each instance, in order to establish insanity as a complete defense to the charges preferred, the accused must prove that insanity.

Headnote 2 The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 US 97, 105, 78 L ed 674, 677, 54 S Ct 330, 90 ALR 575 (1934).

Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights. In Davis v. United States (US) supra, we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But "[i]ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking

Headnote 3 to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts, supra (291 US at 105, 78 L ed 677, 54 S Ct 330, 90 ALR 575). "The judicial judgment in

Headnote 4 applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review." Mr. Justice Frankfurter, concurring in Malinski v. New York, 324 US 401, 417, 89 L ed 1029, 1039, 65 S Ct 781 (1945). We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.

Nothing said in Tot v. United States, 319 US 463, 87 L ed 1519, 63 S Ct 1241 (1943), suggests a different conclusion. That decision struck down a specific presumption created by congressional enactment. This Court found that the fact thus required to be presumed had no rational connection with the fact which, when proven, set the presumption in operation, and that the statute resulted in a presumption of guilt based only upon proof of a fact neither criminal in itself nor an element of the crime charged. We have seen that, here, Oregon required the prosecutor to prove beyond a reasonable doubt every element of the offense charged. Only on the issue of insanity was an absolute bar to the charge was the burden placed upon appellant. In all English-speaking courts, the accused is obliged to introduce proof if he would overcome the presumption of sanity.[19]

It is contended that the instruction may have confused the jury as to the distinction between the State's burden of proving premeditation and the other elements of

Headnote 5 the charge and appellant's burden of proving insanity. We think the charge to the jury was as clear as instructions to juries ordinarily are or reasonably can be, and, with respect to the State's burden of proof upon all the elements of the crime, the charge was particularly emphatic. Juries have for centuries made the basic decisions between guilt and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think that to condemn the operation of this system here would be to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so.

Much we have said applies also to appellant's contention that due process is violated by the Oregon statute providing that a "morbid propensity to commit prohibited

Headnote 6 acts, existing in the mind of a person, who is not shown to have been incapable of knowing the

11 Deady's Gen. Laws Or 1845-1864, Code of Crim Proc, § 204.

12 10 Clark & F 200, 210, 8 Eng Reprint 718 (HL, 1843).

13 Stephen, Digest of the Criminal Law (9th ed, Sturge, 1950), 6; of Sodeman v. Rex (Eng) [1936] WN 189 (PC); see Woolmington v. Director of Public Prosecutions (Eng) [1935] AC 462, 475—HL.

14 Wellhofen, Insanity as a Defense in Criminal Law (1933), 151-155. "Clear proof" was sometimes interpreted to mean proof beyond a reasonable doubt, e. g., State v. De Rance, 34 La Ann 186, 44 Am Rep 426 (1882), and sometimes to mean proof by a preponderance of the evidence, e.g., Hurst v. State, 40 Tex Crim 378, 383, 50 SW 719 (1899).

15 See Wharton, Criminal Evidence (9th ed 1884) §§ 336-340.

16 160 US 469, 484, 40 L ed 499, 504, 16 S Ct 353 (1895); see Hotema v United States, 186 US 413, 46 L ed 1225, 22 S Ct 895 (1902); Matheson v. United States, 227 US 540, 57 L ed 631, 33 S Ct 355 (1913).

17 Id, 160 US at 488, 40 L ed 506, 16 S Ct 353.

18 Wellhofen lists twelve states as requiring proof by a preponderance of the evidence, four as requiring proof "to the satisfaction of the jury," two which combine these formulae, one where by statute the defense must be "clearly proved to the reasonable satisfaction of the jury," one where it has been held that the jury must "believe" the defendant insane, and one where the quantum of proof has not been stated by the court of last resort, but which appears to follow the preponderance rule. Wellhofen, Insanity as a Defense in Criminal Law (1933), 148-151, 172-200. Twenty-two states, including Oregon, are mentioned as holding that the accused has the burden of proving insanity, at least by a preponderance of the evidence, in 9 Wigmore, Evidence (3d ed 1940 and Supp 1951) § 2501.

19 Wellhofen, Insanity as a Defense in Criminal Law (1933), 161; 9 Wigmore, Evidence (3d ed 1940) § 2501.

wrongfulness of such acts, forms no defense to a prosecution therefor."[20] That statute amounts to no more than a legislative adoption of the "right and wrong" test of legal insanity in preference to the "irresistible impulse" test.[21] Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions.[22] The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's Case,[23] but the progress of science has not reached a point where its learning would compel us to

Headnote 7 require the states to eliminate the right and wrong test from their criminal law.[24] Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility.[25] This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not "implicit in the concept of ordered liberty."[26]

Appellant also contends that the trial court's refusal to require the district attorney to make one of appellant's confessions available to his counsel before trial was contrary to due process. We think there is no substance in this argument. This conclusion is buttressed by the absence of any

Headnote 8 assignment of error on this ground in appellant's motion for a new trial. Compare Avery v. Alabama, 308 US 444, 452, 84 L ed 377, 382, 60 S Ct 321 (1940). While it may be the better practice for the prosecution thus to exhibit a confession, failure to do so in this case in no way denied appellant a fair trial. The record shows that the confession was produced in court five days before appellant rested his case. There was ample time both for counsel and expert witnesses to study the confession. In addition the trial judge offered further time for that purpose but it was refused. There is no indication in the record that appellant was prejudiced by the inability of his counsel to acquire earlier access to the confession.

Affirmed.

Mr. Justice *Frankfurter*, joined by Mr. Justice *Black*, dissenting.

However much conditions may have improved since 1905, William H. [later Mr. Chief Justice] Taft expressed his disturbing conviction "that the administration of the criminal law in all the States of the Union (there may be one or two exceptions) is a disgrace to our civilization" (Taft, "The Administration of Criminal Law," 15 Yale LJ 1, 11), no informed person can be other than unhappy about the serious defects of present-day American criminal justice. It is not unthinkable that failure to bring the guilty to book for a heinous crime which deeply stirs popular sentiment may lead the legislature of a State, in one of those emotional storms which on occasion sweep over our people, to enact that thereafter an indictment for murder, following attempted rape, should be presumptive proof of guilt and cast upon the defendant the burden of proving beyond a reasonable doubt that he did not do the killing. Can there be any doubt that such a statute would go beyond the freedom of the States, under the Due Process Clause of the Fourteenth Amendment, to fashion their own penal codes and their own procedures for enforcing them? Why is that so? Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to esablish his guilt beyond a reasonable

Headnote 9 doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of "due process." Accordingly there can be no doubt, I repeat, that a State cannot cast upon an accused the duty of establishing beyond a reasonable doubt that his was not the act which caused the death of another.

But a muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder.

The tests by which such culpability may be determined are varying and conflicting. One does not have to echo the scepticism uttered by Brian, C. J., in the fifteenth century, that "the devil himself knoweth not the mind of men" to appreciate how vast a darkness still envelopes man's understanding of man's mind. Sanity and insanity are concepts of incertitude. They are given varying and conflicting content at the same time and from time to time by specialists in the field. Naturally there has always been conflict between the psychological views absorbed by law and the contradictory views of students of mental health at a particular time. At this stage of scientific knowledge it would be indefensible to impose upon the States, through the due process of law which they must accord before depriving a person of life or liberty, one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test, no matter how backward it may be in the light of the best scientific canons. Inevitably, the legal tests for determining the mental state on which criminal culpability is to be based are in strong conflict in our forty-eight States. But when a State has chosen its theory for testing culpability, it is a deprivation of life without due process to send a man to his doom if he cannot prove beyond a reasonable doubt that the physical events of homicide did not constitute murder because under the State's theory he was incapable of acting culpably.

This does not preclude States from utilizing common sense regarding mental irresponsibility for acts resulting in homicide—from taking for granted that most men are sane and responsible for their acts. That a man's act is not his, because he is devoid of that mental state which begets culpability, is so exceptional a situation that the law has a right to devise an exceptional procedure regarding it. Accordingly, States may provide various ways for dealing with this exceptional situation

Headnote 10 by requiring, for instance, that the defense of "insanity" be specially pleaded, or that he on whose behalf the claim of insanity is made should have the burden of showing enough to overcome the assumption and presumption that normally a man knows what he is about and is therefore responsible for what he does, or that the issue be separately tried, or that a standing disinterested expert agency advise court and jury, or that these and other devices be used in combination. The laws of the forty-eight States present the greatest diversity in relieving the prosecution from proving affirmatively that a man is sane in the way it must prove affirmatively that the defendant is the man who pulled the trigger or struck the blow. Such legis-

20 Or Comp Laws, 1940 § 23-122.

21 State v. Garver, 190 Or 291, 225 P2d 771 (1950); State v. Wallace, 170 Or 60, 131 P2d 222 (1942); State v. Hassing, 60 Or 81, 118 P 195 (1911).

22 Weihofen, Insanity as a Defense in Criminal Law (1933), 15, 64-68, 109-147.

23 10 Clark & F 200, 8 Eng Reprint 718 (HL, 1843).

24 Compare Fisher v. United States, 328 US 463, 475, 476, 90 L ed 1382, 1389, 1390, 66 S Ct 1318, 166 ALR 1176 (1946).

25 See Holloway v. United States, 80 App DC 3, 148 F2d 665 (1945); Glueck, Mental Disorder & the Criminal Law (1925); Hall, Mental Disease and Criminal Responsibility, 45 Col L Rev 677 (1945); Keedy, Insanity and Criminal Responsibility, 30 Harv L Rev 535, 724 (1917).

26 Palko v. Connecticut, 302 US 319, 325, 82 L ed 288, 292, 58 S Ct 149 (1937).

lation makes no inroad upon the basic principle that the State must prove guilt, not the defendant, innocence, and prove it to the satisfaction of a jury beyond a reasonable doubt.

For some unrecorded reason, Oregon is the only one of the forty-eight States that has made inroads upon that principle by requiring the accused to prove beyond a reasonable doubt the absence of one of the essential elements for the commission of murder, namely, culpability for his muscular contraction. Like every other State, Oregon presupposes that an insane person cannot be made to pay with his life for a homicide,though for the public good he may of course be put beyond doing further harm. Unlike every other State, however, Oregon says that the accused person must satisfy a jury beyond a reasonable doubt that, being incapable of committing murder, he has not committed murder.

Such has been the law of Oregon since 1864. That year the Code of Criminal Procedure defined murder in the conventional way, but it also provided: "When the commission of the act charged as a crime is proven, and the defence sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt .. .. .." Gen Laws Or 1845-1864, pp. 441 et seq, Sections 502, 204. The latter section, through various revisions, is the law of Oregon today and was applied in the conviction under review.

Whatever tentative and intermediate steps experience makes permissible for aiding the State in establishing the ultimate issues in a prosecution for crime, the State cannot be relieved, on a final showdown, from proving its accusation. To prove the accusation it must prove each of the items which in combination constitute the offense. And it must make such proof beyond a reasonable doubt. This duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability. The only exception is that very limited class of cases variously characterized as mala prohibita or public torts or enforcement of regulatory measures. See United States v. Dotterweich, 320 US 277, 88 L ed 48, 64 S Ct 134; Morissette v. United States, 342 US 246, ante, 180, 72 S Ct 240. Murder is not a malum prohibitum or a public tort or the object of regulatory legislation. To suggest that the legal oddity by which Oregon imposes upon the accused the burden of proving beyond reasonable doubt that he had the mind with which to commit murder is a mere difference in the measure of proof, is to obliterate the distinction between civil and criminal law.

It is suggested that the jury were charged not merely in conformity with this requirement of Oregon law but also in various general terms, as to the duty of the State to prove every element of the crime charged beyond a reasonable doubt, including in the case of first degree murder, "premeditation, deliberation, malice and intent." Be it so. The short of the matter is that the Oregon Supreme Court sustained the conviction on the ground that the Oregon statute "cast upon the defendant the burden of proving the defense of insanity beyond a reasonable doubt." State v. Leland, 190 Or 598, 638, 227 Prd 785. To suggest, as is suggested by this Court but not by the State court, that, although the jury was compelled to act upon this requirement, the statute does not offend the Due Process Clause because the trial judge also indulged in a farrago of generalties to the jury about "premeditation, deliberation, malice and intent," is to exact gifts of subtlety that not even judges, let alone juries, possess. See International Harvester Co. v Kentucky, 234 US 216, 224, 225, 58 L ed 1284, 1288, 34 S Ct 853. If the Due Process Clause has any meaning at all, it does not permit life to be put to such hazards.

To deny this mode of dealing with the abuses of insanity plead and with unedifying spectacles of expert testimony, is not to deprive Oregon of the widest possible choice of remedies for circumventing such abuses. The multiform legislation prevailing in the different States evinces the great variety of the experimental methods open to them for dealing with the problems raised by insanity defenses in prosecutions for murder.

To repeat the extreme reluctance with which I find a constitutional barrier to any legislation is not to mouth a threadbare phrase. Especially is deference due to the policy of a State when it deals with local crime, its repression and punishment. There is a gulf, however narrow, between deference to local legislation and complete disregard of the duty of judicial review which has fallen to this Court by virtue of the limits placed by the Fourteenth Amendment upon State action. This duty is not to be escaped, whatever I may think of investing judges with the power which the enforcement of that Amendment involves.

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, et al., Petitioners, v. SIMON L. HOWARD, Sr., and St. Louis-San Francisco Railway Co.

SUMMARY OF DECISION

To avoid a strike, a railroad entered into a collective labor contract with a union, composed exclusively of white trainmen, which provided that train porters should no longer do any work as brakemen, and the effect of which was to compel the railroad to abolish the position of "train porters," therefore occupied by Negroes doing all the work of brakemen, and to fill their jobs with white men. The contracting union did not represent porters, who were represented by another union of their own choosing. A Negro train porter who was given notice by the railroad brought a class action in a federal district court for a decree enjoining the railroad from discontinuing the jobs known as "train porters" and from hiring white brakemen to replace the Negro porters.

In an opinion by *Black, J.*, six members of the Court held that injunctive relief should be granted, taking the view that a bargaining representative who acts by the authority of the Railway Labor Act has the duty to refrain from using its statutory bargaining power so as to abolish the jobs of the colored workers, even though they are in a separate class for representation purposes and are, in fact, represented by another union of their own choosing.

Minton, J., with the concurrence of *Vinson, Ch. J.*, and *Reed, J.*, dissented on the grounds that no applicable federal law prohibited racial discrimination by private parties such as the railroad and the union, and that the case involved a dispute between employees of a carrier as to whether the union was the representative of the train porters, a matter to be resolved by the National Mediation Board, not by the courts.

HEADNOTES

Labor—bargaining representative acting under Railway Labor Act—duty toward colored employees in craft or class not represented by it.

1. The Railway Labor Act imposes on a labor union acting by authority of the statute as the exclusive bargaining agent of brakemen the duty to refrain from using its bargaining power so as o abolish the jobs of colored porters and drive them from the railroads, even though these porters have for many years been treated by the carriers and the union as a separate class for representation purposes and have in fact been represented by another union of their own choosing; and such duty is violated by the negotiation by such a union of a collective labor contract the effect of which is to compel a railroad to abolish the position of "train porters" theretofore occupied by Negroes and to fill their jobs with white brakemen.

Labor—bargaining representative acting under Railway Labor Act—destroying colored workers' jobs.

2. The Railway Labor Act prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers.

Courts—federal jurisdiction—unlawful use of power granted by federal statute.

3. Federal courts can protect those threatened by an unlawful use of power granted by a federal act.

Labor—resort to courts for protection of rights of colored railroad employees.

4. No existing administrative remedy precludes resort to courts for protection of colored railroad employees against obliteration of their rights under the Railway Labor Act by a bargaining agent acting by the authority of the act.

Labor—administrative remedies under Railway Labor Act.

5. No adequate administrative remedy against obliteration of the rights of colored railroad employees under the Railway Labor Act by a bargaining representative acting by the authority of the act can be afforded by the National Railway Adjustment or Mediation Board, where the dispute involves racial discrimination practiced against them and the validity of a collective bargaining contract, not its meaning, and does not hinge on the proper classification of these employees.

Labor—acts enjoinable—racial discrimination by bargaining representative authorized by Railway Labor Act—effect of Norris-La Guardia Act.

6. Notwithstanding the restrictions imposed on the injunctive powers of federal district courts by the Norris-La Guardia Act, such a court has jurisdiction and power to issue necessary injunctive relief against racial discrimination practiced against colored railroad employees by a bargaining representative acting by the authority of the Railway Labor Act, even though they belong to a class or craft represented by another union.

Labor—duties of bargaining representatives acting under Railway Labor Act.

7. Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the right of other workers.

Labor—injunction against racial discrimination by bargaining Constitutional Law—due process—burden of proof as to accused's insanity.

8. A railroad and a union acting as bargaining representative by the authority of the Railway Labor Act should be permanently enjoined from using a collective labor contract or any other similar bargaining choice for ousting colored train porters from their jobs. In fashioning its decree the trial court is free to consider what provisions are necessary to afford these employees full protection from future discriminatory practices of the union, bearing in mind, however, that disputed questions of reclassification of the craft of "train porters" are committed by the Railway Labor Act to the National Mediation Board.

[No. 458.]

Argued and submitted April 22, 1952. Decided June 9, 1952.

On writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review a judgment reversing, in part, a judgment of the United States District Court for the Eastern District of Missouri which dissolved an interlocutory injunction in a suit brought by Negro porters against a railroad nd a labor union and stay dismissal of the cause to afford them an opportunity to exhaust the administrative remedies of the Railway Labor Act. Affirmed.

Charles R. Judge, of Washington, D. C., and *Victor Packman*, of St. Louis, Missouri, argued the cause for respondent, Samuel L. Howard, Sr.

Eugene G. Nahler, James L. Homire, Cornelius H. Skinker, Jr., and *Alvin J. Baumann*, all of St. Louis, Missouri, submitted the cause for respondent, St. Louis-San Francisco R. Co.

Mr. Justice *Black* delivered the opinion of the Court.

This case raises questions concerning the power of courts to protect Negro railroad employees from loss of their jobs under compulsion of a bargaining agreement which, to avoid a strike, the railroad made with an exclusively white man's union. Respondent Simon Howard, a Frisco[1] train employee for nearly forty years, brought this action on behalf of himself and other colored employees similarly situated.

In summary the complaint alleged: Negro employees such as respondent constituted a group called "train porters" although they actually performed all the duties of white "brakemen"; the Brotherhood of Railroad Trainmen, bagaining representative of "brakemen" under the Railway Labor Act,[2] had for years used its influence in an attempt to eliminate Negro trainmen and get their jobs for white men who, unlike colored "train porters," were or could be members of the Brotherhood; on March 7, 1946, the Brotherhood of Railroad Trainmen, bargaining representative the colored "train porters" and fill their jobs with white men who, under the agreement, would do less work but get more pay. The complaint charged that the Brotherhood's "discriminatory action" violated the train porter's rights under the Railway Labor Act and under the Labor Act and under the Constitution; that the agreement was void because against public policy, prejudicial to the public inerest, and designed to deprive Negro trainmen of the right to earn a livelihood because of their race or color. The prayers were that the court adjudge and decree that the contract was void and unenforceable for the reason stated; that the Railroad be "enjoined from discontinuing the jobs known as Train Porters" and "from hiring white Brakemen to replace or displace plaintiff and other Train Porters as planned in accordance with said agreement."

The facts as found by the District Court, affirmed with emphasis by the Court of Appeals, substantially establish the truth of the complaint's material allegations. These facts showed that the Negro train porters had for a great many years served the Railroad with loyalty, integrity and efficiency; that "train porters" do all the work of brakemen;[3] that the Government administrator of railroads during World War I had classified them as brakemen and had required that they be paid just like white brakemen; that when the railroads went back to their owners, they redesignated these colored brakemen as "train porters," "left their duties untouched," and forced them to accept wages far below those of white "brakemen" who were Brotherhood members; that for more than a quarter of a century the Brotherhood and other exclusively white rail unions had continually carried on a program of aggressive hostility to employment of Negros for train, engine and yard service; that the agreement of March 7, 1946, here under attack, provides that train porters shall no longer do any work "generally recognized as brakeman's duties"; that while this agreement did not in express words compel discharge of "train porters," the economic unsoundness of keeping them after transfer of their "brakemen" functions made com-

1 St. Louis-San Francisco Railway Company and its subsidiary St. Louis-San Francisco & Texas Railway Company.

2 44 Stat 577, as amended, 48 Stat 1185, 45 USC §§ 151 et seq.

3 In addition to doing all the work done by ordinary brakemen, train porters have been required to sweep the coaches and assist passengers to get on and off the trains. As the Court of Appeals noted, "These aisle-sweeping and passenger-assisting tasks, however, are simply minor and incidental, occupying only, as the record shows, approximately five per cent of a train porter's time." 191 F2d 442, 444.

plete abolition of the "train porter" group inevitable; that two days after "the Carriers, reluctantly, and as a result of the strike threats" signed the agreement, they notified train porters that "Under this agreement we will, effective April 1, 1946, discontinue all train porter positions." Accordingly, respondent Howard, and others, were personally notified to turn in their switch keys, lanterns, markers and other brakemen's equipment, and notices of job vacancies were posted to be bid in by white brakemen only.

The District Court held that the complaint raised questions which Congress by the Railway Labor Act had made subject to the exclusive jurisdiction of the National Mediaton Board and the National Railroad Adjustment Board. 72 Supp 695. The Court of Appeals reversed this holding.[4] It held that the agreement, as construed and acted upon by the Railroad, was an "attempted predatory appropriation" of the "train porters" jobs, and was to this extent illegal and unenforceable. It therefore ordered that the Railroad must keep the "train porters' as employees; it permitted the Railroad and the Brotherhood to treat the contract as valid on condition that the railroad would recognize the colored "train porters" as members of the craft of "brakemen" and that the Brotherhood would fairly represent them as such. 191 F2d 442. We granted certiorari. 342 US 940, ante, 372, 72 S. Ct 551.

While different in some respects, the basic pattern of racial discrimination in this case is much the same as that we had to consider in Steele v. Louisville & N. R. Co. 323 US 192, 89 L ed 173, 65 S. Ct 226. In this case, as was charged in the Steele Case, a Brotherhood acting as a bargaining agent under the Railway Labor Act has been hostile to Negro employees, has discriminated against them, and has forced the Railroad to make a contract which would help Brotherhood members take over the jobs of the colored "train porters."

There is difference in the circumstances of the two cases, however, which it is contended requires us to deny the judicial remedy here that was accorded in the Steele Case. That difference is this: Steele was admittedly a locomotive fireman although not a member of the Brotherhood of Locomotive Firemen and Enginemen which under the Railway Labor Act was the exclusive bargaining representative of the entire craft of firemen. We held that the language of the Act imposed a duty on the craft bargaining representative to exercise the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against any of them. Failure to exercise this duty was held to give rise to a cause of action under the Act. In this case, unlike the Steele Case, the colored employees have for many years been treated by the carriers and the Brotherhood as a separate class for representation purposes and have in fact been represented by another union of their own choosing. Since the Brotherhood has discriminated against "train porters" instead of minority members of its own "craft," it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. We think this argument is unsound and that the opinion in the Steele Case points to a breach of statutory duty by this Brotherhood.

Headnote 1

As previously noted, these train porters are threatened with loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the Steele Case "discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." Steele v. Louisville & N. R. Co. supra (323 US at 203, 89 L ed 183, 65 S Ct 226), and cases there cited. Cf. Shelley v. Kraemer, 334 US 7, 92 L ed 1161, 68 S Ct 836, 3 ALR 441. The Federal Act thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers. And courts can protect those threatened by such an unlawful use of power granted by a federal act.

Headnote 2

Headnote 3

Here, as in the Steele Case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railway Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum v. Delaware, L. & W. R. Co. 339 US 239, 94 L ed 795, 70 S Ct 577. This dispute, involves the validity of the contract, not its meaning Nor does the dispute hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board under our holding in Switchmen's Union of N. A. v. National Mediation Board, 320 US 297, 88 L ed 61, 64 S Ct 95. For the contention here with which we agree is that the racial discrimination practiced is unlawful, whether colored employees are classified as "train porters," "brakemen," or something else. Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders no withstanding the provisions of the Norris-LaGuardia Act.[5] We need add nothing to what was said about the inapplicability of that Act in the Steele Case and in Graham v. Brotherhood of Loc. Firemen & Enginemen, 338 US 232, 239, 240, 94 L ed 22, 29, 70 S Ct 14.

Headnote 4

Headnote 5

Headnote 6

Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the right of other workers. We agree with the Court of Appeals that the District Court had jurisdiction to protect these workers from the racial discrimination practiced against them. On demand, the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs. In fashioning its decree the District Court is left free to consider what provisions are necessary to afford these employees full protection from future discriminatory practices of the Brotherhood. However, in drawing its decree, the District Court must bear in mind that disputed questions of reclassification of the craft of "train porters" are committed by the Railway Labor Act to the National Mediation Board. Switchmen's Union of N. A. National Mediation Board (US) supra.

Headnote 7

Headnote 8

The judgment of the Court of Appeals reversing that of the District Court is affirmed, and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

It is so ordered.

Mr. Justice *Minton*, with whom The *Chief Justice* and Mr. Justice *Reed* join, dissenting.

The right of the Brotherhood to represent railroad employees existed before the Railway Labor Act was passed. The Act simply protects the employees when this right of representation is exercised. If a labor organization is designated by a majority

4 One part of the District Court's order was affirmed. The Court of Appeals held that the District Court had properly enjoined the Railroad from abolishing the position of "train porters" under the notices given, on the ground that these notices were insufficient to meet the requirements of § 2, Seventh, and § 6 of the Railway Labor Act. The view we take makes it unnecessary for us to consider this question.

5 47 Stat 70, 29 USC §§ 101 et seq.

of the employees in a craft or class as bargaining representative for that craft or class and is so recognized by the carrier, that labor organization has a duty to represent in good faith all workers of the craft. Steele v. Louisville & N. R. Co. 323 US 192, 202, 89 L ed 173, 183, 65 S Ct 226. In the Steele Case, the complainant was a locomotive fireman; his duties were wholly those of a fireman. The Brotherhood in that case represented the "firemen's craft," but would not admit Steele as a member because he was a Negro. As the legal representative of his craft of firemen, the Brotherhood made a contract with the carrier that discriminated against him because of his race. This Court held the contract invalid. It would have been the same if the Brotherhood had discriminated against him on some other ground, unrelated to race. It was the Brotherhood's duty "to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent." Steele, supra (323 US at 199, 89 L ed 181, 65 S Ct 226).

In the instant case the Brotherhood has never purported to represent the train porters. The train porters have never requested that the Brotherhood represent them. Classification of the job of "train porter" was established more than forty years ago and has never been disputed. At that time, the principal duties of the train porters were cleaning the cars, assisting the passengers, and helping to load and unload baggage; only a small part of the duties were those of brakemen, who were required to have higher educational qualifications. As early as 1921, the train porters organized a separate bargaining unit through which they have continuously bargained with the carrier here involved; they now have an existing contract with this carrier. Although the carriers gradually imposed upon the train porters more of the duties of brakemen until today most of their duties are those of brakemen, they have never been classified as brakemen.

The majority does not say that the train porters are brakmen and therefore the Brotherhood must represent them fairly, as was held in Steele. Whether they belong to the Brotherhood is not determinative of the latter's duties of representation, if it represents the craft of brakemen and if the train porters are brakemen. Steele was not a member of the Brotherhood of Locomotive Firemen and Enginemen and could not be because of race—the same reason that the train porters cannot belong to the Brotherhood of Trainmen. But Steele was a fireman, while the train porters are not brakemen.

The Brotherhood stoutly opposes the contention that it is the representative of the train porters. For the Court so to hold would be to fly in the face of the statute (45 USC § 152 Ninth) and the holding of this Court in General Committee of Adjustment, B.L.E. v. Missouri-Kansas-Texas R. Co. 320 US 323, 334-336, 88 L ed 76, 83, 64 S Ct 146.* The majority avoids the dispute in terms but embraces it in fact by saying it is passing on the validity of the contract. If this is true, it is done at the instance of persons for whom the Brotherhood was not contracting and was under no duty to contract. The train porters had a duly elected bargaining representative, which fact operated to exclude the Brotherhood from representing the craft. Steele, supra (323 US at 200, 89 L ed 181, 65 S. Ct 226); Virginia R. Co. v. System Federation, R.E.D. 300 US 515, 548, 81 L ed 789, 799, 57 S. Ct 592.

The majority reaches out to invalidate the contract, not because the train porters are brakemen entitled to fair representation by the Brotherhood, but because they are Negros who were discriminated against by the carrier at the behest of the Brotherhood. I do not understand that private parties such as the carrier and the Brotherhood may not discriminate on the ground of race. Neither a state government nor the Federal Government may nor the Federal Government may do so, but I know of no applicable federal law which says that private parties may not. That is the whole problem underlying the proposed federal Fair Employment Practices Code. Of course, this Court by sheer power can say this case is Steele, or even lay down a code of fair employment practices. But sheer power is not a substitute for legality. I do not have to agree with the discrimination here indulged in to question the legality of today's decision.

I think there was a dispute here between employees of the carrier as to whether the Brotherhood was the representative of the train porters, and that this is a matter to be resolved by the National Mediation Board, not the courts. I would remand this case to the District Court to be dismissed as nonjustificiable.

* "Nor does § 2, Second make justiciable what otherwise is not. It provides that 'All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.' As we have already pointed out, § 2, Ninth, after providing for a certification by the Mediation Board of the particular craft or class representative, states that "the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.'

"It is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. H.R. Rep. No. 1944, supra, p. 2; Rep. No. 1065, 73d Cong., 2d Sess., p. 3. However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them."

WHEN CROSS-EXAMINATION WENT TOO FAR

THIS STORY occurred at Fort Collins, Colorado, perhaps 25 years ago, and at least the principal participants have passed to another jurisdiction.

We were defending a very prominent citizen charged with statutory rape. The District Attorney was assisted by a very able lawyer whom we may know as R. Immediately after the arrest, the girl in the case had been taken to Denver, where she had been kept in a Catholic Home until the trial.

In the course of her testimony, on cross-examination, she stated that a detective had come to her in the Home disguised as a priest and had offered her $500.00 to change her story. This testimony came just before closing in the evening. During the night we succeeded in inducing the priest in charge of the Home, with a couple of nuns, to be presented in the court the next day. Having kept them out of sight, we put the girl back on the stand and asked her if she could identify the detective if she saw him. Upon her saying "yes," we had the priest step out and said that was the man

The prosecution closing its case shortly after, we put the priest on the stand. He was a brilliant man. Upon direct examination, he said that as priest he had charge of this Home, and that no other man could possibly have communicated with the girl. He said that he did talk with her fully about the case. She told her story and insisted that it was true. He, of course, denied any bribe or anything of the sort.

Of course, cross-examination for the purpose of emphasizing the girl's affirmance of her story under the circumstances was something like this:

First, he was asked as to the details of her story which were repeated by counsel from her testimony. He said she had told him that story. "Did you advice her of the seriousness of making charges like this against this defendant?" "I did sir." "Did you call attention to the prominent position of this defendant in the community as a particular reason why no false charge should be made against him?" "I did, sir." All of this in great detail, as may be imagined. "How long did you talk with her?" "Perhaps an hour, sir." "And in spite of all of your insistence upon the gravity of her charges, and the sin and punishment, both in this world and the next, for false testimony, she still insisted she was telling the truth, did she?" "She did, sir." Certainly an ideal place to stop. But one more fatal question; "Now, Father, please tell this jury, sir, how this young lady impressed you." "She impressed me, sir, as wise beyond her years, a liar and a common prostitute." Of course, the defendant won the case.—GEORGE CLAMMER, in DOCKET, Vol. 4 No. 36, p. 3964.

I

Andres Pitargue, plaintiff-appellee, vs. Leandro Sorilla, defendant-appellant, G. R. L-4302, September 17, 1952, Labrador, J.

1. POSSESSORY ACTION; FORCIBLE ENTRY AND DETAINER; RECOVERY OF POSSESSION OF REAL PROPERTY.— Under the Civil Code, either in the old, which was in force in this country before the American occupation, or in the new, we have a possessory action, the aim and purpose of which is the recovery of the physical possession of real property, irrespective of the question as to who has the title thereto.

2. PUBLIC LANDS; COURTS; JURISDICTION OF COURTS OVER POSSESSORY ACTIONS.— The vesting of the Lands Department with authority to administer, dispose, and alienate public lands must not be understood as depriving the other branches of the Government of the exercise of their respective functions or powers thereon, such as the authority to stop disorders and quell breaches of the peace by the police, and the authority on the part of the courts to take jurisdiction over possessory actions arising therefrom not involving, directly or indirectly, alienation and disposition.

3. ID.; ID.; PREJUDICIAL INTERFERENCE; DISPOSITION OR ALIENATION OF PUBLIC LANDS.— The determination of the respective rights of rival claimants to public lands is different from the determination of who has the actual physical possession or occupation with a view to protecting the same and preventing disorder and breaches of the peace. A judgment of the court ordering restitution of the possession of a parcel of land to the actual occupant, who has been deprived thereof by another through the use of force or in any other illegal manner, can never be "prejudicial interference" with the disposition or alienation of public lands.

4. FORCIBLE ENTRY AND UNLAWFUL DETAINER; NATURE OF ACTION OF FORCIBLE ENTRY.— The action of forcible entry is a summary and expeditious remedy whereby one in peaceful and quiet possession may recover the possession of which he has been deprived by a stronger hand, by violence or terror. its ultimate object being to prevent breach of the peace and criminal disorder. The basis of the remedy is mere possession as a fact, of physical possession, not a legal possession. The title or right to possession is never in issue in an action of forcible entry; as a matter of fact, evidence hereof is expressly banned, except to prove the nature of the possession.

5. PUBLIC LANDS; COURTS; FORCIBLE ENTRY AND UNLAWFUL DETAINER; JURISDICTION OF COURTS OVER FORCIBLE ENTRY AND UNLAWFUL DETAINER NOT AN INTERFERENCE WITH ALIENATION OF PUBLIC LANDS.— The grant of power and duty to the Lands Department to alienate and dispose of public lands does not divest the courts of their duty or power to take cognizance of actions instituted by settlers or occupants or applicants against others to protect their respective possessions and occupations, more especially the actions of trespass, forcible entry and unlawful detainer, and the exercise of such jurisdiction is no interference with the alienation, disposition, and control of public lands.

6. ID.; ID; ID.; RIGHTS OF APPLICANT FOR PUBLIC LANDS PROTECTED BY POSSESSORY ACTION OF FORCIBLE ENTRY.— Even pending the investigation of, and resolution on, an application for a public lands by a *bona fide* occupant, by the priority of his application and record of his entry, he acquires a right to the possession of the public land he applied for against any other public land applicant, which right may be protected by the possessory action of forcible entry or by any other suitable remedy that our rules provide.

7. JUDGMENT; FORCIBLE ENTRY AND UNLAWFUL DETAINER; USURPATION OF REAL PROPERTY; EFFECT OF JUDGMENT IN CRIMINAL CASE UPON CIVIL ACTION.— The dismissal of criminal action for usurpation of real property is not a bar to the filing of an action of forcible entry, for not only are the parties in the criminal action and in the action for forcible entry not identical, but the causes of action involved are also different.

Vicente Fontanosa *for appellant.*

Martin A. Galit, *for appellee.*

DECISION

LABRADOR, J.:

On July 30, 1941, plaintiff-appellee filed a miscellaneous sales application for a parcel of land known as Cadastral Lot No. 2777 situated at Mlang, Kidapawan, Cotabato, and paid a deposit of ₱5.00 therefor (Exhibit F). The Bureau of Lands acknowledged receipt of his application on November 22, 1941 (Exhibit E), and informed that it had been referred to the district land office of Cotabato, Cotabato. Upon receipt of this acknowledgement he started the construction of a small house on the lot, but the same was not finished because of the outbreak of the war. In 1946 he had another house constructed on the lot, which he used both as a clinic (he is a dentist) and as a residence. He introduced other improvements on the land and these, together with the house, he declared for tax purposes (Exhibit B), paying taxes thereon in 1947 and 1948 (Exhibits C and D). He placed one Cacayorin in charge of the house, but Cacayorin left it on December 13, 1948. Thereupon defendant-appellant herein demolished the house and built thereon one of his own. On December 17, 1948, plantiff went to defendant and asked the latter why he had constructed a building on the land, and the latter gave the excuse that there was no sign of interest on the sign of interest on the part of the one who had applied for it.

On March 9, 1949, plaintiff-appellee instituted this action of forcible entry in the Justice of the peace court, praying that defendant be ordered to vacate the lot usurped and remove the construction he had made thereon, with monthly damages at ₱10. Thereupon defendant filed a motion to dismiss the action on two grounds, namely, (1) that the court has no jurisdiction over the subject matter, as the same falls under the exclusive jurisdiction of the Bureau of Lands, and (2) that the action is barred by a prior judgment, because a previous criminal action for usurpation of real property filed by plaintiff against him had been dismissed. The Justice of the peace court denied the motion on the ground that the issue involved is as to who was in the actual possession of the lot in question on December 14, 1948, which issue can be resolved only after presentation of evidence (Record on Appeal, pp. 26-27). Thereupon defendant filed an answer denying plaintiff's possession since 1946, and alleging as special defenses (1) that the lot is an unawarded public land, which is already under investigation by the Bureau of Lands, and (2) that defendant was already acquitted of a criminal charge filed by plaintiff against him for usurpation of real property. By way of counterclaim he

demanded ₱2,800 from plaintiff (Record on Appeal, pp. 27-33). On June 4, 1949, the Justice of the peace court declared itself without jurisdiction to try the case for the reason that the subject matter of the action is the subject of an administrative investigation (Ibid., p. 39). Against this judgment plaintiff appealed to the Court of First Instance. At first this court refused to take cognizance of the case, but upon the authority of the case of Mago vs. Bihag, 44 O.G. (12) 4934, decided by the Court of Appeals, it proceeded to try the case on the merits. After trial it found the facts already set forth above, and sentence the defendant to vacate the land and indemnify the plaintiff in the sum of ₱100, with costs. Against this judgment this appeal has been presented, the defendant-appellant making the following assignments of error in his brief:

1. The lower Court erred in trying the case when the land involved is a public land and jurisdicton of which belong to the Land Department of the Philippines.

2. The lower Court erred in trying the case when prior to the commencement of this action an administrative case was (is) pending between the parties over the same land in the Bureau of Lands and, as such, the latter has acquired first jurisdiction over the subject-matter of the action.

3. The lower Court erred in trying the case when the cause of this action is barred by a prior judgment.

4. The lower Court erred in trying the case and rendering a decision on the merits when its duty after it had determined that the Justice of the Peace Court has jurisdiction is to reverse the order of dismissal of the inferior court and remand to it for further proceedings.

Under the facts and circumstances of the case the question now before us is as follows: Do courts have jurisdiction to entertain an action of forcible entry instituted by a *bona fide* applicant of public land, who is in occupation and peaceful possession thereof and who has introduced improvements, against one who deprives him of the possession thereof before award and pending investigation of the application? Defendant-appellant contends that as the administrative disposition and control of public lands is vested exclusively in the Lands Department, cognizance of the forcible entry action or of any possessory action constitutes a "prejudicial interference" with the said administrative functions, because there is an administrative case pending in the Bureau of Lands between the same parties over the same land. The record contains a certificate of a lands inspector the effect that the investigation of the conflict between plaintiff-appellee herein and the defendant-appellant has been suspended because of the trial of the criminal case for usurpation filed by plaintiff against defendant-appellant. (See Record on Appeal, pp. 25-26.) We note from the certificate, however, that while plaintiff's application is registered as MSA 9917, defendant-appellant does not appear to have made any formal application at all.

It must be made clear at the outset that this case does not involve a situation where the Bureau of Lands has already made an award of, or authorized and entry into, the public land. It is purely a possessory action by a *bona fide* applicant who has occupied the land he has applied for before the outbreak of the war under the ostensible authority of his application, which was given due course for investigation, but as to which no approval has been given because investigation has not yet been finished.

An ideal situation in the dispository of public lands would be one wherein these alienable and disposable are yet unoccupied and are delivered to the applicants upon the approval of their application, free from other occupants or claimants. But the situation in the country has invariably been the opposite; lands are occupied without being applied for, or before the applications are approved. In fact, the approval of applications often takes place many years after the occupation began or the application was filed, so that many other applicants or claimants have entered the land in the meantime, provoking conflicts and overlapping of applications. For some reason or other the Lands Department has been unable to cope with the ever increasing avalanche of application, or of conflicts and contests between rival applicants and claimants.

The question that is before this Count is: Are courts without jurisdiction to take cognizance of possessory actions involving these public lands before final award is made by the Lands Department, and before title is given any of the conflicting claimants? It is one of utmost importance, as there are public lands everywhere and there are thousands of settlers, especially in newly opened regions. It also involves a matter of policy, as it requires the determination of the respective authorities and functions of two coordinate branches of the Government in connection with public land conflicts.

Our problem is made simple by the fact that under the Civil Code, either in the old, which was in force in this country before the American occupation, or in the new, we have a possessory action, the aim and purpose of which is the recovery of the physical possession of real property, irrespective of the question as to who has the title thereto. Under the Spanish Civil Code we had the *accion interdictal*, a summary proceeding which could be brought within one year from dispossession (Roman Catholic Bishop of Cebu vs. Mangaron, 6 Phil. 286, 291); and as early as October 1, 1901, upon the enactment of the Code of Civil Procedure (Act No. 190 of the Philippine Commission) we implanted the common law action of forcible entry (Section 80 of Act No. 190), the object of which has been stated by this Court to be "to prevent breaches of the peace and criminal disorder which ensue from the withdrawal of the remedy, and the reasonable hope such withdrawal would create that some advantage must accrue to these persons who, believing themselves entitled to the possession of property, resort to force to gain possession rather than to some appropriate action in the courts to assert their claims." (Supia and Batioco vs. Quintero and Ayala, 59 Phil. 312, 314. So before Act (Act No. 926) the action of forcible entry was already available in the courts of the country. So the question to be resolved is, Did the Legistature intend, when it vested the power and authority to alienate and dispose of the public lands in the Lands Department, to exclude the courts from entertaining the possessory action of forcible entry between rival claimants or occupants of any land before award thereof to any of the parties? Did Congress intend that the lands applied for, or all public lands for that matter, be removed from the jurisdiction of the Judicial Branch of the Government, so that any troubles arising therefrom, or any branches of the peace or disorders caused by rival claimants, could be inquired into only by the Lands Department to the exclusion of the courts? The answer to this question seems to us evident. The Lands Department does not have the means to police public lands; neither does it have the means to prevent disorders arising therefrom, or contain breaches of the peace among settlers; or to pass promptly upon conflicts of possession. Then its power is clearly limited to *disposition and alienation*, and while it may decide conflicts of possession in order to make proper award, the settlement of conflicts of possession which is recognized in the courts herein has another ultimate purpose, i.e., the protection of actual possessors and occupants with a view to the prevention of breaches of the peace. The power to dispose and alienate could not have been intended to include the power to prevent or settle disorders or breaches of the peace among rival settlers

or claimants prior to the final award. As to this, therefore, the corresponding branches of the Government must continue to exercise power and jurisdiction within the limits of their respective functions. The vesting of the Lands Department with authority to administer, dispose, and alienate public lands, therefore, must not be understood as depriving the other branches of the Government of the exercise of their respective functions or powers thereon, such as the authority to stop disorders and quell breaches of the peace by the police, and the authority on the part of the courts to take jurisdiction over possessory actions arising therefrom not involving, directly or indirectly, alienation and disposition.

Our attention has been called to a principle enunciated in American courts to the effect that courts have no jurisdiction to determine the rights of claimants to public lands, and that until the disposition of the land has passed from the control of the Federal Government, the courts will not interfere with the administration of matters concerning the same. (50 C. J. L-4931094.) We have no quarrel with this principle. The determination of the respective rights of rival claimants to public lands is different from the determination of who has the actual physical possession or occupation with a view to protecting the same and preventing disorder and breaches of the peace. A judgment of the court ordering restitution of the possession of a parcel of land to the actual occupant, who has been deprived thereof by another through the use of force or in any other illegal manner, can never be "prejudicial interference" with the disposition or alienation of public lands. On the other hand, if courts were deprived of jurisdiction of cases involving conflicts of possession, the threat of judicial action against breaches of the peace committed on public lands would be eliminated, and a state of lawlessness would probably be produced between applicants, occupants or squatters, where force or might, not right or justice, would rule.

It must be borne in mind that the action that would be used to solve conflicts of possession between rivals or conflicting applicants or claimants would be no other than that of forcible entry. This action, both in England and the United States and in our jurisdiction, is a summary and expeditious remedy whereby one in peaceful and quiet possession may recover the possession of which he has been deprived by a stronger hand, by violence or terror; its ultimate object being to prevent breach of the peace and criminal disorder. (Supia and Batiaco vs. Quintero and Ayala, 59 Phil. 312, 314.) The basis of the remedy is mere possession as *a fact* of physical possession, not a legal possession. (Mediran vs. Villanueva, 37 Phil. 752.) The title or right to possession is never in issue in an action of forcible entry; as a matter of fact, evidence thereof is expressly banned, except to prove the nature of the possession. (Section 4, Rule 72, Rules of Court.) With this nature of the action in mind, by no stretch of the imagination can the conclusion be arrived at that the use of the remedy in the courts of justice would constitute an interference with the alienation, disposition, and control of public lands. To limit ourselves to the case at bar, can it be pretended at all that its result would in any way interfere with the manner of the alienation or disposition of the land contested? On the contrary, it would facilitate adjudication, for the question of priority of possession having been decided in a final manner by the courts, said question need no longer waste the time of the land officers making the adjudication or award.

The original Public Land Law (Act 926) was drafted and passed by a Commission composed mostly of Americans, and as the United States has had its vast public lands and as the United States has had its vast public lands and has had the same problems as we now have, involving their settlement and occupation, it is reasonable to assume that it was their intention to introduce into the country these laws in relation to our problems of land settlement and disposition. The problem now brought before us was presented in an analogous case in the year 1894 before the Supreme Court of Oklahoma in the case of Spreat v. Durland, 2 Okl. 24, 35 Pac. 682, and said court made practically the same solution as we have, thus:

> x x x. This question is one of vital importance in Oklahoma. All our lands are entered, and title procured therefor, under the homestead laws of the United States. The question arising out of averse possession, as between homestead claimants, daily confronts our courts. To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases, pending the settlement of title in the land department, would be the announcement of a doctrine abhorrent to a sense of common justice. It would encourage the strong to override the weak, would place a premium upon greed and the use of force, and, in many instances, lead to bloodshed and crime. Such a state of affairs is to be avoided, and the courts should not hesitate to invoke the powers inherent in them, and lend their aid, in every way possible, to prevent injustice, by preventing encroachments upon the possessory rights of settlers, or by equitably adjusting their differences. In the case under consideration, no adequate remedy at law is provided for relief. Ejectment will not lie. Adams v. Couch, 1 Okl. 17, 26 Pac. 1009. And, at the time this proceeding was instituted, the forcible entry and detainer act was insufficient in its provisions to afford a remedy. The appellee was entitled to speed relief, and ought not to be compelled to wait the final and tedious result of the litigation in the interior department, before obtaining that which he clearly shows himself entitled to have.

That action of forcible entry was then deemed insufficient in that state to prevent acts of trespass interfering with an applicant's possession, so that the court ordered the issuance of an injunction. The main issue involved, however, was whether pending final investigation and award the occupant should be protected in his possession, and the Supreme Court of Oklahoma said it should, issuing an injunction to protect said possession.

The same conclusion was arrived at by the Supreme Court of Washington in the case of Colwell v. Smith, 1 Wash. T. 92, 94, when it held:

> We will not decide between two conflicting claimants, both of whom are actually in possession of certain portions of the claim in dispute, who is in the right, so far as to dispossess one or the other from the entire claim, which would render it impossible for him to prove that residence the law requires, and thus contest his claim before the register and receiver; we can and must protect either party from trespass by the other, upon such portion of the claim as may be in the actual exclusive possession of such party.

Resuming the considerations we have set forth above, we hold that the great of power and duty to the Lands Department to alienate and dispose of public lands does not divest the courts of their duty or power to take cognizance of actions instituted by settlers or occupants or applicants against others to protect their respective possessions and occupations, more especially the actions of trespass, forcible entry and unlawful detainer, and that the exercise of such jurisdiction is no interference with the alienation, disposition, and control of public lands. The question we have proposed to consider must be answered in the affirmative.

Our resolution above set forth answers defendant-appellant's contention. We have, however, to go further and explore another fundamental question, i.e., whe-

ther a public land applicant, such as the plaintiff-appellee herein, may be considered as having any right to the land occupied, which may entitle him to sue in the courts of justice for a remedy for the return of the possession hereof, such as an action of forcible entry or unlawful detainer, or any other suitable remedy provided by law. In the United States a claim "is initiated by an entry of the land, which is effectual by making an application at the proper land office, filing the affidavit and paying the amounts required by x x x the Revised Statutes. (Sturr v. Beck, 133 U.S. 541, 10 S. Ct. 350, 33 L. Ed. 761.) "Entry" as applied to appropriation of land, "means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim." (Ibid., citing Chotard v. Pope, 25 U.S. 12 Wheat, 586, 588.) It has been held that entry based upon priority in the initiatory steps, even if not accompanied by occupation, may be recognized as against another applicant.

In Hasting & Dakota R. Co. v. Whitney, ubi supra, an affidavit for the purpose of entering land as a homestead was filed on behalf of one Turner, in a local land office in Minnesota, on May 8, 1865. Turner claiming to act under section 1 of the Act of March 21, 1864 (13 Stat.. 35), now section 2293 of the Revised Statutes of the United States. As a matter of fact, Turner was never on the land, and no member of his family was then residing, or ever did reside, on it, and no improvements whatever had ever been made thereon by anyone. Upon being paid their fees, the register and receiver of the land office allowed the entry, and the same stood upon the records of the local land office. and upon the records of the General Land Office, uncancelled, until September 30, 1872. Between May, 1865, and September, 1872, Congress made a grant to the State of Minnesota for the purpose of aiding in the construction of a railroad from Hastings, through certain countries, to a point on the western boundary of the State, which grant was accepted by the Legislature of the State of Minnesota and transferred to the Hastings and Dakota Railroad Company, which shortly thereafter definitely located its line of road by filing its map in the office of the commissioner of the General Land Office. All these proceedings occured prior to the 30th of September, 1872. This court declared that the almost uniform practice of the Department has been to regard land upon which an entry of record, valid upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption, settlement, sale or grant, until the original entry be cancelled or be declared forfeited, in which case the land reverts to the government as part of the public domain, and because again subject to entry under the Land Laws; and it was held that whatever defects there might be in an entry, so long as it remained a subsisting entry of record, whose legality had been passed upon by the land authorities and their action remained unreversed, it was such an appropriation of the tract as segregated it from the public domain, and therefore precluded it from subsequent grant; and that this entry on behalf of Turner "attached to the land" in question, with the meaning of the Act of Congress making the grant (14 Stat. 87), and could not be included within it. And as to mere settlement with the intention of obtaining title under the pre-emption Law, while it has been held that no vested right in the land as against the United States is acquired until all the prerequisites for the acquisition of title have been complied with, yet rights in parties as against each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. "The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants." Shepley v. Cowan, 91 U.S. 330, 337 (23:424, 426).

There are compelling reasons of policy supporting the recognition of a right in a *bona fide* applicant who has *occupied* the land applied for. Recognition of the right encourages actual settlement; it discourages speculation and land-grabbing. It is in accord with well established practices in the United States. It prevents conflicts and the overlapping of claims. It is an act of simple justice to the enterprise and diligence of the pioneer, without which land settlement can not be encouraged or emigration from thickly populated areas hastened.

Our answer to the second problem is also in the affirmative, and we hold that even pending the investigation of, and resolution on, an application by a *bona fide* occupant, such as plaintiff-appellee herein, by the priority of his application and record of his entry, he acquires a right to the possession of the public land he applied for against any other public land applicant, which right may be protected by the possessory action of forcible entry or by any other suitable remedy that our rules provide.

Having disposed of the most important questions raised on this appeal, we will next consider the procedural question, i.e., that the Court of First Instance, after deciding the question of jurisdiction of the justice of the peace favorably, should have remanded the case to that court for trial. The record discloses that upon the docketing of the case in the Court of First Instance on appeal, defendant-appellant filed a motion to dismiss which the Court of First Instance granted. However, upon motion for reconsideration filed by plaintiff, the trial court vacated this order of dismissal, and thereupon the defendant presented his answer. There was no need of remanding the case to the justice of the peace court for trial, because this court had already heard and tried the case evidently on the merits. The case was, therefore, brought before the Court of First Instance on appeal and for a *new trial*, not only on the question of jurisdiction but on the merits also.

The claim of bar by a prior judgment, because the action for usurpation of real property instituted by plaintiff-appellant was dismissed, can not be sustained, for not only are the parties in the previous criminal action and in this action of forcible entry not identical, but the causes of action involved are also different.

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

Paras, C.J., Pablo, Bengzon, Padilla, Tuason, Montemayor, and *Bautista Angelo*, concurred.

II

Sta. Mesa Slipways & Engineering Company, Inc., petitioner vs. the Court of Industrial Relations and Macario Tadina, et al., respondent, G. R. No. L-4521, Aug. 18, 1952 Montemayor, J.

1. EMPLOYERS AND EMPLOYEES: DISMISSAL: NOTICE: PAYMENT OF WAGES AT THE END OF EACH WEEK AND ON AN HOURLY BASIS.—Although the laborers were paid at the end of each week and on an hourly basis, it does not mean that there was a fixed term of employment. The basis of salary and period of payment is only for the purpose of computing the amount of wages earned and the time spent. They do not refer to the term or period of employment. Consequently, the contract of employment of such laborers was without a fixed period, and so comes within the purview of the first paragraph of Art. 302, Code of Commerce.

2. ID.; DISMISSAL WITHOUT JUST CAUSE.—The laborers of a company were notified that because of an inventory that was to be made, lasting about two weeks, their work would be suspended and that later they would be recalled. They offered to work after the termination

of the inventory by reason of which their work was suspended, but they were not allowed to continue in their employment. *Held:* Through no fault of the laborers, they were laid off and separated from the company's service. They were for all practical purposes dismissed without just cause.

3. ID.; COMMERCIAL EMPLOYEES.— An employer mainly dedicated in the work of building and repair of vessels and barges is a commercial company, and its employees and laborers, commercial employees.

4. ID.; PAYMENT OF ONE MONTH WAGES UPON SEPARATION FROM SERVICE.— Regardless of whether the laborers are commercial or industrial or business employees, the employers should pay the laborers the equivalent of one month wages upon separation from service without just cause.

5. ID.; COURT OF INDUSTRIAL RELATIONS; JURISDICTIONAL REQUISITES.—In order that the Court of Industrial Relations could acquire jurisdiction over a case, the following requisites or elements must exist: (1) Dispute, industrial or agricultural; (2) that said dispute is causing or likely to cause a strike or lockout; (3) that said dispute arose from the differences as regards wages, dismissals, lay-offs, etc. between employees and employers; and (4) that the number of employees or laborers must exceed thirty.

6. ID.; LOCKOUT; EXISTENCE OF LOCKOUT.— Where the work of the laborers of a company was suspended in order to make proper inventory, and when the laborers returned to work after the inventory, they were prevented from resuming work, there was to them, for all practical purposes, a lockout.

7. ID.; ID.; STRIKE; LOCKOUT AND STRIKE, COMPARED.— The "lockout" alike with the "strike", constitutes a suspension of employees' services, but the distinction is said to arise from the fact that the employer rather than his employees is the doer of the deed of suspension. In both cases, a labor controversy exists, which is deemed intolerable by one of the parties, but the lockout indicates that the employer rather than his employees have brought the matter to issue. Strikes are said statistically to be the rule, which lockouts constitute exceptions, but it is probably impossible to determine with any fair degree of conclusiveness whether the given dispute has been precipitated by a strike or a lockout because one, especially the latter, is many times set in motion in hurried anticipation of the other.

8. ID.; ID.; NATURE OF THE TERM "LOCKOUT".— A "lockout" is a term commonly used to express all employer's act of excluding from his plant union members hitherto employed by him. The act may affect all or less than all of the employee-union members. Lockout, in the sense in which it is universally used, is an act directed at the union itself rather than at the individual employer-members of the union.

9. ID.; ID.; ID.; SHUT-DOWN AND LOCKOUT, DISTINGUISHED.— A "shut-down" differs from a lockout in that in a lockout the plant continues to operate. The employee-union members locked out are replaced by non-union substitutes and the plant continues to function. In a "shut-down" the plant ceases to operate. A shut-down is the willful act of the employer himself, following a complete lockout as contrasted to the compulsory stoppage of operations as a result of a strike and walkout. It can truly be said that all shut-downs are lock-outs, but not all lock-outs constitute or effect shut-downs.

10. ID.; COURT OF INDUSTRIAL RELATIONS; STOPPAGE; RIGHT OF LABORER TO BE HEARD BY COURT OF INDUSTRIAL RELATIONS.—A laborer who was deprived of his work without just cause or the occasion of stoppage of work or temporary cessation of operation has a right to be heard by the Court of Industrial Relations.

11. ID.; ID.; INDUSTRIAL DISPUTES. —The Court of Industrial Relations should take cognizance of industrial disputes arising from a strike or lockout or those that come hereafter because the claim or damage caused to the workers because of their dismissal or lay-off necessarily comes after and not before the strike or lockout.

12. ID.; ID.; SUBSEQUENT REDUCTION OF THE NUMBER OF LABORERS AFFECTED.— Pending proceeding in the Court of Industrial Relations, ten of the thirty-seven petitioning employees or laborers withdrew from the petition because they had amicably settled their differences with the company, thus reducing the number of petitioners from 37 to 27. *Held:* Although during the proceedings in the court below, because of the amicable settlement of the dispute between the petitioner and some of the dismissed laborers, the number of said laborers was reduced to 27, this reduction below 31 as required by law did not affect the jurisdiction of the industrial court. Once the Court of Industrial Relations has acquired jurisdiction, it retains said jurisdiction until the case is completely decided, and that the reduction of the number of employees or laborers affected to a point below the number required by law, to invest the jurisdiction of the court at the beginning, or the amicable settlement of some of the demands originally made did not deprive said court of jurisdiction to continue hearing the case and decide it.

Cirilo R. Tiongson *for petitioner.*

M. A. Ferrer *for respondent Court of Industrial Relation* and Carlos M. Tadina et al.

DECISION

MONTEMAYOR, *J.:*

Petitioner *Sta. Mesa Slipways & Engineering Co., Inc.*, latter to be referred to as the Company, is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines mainly dedicated to the construction and repair of vessels and barges. The respondents Macario Tadina, et al., were former laborers of the petitioner who had been employed as carpenters, some of them having worked for several years, under a verbal contract of employment for no fixed or definite period, with wages paid to them every end of the week. On April 26, 1949, a notice was posted at the rate of the compound of petitioner Company to the effect that in order to make the proper inventory, all work would stop on Saturday, April 30, 1949; that the yard would be closed for a period of two weeks or more if necessary and that the laborers would be notified accordingly as to when normal work will be resumed. The notice was signed by the Manager. The [illegible] work did not, however, apply to monthly personnel together with about forty-one laborers and fifteen watchmen who continued working in the compound. At the end of the two-week period of inventory, respondents Tadina and his fellow laborers had all been paid their wages up to the time they were laid off.

Tadina and thirty-six fellow laborers filed an action with the Court of Industrial Relations alleging that they were not given by the Company the one-month notice provided for in Art. 302 of the Code of Commerce and asking that the said Company be ordered to pay them compensation for one month in lieu of said notice. The Company asked for the dismissal of the case on the ground that

the court lacked jurisdiction over it. It also contended that the claim of respondents for a one-month compensation in lieu of notice was not supported by law and had no legal basis because said petitioners (now respondents herein) were all paid on an hourly basis and only for the number of hours of actual work. Pending proceedings in the Court of Industrial Relations, ten of the thirty-seven petitioning employees or laborers withdrew from the petition because they had amicably settled their differences with the Company, thus reducing the number of petitioners from 37 to 27 which is less than the thirty-one (31) contemplated by Commonwealth Act 103. The motion for dismissal was denied and after due hearing and the submission of a partial stipulation of facts, the industrial court decided in favor of the petitioners and ordered the Company to pay them (petitioners) the equivalent of their wages for one month, with legal interest. The company has now filed this petition for certiorari to review that decision of the lower court, presenting the following questions of law:

"1. Is Art. 302 of the Code of Commerce of the Philippines applicable in this particular case?

2. Does the respondent Court of Industrial Relations have jurisdiction to decide and settle this case?

Article 302 of the Code of Commerce reads as follows:

"ART. 302.—In cases in which the contract does not have a fixed period, any of the parties may terminate it, advising the other thereof one month in advance. The factory or shop clerk shall have a right, in this case, to the salary corresponding to said month."

Under the first question of the applicability of Art. 302 of the present case, petitioner contends that the employment of the laborers involved herein was not without a fixed period because they were paid at the end of every week and therefore they may be considered as having been hired by the week, and besides, the amount of payment was based on the number of hours of work performed. A similar question has heretofore been submitted for determination by this Court. In the case of Sanchez, et al. v. Harry Lyons Construction Inc., et al., G. R. No. L-2779, October 18, 1950, where the laborers involved were paid some on a monthly basis such as ₱250 a month while others were paid ₱5.00 a day, it was there contended that Art. 302 of the Code of Commerce did not apply inasmuch as some of the laborers invoking the provisions of said article were paid by the month and others by the day, and that therefore their employment was with a term, the term being temporary or on the monthly or daily basis. The Court there said:

"x x x x. The stated computation or manner of payment, whether monthly or daily, does not represent nor determine a special time of employment. Thus, a commercial employee may be employed for one year and yet receive his salary on the daily or weekly or monthly or other basis.

"Appellants allege that the use of the word 'temporary' in the contracts of services of some of the plaintiffs shows that their employment was with a term, and the term was 'temporary, on a day to day basis.' The record discloses that this conclusion is unwarranted. The contracts simply say — 'you are hereby employed as temporary guard with a compensation at the rate of ₱5.00 a day ....' The word special time fixed in the contracts referred to in Article 302 of the Code of Commerce. The daily basis therein stipulated is for the computation of pay, and is not necessarily the period of employment. Hence, this Court holds that plaintiffs appellants come within the purview of Article 302 of the Code of Commerce."

In the present case, it may also be said that although the laborers were paid at the end of each week and on an hourly basis, it does not mean that there was a fixed term of employment. The basis of salary and period of payment is only for the purpose of computing the amount of wages earned and the time spent. They do not refer to the term or period of employment. Consequently, we hold that the contract of employment of Macario Tadina and his fellow laborers was without a fixed period, and so come within the purview of the first paragraph of Art. 302, Code of Commerce.

Petitioner says that the decision of the Industrial Court does not contain a finding that the respondent laborers were dismissed without just cause and so, their case does not come within the provisions of the second part of Article 302. It is a fact, however, that through no fault of the laborer, they were laid off and separated from the petitioner's service. They offered to work after the termination of the inventory by reason of which their work was suspended, but they were for all practical purposes dismissed without just cause.

Lastly, petitioner contends that Art. 302 is no applicable here because the laborers were not commercial employees so as to warrant the application of the provisions of the Code of Commerce. It cites the case of Juan Arribas vs. Hawaiian-Philippine Co., G. R. No. 37219, dated August 23, 1923, purporting to hold that before an employee can invoke the provisions of Art. 302 of the Code of Commerce he must show that he is a commercial employee. Unfortunately, we are unable to read said case because it does not appear to have been published in the Philippine Reports or in the Official Gazette and we are unable to find it among our records that survived the last war. But granting that there was such a ruling by this Court, we also find that in the case of Philippine Trust Company vs. Smith Navigation Company, 66 Phil. 277 promulgated much later on September 30, 1938, this Court held or rather stated in the course of the decision that the contract of repair of vessels entered into between the appellee Smith Navigation Company and the intervenor-appellant El Varadero de Manila which later company, by the way was also engaged in the building and repair of vessels, like the petitioner herein, was a commercial transaction and as such should be governed first by the provisions of the Code of Commerce. One possible implication from said holding might be that an employer like the petitioner, engaged in the work of building and repair of vessels, is a commercial company, and its employees and laborers, commercial employees. But regardless of whether the laborers in the present case are commercial or industrial or business employees, the employer should, we believe, pay them the equivalent of one month wages upon separation from service without just cause. In the first place, from the standpoint of the laborer or employee, one employed by an industrial or business concerned is as much entitled to the benefits of the law and deserves his one month pay as one employed by a merchant. In the second place, regardless of the strict applicability or non-applicability of Art. 302, the Court of Industrial Relations by reason of its general jurisdiction and authority to decide labor disputes, the amount of salary or wages to be paid laborers and employees, to determine their living conditions has been deciding not only the minimum that the employer should pay its employees but also granting them even sick and vacation leave with pay without any express legal provision. A month's pay upon separation from service without just cause and without notice may also in the discretion of the Industrial Court be granted provided that said discretion is not abused.

In the case of Sanchez et al. v. Harry Lyons Construction Co., et al., *supra*, while one of the companies therein included as defendant-appellants, namely, the Material Distributors Inc. was engaged in buying surplus property, repairing and then selling them to the public for which reason it might be readily

considered a commercial company and its laborers commercial employees, the other company Harry Lyons Construction Co., Inc. was engaged in the construction of roads and bridges, a business hardly to be regarded as commercial; still, the employees of both companies were all considered commercial employees, entitled to the equivalent of one month pay, because of separation from service without notice.

Again, in the case of Lopez v. Roces, as Manager of the People's Homesite Corporation, 73 Phil. 605, the Supreme Court held that when the one month notice is not given, not only the factor or shop clerk, but any employee discharged without just cause is entitled to an indemnity which may be a month's salary, and that the Homesite Corporation being a business company, its chauffeur dismissed without notice may be considered as a commercial employee entitled to one month pay.

Going to the second question, that of jurisdiction of the Court of Industrial Relations, petitioner contends that in accordance with Chapter I, Section 1 and Chapter II, Section 4 of the Commonwealth Act No. 103, in order that the CIR could acquire jurisdiction over a case, the following requisites or elements must exist:

1. Dispute industrial or agricultural;
2. Said dispute is causing or likely to lockout;
3. Said dispute arose from differences as regards wages, dismissals, lay-offs, etc. between employees and employers; and
4. The number of employees or laborers must exceed thirty.

We agree with the respondent Court that all the four elements enumerated above were present. There was an industrial dispute between the petitioner and its laborers; said dispute arose from diferences as regards dismissal and lay-off, and the number of employees affected—thirty-seven — was more than the minimum required by the law. The only element which may be subject to doubt is whether or not the dispute is causing or is likely to cause strike but there was a sort of lockout. When the 37 laborers returned to work after the inventory and when prevented from resuming work, there was to them, for all practical purposes, a lockout.

> The 'lockout' alike with the 'strike,' constitutes a suspension of employees' services, but the distinction is said to arise from the fact that the employer rather than his employees is the doer of the deed of suspension. In both cases, a labor controversy exists, which is deemed intolerable by one of the parties, but the lockout indicates that the employer rather than his employees have brought the matter to issue. Strikes are said statistically to be the rule, while lockouts constitute exceptions, but it is probably impossible to determine with any fair degree of conclusiveness whether the given dispute has been precipitated by a strike or a lockout because one, especially the latter, is many times set in motion in hurried anticipation of the other." (Teller, Labor Disputes and Collective Bargaining, Vol. I, p. 246).
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> "A 'lockout' is a term commonly used to express an employer's act of excluding from his plant union members hitherto employed by him. The act may affect all or less than all of the employee-union members. Lockout, in the sense in which it is universally used, is an act directed at the union itself rather than at the individual employer-members of the union. x x x
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> "A 'shut-down' differs from a lockout in that in a lock-out the plant continues to operate. The employee-union members locked out are replaced by non-union substitutes and the paint continues to function. In a 'shut-down' the plant ceases to operate. A shut-down is the wilful act of the employer himself, following a complete lock-out as contracted to the compulsory stoppage of operations as a result of a strike and walkout. It can truly be aid that all shut-downs are lock-outs, but not all lock-outs constitute or effect shut-downs." (Rothenberg, Labor Relations, pp. 58-59.)

Of course, ordinarily, a lockout refers to union members, and is used to discipline laborers for their union activities, or is directed at the union itself; and in the present case there is no evidence about the union affiliation of Tadina and his fellow laborers, or the real reason behind their ouster and exclusion from work. But whatever the reason, to them there was stoppage of work, a lockout within the contemplation of the law warranting the extension of juridiction of the CIA and its intervention if sought.

In the case of Yellow Taxi and Pasay Transportation Worker's Union (CLO) v. Manila Yellow Taxi Cab Company, Inc., 45 O. G. 4856, this Court held that a laborer who was deprived of his work without just cause on the occasion of stoppage of work or temporary cessation of operations (pare) has a right to be heard by the Court of Industrial Relations. It further held that said court should take cognizance of industrial disputes arising from a strike or lockout or those that come thereafter because the claim or damage caused to the workers because of their dismissal or lay-off necessarily comes after and not before the strike or lockout.

As to the number of laborers involved in the present case, although during the proceedings in the court below, because of the amicable settlement of the dispute between the petitioner and some of the dismissed laborers, the number of said laborers was reduced to 27, this reduction below 31 as required by law did not affect the jurisdiction of the industrial court. In the case of Pepsicola, Inc. v. National Labor Union, G. R. No. L-1500, 46 O. G. (Sup.) No. 1, p. 130 and Manila Hotel Employees Association v. Manila Hotel, 73 Phil. 374, this Court laid down the doctrine to the effect that once the Court of Industrial Relations has acquired jurisdiction, it retains said jurisdiction until the case is completely decided, and that the reduction of the number of employees or laborers affected to a point below the number required by law, to invest the jurisdiction of the court at the beginning, or the amicable settlement of some of the demands originally made did not deprive said court of jurisdiction to continue hearing the case and decide it.

In view of the foregoing, the decision appealed from is hereby affirmed, with costs.

Paras, C. J., Pablo, Bengzon, Padilla, Tuason, Baustista Angelo, and Labrador JJ., concurred.

Messrs. Justices Feria, Reyes and Jugo did not take part.

III

Laureto A. Talaroc, petitioner-appellee, vs. Alejandro D. Uy respondent-appellant, G. R. *L-5397, September 26, 1952, Tuason, J*

1. ELECTIONS; CITIZENSHIP OF ELECTED CANDIDATES.— U was elected municipal mayor of Manticao, Misamis Oriental on November 13, 1951. T, one of the defeated candidates for the same office, contested the election of U on the ground that the latter is a Chinese national and therefore ineligible to the office of the municipal mayor. U was born on January 26, 1912 in the municipality of Iligan, province of Lanao, of Chinese father and of Filipino mother. His father and mother were married on March 3, 1914 in Iligan. The father died in this municipality on February 17, 1917 and the mother died on August 29, 1949 in the municipality of Manticao, Misamis Oriental. U had voted in the previous elections and had held various positions in the government. *Held:* U is a Filipino citizen and eligible to the office of municipal mayor. He became a Philippine citizen at least upon his fa-

ther's death. Commonwealth Act No. 63, providing a method for regaining Philippines citizenship by Filipino woman in such case, was passed when U's mother had been a widow for 19 years and U had been of age three years, and this law carries no provision giving it retroactive effect. It would neither be fair nor good policy to hold U an alien after he had exercised the privileges of citizenship and the Government had confirmed his Philippine citizenship on the faith of legal principles that had the force of law.

Claro M. Recto for appellant.

Justiniano R. Borja for appellee.

DECISION

TUASON, *J.*:

The election of Alejandro D. Uy to the office of municipal mayor of Manticao, Misamis Oriental, on November 13, 1951, brought the instant action of quo warranto in the Court of First Instance of that province. The petitioner was Laureto A. Talaroc, one of the defeated candidates for the same office, and the grounds of the petition were that he respondent is a Chinese national and therefore ineligible. The court below found the petition well founded and declared the position in question vacant.

The personal circumstances of the respondent as found by the court are not in dispute. They are as follows:

> "Estan establecidas por las pruebas, y admitidas por las partes, que Alejandro D. Uy nacio en Enero 28, 1912, en el municipio de Iligan, provincia de Lanao (Exhibito 1), de padre chino, Uy Piangco, y de macre Filipina, Ursula Diabo, cuando convivian estos como marido y mujer, pero despues contrajeron matrimonio eclesiastico al Marzo 3, 1914, en dicho pueblo (Exhibito 9). Tuvieron siete hijos, siendo el recurrido Alejandro D. Uy el 5.o hijo. Uy Piangco, nativo de Chuitao, Amoy, China, nunca se ausento desde que llego hacia 1893 o 1895, en Filipinas hasta su fallecimiento el Febrero 17, 1917, en Iligan, Lanao, donde estuvo residiendo continuamente, murio con posterioridad, el Agosto 29, 1949, en el municipio de Manticao, Misamis Oriental (Exhibit 3). Aparece tambien que el recurrido Alejandro D. Uy nunca fue a China y he votado en las anteriores elecciones verificadas en el pais, y ha desempenado empleos como Inspector del "Bureau of Plant Industry" en 1948 (Exh. 4); en los anos 1935, 1946, 1947, maestro bajo el Bureau of Public Schools, en Manticao District (Exhs. 5 y 5-a); filing clerk en la Tesoreria Municipal de Initao, en 1935 al 1945 (Exh. 4); y Acting Municipal Treasurer de Lagait, en 1942 a 1943 (Exh. 6); ademas de haber servido al 120th Infantry Regiment de la guerrilla, y algun tiempo 'Tax collector' del gobierno de ocupacion japonesa, en esta provincia de Misamis Oriental."

These facts also appear uncontroverted in evidence: One of the respondent's brothers, Pedro D. Uy, before the war and up to this time has been occupying the position of income tax examiner of the Bureau of Internal Revenue. His other brother, Jose D. Uy, is a practising certified public accountant, and before the war was the accountant of the National Abaca and Fiber Corporation (NAFCO). His other brother, Dr. Victorio D. Uy, is a practising physician, and, before the war, was charity physician in Initao and later a physician in the provincial hospital. During the war, Dr. Uy was a captain in the Philippine army. His younger brother was a lieutenant in the 120th Infantry Regiment of the Guerrillas. All his brothers married Filipina girls and they were never identified with any Chinese political or social organization. Respondent's father acquired properties in Lugait. His mother, who never remarried, campaigned for woman suffrage in 1935 and voted in the subsequent elections.

The respondent's contentions, which the court below rejected, were that his father was a subject of Spain on April 11, 1899 by virtue of Article 17 of the Civil Code; that his mother *ipso facto* reacquired her Filipino citizenship upon the death of her husband on February 17, 1917, and the child followed her citizenship; and that the respondent is a citizen of the Philippines by the mere fact of his birth therein. His Honor the Judge noted that, while under the Roa doctrine (Roa v. Insular Collector of Customs, 23 Phil. 315), Alejandro D. Uy would be a Filipino citizen regardless of the nationality of his parents, yet, he said, this doctrine was abandoned in Tan Chon v. Secretary of Labor, G. R. No. 47616, September 16, 1947; Swee Sang vs. The Commonwealth of the Philippines, G. R. No. 47625, decided with Tan Chong vs. Secretary of Labor; and Villahermosa vs. The Commissioner of Immigration G. R. No. L-1663, March 31, 1948.

It may be recalled that in the case of Roa vs. Insular Collector of Customs, *supra*, the petitioner was born in lawful wedlock in the Philippines on July 6, 1889, his father being a native of China and his mother a Filipina. His father was domiciled in this country up to the year 1895 when he went to China and never returned, dying there about 1900. In May, 1901, Roa, who was then a minor, was sent to China by his widowed mother for the sole purpose of studying, and returned in October, 1910, being then about 21 years and 3 months of age. He was denied admission by the board of special inquiry, whose decision was affirmed by the Court of First Instance in habeas corpus proceedings.

This Court held that Article 17 of the Civil Code "is sufficient to show that the first paragraph affirms and recognizes the principle of nationality by place of birth, *jus soli*." Citing various decisions, authorities, and opinions of the United States Attorney General, if found that the decided weight of authority was to the effect that the marriage of an American woman with an alien conferred his nationality upon her during coverture; that upon the dissolution of the marriage by death of the husband, the wife reverted, *ipso facto*, to her former status, unless her conduct or acts showed that she elected to retain the nationality of her husband, and that where the widowed mother herself thus reacquire her former nationality, her children, she being their natural guardian, should follow her nationality with the *proviso* that they may elect for themselves upon reaching majority.

The Roa decision, promulgated on October 30, 1912, set a precedent that was uniformly followed in numerous cases. This long line of decisions applied the principle of *jus soli* up to September 16, 1947, when that principle was renounce in the cases of Tan Cheng v. Secretary of Labor and Swee Sang v. The Commonwealth of the Philippines cited in the appealed decision.

These two decision are not, in our opinion, controlling in this case.

Article IV, entitled "Citizenship," of the Constitution provides:

> "Section 1. The following are citizens of the Philippines:
>
> "(1) Those who are citizens of the Philippine Islands at the time of the adoption of this Constitution.

On the strength of the Roa doctrine, Alejandro D. Uy undoubtedly was considered a full-pledged Philippine citizen on the date of the adoption of the Constitution, when *jus soli* has been the prevailing doctrine. "With it," as Mr. Justice Laurel said in Ramon Torres et al. vs. Tan Chim, 69 Phil. 519, "the bench and the bar were familiar. The members of the Constitutional Convention were also aware of this rule, and in abrogating the doctrine laid down in the Roa case, by making the *jus sanguinis* the predominating principle in the determination of Philippine citizenship, they did not intend to exclude these who, in the situation of Tranquilino Roa, were citizens of the Philippines by judicial declaration at the time of the adoption of

the Constitution. This, "the Court went on to say," is apparent from the following excerpt of the proceedings of the Constitutional Convention when Article IV of the Constitution was discussed:

"Delegate Aruego.—Mr. President, may I just have one question? May I ask Mr. Roxas if, under this proposition that you have, all children born in the Philippines before the adoption of the Constitution was included?

"Delegate Roxas. — No, sir: that is to say, if they are citizens in accordance with the present law, they will be citizens.

"Delegate Aruego.—But as I said they are citizens by judicial decisions.

"Delegate Roxas.—If they are citizens now by judicial decisions, they will be citizens.

"Delegate Aruego.—I should like to make it clear that we are voting on the proposition so that it will include all those born in the Philippines, regardless of their parentage, because I have heard some objections here to the incorporation in toto of the doctrine of jus soli. There are many who do not want to include, as are included in the proposition we are voting upon x x x

"I should like to find out from the gentleman from Capiz if that proposition would make Filipino citizens of children of Chinese parents born last year or this year.

"Delegate Roxas.—No, because by the laws of the Philippine Islands, they are not Filipino citizens now." (Record of the Proceedings of the Constitutional Convention, Session of November 26, 1934.)

Unlike the Tan Chong case, the herein appellant Uy had attained the age of majority when the Constitution went into effect, and had been allowed to exercise the right of suffrage, to hold public offices, and to take the oath of allegiance to the Commonwealth Government or Republic of the Philippines.

The Tan Chong decision itself makes this express reservation: "Needless to say, this decision is not intended or designed to deprive, as it can not divest, of their Filipino citizenship, those who have been declared to be Filipino citizens, or upon whom such citizenship had been conferred by the courts because of the doctrine or principle of *res adjudicata*." Certainly, it would neither be fair nor good policy to hold the respondent an alien after he had exercised the privileges of citizenship and the Government had confirmed his Philippine citizenship on the faith of legal principles that had the force of law. On several occasions the Secretary of Justice had declared as Filipino citizens persons similarly circumstanced as the herein respondent. (Opinion 40, series of 1940, of the Secretary of Justice. See also Opinion No. 18, series of 1942, of the Commissioner of Justice, 1942 Off. Gaz., September.)

Cut out of the same pattern and deserving of the same consideration is the proposition that Alejandro D. Uy became a Philippine citizen at least upon his father's death.

It has been seen that, according to the rule of the Roa case, a Filipino woman married to a Chinese *ipso facto* reacquired her Filipino citizen upon her husband's demite and that thereafter her minor children's nationality automatically followed that of the mother's. This rule was not changed by the adoption of the *jus sanguini* doctrine, and was in force until Commonwealth Act No. 63 went into effect in 1936, by which the Legislature, for the first time, provided a method for regaining Philippines citizenship by Filipino women in such cases. It is to be noted that when Commonwealth Act No. 63 was passed Ursula Diabo had been a widow for 19 years and Alejandro D. Dy had been of age three years, and that the new law carries no provision giving it retroactive effect.

These conclusions make superfluous consideration of the rest of the several assignments of error by the appellant upon which we refrain to express an opinion.

The decision of the lower court is reversed and the respondent and appellant declared a Filipino citizen and eligible to the office of municipal mayor. The petitioner and apoellee will pay the costs of both instances.

Paras, C. J., Bengzon, Montemayor and *Bautista Angelo*, concurred.

PABLO, M., *concurrente:*

Opino que Alejandro D. Uy nacio como ciudadano filipino en 28 de enero de 1912 en Iligan, Lanao, porque su madre Ursula Diabo no estaba casada legalmente con Uy Piangco, pues el hijo natural sigue la ciudadania de su madre (Serra contra Republica de Filipinas, G. R. No. L-4223, mayo 12, 1952); pero al casarse ella con Uy Piangco en 3 de marzo de 1914, Alejandro D. Uy quedo legitimado por subsiguiente matrimonio (Art. 120, Cod. Civ. Esp.); *ipso facto* se habia hecho ciudadano chino porque como menor de edad, tenia que seguir la nacionalidad de su padre legitimo (Art. 18, Cod. Civ. Esp.), como Ursula siguio la de su marido (Art. 22, Cod. Civ. Esp.).

Al fallecimiento de Uy Piangco en 17 de febrero de 1917, Ursula Diabo no se hizo automaticamente ciudadana filipina, pues el articulo 32 de Codigo Civil Español entonces vigente dispone que la española (filipina) que casare con extranjero podra, disuelto el matrimonio, recobrar la nacionalidad española (filipina) llenando los requisitos expresados en el articulo anterior, y estos requisitos son: (a) volviendo la viuda al Reino (repatriacion); (b) declarando su voluntad de recobrar la ciudadania filipina; y (c) renunciando la proteccion del pabellon del pais de su marido. La primera condicion esta practicamente cumplida porque Diabo no salio nunca de Filipinas; pero no esta probado que hubiese declarado ante el registrador civil de su residencia que era su intencion recobrar la ciudadania filipina, ni que hubiese renunciado la proteccion de la bandera china. Desde el 26 de noviembre de 1930 en que se establecio el registro civil en Filipinas, siendo registrador civil local el tesorero municipal, hasta el 28 de agosto de 1949 en que fallecio—mas de dieciocho años — Ursula Diabo tenia amplia oportunidad de hacer la declaracion que exige el articulo 21 de Codigo Civil, pero no lo ha hecho; su silencio da lugar a la presuncion de que deseo continuar gozando de la ciudadania de su marido. Para recobrar la ciudadania filipina, la viuda de un extranjero debe ejecutar ciertos actos que demuestren su deseo indubitable de readquirir su antigua ciudadania y perder la de su finado marido; por tanto, Alejandro D. Uy tampoco readquirio la ciudadania filipina por el mero hecho de haber quedado viuda su madre.

Es principio universalmente aceptado que la expatriacion es derecho inherente a todos. Los hijos de un extranjero nacidos en Filipinas deben manifestar el encargado del Registro civil dentro del año siguiente a su mayor edad o emancipacion, si desean optar por la ciudadania de su pais natal (Art. 19, Cod. Civ. Esp.). Aunque no aparece que ha hecho tal manifestacion al registrador civil, Alejandro D. Uy ejercito, sin embargo, el derecho de sufragio "en las anteriores eleccion verificadas en el pais" al tener edad competente para votar. Con ello demostro que queria adoptar la ciudadania del pais de su nacimiento, prefiriendola a la de su padre. Cuando el 1935 Alejandro D. Uy sirvio al gobierno como maestro de escuela bajo el Departamento de Instruccion Publica, despues escribiente en la tesoreria municipal de Initao en 1937, y mas tarde tesorero de Lugait en 1942 a 1943, y cuando, con exposicion de su vida, ingreso en las filas del 120.o Regimiento de Infanteria de las guerrillas, demostro de una manera clara e inequivoca que preferia ser ciudadano filipino a ser ciudadano chino.

Alejandro D. Uy, de acuerdo con el Codigo Civil antiguo es ciudadano filipino porque opto serlo al llegar a mayor edad. Tambien es ciudadano filipino por disposicion constitucional. Al votar en las elecciones verificadas en el pais al llegar a la mayor edad, demostro que quiso abrazar la ciudadania filipina. La Constitucion dice asi: "Son ciudadanos filipinos: x x x (4) los que, siendo hijos de madres de ciudadania filipina, optaren por esta al llegar a la mayor edad." (Art. 4,Titulo IV, Constitucion). Bueno es hacer constar que existe error en esta disposicion: debe decirse filipina." La filipina que se casa con un extranjero sigue la ciudadania de su marido; por el simple hecho del matrimonio pierde la ciudadania filipina y se hace extranjera: no puede continuar en la condicion de ciudadana filipina por expresa disposicion de la ley, pero no pierde la nacionalidad filipina.

Por las razones expuestas, y no por otras, Alejandro D. Uy adquirio la ciudadania filipina.

PADILLA, *J., concurring.*

I would rest the judgment in this case on the undisputed fact that the respondent was born out of wedlock in Iligan, Lanao, on 28, January 1912 of a Filipino mother and a Chinese father who were married on 3 March 1914 and that his father died on 17 February 1917. He was a Filipino citizen, became Chinese citizen when his father and mother were married, and reacquired his original citizenship on the death of his father, because being under age he followed the citizenship of his mother who reacquired her Filipino citizenship of his mother who reacquired her Filipino citizenship upon the death of her husband and never remarried.

I do not agree to the proposition that persons born in this country of alien parentage whose father is an alien must be deemed Filipino citizens under and by virtue of the doctrine laid down in the case of Roa v. Collector of Customs, 23 Phil. 315. Precisely, the judgment in the cases of Tan Chong v. The Secretary of Labor and Lam Swee Sang v. The Commonwealth of the Philippines, 45 O.G. 1269, holds that as the doctrine laid down in the case of Roa v. Collector of Customs, *supra*, is in conflict with the law in force at the time it must be abandoned. Jose Tan Chong invoked also the benefit of the doctrine in the Roa v. Collector of Cusos case. There is only an exception to the rule laid down in the case of Tan Chong v. The Secretary of Labor and Lam Swee Sang v. The Commonwealth of the Philippines, *supra*.

I concur in this opinion.

(Sgd.) ALEJO LABRADOR

IV

Hon. Agustin P. Montesa, et al appellants, vs. Manila Cordage Co., appellee, G. R. L-4559, September 19, 1952, Pablo, J.

1. COURT; JURISDICTION; INTERFERENCE WITH COORDINATE COURT; EXCEPTION.—A judge of a branch of the court should not annul the order issued by another judge of difference branch of the same court, because both of them are judges of the same category and act independently but coordinately, unless the second judge acts in place of the first judge in the same proceedings.
2. ID.; ID.; ATTACHMENT; DELIVERY OF PERSONAL PROPERTY.—Under section 2(c), Rule 62 of the Rules of Court, a court has no jurisdiction to order the delivery of personal property to the plaintiff if the property is under attachment.

Estanislao A. Fernandez for petitioners.

Ross, Selph, Carrascoso & Janda and *Defin L. Gonzalez* for respondent.

DECISION

PABLO, *J.*:

Se trata de una apelacion interpuesta por el Hon. Juez Montesa, Hao Yu Guan alias A. Lao Roldan y Rufino Ibañez contra una resolucion del Tribunal de Apelacion.

En 7 de marzo de 1950 el Sheriff de Manila, cumpliendo la order expedida en la causa civil No. 9126 del Juzgado de Primera Instancia de esta ciudad, titulada Manila Cordage Company contra Yu Bon Chiong, embargo el automovil Buick Sedan con placa No. 1074 (año 1950) de Yu Bon Chiong que era demandado en dicha causa.

En 8 de marzo Hao Yu Guan alias A. Lao Roldan y Rufino Ibañez presentaron una reclamacion de terceria cada uno, alegando el primero que el automovil estaba hipotecado a su favor hipoteca de bienes muebles, art. 4, Ley (3952), y el segundo, que es condueño de dicho vehiculo. El Sheriff advirtio a la Manila Cordage Company que levantaria el embargo del automovil si ella no prestaba fianza correspondiente. Por tal motivo, la Fidelity & Surety Co., a peticion de Manila Cordage Company, presto fianza de acuerdo con el articulo 14, Regla 59.

En 17 de marzo los terceristas presentaron una demanda en el Juzgado de Primera Instancia de Manila contra la Manila Cordage Company, la Fidelity & Surety Co., y el Sheriff de Manila (causa civil No. 10624), pidiendo la expedicion de una orden de interdicto preliminar para que los demandados, especialmente el Sheriff, desistiesen de continuar reteniendo el Buick y que se lo entregasen a ellos; el Hon. Juez Montesa expidio *ex parte* la orden pedida y, en cumplimiento con dicha order, el Sheriff de Manila entrego el automovil a los demandantes. Al enterarse de esta, la Manila Cordage Company presento una mocion urgente pidiendo la disolucion de la orden de interdicto expedida por dicho Juez, alegando que este se habia excedido en su jurisdiccion al expedir dicha orden; que dicho automovil estaba ya preventivamente embargado en la causa civil No. 9126 por orden valida expedida por el Hon. Juez Macadaeg. Dicha mocion urgente habia sido de negada por el Hon. Juez Pecson en 18 de abril y la mocion de reconsideracion desestimada por el Hon. Juez Montesa en 23 de mayo.

La Manila Cordage Co., acudio al Tribunal de Apelacion por medio del recurso de certiorari contra el Hon. Juez Montesa y otros, pidiendo la revocacion de la orden expedida por dicho juez en la causa No. 10624.

Despues de considerar las razones de una y otra parte, el Tribunal de Apelacion revoco en 29 de diciembre de 1950 la orden del Hon. Juez Montesa que disolvia la orden de embargo preventivo dictada por el Juez Macadaeg. Contra esta resolucion, el Hon. Juez Montesa y otros acuden en apelacion a este Tribunal por medio de certiorari.

Los recurrentes arguyen que la doctrina sentada en el asunto de Cabigao y otro contra Del Rosario y otro, y en Hubahib contra Insular Drug Co., ha sido ya revocada por la decision dictada en Mercado y otros contra Ocampo, y sostienen que el juez de una sala puede expedir una orden anulando la orden de otro juez de otra sala del mismo juzgado de primera instancia.

Analicemos las tres causas citadas:

El Juez de la Segunda Sala del Juzgado de Primera Instancia de Manila condeno al demandado en la causa civil No. 18451, Cabigao contra Lim y Pineda, a pagar al demandante la suma de ₱379.00 con intereses y costas. La decision fue confirmada por este Tribunal en 12 de agosto de 1922; el Juez de la Segunda Sala expidio el mandamiento de ejecucion en 11 de octubre de 1922; el Sheriff de la ciudad trabo embargo sobre los bienes del demandado Lim y Pineda; en 18 del mismo mes Lim y Pineda pidio en la Sala Primera un interdicto prohibitorio preliminar contra el Sheriff y dicho Juez expidio la orden pedida.

Cabigao y otro acudieron a esta Superioridad pidiendo en un recurso de inhibicion que se ordenase al Juez de la Primera Sala que desistiese de intervenir en la ejecucion de la sentencia dictada en la causa civil No. 18451, y este Tribunal, despues de sir a las partes, declaro nulo y sin ningun valor el interdicto prohibitorio preliminar expedido por el Juez recurrido (el de la Primera Sala) declarando que "Las varias salas del Juzgado de Primera Instancia de Manila son, en cierto sentido, juzgados de jurisdiccion coordinada, y el, permitirlos que intervengan en sentencias o decretos de otros por medio de un interdicto prohibitorio, claramente conduciria a confusion, y seriamente podria embarazar la administracion de justicia." (44 Jur. Fil., 195).

En el asunto de Hubahib contra Insular Drug. Co., 5 Lawyers Journal 281 (Feb. 27, 1937), en que el Juez de la Primera Sala de Cebu expidio un interdicto prohibitorio preliminar contra el sheriff provincial para impedirle que cumplimentase el mandamiento de ejecucion expedido por el Juez de la Tercera Sala del mismo juzgado, reiterando la doctrina sentada en Cabigas y otro contra Del Rosario, este Tribunal dijo: "Las varias Salas de un Juzgado de Primera Instancia de una provincia o ciudad, teniendo como tienen la misma o igual autoridad y siendo como son de jurisdiccion concurrente, y coordinada, no deben, ni puede, ni les esta permitido, inmiscuirse en sus respectivos asuntos, y menos en sus ordenes o sentencias, por medio de interdictos prohibitorios. (Cabigao y otro contra Del Rosario y otro, 1922, 44 Jur. Fil., 192, y las causas alli citadas; Nuñez y Enrile contra Low, 1911, 19 Jur. Fil., 256; Orais contra Escaño, 1909, 14 Jur. Fil. 215.)"

En el asunto de Mercado y otro contra el Juez Ocampo, 72 Phil. Rep. 318, se trataba de una orden dictada por el Hon. Juez B. A., de 28 de enero de 1940, que desestimo las objeciones de las comparecientes y mantuvo su orden del 16 de abril del mismo año, que ordenaba la comparecencia de E. L. de B. y J. F. de R. para declarar sobre ciertos bienes del finado Mercado. Las comparecientes presentaron mociones de reconsideracion y nueva vista; el Juez O., que habia vuelto o ocupar su sala del juzgado despues de su vacacion, en resolucion del 2 de julio de 1950, reconsidero las ordenes promulgadas por el anterior Juez B. A. El segundo juez no se entrometio en las ordenes del primero porque el segundo actuaba en lugar del primero en un mismo asunto. Este Tribunal sento la doctrina de que "x x x un juez que preside una sala de un juzgado de primera instancia puede modificar o anular la orden que ha dictado otro juez del mismo juzgado, sin que por ello se infrinja el principio de coordinacion, y que la norma que debe servir de guia debe ser la de si el juez que dicto la primera orden tenia facultad para modificarla o dejarla sin efecto, en cuyo caso el otro juez que la modifico o anulo debe tener igualmente la misma facultad. Y la razon de la doctrina asi sentada consiste sencillamente en que ambos jueces actuan en el mismo juzgado y es el mismo juzgado el que ha modificado o anulado la orden.

"Refiriendonos ahora al caso en consideracion, resulta que el Juez O., al anular las ordenes del Juez B. A., actuaba como Juez del mismo Juzgado de Primera Instancia de Pampanga y apareciendo claro que si las mociones de reconsideracion se hubiesen presentado ante el Juez B. A. este podia anularlas, si a su juicio asi procediese, es obvio que el Juez O. podia hacer lo mismo y podia anularlas, como asi lo hizo.

"x x x Declaramos que el Juez O. tenia jurisdiccion para anular las ordenes que dicto el Juez B. A. y que al hacerlo no hizo mal uso de la discrecion que le ha conferido la ley x x x."

La doctrina en esta ultima causa no revoca la establecida en las dos anteriores causas citadas. En aquellas dos el juez de una sala expidio en un asunto una orden de interdicto anulando la orden de ejecucion dictada en otro por el juez de la otra, lo que es una verdadera intromision indebida de un juez en el asunto de otro juez. Pero en el asunto de Mercado contra Ocampo no se trata de dos causas de dos diferentes salas; se trata de una orden de un juez proveida en un asunto y que despues fue revocada por otro juez que habia vuelto a ocupar su cargo al terminar su vacacion. Aunque eran dos jueces, actuo, sin embargo, el uno en lugar del otro como si hubiera actuado un solo juez. No se ha declarado expresamente la base sobre que descansa la doctrina en las causas de Cabigao y otro contra Del Rosario, y Hubahib contra Insular Drug Co., pero es evidente que es el articulo 263, parrafo 4, del Codigo de Procedimiento Civil.

El articulo 1.o de la Regla 62 dispone que, en un litigio para recobrar la posesion de bienes muebles, el demandante podra solicitar una order interlocutoria para que se le entreguen dichos bienes; pero, para que pueda obtener esa orden, es necesario que pruebe bajo juramento: (a) que es dueño de los bienes embargados a que tiene derecho a la posesion de los mismos; (b) que los bienes son injustamente detentados, alegando la causa de la detentacion; (c) que no han sido secuestrados para satisfacer contribucion alguna, ni multa por mandato de la ley, ni embargados en virtud de ejecucion o embargo preventivo contra los bienes del demandante, o en caso de serlo asi, que son bienes exentos de embargo; y (d) que preste una fianza a favor del demandado por el doble valor de los bienes que reclama para garantizar la devolucion de los mismos al demandado, si asi se dispusiere en la sentencia, y para el pago a dicho demandado de cualquier cantidad que pueda recobrar de la parte demandante en el asunto.

El Buick Sedan con placa No. 1074 habia sido embargado por el Sheriff en virtud de una orden de embargo preventivo dictada en la causa civil No. 9126, y el automovil no esta exento de embargo (Regla 39, art. 12). No podia, por tanto, el Hon. Juez Montesa, por medio de una orden interlocutoria, disponer la entrega a los demandantes de dicho automovil en la causa civil No. 10624, anulando *ipso facto* la orden de embargo preventivo dictada en la causa civil No. 9126. Fue una indebida intremision de un juez en la orden de otro juez de igual categoria. En realidad, la orden dictada en la causa civil No. 10624 deshizo la que otro juez decreto en la causa No. 9126. El juez de una sala de un Juzgado no debe anular la orden de otro juez de otra sala del mismo juzgado porque ambos son jueces de la misma categoria y actuan independiente pero coordinamente, a menos que el segundo actue en lugar del primero sobre un mismo expediente.

La orden dictada disolviendo la orden de embargo preventivo era factible bajo el Codigo de Procedimiento Civil porque su articulo 263, parrafo 4, dice asi:

> "Que los bienes no han sido secuestrados para satisfacer contribucion alguna, ni multa por mandato de una ley, ni embargados en cumplimiento de una sentencia dictada contra los bienes del demandante; y en el caso de haber sido embargados, que son bienes exentos de embargo."

Pero, bajo el reglamento vigente, no se puede ordenar la entrega de los bienes embargados preventivamente porque la Regla 62, articulo 2, parrafo (c), dispone lo siguiente:

> "Que no han sido secuestrados para satisfacer contribucion alguna, ni multa por mandato de la ley, ni embargados en virtud de ejecucion o embargo preventivo contra los bienes del demandante, o en caso de serlo asi, que son bienes exentos de embargo."

En la nueva disposicion se añadieron las palabras *"o embargo preventivo"*. Esta es la innovacion adoptada por el nuevo reglamento, con el evidente pro-

posito de impedir el triste espectaculo de que un juez revoque la orden dictada por otro juez, en jerjuicio de la ordenada administracion de justicia.

Ademas, los demandantes solamente prestaron fianza de ₱6,500.00, que es el valor del automovil embargado, en vez del doble de su valor.

La orden impugnada esta en abierta contravencion con las disposiciones del articulo 2, Regla 62.

Se confirma la resolucion apelada con costas contra Hao Yu Guan y Rufino Ibañez.

Paras, C.J., Bengzon, Padilla, Montemayor, Jugo, Bautista Angelo and *Labrador, JJ.*, conformes.

V

Jose L. Laxamana, petitoner, vs. Jose T. Baltazar, respondent. G. R. L-5955, September 19, 1952, Bengzon, J.

1. PUBLIC OFFICERS; MAYORS; VICE-MAYOR DISCHARGES DUTIES OF SUSPENDED MAYOR.—When in July 1952 the mayor of Sexmoan, Pampanga, was suspended, the vice-mayor B, assumed office as mayor by virtue of section 2195 of the Revised Administrative Code. However, the provincial governor, acting under section 21(a) of the Revised Election Code (R. A. 180), with the consent of the provincial board appointed L, as mayor of Sexmoan, who immediately took the corresponding official oath. *Held:* When the mayor of a municipality is suspended, absent or temporarily unable, his duties should be discharged by the vice-mayor in accordance with sec. 2195 of the Revised Administrative Code.

2. STATUTORY CONSTRUCTION; INTERPRETATION OF REENACTED STATUTE.—Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is reenacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law.

3. ID.; CONFLICT BETWEEN GENERAL AND SPECIAL STATUTES.—Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute.

4 ID.; CONSTRUCTION PLACED UPON STATUTE BY EXECUTIVE OFFICERS.— The contemporaneous construction placed upon the statute by the executive officers charged with its execution deserves great weight in the courts.

Gerardo S. Limlingan and Jose L. Baltazar for petitioner.

Macapagal, Punsalan & Yabut and *Pedro S. David* for respondent.

Pedro Lopez, Ramon Duterte and *Regino Hermosisima* as *amici curiae.*

DECISION

BENGZON, *J.*:

When in July 1952 the mayor of Sexmoan, Pampanga, was suspended, the vice-mayor Jose T. Baltazar, assumed office as mayor by virtue of section 2195 of the Revised Administrative Code. However, the provincial governor, acting under section 21(a) of the Revised Election Code (R. A. 180), with the consent of the provincial board appointed Jose L. Laxamana, as mayor of Sexmoan, who immediately took the corresponding official oath.

Result: this *quo warranto* proceeding, based solely on the petitioner's proposition that the section first mentioned has been repealed by the subsequent provision of the Revised Election Code.

If there was such repeal, this petition should be granted; and Laxamana declared the lawful mayor of Sexmoan. Otherwise it must be denied (1).

The two statutory provisions read as follows:

"Sec. 2195. TEMPORARY DISABILITY OF MAYOR.—Upon the occasion of the absence, suspension, or other temporary disability of the Mayor, his duties shall be discharged by the Vice-Mayor, or if there be no Vice-Mayor, by the councilor who at the last general election received the highest number of votes."

"Sec. 21(a) VACANCY IN ELECTIVE PROVINCIAL, CITY OR MUNICIPAL OFFICE.—Whenever a temporary vacancy in any elective local office occurs, the same shall be filled by appointment by the President if it is a provincial or city office, and by the provincial governor, with the consent of the provincial board, if it is a municipal office. (R. A. 180, the Revised Election Code.)

Section 21(a)—the portion relating to municipal offices — was taken from section 2180 of the Revised Administrative Code, which partly provided:

"Sec. 2180. VACANCIES IN MUNICIPAL OFFICE.—(a) In case of a temporary vacancy in any municipal office, the same shall be filled by appointment by the provincial governor, with the consent of the provincial board.

(b) In case of a permanent vacancy in any municipal office, the same shall be filed by appointment by the provincial board, except in case of a municipal president, in which the permanent vacancy shall be filled by the municipal vice-president." x x x

It will be seen that under this section, when the office of municipal president (now mayor) became *permanently vacant* the vice-president stepped into the office. The section omitted reference to *temporary vacancy* of such office because section 2195 governed that contingency. In this regard sections 2180 and 2195 supplemented each other. Paragraph (a), of section 2180 applied to municipal offices in general, other than that of the municipal president.

Under the Revised Administrative Code, —especially the two sections indicated— there was no doubt in Government circles that when the municipal president was suspended from office, the vice-president took his place.

"Temporary vacancy in office of municipal president.—Paragraph (a) of this section (2180) should be construed to cover only municipal offices other than the office of president. Section 2195 of the Administrative Code should be applied in case of the absence, suspension, or other temporary disability of the municipal president. (Op. Atty. Gen., Sept. 21, 1917; Ins. Aud., Oct. 23, 1927.)" (Araneta, Administrative Code Vol. IV p. 2838).

"Municipal president cannot designate acting president. — There is no provision of law expressly or impliedly authorizing the municipal president to designate any person to act in his stead during his temporary absence or disability. From the provision of section 2195 of this Code, it is clear that the vice-president or, if there be no vice-president, the councilor who at the last general election received the highest number of votes, should automatically (without any formal designation) discharge the duties of the president." (Op. Ins. Aud., March 2, 1926.) (Araneta, Administrative Code Vol. IV p. 2839).

Now, it is reasonable to assure that the incorporation of the above section 2180 into the Revised Election law as sec. 21(a) did not have the effect of enlarging its scope (2), to supersede or repeal section 2195, what with the presumption against implied repeals (3).

(1) The alleged offer of appointment by the governor which Baltazar rejected is immaterial, because under sec. 2195 no appointment is needed.

(2) It was even restricted to elective municipal office.

(3) Sutherland, Statutory Construction 3rd Ed. sec. 2014 note 1.

"Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is re-enacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. The rule here is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment." (Sutherland Statutory Construction, sec. 5109.)

Indeed, even disregarding their origin, the allegedly conflicting sections, could be interpreted in the light of the principle of statutory construction that when a general and a particular provision are inconsistent the latter is paramount to the former (Sec. 288 Act 190). In other words, section 2195 referring particularly to vacancy in the office of mayor, must prevail over the general terms of sec. 21(a) as to vacancies of municipal (local) offices. Otherwise stated, section 2195 may be deemed an exception to or qualification of the latter [4]. "Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute." (Sutherland Statutory Construction," (Sutherland Statutory Construction, sec. 5204.)

In a recent decision [5], we had occasion to pass on a similar situation, -repeal by subsequent general provision of a prior special provision- and we said,:

"It is well settled that a special and local statute, providing for a particular case or class of cases, is not repealed by a subsequent statute, **general** in its **terms, provisions and application,** unless the intent to repeal or alter is manifest, although the terms of the general act are broad enough to include the cases embraced in the special law. x x x It is a canon of statutory construction that a later **statute, general in its terms** and not expressly repealing a **prior special** statute, will ordinarily not affect the special provisions of such earlier statute. (Steamboat Company vs. Collector. 18 Wall. [U.S.], 478; Cass County vs. Gillett, 100 U.S. 585; Minnesota vs. Hitchcock, 185 U.S. 373, 396.)

"Where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special — the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, one as a general law of the land, the other as the law of a particular case. (State vs. Stoll, 17 Wall. [U.S.], 425.)"

In fact even after the Revised Election Code was enacted, the Department of the Interior and the office of Executive Secretary who are charged with the supervision of provincial and municipal governments have "consistently held that in case of the suspension or other temporary disability of the mayor, the vice-mayor shall, by operation of law, assume the office of the mayor, and if the vice-mayor is not available, the said office shall be discharged by the first councilor." (Annex 5 of the answer).

Needless to say, the contemporaneous construction placed upon the statute by the executive officers charged with its execution deserves great weight in the courts [6].

Consequently it is our ruling that when the mayor of a municipality is suspended, absent or temporarily unable, his duties should be discharged by the vice-mayor in accordance with sec. 2195 of the Revised Administrative Code.

This *quo warranto* petition is dismissed with costs. So ordered.

Paras, C.J., Pablo, Padilla, Montemayor, Jugo, Bautista Angelo and *Labrador, JJ*, concurred.

Mr. Justice Tuason took no part.

VI

Paulino Dumaguin, plaintiff-appellant, vs. A. J. Reynolds, E. J. Harrison and Big Wedge Mining Co., G. R. L-3572, September 30, 1952, Montemayor, J.

1. MINING EMPLOYERS AND EMPLOYEES; LOCATION OF MINING CLAIMS.—It would really be unfair, even against public policy to allow a person employed to stake and locate mining claims for his employer to make locations on his own account and for his own benefit tho done outside hours of work or employment, because there is an obvious incompatibility and conflict of interests between those of the employer on one hand and those of the employer on the other, unless there is a clear and express agreement to the contrary.

2. ID.; ID.; EMPLOYERS NOT ALLOWED TO STAKE MINING CLAIMS FOR THEM.—It has been the practice of miners to employ others to stake mining claims for them. This is usually done after the prospectors have assured themselves that a mine exists in a certain locality. The man who places the stake could easily leave fractional mineral claims in between the claims without reporting the existence of these factions to his principal. Later he could stake and claim them. If this is permitted to happen, bona fide miners can easily be held up by the very men whom they have employed to stake their mining claims. If the mining industry shall be protected and the exploitation of the natural resources of his country encouraged, such practice should not be tolerated. The wrong or the damage that can be done is unlimited. If agents or employees or laborers are permitted to conceal or without certain mining claims ordered staked by their employer who gave them specific instructions to stake the entire ground in a certain locality, the effect will practically be the condonation and legalization of a holdup.

3. CONTRACT; GUARDIANSHIP. CONTRACT ENTERED INTO BY PERSON UNDER GUARDIANSHIP. —Even in the execution of contracts, in the absence of a statute to the contrary, the presumption of insanity and mental incapacity is only *prima facie* and may be rebutted by evidence; and a person under guardianship for insanity may still enter into a valid contract and even convey property, provided it is proven that at the time of entering into said contract, he was not to interfere with or affect his capacity to appreciate the meaning and significance of the transaction entered into by him.

4. INSANITY; PERSONS MENTALLY DERANGED REGARDING CERTAIN SUBJECTS MENTALLY SOUND IN OTHER RESPECTS.—There are many cases of persons mentally deranged who although they have been having obsessions and delusions for many years regarding certain subjects and situations, still are mentally sound in other respects. There are others who though insane, have their lucid intervals when in all respects they are perfectly same and mentally sound.

5. ID.; MINING; EMPLOYERS AND EMPLOYEES. EMPLOYEE COULD BE COMPELLED TO TRANSFER MINING CLAIMS TO EMPLOYER.—Although at the time of executing the deed of sale of mining claims, the vendor was still mentally inca-

(4) Sutherland, Statutory Construction 3rd Ed. Vol. 1 p. 486.

(5) Philippine Railway Co. v. Collector of Int. Rev. G.R. No. L-3859, March, 1952.

(6) Madrigal v. Rafferty, 38 Phil. 414, Government v. Binalonan, 32 Phil. 634.

pacitated, because of his moral and legal obligation to transfer the mining claims to his employers, he could through his guardian have been compelled by the court to execute said transfer, or after the termination of his guardianship obliged personally to execute said transfer to his employers. He acted as a trustee for his employers and the law will not allow him to invoke insanity or mental incapacity to violate his trust.

6 CONTRACTS: VALIDITY OF ONE-PESO CONSIDERATION.- Where in the two deeds of sale of mining claims each mentions ₱1.00 and other valuable consideration, the receipt whereof was acknowledged, to be the consideration, the consideration is sufficient, according to the provision of law, (Art. 1277 of the Civil Code). Besides, consideration in the contract will be presumed and it is licit, unless the debtor proves the contrary.

7. MINING: EMPLOYERS AND EMPLOYERS: CONSIDERATION FOR CONVEYANCE OF MINING CLAIMS NOT NECESSARY.— The mining claims having been located for the benefit of the employer by an employee in his capacity as such, paid for that purpose, no consideration for the conveyances of the mining claims by the employee to the employee was necessary. The employee was merely fulfilling an obligation and complying with a trust.

Tañada, Pelaez & Teehankee for appellant.

Claro M. Recto for appellee.

DECISION

MONTEMAYOR, *J.:*

For purposes of this decision, the following facts may be said to be agreed upon by the parties or to be without dispute. Because the plaintiff-Paulino M. Dumaguin would appear to be the central figure in this case, we shall begin by making reference to this background and his status at the time he entered into the transactions and executed the deeds of conveyance whose legality is now the subject of the present petition.

Paulino M. Dumaguin was a teacher in the public elementary schools for a year and a half, and from 1916 to 1918 was the Manager of the Head Waters Mining Company in Baguio. As Manager of said mining company Paulino acquired some knowledge of mining. On or before May 21, 1929, he was a supervising line-man of the Bureau of Posts. On that date (May 21, 1929) he was admitted to the Insular Psychopathic Hospital at San Felipe Neri (now the National Psychopathic Hospital), Mandaluyong, Rizal, said to be suffering from "paranecia". On October 15, 1929, Dr. Toribio Joson, assistant alienist of said Hospital, submitted the following memorandum:

MEMORANDUM

TO: The Alienist in Charge Insular Psychopathic Hospital, San Felipe Neri, Rizal.

SUBJECT: Paulino M. Dumaguin—Male, married, 33 years old, Ex-Supervising Lineman of the Bureau of Posts, admitted to the hospital at 11:25 a.m. on May 21, 1929.

1. The patient is well behaved, oriented in all sphere, coherent in his speech and has no more illusion or hallucinations; but is having a delusion that one of the patients in the hospital is trying to chloroform him. He consequently keeps away from the said patient.

2. He is also not sure that his former officemates whom he erroneously believed chloroformed him before, would not chloroform him anymore when he goes home.

3. This type of insanity which Paulino M. Dumaguin is suffering from is therefore that of **Paranecia, which runs a very chronic course of usually a life time, but which may show improvement as the patient grows older".** (See Exhibits 42, folio 195; Italic ours)

After Paulino's discharge from the hospital on or about November 11, 1929, in order to enable his wife to withdraw his retirement gratuity from the government, on September 16, 1930, she filed guardianship proceedings in the Court of First Instance of Camarines Sur. Said court relying presumably on the report of Dr. Joson above quoted granted the petition and appointed her as Paulino's guardian.

On February 2, 1931, Paulino and his guardian in a joint motion before the Court of Camarines Sur among others alleged that —

"4. Que en la actualidad, el citado Paulino M. Dumaguin, ya esta re-establecido, por lo que se le ha permitido dejar el Hospital y ahora vive con su familia en esta localidad, que es su residencia.

"5. Que el mencionado Paulino M. Dumaguin ha recibido un cheque del Gobierno por la cantidad de ₱412.38, como parte de su pension.

"6. Que los comparecientes necesitan el importe el importe de dicho cheque para atender a sus subsistencia, pues se hallan en la actualidad faltos de todo necesario."

and asked that they be authorized to cash said check and use its proceeds for their support:

"POR TANTO, suplican al Juzgado que se les poner de su producto para su manutencion."

In 1934, the guardianship proceedings were closed.

In and before the year 1930, defendants A. I. Reynolds and E. J. Harrison sold and transferred to the same demineral claims in the Itogon District, subprovince of Benguet, Mountain Province, known as the "ANACONDA GROUP". They employed Fructuoso Dumaguin, brother of plaintiff Paulino, in their work as prospectors.

At the beginning of 1931, Fructuoso Dumaguin was thus working for said defendants Reynolds and Harrison relocating some of their mining claims previously located and locating new ones, for which work he was paid ₱5.00 a day. About the same time his brother Paulino M. Dumaguin, plaintiff herein, leaving his home in Camarines Sur went up to Baguio in search of work. To help him, Fructuoso got him employed by the defendants and the two brothers worked together in the mining business for the defendants.

The theory of the plaintiff is that he was employed only to re-locate defendants' mining claims in the ANACONDA GROUP while the defense claims that like his brother Fructuoso, Paulino was employed not only to re-locate mining claims within the Anaconda Group but also to stake and locate new mining claims for them. For said work Paulino was also paid by the day by defendants.

During the months of May, June and July of that year 1931 the two brothers Fructuoso and Paulino staked and located ten mining claims or fractions thereof named Victoria, Greta, Triangle, Lolita, Frank, Paul, Leo, Loreto, Arthur and G. Ubalde, all said claims or fractions being later registered in the name of Paulino M. Dumaguin as locator in the office of the Mining Recorder. By virtue of an instrument (Exh. "A") entitled "Deed of Transfer" dated September 10, 1931, Paulino M. Dumaguin conveyed and transferred to defendants A. I. Reynolds and E. J. Harrison nine of the ten mineral claims just mentioned, and in another instrument (Exh. "B") on the same date September 10, 1931, Paulino transferred and conveyed to defendant Reynolds the remaining claim Victoria.

Later, Reynolds as vendee of the mining claim Victoria by virtue of a deed of sale (Exh. "C") dated November 2, 1931 sold and transferred said claim to the defendant Big Wedge Mining Co. In another deed of sale (Exh. "D") dated June 2, 1933, Reynolds and Harrison sold and transferred to the same de-

fendant Big Wedge Mining Co. the claims Frank, Paul, Leo, Loreto and Arthur. In still another deed of sale (Exh. "J"), Reynolds and Harrison sold and transferred to the same Big Wedge Mining Co. the Greta, Lolita and Triangle fractions or mineral claims. As a result, all the ten mineral claims or fractions transferred by Paulino to Reynolds and Harrison, with the exception of the claim G. Ubalde were in turn sold and transferred to the Big Wedge Mining Co. What was done with this last claim or fraction G. Ubalde, does not appear on the record, but it must still remain in the name of Reynolds and Harrison.

Plaintiff Dumaguin initiated this case in the Court of First Instance of Baguio by filing his original complaint on November 5, 1934, later amending it on July 26, 1939 and finally re-amending it on June 4, 1940. Under his re-amended complaint which contains three causes of action, he alleges that when he executed the deeds of transfer (Exhs. A and B) he was under guardianship and did not possess the mental capacity to contract and so asked the court that the said two deeds be declared null and void. He also alleged that those two deeds being void, Reynolds and Harrison had no title to transmit to the Big Wedge Mining Co. by virtue of the deeds of sale, Exhs. "C" and "D" (plaintiff evidently overlooked the deed, Exh. "J"), and therefore those two deeds of sale (Exhs. C and D) should also be declared null and void, and that he (Paulino) should be declared the owner of the ten mining claims or fractions in question. Finally, he claimed that the Big Wedge Mining Co. had illegally taken possession of the ten mining claims and profitably worked or operated them and so he asked that said company be ordered to render an accounting of its operations and the profits made therefrom, and that the defendants should be ordered jointly and severally to pay to the plaintiff such profits as may have been derived by the Big Wedge Mining Co. as shown by its accounts.

Defendants Reynolds and Harrison filed their original answers on January 30, 1935 and April 12, 1935, respectively, both superseded by their amended answers on January 22, 1936. Defendant Big Wedge Mining Co. filed its answer on January 30, 1935, which was amended on January 18, 1936 and later re-amended on February 5, 1940. Reynolds and Harrison claimed in their answers that plaintiff Paulino and his brother Fructuoso had been expressly employed by them to locate and stake mineral claims, and that said two brothers staked and located the ten mineral claims in question for them (defendants), and that there was an understanding between the two brothers and the two defendants that said mineral claims so located would eventually be transferred to them. In its turn defendant Big Wedge Mining Co. followed the theory of Reynolds and Harrison about Paulino having been employed by them and having made the location of the mineral claims in question for their employers, said that the company was not aware of the alleged mental capacity of plaintiff at the time that he executed the deeds of transfer in favor of Reynolds and Harrison, and that even if plaintiff was under guardianship at the time, yet he confirmed and ratified the deeds of transfer by his acts and letters after his release from guardianship, and that said company bought the said mineral claims in good faith and for valuable consideration from the registered owners.

Hearing was held on July 31, 1940. The evidence submitted was mainly documentary. Only three witnesses took the witness stand. Atty. Alberto Jamir was presented by the Big Wedge Mining Co. to identify a copy of a decision rendered by the Securities and Exchange Commission. Defendant Reynolds testified for the defense. For the plaintiff, only Fructuoso Dumaguin testified for his brother. Why Paulino, the plaintiff, did not take the witness stand, if not to support the allegations of his complaint, at least to refute the evidence for the defense particularly that which tended to show that he was employed by defendants Reynolds and Harrison to stake and locate mineral claims for them with the understanding that he would later transfer said claims to his employers, is not known to this Court. After trial, Judge Jose R. Carlos before whom the hearing was held, rendered judgment on January 16, 1941, dismissing the complaint.

Paulino Dumaguin appealed from that decision. His Record on Appeal was approved on April 16, 1941 Appellant's brief was filed on November 3, 1941 and the brief for the Big Wedge Mining Co. was filed or rather is dated December 31, 1941. It is not known whether defendants Reynolds and Harrison ever filed a brief. The fact is that the record of the case was lost or destroyed during the war and only copies of the record on appeal and the brief were salvaged. As to the oral and documentary evidence which was lost, only those portions of the transcript and documents reproduced and appearing in the briefs are now available. But the parties have agreed to the correctness of these portions so quoted in the briefs.

After the reconstitution of the case, the Court of Appeals which had taken charge of the appeal found that the amount involved was beyond its jurisdiction and so certified the case to us. Neither Reynolds nor Harrison has appeared before the Court of Appeals or before this Court. Appellant's attorney represented that Harrison's counsel could not appear in the appeal due to lack of authority not having heard from his client since Liberation and being of the belief that his client is dead. There was also information to the effect that defendant Reynolds had been killed during the early part of the occupation by the Japanese. So, only the Big Wedge Mining Co. is opposing the present appeal.

The decisive and pivotal question here is whether plaintiff Paulino M. Dumaguin and his brother Fructuoso acting on their account staked and located these mining claims or fractions in dispute for Paulino, or whether they acting as employees and agents of defendants Reynolds and Harrison, staked and located said claims for and in behalf of their employers. We agree with the trial court that the great preponderance of evidence is to the effect that these claims were located for Reynolds and Harrison by Paulino and Fructuoso as employees, and that the latter were purposely employed and paid for his work. All the expenses incident to the staking and location of said claims and the registration of the corresponding declarations of location were paid by Reynolds and Harrison. It is true that in one part of his testimony, Fructuoso claimed that he and his brother were employed merely to re-locate the mining claims of defendants within the Anaconda Group but later on, he admitted in his testimony and also in his affidavit (Exh. "1") which was prepared before these proceedings were initiated in court that he and his brother Paulino working together were paid by the defendants Reynolds and Harrison to locate new mining claims outside the Anaconda Group; that as a matter of fact, Paulino engaged in this work at the beginning, but because he (Fructuoso) found that Paulino physically was not equal to the arduous work of climbing up and down mountains to stake and locate claims, he was placed in charge of the payroll of the defendants and detailed to do paper work which, it is presumed, included the registration of the declarations of location of the mining claims in the office of the Mining Recorder, in his name. Fructuoso also admitted that there was an understanding before and pending the staking and location of said mining claims that they would eventually be transferred to their real owner, Reynolds and Harrison.

In consonance with this correct theory that these mining claims were located for defendants Reynolds and Harrison, as counsel for appellee well observes, Exhibits A and B are both entitled "Deed of Transfer". This conveys the idea that

Paulino was merely transferring to the real owners property which technically and in name were registered as his own. Otherwise, if he really owned these mining claims, the two deeds (Exhibits A and B) would have been more appropriately entitled "Deed of Sale" and the body of said instruments should have stated that he was selling the mining claims. On the other hand, we have the instruments (Exhibits C and D) wherein Reynolds and Harrison sold said mining claims or fractions to the Big Wedge Mining Co. and the documents were each entitled "Deed of Sale".

It would really be unfair, even against public policy to allow a person employed to stake and locate mining claims for his employer to make locations on his own account and for his own benefit though done outside hours of work or employment, because there is an obvious incompatibility and conflict of interests between those of the employer on the one hand and those of the employee on the other, unless there is a clear and express agreement to the contrary. Judge Carlos in his well-considered decision correctly states the fiduciary relation between Paulino and his employers Reynolds and Harrison and the sound and correct rule and public policy on this matter.

"The fiduciary relation between the plaintiff and the defendants A. I. Reynolds and E. J. Harrison is very clear from the evidence. Fructuoso M. Dumaguin has clearly stated that his brother, Paulino M. Dumaguin, was working under him while he was locating the claims in question for A. I. Reynolds and E. J. Harrison. There can be no doubt that these claims in question were among those which these defendants wanted staked because, according to Fructuoso M. Dumanguin himself, they all adjoin the Anaconda Group, which ground he was specifically instructed to stake for the said defendants. The plaintiff herein, therefore, learned of the existence, especially of the fractional mineral claims, because he was with the party who staked the rest of the claims in that locality. To permit the plaintiff herein to assert his claim of ownership over these claims in question would be tantamount to allowing him to violate and infringe all the sound and age-old rules which govern principal and agent. There can be no doubt that this relation existed because Fructuoso M. Dumaguin, the sole witness for the plaintiff, stated categorically in his affidavit Exhibit "T" that all the claims subject of this litigation, except the C. Ubalde mineral claim, had been located and staked by him for A. I. Reynolds and E. J. Harrison, though the same were recorded in the name of his brother Paulino. It is quite evident, therefore, that even if no transfers were made on Exhibits "A" and "B" did not exist, these two defendants would still be entitled to an assignment of the said claims. The evidence of the fiduciary relation between the plaintiff and the defendants A. I. Reynolds and E. J. Harrison was given by none other than Fructuoso M. Dumaguin, the brother the only witness of the plaintiff in this case.

"Any act of an agent, the object or tendency of which is to commit a fraud or breach of the agency, should be discouraged. In the first place, such acts are condemned by public policy. They are against the morals; therefore, they should never be tolerated. An agent or trustee, or anybody who acts in a fiduciary capacity, should never be permitted to capitalize on his fiduciary position to mulct or take advantage of his principal or employer.

"It has been the practice of miners to employ others to stake mining claims for them. This is usually done after the prospectors have assured themselves that a mine exists in a certain locality. The man who places the stake could easily leave fractional mineral claims in between the claims without reporting the existence of these fractions to his principal. Later he could stake and claim them. If this is permitted to happen, bona fide miners can easily be held up by the very men whom they have employed to stake their mining claims. If the mining industry shall be protected and the exploitation of the natural resources of this country encouraged, such practice should not be tolerated. The wrong or the damage that can be done is unlimited. If agents or employees or laborers are permitted to conceal or withhold certain mining claims ordered staked by their employer who gave them specific instructions to stake the entire ground in a certain locality, the effect will practically be the condonation and legalization of a holdup. For the reason, Mechem on Agency, Sec. 1224, said the following:

"'The well-settled and salutary principle that person who undertakes to act for another shall not, be in the same matter, act for himself, result also in the other rule, that all profits made and advantage gained by the agent in the execution of the agency belong to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent if it be the fruit of the agency. If his duty be strictly performed, the resulting profit accrues to the principal as the legitimate consequence of the relation; if profit accrues from his violation of duty while executing the agency, that likewise belongs to the principal, not only because the principal has to assume the responsibility of the transaction, but also because the agent cannot be permitted to derive advantage from his own default.

'It is only by rigid adherence to this rule that all temptation can be removed from one acting in a fiduciary capacity, to abuse his trust or seek his own advantage in the position which it affords him.'"

In view of our conclusion and holding that these mining claims were staked and located for the benefit of defendants Reynolds and Harrison, the other points and questions involved in the appeal exhaustively, in detail and with a wealth of authorities, discussed by counsel for both appellant and appellee with ability and skill, become incidental and not of much if any relevancy whatsoever, although we may discuss one or two of them not so much to strengthen our decision but rather to render more clear our views. Appellant contends that the deeds of transfer (Exhs. A and B) should be annulled for lack of mental capacity because at the time of their execution he was under guardianship for insanity. It is contended that altho in a case of execution of a will by a testator who was under guardianship for mental derangement, the presumption of insanity is only *juris tantum*, subject to rebuttal, nevertheless, mental incapacity as regards contracts particularly those transferring property, under similar circumstances, involves a conclusive presumption which cannot be rebutted by evidence. We have studied the arguments and authorities adduced by both counsel on this point and we are inclined to agree with counsel for appellee that the better rule is that even in the execution of contracts, in the absence of a statute to the contrary, the presumption of insanity and mental incapacity is only *prima facie* and may be rebutted by evidence; and that a person under guardianship for insanity may still enter into a valid contract and even convey property, provided it is proven that at the time of entering into said contract, he was not insane or that his mental defect if mentally deranged did not interfere with or affect his capacity to appreciate the meaning and significance of the transaction entered into by him.

"Sec. 66. Generally. — Of course, not every substandard mentality or even every mental infirmity has the effect of rendering the afflicted person disabled for the purpose of entering into contract and making conveyances. x x x A reasonable test, suggested by several courts for the purpose of determining whether an infirmity operates to render

a person incapable of binding himself absolutely by contract, is whether his mind has been so affected as to render him incapable of understanding the nature and consequences of his acts, or, more exactly, whether his mental powers have become so far affected as to make him unable to understand the character of the transaction in question. x x x Some authorities take the view that a guarantor may be competent to execute a deed notwithstanding his disability to transact business generally, provided he understands the nature of what he is doing and recollects the property of which he is doing and recollects the property of which he is making a disposition and to whom he is conveying it. Other authorities, however, take the position that to sustain a deed, the grantor must have the ability to transact ordinary business. In any event, if it appears that the grantor in a deed was incapable of comprehending that the effect of the instrument, when made, executed, and delivered, would be to divest him of title to the land covered by the instrument, it is not binding upon him. x x x." (28 Am. Jur. Insane, etc., Sec. 66, pp. 701-702.)

"x x x Even partial insanity will not render a contract voidable unless it exists in connection with or is referable to the subject matter of the contract. Similarly, a delusion if unconnected with the transaction in question, is not sufficient to affect the validity of a contract consummated by the person thus affected. Monomania or a mental fixation or abnormality respecting a matter disconnected with the act of conveying property will not affect the validity of the conveyance. x x x" (Ibid., p. 703).

There are many cases of persons mentally deranged who although they have been having obsessions and delusions for many years regarding certain subjects and situations, still are mentally sound in other respects. There are others who though insane, have their lucid intervals when in all respects they are perfectly same and mentally sound.

In the case of Paulino M. Dumaguin, according to the doctor who observed and examined him, and who made his report on October 15, 1929, and that was more than two years before Exhibits A and B were executed, he (Paulino) while in the hospital was "well behaved, oriented in all spheres, coherent in his speech and has no more illusion or hallucinations; but is having a delusion that one of the patients in the hospital is trying to chloroform him. He consequently keeps away from said patient;" and that he was "not sure that his former officemates whom he erroneously believed chloroformed him before would not chloroform him anymore when he goes home." This was in 1929. The same year Paulino was discharged from the hospital presumably because his condition had improved, and on February 2, 1931, Paulino and his wife in a motion assured the Court of Camarines Sur that Paulino was already re-established (ya esta re-establicido). Several months later he went to Baguio looking for work. It is to be presumed that he was then no longer insane. It is equally to be presumed that his brother Fructuoso would not have recommended him for employment by defendants Reynolds and Harrison and actually let him work for them, at the beginning climbing up and down mountains to stake and locate claims for his employers: and if Paulino was then insane, it was not likely that Reynolds and Harrison would employ him to do the work of staking and locating claims to say nothing of taking charge of the payroll of their emolover, and registering with the Mining Recorder the declarations of location of mining claims. There is every reason to believe as we do and hold that at least from about the beginning of the year 1931 when Paulino began working for his employers Reynolds and Harrison, and when he executed Exhs. A and B, he had the mental capacity to transact ordinary business and was mentally capable of validly entering into contract even conveying property to another. But even assuming that at the time of executing Exhibits A and B. Paulino were still mentally incapacitated, still, because of his moral and legal obligation to transfer said claims to his employers, he could through his guardian have been compelled by the court to execute said transfer, or after the termination of his guardianship obliged personally to execute said transfer to his employers. He acted as a trustee for his employers and the law will not allow him to invoke insanity or mental incapacity to violate his trust.

In relation with this alleged incapacity of Paulino, it is interesting to note that when he and his lawyers filed his first complaint in 1934, that is, about three years after executing Exhs. A and B, they said nothing about being mentally incapacitated in 1931. They did not ask for the annulment of the deeds of transfer (Exhibits A and B) on the ground of lack of mental capacity. They assumed and took it for granted and led others to believe that said deeds of transfer were valid. They only asked for the payment of damages. It was not until five years later in the year 1939 when they filed the first amended complaint that they raised his question of mental incapacity. It took him and his lawyers almost five years to discover and claim that he (Paulino) was not mentally capable to enter into a contract when he executed exhibits A and B. In view of all this, we may well and logically presume that all the time that Paulino was employed by Reynolds and Harrison to locate and register mining claims for them, and at the time that he executed Exhibits A and B and for several years thereafter when he continued in their employ, neither Fructuoso, Paulino's brother nor defendants Reynolds and Harrison had any reason to suspect, much less, to believe that Paulino was other than a sane, responsible, and mentally capable individual, able to take care not only of himself and his interest but also of the interests of his employers. Neither did the other employees of Reynolds and Harrison to whom Paulino paid wages on paydays, he being in charge of the payroll, and the Mining Recorder before whom he executed proper and valid affidavits of locations for purposes of registration, note any mental incapacity on the part of Paulino. All this goes to reinforce the finding that Paulino was mentally sane and capable in 1931.

Counsel for appellant next contends that Exhibits "A" and "B" should be declared void for lack of consideration Said two deeds each mentions ₱1.00 and other valuable consideration, the receipt whereof was acknowledged, to be the consideration. We believe that that consideration is sufficient, this aside from the provision of law (Article 1277) of the Civil Code), that consideration in a contract will be presumed and that it is licit, unless the debtor prove the contrary which Paulino in this case failed to establish. Furthermore, according to Reynolds, in consideration of the transfer of these mining claims, he had later paid Paulino between ₱3,000.00 and ₱5,000.00. This was not refuted by Paulino. Moreover. under the view we take of the mining claims having been located for the benefit of defendants Reynolds and Harrison, by Paulino in his capacity as their employee, paid for that purpose, no consideration for the conveyances was even necessary. He was merely fulfilling an obligation and complying with a trust.

In conclusion we find and hold that Exhibits "A" and "B" were valid conveyances executed by one who was mentally capable. Consequently, Reynolds and Harrison had a valid title to convey as they did convey to defendant Big Wedge Mining Co. in Exhibits "C", "D", and "J".

In view of the foregoing, finding no reversible error in the decision appealed from the same is hereby affirmed, with costs.

Paras, C.J., Bengzon, Padilla, Jugo, Bautista Angelo, and Labrador, JJ., concurred.

Messrs. Justices Feria, Tuason, Reyes and Pablo did not take part.

VII

People of the Philippines, plaintiff-appellee, vs. Nestorio Remalante, defendant-appellant, G.R. L-3512, September 26, 1952, Padilla, J.

1. MURDER; KIDNAPPING; INTENTION TO KIDNAP THE VICTIM; PRESENCE OF QUALIFYING CIRCUMSTANCE—While T accompanied by two others was on the way to her home in the barrio of Guinarona, municipality of Dagami, province of Leyte coming from her farm, she met a group of more than ten men all armed with rifles, some of them with beard reaching the breast. R, one of the bearded men, approached, took hold of and dragged T toward the *sitio* of Sawahon. Hardly had the companions of T walked one kilometer when they heard gun reports. The following day T was found dead in Sawahon with two gunshot wounds, the points of entry being at the back and of exit at the left breast and shoulder. R was charged with the complex crime of kidnapping with murder. *Held:* There is no sufficient evidence of intention to kidnap because from the moment T was held and dragged to the time when the gun reports were heard nothing was done or said by R or his confederates to show or indicate that the captors intended to deprive her of her liberty for sometime and for some purpose and thereafter set her free or kill her. The interval was short as to negative the idea implied in kidnapping. Her short detention and illtreatment are included or form part of the perpetration of the crime of murder. It is murder because of the concurrence of at least one qualifying circumstance, either of treachery, or of abuse of superior strength, or with the aid of armed men, the first shown by the entry of the shots at the back and the second and the third by the number of the armed captors, the appellant and his companions, some or one of whom killed T.

2. EVIDENCE; MARAUDERS; DISSIDENTS; BANDITS; GROWING OF BEARD.—The fact that the appellant grew beard reaching his breast as some of his companions did is a positive and clear proof that he was a member of the of marauders, dissidents, bandits who were harassing the peaceful inhabitants of the town of Dagami and is environs.

3. ID.; CONSPIRACY; ACTS SHOW CONSPIRACY.—Where one in a group of more than ten men all armed with rifles upon meeting the victim who was on the way to her home, approached, took hold and dragged her away and the next day the victim was found dead with two gunshot wounds, the acts of the malefactors show and constitute conspiracy which renders the appellant liable for the crime committed by his companions, although no one witnessed the killing of the victim.

Modesto R. Ramolete for appellant.

Solicitor General Pompeyo Diaz and *Assistant Solicitor General Francisco Carreon* for appellee.

DECISION

PADILLA, *J.*:

At about 4:00 o'clock in the afternoon of 18 March 1948, while Mercedes Tobias accompanied by Eusebio Gerilla and Lucia Pelo was on the way to her home in the barrio of Guinarona, municipality of Dagami, province of Leyte, coming from her farm in Maanghon, she met a group of more than ten men all armed with rifles, some of them with beard reaching the breast. Nestorio Remalante, one of the bearded men, approached, took hold of and dragged Mercedes Tobias. She remonstrated and entreated him not to take her because she had done him no wrong. Remalante continued to drag and struck her with the butt of his rifle on different parts of her body. The companions of Mercedes were told to continue their way. They saw Mercedes being dragged toward the *sitio* of Sawahon. Hardly had they walked one kilometer when they heard gun reports. The following day Mercedes Tobias was found dead in Sawahon with two gunshot wounds, the points of entry being at the back and of exit at the left breast and shoulder (Exhibit A).

Nestorio Remalante was charged with the complex crime of kidnapping with murder. His companions have not been apprehended. After trial the Court of First Instance of Leyte found him guilty of the crime charged and sentenced him to *reclusion perpetua*, the accessories of the law, to indemnify the heirs of the deceased in the sum of ₱2,000 and to pay the costs. He has appealed.

The appellant claims that at about 1:00 o'clock in the afternoon of that day while he together with Emeterio Arellano was working on his farm at Binog the dissidents apprehended and detained him because they were not satisfied with his answers as to whether he had been furnishing the constabulary soldiers information about them; that as he begged to be excused from going with them they beat him up with their rifles hitting him on the head and causing him to lose consciousness; that when he came to the dissidents took him together with another male prisoner along with them and on their way they met Mercedes Tobias and her companions; that upon orders of the leader of the band he (the appellant) took hold of Mercedes Tobias and when he informed the leader that she refused to go with them the leader again beat him up (the appellant); that the dissidents together with the three captives continued their way; that after walking 100 meters they stopped; that the leader commanded five soldiers and the two male prisoners to prepare the meal and the other soldiers to take Mercedes Tobias away; that not long hereafter the appellant heard gun reports from a place about a kilometer away; and that after taking their meal he (the appellant) was further questioned and the dissidents satisfied that he was not an informer released him.

The appellant admits he took hold and dragged Mercedes Tobias on that occasion, although he pretends it was upon orders of the leader of the band. If it is true that he was illtreated by the captors and fell unconscious as a result thereof, it is strange that he did not exhibit or show any bruise or wound which would have left a scar. The corroborative evidence of his claim is given by Emeterio Arellano who is the husband of his mother's sister. The fact that the appellant grew beard reaching his breast as some of his companions did is a positive and clear proof that he was a member of the group of marauders, dissidents, bandits who were harassing the peaceful inhabitants of the town of Dagami and its environs. It is true that no one witnessed the killing of Mercedes Tobias, but the acts of the malefactors show and constitute conspiracy which renders the appellant liable for the crime committed by his companions.

There is no sufficient evidence of intention to kidnap because from the moment Mercedes Tobias was held and dragged to the time when the gun reports were heard nothing was done or said by the appellant or his confederates to show or indicate that the captors intended to deprive her of her liberty for sometime and for some purpose and thereafter set her free or kill her. The interval was so short as to negative the idea implied in kidnapping. Her short detention and illtreatment are included or form part of the perpetration of the crime of murder. It is murder because of the concurrence of at least one qualifying circumstance, either of treachery,

or of abuse of superior strength, or with the aid of armed men, the first shown by the entry of the shots at the back and the second and the third by the number of the armed captors. the appellant and his companions, some or one of whom killed Mercedes Tobias. For lack of sufficient number of votes as required by law, the death penalty recommended by the Solicitor General cannot be imposed.

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

Paras, C.J., Bengzon, Jugo, Pablo, Montemayor, Bautista Angelo, and Labrador, JJ., concurred.

Messrs. Justices Feria and Reyes took no part.

I certify that Mr. Justice Tuason concurred in this opinion.

(SGD.) RICARDO PARAS
Chief Justice

VIII

Administrative Case, No. 126, vs. In re: Atty. Tranquilino Rovero, respondent, October 24, 1952, Paras, C. J.

1. ATTORNEY-AT-LAW; ACTS OF ATTORNEY NOT IN THE EXERCISE OF LEGAL PROFESSION.— Under Sec. 25, Rule 127 of the Rules of Court, a member of the bar may be removed or suspended from his office as attorney for a conviction of a crime involving moral turpitude, and this ground is a part from any deceit, malpractice or other gross misconduct in office as lawyer.
2. ID.; MORAL TURPITUDE, DEFINED; CONVICTION OF SMUGGLING.— Moral turpitude includes any act done contrary to justice, honesty, modesty or good morals. The conviction of an attorney of smuggling by final decision of the Court of Appeals certainly involves an act done contrary at least to honesty or good morals.

First Assistant Solicitor General *Ruperto Kapunan, Jr.* and Solicitor *Jesus A. Avanceña* as complainants.

Respondent in his own behalf.

RESOLUTION

PARAS, *C. J.*:

The Solicitor-General has filed the present complaint for disbarment against Atty. Tranquilino Rovero, on the grounds that on March 31, 1947, "respondent Tranquilino Rovero, having been found in a final decision rendered by the then Insular Collector of Customs to have violated the customs law by fraudulently concealing a dutiable importation, was fined in an amount equal to three times the customs duty due on a piece of jewelry which he omitted to declare and which was subsequently found to be concealed in his wallet", and that on October 28, 1948, "respondent Transquilino Rovero was convicted of smuggling by final decision of the Court of Appeals in Criminal Case No. CA-G. R. No. 2214-R, affirming a judgment of the Court of First Instance of Manila sentencing him to pay a fine of ₱2,500.00, with subsidiary imprisonment in case of insolvency, said case involving a fraudulent practice against customs revenue, as defined and penalized by Section 2703 of the Revised Administrative Code." The respondent admits the existence of the decision of the Collector of Customs, and his conviction by the Court of Appeals, but sets up the defense that they are not sufficient to disqualify him from the practice of law, especially because the acts of which he was found guilty, while at most merely discreditable, had been committed by him as an individual and not in pursuance or in the exercise of his legal profession.

Under section 25, Rule 127, of the Rules of Court, a member of the bar may be removed or suspended from his office as attorney for a conviction of a crime involving moral turpitude, and this ground is apart from any deceit, malpractice or other gross misconduct in office as lawyer. Moral turpitude includes any act done contrary to justice, honesty, modesty or good morals. (*In re* Basa, 41 Phil. 275.)

Respondent's conviction of smuggling by final decision of the Court of Appeals certainly involves an act done contrary at least to honesty or good morals. The ground invoked by he Solicitor General is aggravated by the fact that the respondent sought to defraud, not merely a private person, but the Government.

Wherefore, the respondent Tranquilino Rovero is hereby disbarred from the practice of law, and he is hereby directed to surrender to this Court his lawyer's certificate within 10 days after this resolution shall have become final.

So ordered.

Pablo, Bengzon, Padilla, Montemayor, Jugo, Bautista Angelo and Labrador, J.J., concurred.

IX

In re: Petition for the Probate of the Will of the Deceased Da. Leona Singson. Dr. Manuel Singson, petitioner-appellee, vs. Emilia Florentino, Trinidad Florentino de Paz, et al, L-4603, October 25, 1952, Bautista Angelo, J.

1. WILL; TRIAL; DEPOSITION OF INSTRUMENTAL WITNESS.— Where the instrumental witness of the will is within the seat of the court but is unable to appear at the trial because of sickness his deposition may be taken under Sec. 11, Rule 77 in connection with Sec. 4, Rule 18 of the Rules of Court.
2. ID.; ATTESTATION CLAUSE; NUMBER OF PAGES UPON WHICH WILL IS WRITTEN.— The provision of Sec. 618 of the Code of Civil Procedure, as amended by Act No. 2645, which requires that the attestation clause shall state the number of pages or sheets upon which the will is written is mandatory as an effective safeguard against the possibility of interpolation or ommission of some of the pages of the will to the prejudice of the heirs to whom the property is intended to be bequeathed.
3. ID.; ID.; FAILURE TO STATE NUMBER OF PAGES UPON WHICH WILL IS WRITTEN.— Where the attestation clause of the will does not state the number of sheets or pages upon which the will is written, but the last part of the body of the will contains a statement that it is composed of eight pages, the will is drafted in substantial compliance with the law.
4. ID.; ID.; PLACE WHERE SIGNATURE OF TESTATRIX HAD BEEN AFFIXED.— The attestation clause of the will reads: "Nosotros los testigos, conforme al ruego de Da Leona Singson, en este testamento, despues de anunciarnos que este es su testamento donde hizo sus ordenes sobre su verdadera y ultima voluntad, firmo o imprimio su carca digital en presencia de todos nosotros; y nosotros firmamos tambien en presencia de ella y delante de cada uno de nosotros al pie del citado testamento y en el margen izquierdo de sus otras paginas. Y hemos observado que Da. Leona Singson estaba en su sano juicio, pensamiento y uso de sus sentidos," *Held:* The attestation clause at first glance would appear that the testatrix merely signed or stamped her thumbmark on the will in the presence of the witnesses, without stating the place where signature or thumbmark had been affixed, which impression is caused by the fact that right after the sentence "firmo e imprimio su marca digital en presencia de todos nosotros," there appears a semicolon; but if this semicolon is disregarded, it would appear that the testatrix signed or affixed her thumbmark not only at the bottom of the will but also on the left margin of each and every page thereon, considering the concluding part of the sentence

concerning the signing of the will. That semicolon undoubtedly has been placed there by mistake or through inadvertence, as may be deduced from the use of the word "tambien" made by the witnesses in the sentence immediately following, which conveys the idea of oneness in action both on the part of the testatrix and the witnesses. Thus considered and interpreted, the attestation clause complies substantially with the law.

Vicente Paz for oppositors-appellants.

Felix V. Vergara and *Pedro Singson* for petitioner-appellee Dr. Manuel Singson and legatees Consolacion Florentino and Rosario F. de Donato.

DECISION

BAUTISTA ANGELO, *J.*:

This is an appeal from a decision of the Court of First Instance of Ilocos Sur admitting to probate the last will and testament of the late Leona Singson.

On January 13, 1948, Leona Singson died in Vigan, Ilocos Sur, leaving a will. In said will the deceased instituted as heirs her brothers Evaristo, Dionisio and Manuel, her nieces Rosario F. de Donato, Emilia Florentino and Trinidad Florentino de Paz, her grand niece Consolacion Florentino, and some servants. She named her brothers Evaristo and Manuel as executors of the will. On February 2, 1948, Manuel Singson filed a petition for the probate of said will.

On March 6, 1948, Emilia Florentino, Trinidad Florentino de Paz and Josefina Florentino Vda. de Lim, daughters of a sister of the deceased, opposed the petition alleging among other grounds that the signature appearing in the will are not the genuine signatures of the deceased, and that the will has not been executed in accordance with the formalities of the law.

After due trial, the court found that the will has been executed in accordance with law and admitted the same to probate. The oppositors appealed to the Court of Appeals, but the case was later certified to this Court for the reason that it involves purely questions of law.

The first error assigned refers to the admission by the lower court of the deposition of Fidel Reyes, an instrumental witness, which was taken because he was then suffering from paralysis and was thus physically incapacitated to appear and testify in court. It is the claim of the oppositors that, under section 11, rule 77 of the Rules, if the will is contested, all the subscribing witnesses present in the Philippines must be produced and examined, and if they are dead, absent or insane, this fact must be satisfactorily shown to the court. If a subscribing witness is present in the Philippines but outside the province where the will has been filed, his deposition must be taken. In this case Fidel Reyes was not outside of the province, in fact he was then living in the place where the case was pending trial. He, therefore, must appear in court and his deposition cannot be taken. And so they contend that the lower court erred in admitting his deposition instead of taking his testimony.

It should be noted that one of the three instrumental witnesses of the will, namely, Bonifacio Brillantes, was already dead when the case came up for trial and the only witnesses then available were Victoriano Lazo and Fidel Reyes who was then unable to appear because of his physical ailment. And when this matter was brought to the knowledge of the court, the latter manifested its desire to go to the house of the ailing witness for the taking of his testimony, but the move was prevented because of the conformity of counsel for the oppositors to the taking of his deposition. And because of this conformity, the deposition was taken and on that occasion opposing counsel was present and actually took part in the taking of the deposition. In the face of these facts, we opine that, while the taking of the deposition was not made in strict compliance with the rule (section 11, rule 77), the deficiency, if any, has been cured by the waiver evinced by counsel for the oppositors which prevented the court from constituting itself in the residence of the witness.

We believe, however, that the deposition may also be justified by interpreting section 11, rule 77, in connection with rule 18, section 4(c), of the Rules, relative to the taking of the deposition of a witness in ordinary cases when he is unable to testify because of sickness. Interpreting and harmonizing together these two provisions we may draw the conclusion that even if an instrumental witness is within the seat of the court but is unable to appear because of sickness, as in this case, his deposition may still be taken, for a different interpretation would be senseless and impractical and would defeat the very purpose which said rule 77 intends to serve.

Another point raised by oppositors refers to the alleged failure of the attestation clause to state the number of the sheets or pages in which the will is written which, it is claimed, is fatal because it is contrary to the express requirement of the law.

The law referred to is article 618 of the Code of Civil Procedure, as amended by Act No. 2645, which requires that the attestation clause shall state the number of pages or sheets upon which the will is written, which requirement has been held to be mandatory as an effective safeguard against the possibility of interpolation or omission of some of the pages of the will to the prejudice of heirs to whom the property is intended to be bequeathed (In re will of Andrada, 42 Phil. 180; Uy Coque v. Navas L. Sioca, 43 Phil. 405; Gumban v. Gorecho, 50 Phil. 30; Quinto v. Morata, 54 Phil. 481; in re will of Maximo Sarmiento v. Roman Sarmiento, et al., 38 Off. Gaz., 2632). The *ratio decidendi* of these cases seems to be that the attestation clause must contain a statement of the number of sheets or pages composing the will and that if this is missing or is omitted, it will have the effect of invalidating the will if the deficiency cannot be supplied, not by evidence *aliunde*, but by a consideration or examination of the will itself. But here the situation is different. While the attestation clause does not state the number of sheets or pages upon which the will is written, however, the last part of the body of the will contains a statement that it is composed of eight pages, which circumstance in our opinion takes this case out of the rigid rule of construction and places it within the realm of similar cases where a broad and more liberal view has been adopted to prevent the will of the testator from being defeated by purely technical considerations.

One of such cases is De Gala v. Gonzales and Ona, 53 Phil. 104. Here one of the objections raised was that the attestation clause does not state that the will had been signed in the presence of the witnesses although this fact appears in the last paragraph of the body of the will, and the Court, in overruling the objection, said that "it may be conceded that the attestation clause is not artistically drawn and that, standing alone, it does not quite meet the requirements of the statute, but taken in connection with the last clause of the body of the will, it is fairly clear and sufficiently carries out the legislative intent; it leaves no possible doubt as to the authenticity of the document".

Another case that may be cited is Mendoza v. Pilapil, 40 Off. Gaz., No. 9, p. 1855. (June 27, 1941). In this case, the objection was that the attestation clause does not state the number of pages upon which the will was written, and yet the court held that the law has been substantially complied with inasmuch as in the body of the will and on the same page wherein the attestation clause appears written it is expressly stated that will contains three pages each of which was numbered in letters and in figures. Said the court:

"El proposito de la ley al establecer las formalidades que se requieren en un

testamento, es indudablemente asegurar y garantizar su autenticidad contra la mala fe y el fraude, para evitar que aquellos que no tienen derecho a suceder al testador, le suceden y salgan beneficiados con la legalizacion del mismo. Se ha cumplido dicho proposito en el caso de que se viene hablando porque, en el mismo cuerpo del testamento y en la misma pagina donde aparece la clausula de atestiguamiento, o sea la tercera, se expresa que el testamento consta de tres paginas y porque cada una de las dos primeras lleva en parte la nota en letras, y en parte la nota en guarismos, de que son respectivamente la primera y segunda paginas del mismo. Estos hechos excluyen evidentemente todo temor, toda sospecha, o todo asomo de duda de que se haya sustituido alguna de sus paginas con otra." (Mendoza v. Pilapil, et al., 40 Off. Gaz., No. 9, pp. 1855, 1862).

Considering the form in which the will question is written in the light of the liberal ruling above adverted to the conclusion is inescapable that the will has been drafted in substantial compliance with the law. This opinion is bolstered up when we examine the will itself which shows on its face that it is really and actually composed of eight pages duly signed by the testatrix and her instrumental witnesses.

The remaining question to be determined is: does the attestation clause state that the testafrix signed each and every page of the will in the presence of the three instrumental witnesses as required by law?

The disputed attestation clause reads as follows:

"NOSOTROS los testigos, conforme al ruego de Da Leona Singson, en este testamento, despues de aunciarnos que este es su testamento donde hizo sus ordenes sobre su verdadera y ultima voluntad, firmo o imprimio su marca digital en presencia de todos nosotros; y nosotros firmamos tambien en presencia de ella y delante de cada uno de nosotros al pie del citado testamento y en el margen izquierdo de sus otras paginas. Y hemos observado que Da. Leona Singson estaba en su sano juicio, pensamiento y uso de sus sentidos. (Exh. A-1)".

A perusal of the above attestation clause would at first glance give the impression that the testatrix merely signed or stamped her thumbmark on the will in the presence of the witnesses, without stating the place where her signature or thumbmark had been affixed, which impression is caused by the fact that right after the sentence *firmo e imprimio su marca digital en presencia de todos nosotros*, there appears a semicolon; but if this semicolon is disregarded, we would at once see that the testatrix signed or affixed her thumbmark not only at the bottom of the will but also on the left margin of each and every page thereon, considering the concluding part of the sentence concerning the signing of the will. That semicolon undoubtedly has been placed there by mistake or through inadvertence, as may be deduced from the use of the word *tambien* made by the witnesses in the sentence immediately following, which conveys the idea of oneness in action both on the part of the testatrix and the witnesses. Thus considered and interpreted, the attestation clause complies substantially with the law.

"The appellants earnestly contend that the attestation clause fails to show that the witnesses signed the will and each and every page thereof because it simply says 'que nosotros los testigos hemos tambien firmado en presencia de la testadora y en la presencia del uno al otro' (that we the witnesses also signed in the presence of the testatrix and of each other).

In answer to this contention it may be said that this portion of the attestation clause must be read in connection with the portion preceding it which states that the testatrix signed the will and on all the margins thereof in the presence of the witnesses; especially, because the word also used therein establishes a very close connection between said two portions of the attestation clause. This word also should: therefore be given its full meaning which, in the instant case, is that the witnesses signed the will in the same manner as the testatrix did. The language of the whole attestation clause, taken together, clearly shows that the witnesses signed the will and on all the margins thereof in the presence of the testatrix and of each other." (Rey v. Cartagena, 56 Phil. pp. 282, 284.)

In view of the foregoing, we find that the lower court did not commit any of the errors assigned by appellants and, therefore, we affirm the decision appealed frob, with costs.

Paras, C.J., Pablo, Bengzon, Padilla, and *Montemayor, JJ.*, concurred.

Messrs. Justices Jugo and Labrador concurred in the result.

X

Eugenio Evangelista and Simeon Evangelista, plaintiffs-appellees, vs. Brigida Soriano, defendant-appellant, L-4625, October 29, 1952, Padilla, J.

1. DEFAULT; ANSWER; EFFECT OF FILING ANSWER.—Where the defendant in an action for detainer and collection of rentals due and unpaid filed her answer within the time provided for in Sec. 1, Rule 9 of the Rules of Court, she could not be deemed and declared in default (Sec. 3, Rule 7).

2. APPEAL; WHO COULD WITHDRAW THE APPEAL.—Under the provisions of Sec. 9, Rule 40 of the Rules of Court, the party who could withdraw the appeal to the Court of First Instance from the judgment of the municipal court was the appellant, because such withdrawal would revive the judgment against her rendered by the municipal court. Obviously, the appellees for whom judgment was rendered could not ask for the withdrawal of the appeal. They would not ask for the dismissal of the case because the judgment secured by them would not be revived thereby and they would be left without judgment which was vacated upon perfection of the appeal.

3. ID.; FAILURE TO APPEAR AT THE TRIAL; WITHDRAWAL OF APPEAL.—When the defendant or her attorney in an action for detainer and collection of rentals due and unpaid failed to appear at the resumption of the trial, the court could not dismiss the appeal to the Court of First Instance from the judgment of the municipal court because it was not authorized to do so, but was in duty bound to hear the evidence of the plaintiffs and render judgment thereon unless for good reasons it deemed it justified to postpone the hearing of the case. Nor could it dismiss the case and grant the remedy prayed for, such as the payment of rentals, even if the defendant had vacated already the premises, without a finding that such rentals were really due and unpaid, for a dismissal of the case, if granted, would leave the prevailing parties in the municipal court bereft of or without a judgment. The failure of the defendant or her attorney to appear at the resumption of the trial of the case could not be deemed a withdrawal of her appeal. And as there are no findings of fact upon which a judgment may be based and rendered, the order of the court holding that defendant's failure to appear and prosecute her appeal is tantamount to a withdrawal of the case on the merits (section 12, Article VIII, of the Constitution).

4. PARTY; DEATH OF PARTY WHEN CASE IS PENDING.—Where a party died when the case is pending, her attorney should prove the fact of her death and the court shall order, upon proper notice, the legal representative of the deceased to appear

for her within 30 days or such time as may be granted, as provided for in section 17, Rule 3 of the Rules of Court.

DECISION

PADILLA, *J.*:

This is an action for detainer and collection of rentals due and unpaid. After trial judgment was rendered for the plaintiffs. The defendant appealed filing a supersedeas bond. In the Court of First Instance the defendant filed an answer setting up illegality of the rentals sought to be collected and of he assessed value of the leased premises upon which the increased rental was based, failure of the plaintiffs to make plumbing repairs in the leased premises, a counterclaim for ₱128 claimed to be an excess of the amount of rental authorized by law from February 1945 to December 1946, both inclusive, and damages in the sum of ₱250. On 21 January 1949 the attorneys for the plaintifs filed a motion praying for the dismissal of the case, payment to the plaintiffs of the supersedeas bond in the sum of ₱347.50 and withdrawal by them of the amount of ₱176 for rentals deposited by the defendant, for the reason that the latter had vacated the premises on 19 January 1949 and because she and her attorney failed to appear at the resumption of the trial of the case on 21 January, the plaintiffs waiving payment of rentals for July, October, November and December 1948 and half of January 1949, to put an end to the litigation, without costs. On that date, after stating that the case was partly tried on 1 July, the trial having been postponed due to the failure of the clerk of the municipal court to forward the exhibits presented by the parties, and that the resumption of the trial set for 24 August and 23 September was postponed again upon motion of the attorney for the defendant and set for 21 January 1949 on which date the defendant and her attorney failed to appear and the attorneys for the plaintiffs moved for the dismissal of the case and prayed that the plaintiffs be allowed to withdraw the rentals deposited in court by the defendant, the court entered an order holding that "her failure to appear and prosecute her appeal is tantamount to a withdrawal of said appeal" and that "the appeal is considered withdrawn, the judgment of the Municipal Court is deemed revived and let the record of the case be remanded to the Municipal Court in accordance with Sec. 9, Rule 40, of the Rules of Court, for the enforcement of the judgment rendered by it in the case." On 24 January 1949 the attorney for the defendant filed a motion praying that the proceedings be suspended until after the provisions of section 17, Rule 3, shall have been complied with, in view of the fact that the defendant had died on 9 January 1949, and explaining that his (attorney's) failure to appear at the resumpton of the trial on 21 January was due to the fact that there was a proposal for an amicable settlement and that not having heard from the defendant despite his letter to her sent on the 15th, he thought that the case had been settled amicably. On 29 January 1949 both motions for dismissal of the case filed on behalf of the plaintiffs and for suspension of the proceedings filed in behalf of the defendant were acted upon, the Court inviting attention to its order of 21 January 1949, which, according to it, disposed of the two motions, and further holding that the case was "within the jurisdiction of the Municipal Court for the execution of the judgment rendered by it in his case." On 18 May 1949, acting upon a motion filed by the plaintiffs, the court authorized the atorneys for the plaintiffs to withdraw the sum of ₱176 in cash for rentals deposited and of ₱347.50 as supersedeas bond, and further stated that "this withdrawal is authorized in accordance with the judgment rendered in this case on 21 January 1949." On 21 June 1949 attorney for the defendant moved for reconsideration of the order of 18 May 1949, on the ground that it was contrary to law and entered without jurisdiction. This motion was denied. A notice of appeal, an appeal bond and a record on appeal were filed. The appeal was certified to this Court because only questions of law are raised and involved.

Section 9, Rule 40, provides: "A perfected appeal shall operate to vacate the judgment of x x x the municipal court, and the action when duly entered in the Court of First Instance shall stand for trial *de novo* upon its merits in accordance with the regular procedure in that Court, as though the same had never been tried before and had been originally there commenced. If the appeal is withdrawn, the judgment shall be deemed revived and shall forthwith be remanded to the x x x municipal court for execution." The defendant filed her answer within the time provided foir n section 1, Rule 9, so she could not be deemed and declared in default (section 3, Rule 7). Even if she had failed to file her answer within the time required and were declared in default, the plaintiffs were bound to present their evidence upon which judgment could be rendered. In accordance with the above quoted provisions of section 9, Rule 40, the party who could withdraw the appeal was the appellant, because such withdrawal would revive the judgment against her rendered by the municipal court. Obviously, the appellees for whom judgment was rendered could not ask for the withdrawal of the appeal. They would not ask for the dismissal of the case because the judgment secured by them would not be revived thereby and they would be left without judgment which was vacated upon perfection of the appeal.

It is contended that section 9, Rule 40, is not applicable to appeals in detainer cases because the appeal does not vacate the judgment but suspends only, as may be inferred from the authority of the court to which the case has been appealed to order execution of the judgment during the pendency of the appeal upon failure of the appellant to pay to the prevailing party or to deposit in court the stipulated rentals or the reasonable compensation, for the preceding month on or before the tenth day of each month, for the use or occupation of the premises, as fund by the judgment of the municipal or justice of the peace court. This authority to direct execution expressly provided for in section 8, Rule 72, in no way alters the provisions of section 9, Rule 40, on the effect of an appeal upon a judgment rendered by a municipal or justice of the peace court. And proof of this is the provision in the same section that such execution shall not be a bar to the appeal taking its course until the final disposition thereof on its merits." When the defendant or her attorney failed to appear at the resumption of the trial on 21 January 1949, the court could not dismiss the appeal because it was not authorized to do so, but was in duty bound to hear the evidence of the plaintiffs and render judgment thereon unless for good reasons it deemed it justified to postpone the hearing of the case. Nor could it dismiss the case and grant the remedy prayed for, such as the payment of rentals, even if the defendant had vacated already the premises, without a finding that such rentals were really due and unpaid, for a dismissal of the case, if granted, would leave the prevailing parties in the municipal court bereft of or without a judgment. The failure of the defendant or her attorney to appear at the resumption of the trial of the case on 21 January 1949 could not be deemed a withdrawal of her appeal. And as there are no findings of facts upon which a judgment may be based and rendered, the order of 21 January 1949 is not and cannot be deemed a judgment of the case on the merits (section 12. Article VIII, of he Constitution).

As to the substitution of the defendant, her attorney should prove the fact of her death and the court shall order, upon proper notice, the legal representative of the deceased to appear for her within 30 days or such time as may be

granted, as provided for in section 17, Rule 3. The Court could not order the legal representaive of the decease to appear for her because it considered the order of 21 January 1949 as judgment entered in the case and notice of the defendant's death was given it three days later or on 24 January 1949.

The trial court seems to be of the behef and opinion that the order of 21 January 1949 is a judgment, where it held that failure of the defendant or her attorney to appear at the resumption of the hearing of the case on that date was tantamount to a withdrawal of the appeal, that the judgment of the municipal court was revived, and that for that reason it directed the record of the case to be remanded to the municipal court for execution. For the reasons above set forth this is an error, because as the appellant did not withdraw the appeal there was no withdrawal thereof. On the other hand, as already stated, the appellees could not ask for the withdrawal of the appeal because it was not their appeal and would not ask for the dismissal of the case because, if granted, they would have been left without a judgment.

The orders of 29 January and 18 May 1949, being predicated upon an erroneous opinion that the order of 21 January 1949 is a judgment, which is not and is a nullity, are set aside and the case remanded to the court below for further proceedings in accordance with law, without costs.

Paras, C.J., Pablo, Bengzon, Montemayor, Jugo, Bautista Angelo and Labrador, JJ., concurred.

XI

Alicia S. Gonzales, plaintiff-appellee, vs. Asia Life Insurance Co., defendant-appellant, L-5188, October 29, 1952, Bengzon, J.

1. INSURANCE: TENDER OF PREMIUM REFUSED.—On April 15, 1940, the defendant Asia Life Insurance Company insured the life of G. The premium was payable annually on or before April 15. The premiums for the first two years were duly paid. On or before April 15, 1942 the insured tendered the premium for the third policy year to the branch office of the company in Iloilo City, but the insurer refused to accept it, because the office was closing for the day on account of the threat of bombing by Japanese planes. On September 22, 1942 G died. *Held:* The refusal to accept payment was not justified. The insurer, therefore, may not asset nonpayment of the premium as a defense to an action on the policy. The act of the insurer or his agent in refusing the tender of a premium properly made, will necessarily estop the insurer from claiming a forfeiture from non-payment.

J. A. Wolfson for appellant.
Fulgencio Vega for appellee.

DECISION

BENGZON, *J.*:

On April 15, 1940, the defendant American corporation issued its twenty-year endowment policy insuring the life of Celso R. Gonzales and designating the plaintiff Alicia S. Gonzales, as beneficiary. The premium was payable annually on or before April 15. The premiums for the first two years were duly paid. The premium accruing April 15, 1942 was not actually paid. But according to the court of first instance of Iloilo, where this case was tried, "On or before April 15, 1942 the premium for the third policy year was tendered to the branch office of the company in Iloilo City, but was not accepted because at the time it was tendered the office was closing for the day on account of the threat of bombing by Japanese planes. There is some controversy between the parties as to this fact, the defendant denying that tender of payment was ever made, while on the other hand the plaintiff's witness Carlos Soriano, who was the one who had been delegated by the insured to make the payment, could not remember the precise date when he offered it. But that there was tender of payment of the third-year premium on or before its due date, which however was not accepted for the reason already referred to, may reasonably be inferred from the fact that the plaintiff's statement to that effect in her claim-letter written to the defendant on November 2, 1945 (Exh. 1), was not challenged or denied by the latter's agent in Iloilo, who simply transmitted said letter to the Manila office for adjudication of the claim on the basis of what was therein stated."

On September 22, 1942 Celso R. Gonzales died.

After the deliberation in January 1947 this suit was instituted. The defense was based on non-payment of the premium, and the consequent lapse of the policy before the insured's death. The Hon. Queruben Macalintal allowed the plaintiff beneficiary to recover on the grounds: (1) that the premium for April 15, 1942 had been tendered on or before that date but was refused, and (2) because non-payment of that premium was excused by the occurence of the war, the American insurance company having closed its Iloilo office on and after April 16, 1942.

There is no question that under the terms of the policy, non-payment of premiums on time would cause the lapse thereof. There is also no question that the annual premium for same policy was due and payable on April 15, 1942 there being no allegation or claim that such surrender value and accumulated from which the premium could be advanced by the insurer.

Appellant's sole assignment of error is that the trial court erred in not holding that the policy lapsed by reason of non-payment of premiums. The only argument in support of this assignment is our decision in Constantino v. Asia Life Insurance Company, 47 Off. Gaz. Suppl. 12 p. 428 and others, holding that the occurence of war was no excuse for nonpayment of premiums. In the face of our rulings the lower court's decision (1) following a contrary doctrine must be held erroneous.

However, it does not follow that defendant is entitled to reversal. His Honor declared that the premium had been tendered on or before April 15, 1942, the insurer refusing to accept it, "because the office was closing for the day on account of the threat of bombing by Japanese planes." That is a finding of fact which we find no reason to disturb. The refusal to accept payment was not justified. The insurer, therefore, may not assert non-payment of the premium as a defense to an action on the policy.

"The act of the insurer or his agent in refusing the tender of a premium properly made, will necessarily estop the insurer from claiming a forfeiture from nonpayment." (Vance on Insurance 2d Ed. p. 294 citing Meyer v. Ins. Co. 29 Am. Rep. 200; Continental Ins. Co. v. Miller 30 N.E. 718).

According to Corpus Juris, Vol. 32, tender to an agent authorized to receive payment of premiums is obviously sufficient to prevent a forfeiture for nonpayment. (p. 1311)

> "When the assured was involved in no default, but was at the place when and where payment was to be made, ready and willing to pay, but was prevented by the disability of the company to receive payment, from whatever cause, he having had no agency in producing it, the company is not entitled to claim the forfeiture, or to be relieved from its obligation to pay the sum assured." (Manhattan I. Ins. Co. v. Warwick, supra.) (Note, Corpus Juris Vol. 32 p. 1306)

Again the situation here described bears some similarity to the case where the insured made efforts to pay at the office of the insular but could not pay due to the absence of the latter's agent,

(1) Rendered before publication of our views.

"Absence from office.—While inability of insured to make payment at the office of insurer because of the absence of its representatives does not excuse nonpayment where it does not appear that the effort to make payment was made during reasonable office hours, where insured has made reasonable efforts to pay during office hours but is prevented by such absence, nonpayment is excused." (Corpus Juris Sec. Vol. 45 p. 474)

Wherefore, it is proper to affirm the decision requiring the insurer to pay with legal interest, the value of the policy minus the amount of the premium unpaid on September 22, 1942.

The question whether the insurer was justified in contesting the claim and should pay the beneficiary legal interest for the duration of the delay [1], may properly be overlooked, because plaintiff has not appealed.

Judgment affirmed, with costs.

Paras, C.J., Pablo, Padilla, Montemayor, Jugo, Bautista Angelo and *Labrador, JJ.*, concerred.

XII

People of the Philippines, plaintiff-appellee, vs. Bienvenido Capistrano, defendant-appellant, L-4549, October 22, 1952, Jugo, J.

1. CRIMINAL LAW; PENALTY; MINORITY CONSIDERED AS A SPECIAL MITIGATING CIRCUMSTANCE.—The accused was more than nine but less than fifteen of age at the time he committed the crime of treason. However, the accused acted with discernment, yet it may be leader or commander of the raiding party. *Held:* Although his minority does not exempt him from criminal responsibility for the reason that he acted with discernment, yet it may be considered as a special mitigating circumstances lowering the penalty by two degrees.

2. ID.; MINORS; SUSPENSION OF SENTENCE.—Where the accused was more than nine but less than fifteen years but was over eighteen years old at the time of the trial, Art. 80 of the Revised Penal Code providing for suspension of sentence of minor delinquents cannot be applied.

(1) Section 91-A Insurance Act as amended. Alicia S. Gonzales v. Asia Life Insurance Company.

Miguel F. Trias for appelant.
Solicitor General *Pompeyo Diaz* and Solicitor *Esmeraldo Umali* for appellee.

DECISION

JUGO, *J.*:

Bienvenido Capistrano was charged before the Court of First Instance of Quezon province with the crime of treason on four (4) counts. He was found guilty by said court and setenced to suffer life imprisonment and to pay a fine of ₱10,000.000 and the costs.

The attorney *de oficio* of the appellant states in a petition filed with this Court that after having read, reread, and studied the evidence, he finds no substantial error committed by the trial court and prays for the affirmance of the judgment.

The evidence of record establishes the following:

The accused Bienvenido Capistrano admitted being a Filipino citizen.

Count No. I

Alejo Enriquez Wong and Carmen Verdera testified that the defendant was a so-called Yoin, which means an armed soldier of the Japanese. Wearing a Japanese army as a guard of a Japanese garrison. To the same effect, the witness Placer Canada testified.

The defendant argued at the trial court that there was no evidence showing that he had been appointed a Yoin or that he was a *Makapili*. While no written formal appointment was introduced in evidence, yet it is clear that he was engaged in the work of guarding the Japanese garrison, armed with a gun and wearing a Japanese uniform and taking part in the military drills of the Japanese army.

Count No. II

At about 3:00 o'clock in the morning of January 8, 1945, the defendant with other Filipino members of the Yoin and several Japanese soldiers, all armed, arrived near the house of Carmen Verdera in barrio Malay Municipality of Lopez, Province of Tayabas (now Quezon), and ordered the inmates therein to open the door. The appellant and his companions entered the house raised the mosquito nets and ordered the inmates to rise. The appellant and his companions tied Graciano Fortuna, Carmen Verdera, Alejo Enriquez Wong, Rufino Rivera, Maria Canada, Brisilio Canada, Remedios Anastasio, Dolores Enriquez, Teodora Zamora, Presentacion Anastacio, and Placer Canada with a rope which was used as a clothesline. The intruders then search the premises and seized from Alejo Enriquez Wong $1,000.00, U. S. currency, and ₱4,000.00, Philippine currency. They took Graciano Fortuna and the other inmates to the Japanese garrison at Lopez, Tayabas (Quezon) and then to the Yoin garrison in the same town. The motive for the raid was that Pedro Canada, a brother of Placer, was a guerilla lieutenant in Lopez and Salvador Fortuna, son of Graciano, was a soldier in the said organization. One night, during the detention of Placer and her companions in the Yoin garrison, the appellant attempted to sexually abuse Placer and her girl companions, but when the women cried and the Japanese came, the defendant escaped. Placer and her companions were released after one month when they paid to the Chief of the Yoin and the appellant the sum of ₱2,500.00 in Japanese war notes. This charge was testified to by the several victims.

The accused was more than nine (9) but less than fifteen (15) years of age at the time that he committed the crime charged. However, the court which had the opportunity to see and hear the accused at the trial found that he acted with discernment. It should be noted, furthermore, that he appeared as the leader or commander of the raiding party. Although his minority does not exempt him from criminal responsibility for the reason that he acted with discernment, yet it may be considered as a special mitigating circumstance lowering the penalty by two (2) degrees.

Article 80 of the Revised Penal Code cannot be applied to the accused because he was over eighteen (18) years old at the time of the trial (People vs. Estefa, 47 Off. Gaz., No. 11, 5652).

In view of the above special mitigating circumstance of minority, the penalty imposed upon the accused is hereby modified by imposing upon him four (4) years of *prision correccional*, to pay a fine of ₱10.000.00 and to indemnify Alejo Enriquez Wong in the sum of ₱6,000.00 with subsidiary imprisonment in case of insolvency in the payment of the fine and the indemnity, with costs.

It is so ordered.

Pablo, Bengzon, Padilla, Montemayor, Bautista Angelo and *Labrador, JJ.*, concurred.

Mr. Chief Justice Paras took no part.

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Decisions of the Director of Patents

REPUBLIC OF THE PHILIPPINES

DEPARTMENT OF COMMERCE AND INDUSTRY

IN THE PHILIPPINES PATENT OFFICE

Patents Decision No. 2 Ser. 1952

EX PARTE A. T. ICASIANO

A. T. Icasiano, *Appellant*

Adolfo A. Scheerer, of Manila, for the Patent Appl. Ser. No. 23, filed May 24, 1948

APPEAL FROM DECISION OF PRINCIPAL EXAMINER

DECISION

This is an appeal from the decision of one of the Principal Patent Examiners rejecting the application of ARISTEO TANTOCO ICASIANO for an alleged invention, which the applicant has entitled, "Bamboo Board which is Rigid, Solid, Light, and Durable as a Material for Building and Construction Purposes, and which is Resistant to Heat, Weather, Abrasion, and to Deteriorations Caused by Fungus, Termites or other Insects."

The application is for a product invention, containing three claims as follows:

"(1) A BAMBOO BOARD, rigid, tough, solid and durable, made up of two layers or plys of woven bamboo strips, impregnated or coated with adhesive, and bonded together by application of pressure with or without heat, depending on the type of adhesive used, to be used as a building or construction material and for other uses:

"(2) A BAMBOO BOARD which has the same properties and similarly manufactured as the bamboo board described under claim No. 1 above, but more rigid, heavier and tougher, being made up of three o rmore layers (plys) of woven bamboo strips; and

"(3) A BAMBOO BOARD which has essentially the same properties and is similarly manufactured as the bamboo boards described under claims Nos. 1 and 2 above, but which is lighter and flexible, being made up of a single layer or ply of woven bamboo strips."

The making of these boards is described by the applicant in the specifications. as follows:

"My boards consists of bamboo strips and an adhesive of synthetic origin, such as phenolic resins, urea resins, etc. The adhesive may also be of animal origin, such as case in, blood albumen, etc., or of vegetable origin, such as natural resins, rubber latex, etc., or a combination of any two or more of the above types of adhesives; but if adhesive of animal or vegetable origin is used the product will be less durable.

"In preparing the board, strips of bamboo are impregnated or coated with synthetic resin adhesive, such as phenolic or urea resins. The strips are then woven according to the desired pattern and two layers (plys) of woven strips are permanently bonded together by application of pressure by means of a press, or some devise which will give a similar action, with or without heat depending on the type of synthetic resin adhesive used. If so desired, the strips may first be woven before the application of the adhesive.

"For a more rigid and tougher board, three or more layers (plys) of adhesive-treated woven bamboo strips are ply-bounded. For a lighter board with some-flexibility, only one layer (ply) of woven strips is used. To secure more artistic effect, the bamboo strips may be stained with any desired color before applying the adhesive and before weaving."

The Principal Examiner rejected all these three product claims on the ground of lack of novelty and lack of invention.

On the point of novelty, the Principal Examiner was of the opinion that the bamboo products described in the three claims were not *new* in the sense of Sec. 9 of the patent law, in that: (a) bamboo products become *tough* and *durable* and *light* because of impregnation with resins, such as phenolic or urea resins, were matters already within existing knowledge, some such products having been disclosed in United States Patent No. 2,352, 740, granted to Shannon on July 4, 1944; (b) boarding materials consisting of separate thin plys, become *solid* and *rigid* because of bonding together with adhesives (among them, phenolic and urea resins) and pressure, were known to have been manufactured in the past, the well-known "plywood" being a particular example of such type of boarding material.

On the point of invention, the Principal Examiner was of the opinion that there could possibly be no invention (as this word is understood in patent law) in a boarding material fashioned in practically the same way and possessed basically of the same characteristics as "plywood", the only difference existing between the two boards being that, while the one is made from bamboo plys, the other is fashioned from wood plys. The Principal Examiner believed the applicant's boards to be a case of mere substitution of materials (bamboo for wood), which substitution, he said, can never, under the well settled principles of the patent law, impart to any device or product the dignity of an invention.

Reference to the patent to Shannon, cited by the Principal Examiner, shows it to be for a method of treating bamboo wih resins for the purpose of imparting to it certain characteristics.

Claim 2 of the said patent, which may be considered as representative of all the claims, is hereinunder quoted.

"2. Method of impregnating bamboo containing cells and membraneous cell walls with a synthetic resin of the group consisting of phenolic aldehyde resins and urea aldehyde resins, which comprises soaking the bamboo in water until the cells and cell wals are impregnated with water and thereafter, without substantial drying of the bamboo, soaking it in a watery solution comprising the synthetic resin until the cells and cell walls are impregnated with the resin, heating the treated bamboo in a humid atmosphere to decrease travel of the resin to the surface of the bamboo and to insolubilize the resin and deposit it within and around the cells and cell walls."

Note Shannon's mention of the use of synthetic resins, such as phenolic and urea resins — the same resins the applicant ICASIANO employs in connection with his alleged invention.

Paragraph 3, page 2 of the specifications of the same Shannon patent describes the bamboo product resulting from proceeding the raw material with phenolic and urea resins, in accordance with the method outlined in Claim 2.

"By proceeding in the manner described herein it has been found possible to control the characteristics of the final product. The treated bamboo is somewhat heavier than the untreated material but is much stronger and, on the basis of equal strengths, a piece of bamboo treated in this manner is lighter in weight than untreated bamboo. The

finished product may be used for poles for pole vaulting, oars, sailboat masts, shafts of golf clubs and polo mallets, bristles for brushes, etc. Where the resin is baked hard after the woody base material is treated, the composite has great dimensional stability under any atmospheric condition and is resistant to abrasion; it is therefore useful for propellers and other parts of aircraft, patterns for casting, phonograph needles, etc."

Note that Shannon asserts that the resulting bamboo bamboo product has the following characteristics not found in the unprocessed product: strength, lightness, stability, resistance to abrasion. Excluding *rigidity* and *solidity*—qualities to be expected when a number of thin, swaying plys are firmly bonded together — these are essentially the same attributes (rigid, tough, solid, light and durable) which the applicant ICASIANO claims, both in his specifications and Claims, for his phenol-urea-resin-treated bamboo board.

We may reasonably assume that, like the applicant's product, Shannon's is also resistant to heat, water, weather, fungus, termites, and other insects, since such attributes in applicant's product result from treatment with phenolic and urea resins, and Shannon's is similarly treated.

From the foregoing, it should be evident that, in respect of its special attributes or characteristics — characteristics which would be absent, if the bamboo were not treated with phenolic and urea resins — the type of bamboo product claimed by the applicant ICASIANO as new, is not in fact new in the accepted sense of the patent law, since it is clearly anticipated by Shannon's earlier bamboo product possessing the same attributes or characteristics.

Reference to literature on plywood, glues, adhesives, and resins shows the following —

"So far as we can trace, one of the earliest mentions of the word 'plywood' in any standard dictionary appears in the Appendix of the 1931 Edition of Chamber's Twentieth Century Dictionary as:

'n., a thin board made from three very thin layers of wood, the grain of the middle layer at right angles to the grain of the outer two, cemented together under pressure.'

"Mr. Onion, in the edition of the *Shorter Oxford English Dictionary* previously mentioned, gives the origin of the word as being 'U.S. 1917 form of Ply (substantive I: 'layer or thickness') wood.'

'A compound wood made of three (five, etc.) thin layers glued or cemented together under pressure, and arranged so that the grain of one layer runs at right angles to the grain of any adjacent layer.'" (Plywoods, their Development, Manufacture and Applic tion by Andrew Dick Wood and Thomas Gray Linn; Chemical Publishing Company, Inc., Brooklyn, N. Y., U.S.A. 1943, page 9)

"PLYWOOD: A product made up of layers of veneer bonded with glue, often bonded with synthetic resin. Alternate layers have grain at right angles to increase strength and to reduce the tendency to shrink and split." (*Handbook of Plastics* by H. R. Simonds, A. J. Weith, and M. H. Bigelow, 2nd Ed., D. Van Nostrand Company, Inc., General Glossary, p. 1428)

"The glues and adhesives used in woodworking and plywood fall into six principal groups, with several minor types that will be mentioned briefly:

animal
vegetable
casein
soya bean
blood albumin
synthetic resins, phenolic and urea
miscellaneous"

"Resin—A raw material, made synthetically, which is the basis for products called the plastics. Certain resins can be used to adhere pieces of wood, and these are called resin adhesives, less correctly resin glues. These adhesives are of relatively recent development and are much more durable than the older types of conventional glues.

"Phenolic resin adhesives are made from phenol and formaldehyde, harden only in the presence of heat, and are the most durable. They are available in liquid, powder, and film form.

"Urea resin adhesives are made from ureas and formaldehyde, harden when heated and in the presnce of certain chemicals (catalysts or hardeners) this hardening can be rapid and at moderate temperatures." (Modern Plywood by Thomas D. Perry, Fourth Printing, 1945; Pitman Publishing Corporation, New York and Chicago, pages 55 and 13).

The foregoing technical information confirms the Principal Examiner's finding that, except for the basic material used in each case (wood, bamboo), there is absolutely no difference between plywood and the applicant's bamboo board, either in the process of manufacturing or in the resulting product. Each consists of a number of relatively thin layers, or plys, bonded together into a solid, rigid board, tough and durable, by application, firstly, of adhesives (among them phenolic and urea resins) and, secondly, of pressure.

Upon these facts, it appears that the Principal Examiner's decision, rejecting all the three Claims in question was not in error.

The bamboo board of the type characterized in Claim 3 (single-ply) is undoubtedly a new commercial product, but it certainly is not a new or novel product in the sense of the patent law. The ply itself (locally known as *sawale*) is old. What applicant claims as patentably new is the old *sawale* become *rigid*, *tough*, *durable* and *light* through impregnation with phenolic or urea resins and through the application of heat and pressure. Such a type of *sawale* cannot be a patentably new product within the purview of Sec. 9 of the statute, because, as hereinabove indicated, the Shannon patent, granted four years before the herein applicant filed his patent application, had disclosed that bamboo—that is, bamboo in the raw or as manufactured into any specific article of commerce — results in a stable (rigid), strong (tough), resistant-to-abrasion (durable), and relaively light product, when impregnated with phenolic or urea resins and heated. Section 9 says that an alleged invention shall not be considered new, if it has been *described* in a *printed publication* in the Philippines or elsewhere. Shannon's patent, describing the qualities of bamboo products treated with his process (which is substantially similar to the process disclosed by the applicant herein) is a printed publication, since United States patents, like Philippines patents, are, after issue, printed and copies sold to the public. Applican't alleged invention, as characterized in Claim 3, is thus not new, having been described in the earlier Shannon patent.

For the same reasons, while the bamboo boards characterized in Claims 1 and 2 (two or more plys bonded together, each ply being of the Claim 3 type) are new commercially, they cannot be new in the patent-law sense. Except for the substitution of bamboo plys for wood plys, these bamboo boards are in all respects the same as plywood, both in the method of manufacture and in the resuling product. As shown in the cited *Plywoods, their Development, Manufacture and Application* (1943), plywood and the method of its manufacture have been described in printed publications as far back as the year 1931. They are described in the *Handbook of Plastics* (first published July, 1943, second ed., Jan., 1949), and mentioned in *Modern Plywood* (1945).

There certainly can be no invention involved in the two types of bamboo board in question. They constitute no more than an extension of Shannon's original thought and of the original conception of commercial plywood. For that extension the skill of the mechanic was sufficient; the creative genius of the inventor was not necessary.

In *Smith v. Nichols*, 112 L. ed. 566, the Supreme Court of the United States said:

"x x x a mere carrying forward or a new or more extended application of the original thought, a change only in form, proportion or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent."

Speaking of the U. S. patent law, which is similar to ours in respect of the requisites for patentability, the same tribunal said in *Cuno Engineering Corporation v. Automatic Devices Corporation*, 86 L. ed. 58:

"Under the statute, the device must not only be new and useful, but it must be an invention and discovery. That is to say, the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain."

It is urged by the applicant that his two types of bamboo board should be regarded both as novel and inventive in that (a) prior to applicant's alleged invention thereof, no one in the Philippines had ever thought of processing *sawale* and of bonding together several sheets of *sawale* so processed into a solid, thick, upright board, in the manner disclosed in his specifications; and (b) in that by his alleged invention he has substantially advanced the sawale-making industry, making *sawale*, converted into the form's he has conceived, useful for multifarious purposes, some of which purpose were impracticable before —"for walls, partitions, panels, ceilings, shingles for roofs, door, windows, tiles, floorings. etc. and also for the manufacture of screens, table-tops, boxes, decorative articles, veneers, etc." (Specifications, p. 1, lines 6-10).

Conceding all these, the three Claims in question are still not allowable, for, after everything has been said in favor of the applicant's priority and of the many new uses of his bamboo boards, said boards still lack the one quality needed for their patentability — invention in themselves. The patentabiliy of a product claim, it has been said, must be found in the product itself, and not solely upon alleged new functions or uses thereof. *In re* Lewis 108 F(2d) 248 (1939); and in claims for structure, patentability, it has been declared, must be found in the structure, not in the results obtained therefrom. *In re* Luck, 108 F(2d) 263 (1940). In *Buono* v. Yankee Maid, 77 F(2d) 274 (1935), the famous Judge Learned Hand said must be exclusively in the conception of the product; that, while that imposes a that a product Claim must stand upon its own invention; that the invention, severe standard, it is not severer than it should be if the monopoly is to extend, as it does in such cases, to the product however made; for unless conception alone is the test and if the inventor may eke out his right by recourse to the ingenuity involved in any process or machine, he gains an unfair advantage, for the claims cover the products produced by processes and machines to which, by hypothesis, he has contributed nothing.

These considerations compel an affirmance of the decision appealed from, rejecting all three claims of applicant's Aopl. Serial No. 23. Said decision is, therefore, affirmed.

AFFIRMED.

This decision is final for the purposes of Chapter XIII of the patent law relating to appeals from the Director of Paents to the Supreme Court.

Manila, Philippines, June 30, 1952.

(SGD.) CELEDONIO AGRAVA
Director of Patents

SOME INTERESTING LEGAL FACTS SAID OF THE U. S. PATENT OFFICES, WHICH APPLY TO THE PHILIPPINES PATENT OFFICE

The Judicial Nature of the Functions of the Patent Office.

The U. S. Supreme Court in *Butterworth, Commissioner of Patents v. the U.S.* 28 L. ed. 656:

"The general object of that system is to execute the intention of that clause of the Constitution, article I., section VIII., which confers upon Congress the power 'To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.' The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention; so that in every grant of the limited monopoly two interests are involved, that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more, when, as in case of interfering claims or patents, other private interests compete for preference. The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law, necessary to be applied in the settlement of this class of public and private rights, have founded a special branch of technical jurisprudence. The investigation of every claim presented involves the adjudication of disputed questions of fact, upon scientific or legal principles, and is, therefore, essentially judicial in its character and requires the intelligent judgment of a trained body science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions."

The U. S. Court of Customs and Patent Appeals in *California Packing Corp. v. Sun-Maid Raisin Growers*, relative to the trademark *Sun-Maid*, 64 F(2d) 370:

"In the case of In re Barratt's Appeal, 14 App. D. C. 255, it was stated, with respect to proceedings in the Patent Office, that they are so nearly akin to judicial proceedings as to be most appropriately designated as quasi-judicial'. See, also, American Fruit Growers, Inc. v. John Braadland, Ltd., 45 F. (2d) 443, 18 C. C. P. A. 790."

The District Court (Dist. of Columbia) in *Carter Carburetor Corporation v. Commissioner of Patents*, 73 U. S. P. O. 278, (1947):

"(4) 8. The exercise of his jurisdiction by the Primary Examiner upon any reference to him by the Examiner of Interference of a motion to shift the burden of proof calls into action the powers and functions exercised by a judge in the admission, rejection and evaluation of evidence and particularly so in an interference, such as No. 82, 262, wherein a party thereto claimed to be entitled to the benefit of the filing date of an earlier joint application filed not by himself alone but by himself and another. Such jurisdiction is truly judicial.

"11. Hunt's petition to 'review and reverse the ruling of the Examiners of Interferences dismissing Hunt's motion to shift the burden of proof' was not addressed to the Commissioner in view of his supervisory authority. The action taken thereon by the Commissioner may not be upheld on such hypothesis. His order of July 19, 1946 was not an exercise of supervisory power but was a review of the decision of the Examiner of Interferences, and in disregard and violation of Rules of Practice in the United States Patent Office Nos. 97, 101, 116, 122 and 124 which have the force and effect of a statute, x x x x A petition may not be entertained by the Commissioner when it seeks to obtain indirectly a review of an examiner's judicial or quasi judicial decision *from which no direct appeal lies* by merely misnaming the action and calling it a petition. Goss v. Scott, 1901 C. D. 80; Manny v. Easley v. Greenwood, Jr., 1889 C. D. 179, 181; Waite v. Macy, 246 U.S. 606, 608.

"(6) 12. The executive supervision and direction which the head of a department may exercise over his subordinate in matters administrative and executive do not extend to matters in which the subordinate is directed by statute or rule having the force of statute to act judicially, or quasi judicially. Butterworth v. Hoe, 112 U. S. 50."

The Rules of Practice of the Patent Office

The same district Court in the same case:

"(3.) 6. The Rules of the Patent Office have the force of a statute and are as binding upon the Commissioner and all officials of the Patent Office as upon applicants for patents and parties to interferences. Westinghouse Traction Brake Co. v. Christensen, 243 F. 901, 905 (C. C. A. 3); Anderson v. Walch, 1552, F. 2d 975; Avery v. Chase, 101 F. 2d 205, 210 (40 USPQ 343, 347-347); *In re* Korton, 58 F. 2d 682 (13 USPQ 345); Interference Law and Practice, by Rivise and Caesar. Vol. 1. p. 25, s10; Defendant's answer to Paragraph 8 of Amended Complaint."

Jurisdiction of the Department Head

The U. S. Supreme Court in the same case cited above:

"x x x x The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the department may extend, in respect to matters purely administrative and executive, they do not exend to a review of the action of the Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subjection takes from it the quality of a judicial act. That it was intended that the Commissioner of Patents, in issuing or withholding patents, in re-issues, interferences and extensions, should exercise quasi judicial functions is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed."

PRACTICE BEFORE THE PHILIPPINES PATENT OFFICE

BY ATTORNEYS AND AGENTS

[Republic Act No. 637]

"Section 7. x x x x x x x.

"The Director may prescribe rules and regulations governing the recognition of attorneys, agents, or other persons representing applicants or other parties before his office in patent and trademarks cases, and may require such persons, attorneys or agents, before being recognized as representatives of applicants or other persons, that they shall show that they are of good moral character and in good repute, are possessed of the necessary qualifications to enable them to render to applicants or other persons valuable service, and are likewise competent to advise and assist applicants or other persons in the presentation or prosecution of their applications or other business before the Office. And the Director of Patents may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before his office any persons, attorney, or agent shown to be incompetent or disreputable, or guilty of gross misconduct, or gross discourtesy or disrespect towards any Patent Office official or examiner while the latter is in the discharge of his official duty, or who refuses to comply with the rules and regulations of the Patent Office, or who shall, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant or other person having immediate or prospective business before the office, by word, circular, letter, or by advertising. The reasons for any such suspension or exclusion shall be duly recorded. And the action of the director may be reviewed upon the petition of the person so refused recognition or so suspended or excluded by the Supreme Court under such conditions and upon such proceedings as the said Court may by its rules determine.

"It shall be unlawful for any person who has not been duly recognized to practice beore the Patent Office to hold himself out or knowingly permit himself to be held out as a patent or trademark solicitor, patent or trademark agent, or patent or trademark attorney, or otherwise in any manner hold himself out, either directly or indirectly, as authorized to represent applicants for patent or trademark in their business before the Patent Office, and it shall be unlawful for any person who has, under the authority of this section, been disbarred or excluded from practice before the Patent Office, and has not been reinstated, to hold himself out in any manner whatever as entitled to represent or assist persons in the transaction of business before the Patent Office; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine of not less than one hundred pesos and not exceeding one thousand pesos."

Decision on Montano Bail Plea

People of the Philippines, plaintiff, vs. Justiniano S. Montano, et. al., accused, Crim. Case No. 11396, December 2, 1952, Court of First Instance of Cavite.

The determination of the plea for bail by Senator Montano is one of the spectacular legal steps taken by our courts of justice. Due to the high position being held by the defendant and the important questions involved therein, we are publishing this decision for the benefit of the readers.—The Editors.

ORDER

I—INTRODUCTORY

OCAMPO, J.:

This case is before this Court upon the application for bail of defendant Justiniano S. Montano, who stands charged herein together with several others with the complex crime of kidnapping with multiple murders and frustrated murders, committed in the manner specified in the information of the Special Prosecutor dated September 29, 1952. No bail was recommended, the charge being for a capital offense. (Sec. 5, Rule 110).

The information of the Special Prosecutor was directly lodged with this Court. After conducting a preliminary investigation, this Court disposed that a warrant be issued for the arrest of Justiniano S. Montano and some of his co-accused against whom the existence of a "probable cause" had been shown. (Sec. 4, Rule 108). Hence, the instant petition for bail which was opposed by the Government.

In the determination of the right of the accused to be admitted to bail, precedents decree that it is now mandatory to conduct a separate proceeding (Gerardo v. Judge of First Instance of Ilocos Norte, G. R. No. L-3451, May 29, 1950), which would imperetively involve the presentation of evidence in anticipation of the regular trial, nevertheless this Court decided to grant the request of counsels for the petitioners for a separate hearing. This hearing was summary in nature. In the interest of justice, however, both parties were afforded a wide latitude in the presentation of their respective evidence, both in chief and in rebuttal. The hearing lasted during the month of October, in the course of which an Amended Information was filed by the Special Prosecutors on the 3rd of the same month.

At the outset, the Court laid down its clear-cut norm of conduct — that the hearing shall be conducted heedless of the high position of the person involved, and that each judicial actuation and every ruling to be laid down shall be unmindful of and in passive to the rank and eminence which the petitioner holds in Congress — in order to stress and vouch to the public at large who have been following these proceedings the supremacy of the law and the principle of equal justice before the law.

II—FACTS OF THE CASE

(a) Evidence for the prosecution.

The concrete evidence for the prosecution discloses that at about five o'clock in the afternoon of August 31, 1952 (t.s.n. 71) se-

veral persons, nine in number, identified to be Magno Iruguin, Mariano de Raya, Leonardo Manicio alias Nardong Putik, Antonio Macailan, Eugenio Maglian, Rafael Dalusag, Maximo Saria, Simplicio Esguerra and Laurb Sison assembled in the house of Magno Iruguin at barrio Tejero, General Trias, Cavite. Shortly after, they boarded a four-door black automobile (t.s.n. 81) for Manila (t.s.n. 56; t.s.n. 2, Sept. 30, 1952). They went to the house of Senator Justiniano S. Montano at the corner of Pi y Margal and D. Tuazon streets, Quezon City, arriving thereat about dusk, **nag-aagaw ang dilim at liwanag)** (t.s.n. 266, 294). On that day, August 31, 1952, the sun set at 6:09 p.m. (t.s.n. 415).

The group were met at the gate by guards of the Montano residence who, after conversing with Magno Iruguin, allowed them to go inside the premises where they waited in the garden. After a short while, they were told to come inside the house. In no time, Senator Justiniano S. Montano appeared, greeted them, and asked why they had come only then. To this, Magno Iruguin replied that they first had to attend to many things at home. (t.s.n. 59). They proceeded immediately to the ground floor of the house (t.s.n. 58), where Iruguin introduced Nardong Putik to Senator Montano, informing the latter that this fellow (Nardong Putik) was the "boy". **(bata)** whom they could trust and depend upon (t.s.n. 3, Sept. 30, 1952). Nardong Putik shook hands with Senator Montano, saying that he "could be of service in any capacity within his power". By way of acknowledgment, the Senator remarked that he would look forward to that promise **(umaasa siya)** (t.s.n. 61). The group then seated themselves, and the Senator began to converse in a low voice with Iruguin, de Raya, Nardong Putik and Dalusag who all sat a little apart from the others. Then and there, Senator Montano told the group to "get" Board Member Villanueva first in Marangondon and, should they fail to accomplish that, to "get" the Mayor (Rillo) next; for if these persons were killed, Camerino would surely attend their funeral, on which occasion they could easily waylay him (t.s.n. 63). Magno Iruguin assured its early execution which would mean elimination of their opponents once and for all. Senator Montano then expressed his hope for its accomplishment as soon as possible. (t.s.n. 6, Sept. 30, 1952). This said, Senator Montano drew out a roll of bills from his pocket and handed it to Magno Iruguin, saying the money was at their disposal **(Sila na ang bahala)** (t.s.n. 64-65). Forthwith, the group bade good-bye and left for Cavite in the same automobile with Magno Iruguin at the wheel. (t.s.n. 68).

On their way, they stopped at a restaurant in Pasay City for their supper (t.s.n. 67). Magno Iruguin paid for the bill. From there, they proceeded directly to Barrio Tejero, General Trias, Cavite, stopping at Emakayan where Eugenio Maglian alighted (t.s.n. 66). Inside the car, Iruguin reminded the group that on Tuesday, September 2, 1952 at about seven o'clock in the evening, they were to meet in the uninhabited lot near his house. (t.s.n. 10, Sept. 30, 1952; t.s.n. 312).

In the evening of September 2, 1952, as agreed, Mariano de Raya, Nardong Putik, Antonio Macailan, Pio Gonzalez, Marciano Timbang, Alejandro Salsatin, Simplicio Esguerra, Cornelio Monzon, Lauro Sison, Maximo Saria, Gregorio Buklatin, Ponciano Buklatin, one alias Luis and another alias Serapio, Florencio Manalo, Marcos Maralang, Rafael Dalusag and others boarded a weapon carrier near the market place at General Trias and proceeded towards Marangondon, Cavite. (t.s.n. 38, 59, 10 & 18, Sept. 30, 1952). They were armed with carbines, Garands, Thompsons, and pistols. (t.s.n. 12 & 13, Sept. 30, 1952). Upon reaching Barrio Tejero, they stopped in front of the house of Magno Iruguin, where the group had previously assembled before going to Senator Montano's place on August 31, 1952. Six others, including Magno Iruguin, Moreno and Nocum, boarded the weapons carrier which traveled in the direction of Marangondon. They were about 21 or 23 in number. Most of them wore fatigue and khaki uniforms with army patches, with the exception of Cornelio Monzon and Pio Gonzales who were garbed in civilian clothes and tied with rope to give them the appearance of "Huk" captives, (t.s.n. 40).

Upon reaching the corner and just before turning right to the plaza of Marangondon where the municipal building is situated, the group alighted. Some posted themselves as guards at that corner, while the others moved towards the municipal building. Upon reaching the municipal building, De Raya and Nardong Putik, who wore the uniform of a PC captain with two bars on his cap, approached the policeman on guard and asked him to identify the two supposed "Huks" (Monzon and Gonzales) he had with him. (t.s.n. 41). When the policeman failed to identify them, Nardong Putik and De Raya charged him with complicity with the Huks and in the same breath ordered him to fetch the Mayor.

Meanwhile, Magno Iruguin, Dalusag and Artemio Castronuevo and two others armed with pistols and rifles and also attired in khaki and fatigue uniforms, went to the house of Board Member Mariano Villanueva to fetch him, but Villanueva was nowhere to be found at that time (t.s.n. 167, 169).

Not long after, Mayor Rillo appeared with four others, namely, Chief of Police Bernardo de Guia, Policemen Benjamin Ramos, Bartolome Reyes and Florencio Bergonio. They were followed sometime later by Ex-Mayor Eriberto de Guia, who was likewise brought to the municipal building. Nardong Putik then asked Mayor Rillo and his companions whether they know the two "Huks" whom they had allegedly captured in the vicinity. When Rillo answered that he did not know the two, Nardong Putig blurted out: "You are tolerating shameless people — Huks." Whereupon they disarmed and hogtied the policemen. (t.s.n. 42).

At the very same moment, Magno Iruguin hid himself behind a stone wall of the municipal building, after explaining to his companions that he was well known in Maragondon.

Meanwhile, two vehicles (jeepneys) were procured in the vicinity. Mayor Rillo and the policemen were compelled to board those two jeepneys, accompanied by the other members of the group. The vehicles were driven in the direction of Naic. After passing a small bridge at the outskirts of Maragondon, where there were no more houses, the two jeepneys were put to a stop. Mayor Rillo and his companions were then forced to get down. After calling them faithless officials, they were taken a little farther where they were stabbed and fired upon with pistols by Nardong Putik, Iruguin and De Raya. (t.s.n. 41 & 46). Believing that their victims were all dead already, the group returned to General Trias and dispersed themselves. On the way home, Iruguin told the men that inasmuch as they already had liquidated the persons whom Senator Montano had wanted to be eliminated, they could go after Governor Camerino, for whose elimination a reward of ₱14,000.00 was being offered. (t.s.n. 47-50). One of Nardong Putik's men then queried, "Have we not waited for him four times — twice in Salinas and twice in Novaleta?"

The next day Macailan, upon instruction of Iruguin, procured from a doctor a medical certificate to the effect that he was sick, even though he was not, so as to excuse him from appearing in a criminal case in Cavite City on that day. (t.s.n. 132-3; 138-9).

(b) Evidence for the defense.

From the evidence submitted by the defense, the following may be gleaned: Senator Montano and his wife went to a mahjong party at the house of one Mrs. Rosario Vda. de Mendoza at 1655 Felix Huertas, Manila (t.s.n. 781, 955, 557), at about two o'clock in the afternoon of August 31, 1952. They played with several persons among whom were their hostess Mrs. Mendoza, Ex-Governor Arturo Ignacio, Don Castillo, Januario Soller, Mrs. Bona, Mrs. Fe Mendoza and others. (t.s.n. 865, 732, 737, 805-6, 809, 819-20). At the start the Senator played with a group upstairs while Mrs. Montano played with another group downstairs. (t.s.n. 550-1, 731, 808). Around 5:00 o'clock p.m., merienda consisting of **puto, pospas,** sweets and soft drinks was served to the guests. (t.s.n. 747-9, 773, 812). Half and hour later, former Governor Ignacio left the house. (t.s.n. 550-1, 811). Whereupon, for lack of quorum, the Senator went downstairs and joined the table of Mrs. Bona.

(t.s.n. 550, 734-6, 812). Sometime later, Mrs. Montano remarked that it was already getting late and that they had better leave. (t.s.n. 815). Ben Castillo had flagged a taxi, and seeing that Senator and Mrs. Montano were also waiting for one, he offered it to them and called for another. (t.s.n. 816). According to Patricio Velasco, however, he was the one who had called the taxi which Senator and Mrs. Montano used in going to the Lyric Theater to see the "Hoodlum Empire", where they arrived at about 7:30 o'clock that evening. (t.s.n. 855, 860, 1432-4). Mayor Arsenio H. Lacson, who had entered the theatre earlier at 7:20 o'clock, noticed Senator and Mrs. Montano as the two entered the movie house at about 7:45 o'clock on the left entrance of the loge and sat three or four seats away from his left. (t.s.n. 322-5, 449-452). According to Mrs. Montano they went home directly at about 10:00 o'clock. (t.s.n. 856).

It was also revealed that on the same evening, a group of young boys, friends of the Montano children, were in the house of the Senator. They stayed there until 8:00 o'clock practicing the Mambo Nuevo in the sala, in preparation for the despedida party that evening at Attorney Panfilo Ramos' residence in honor of the two Montano children who were scheduled to leave for the United States within the first week of September, 1952. (t.s.n. 350-2, 367, 377-8, 403, 408 and 432). While these boys were there, they did not notice the group of nine men who allegedly arrived and conferred with Senator Montano, nor did they notice the Senator or his wife return to the house while they were there. (t.s.n. 372-6, 380-3, 227, 388-92, 402-3). At about 8:00 in the evening, they proceeded to that farewell party in honor of Nene (Consolacion) and Junior (Justiniano) Montano, using the family car of the Montanos. (t.s.n. 350-352, 356-7, and 869-71).

The defense also disclosed that Magno Iruguin, one of the accused, with whom Senator Montano conspired between 6:00 and 7:00 o'clock p.m. of August 31, 1952, according to the evidence for the prosecution, was actually attending the birthday party of Ex-Governor Samonte in the latter's residence at P. Burgos street, Cavite City, where he (Iruguin) stayed from 6:00 to 8:00 o'clock in the evening. (t.s.n. 598-601, 635, 640, 642).

Furthermore, it was that on September 3, 1952, the same Magno Iruguin was at the Rizal Memorial Stadium in Manila attending the basketball game between the Harlem Globe Trotters and the New York Celtics at the very time when the alleged conspiratorial plot was being executed in Maragondon. Iruguin reportedly arrived at that Stadium at about the beginning of the main game between the Globe Trotters and the Celtics; that is, after the preliminary game between the Ateneo and San Beda teams was already over. (t.s.n. 686-7). Iruguin sat in the bleachers beside a Pasay City policeman by the name of Basilio de los Santos, who had earlier arrived at about 7:00 o'clock p.m. (t.s.n. 682, 684). The policeman recognized him, having seen him quite often in the house of Judge Feias while the latter was in charge of the Naric in Pasay. (t.s.n. 685, 68, 402). Iruguin remained seated near De los Santos for about twenty to twenty-five minutes only, after which he moved to a rear seat. (t.s.n. 656, 704 and 706). Iruguin was similarly seen by members of the Pasay Police Department such as Detectives Tadi and Andres Esmiritu, Sergeants Emilio Fuerte and Santos Medina.

III—THE QUESTION AT ISSUE

Upon the evidence thus presented, the only question at issue is whether the evidence of guilt of the petitioner Justiniano S. Montano is strong enough to warrant the denial, or quite insufficient to merit the recognition, of his right to bail, he being charged with a capital offense.

IV—DISCUSSION

In deciding this question, resort must be made to the Constitution which furnished the very rule by which this Court can be guided. On this point, Article III, Par. (16) of the Constitution provides: "All persons shall before conviction be bailable by sufficient sureties, except those charged with capital offenses when evidence of guilt is strong". This constitutional precept found supporting expression in Sec. 6, Rule 110, Rules of Court, in this wise: "No person in custody for the commission of a capital offense shall be admitted to bail if the evidence of his guilt is strong".

In construing, therefore, the quantum of evidence required to sustain a denial of bail in capital offenses, the nature and purpose of the proceedings, as well as the established jurisprudence on the matter, must be fully considered. In the "summary hearing" provided by the Rules, the Court "does not sit to try the merits or to enter into any nice inquiry as to the weight that ought to be allowed to the evidence for or against the accused, nor will it speculate on the outcome of the trial or what further evidence may be therein offered and admitted." (8 C. J. 93, 94; Ocampo v. Rillioraza, et al., G. R. No. L-439, August 20, 1946).

The original Francisco amendment to the bail provision of the Constitution, as approved by the Constitutional Convention originally read:" x x x except when the person is detained because of an accusation for a capital offense, and the proof is evident or the presumption of guilt vehement." This was subsequently changed by the Committee on Style with the more definite and clear-cut clause: "when the evidence of guilt is strong." Just the same, precedents laid down by the United States Supreme Court and by the various courts of the Union can still be resorted to and relied upon as guide in the process of this determination.

Notwithstanding the use of the phrases "proof evident", or "evident proof", or "presumption great" in the United States Constitution and in the various state constitutions, our Supreme Court has always considered that the "provision on bail in our Constitution is patterned after similar provisions contained in the Constitution of the United States and that of many States of the Union." (Teehankee v. Director of Prisons, 43 O. G. 513). In the case cited, the Supreme Court had occasion to observe that the provisions of Section 63 of the Code of Criminal Procedure which provided that "all prisoners shall be bailable before conviction, except those charged with the commission of capital offense, when proof of guilt is evident or the presumption of guilt is strong" is substantially the same as Article III, Section 1, par. 16, of our Constitution.

In this connection, it has been held that "although the rule is couched by the courts in various terms, and the question is one which must be determined in the exercise of sound discretion of the court or officer, it may be broadly stated that the facts and circumstances must be such as clearly to evidence the guilt of the accused and the probability of his conviction in order to justify a refusal to admit him to bail". (8 C. J. 56). Again, "The tendency of the courts has been toward a fair and liberal construction, rather than otherwise, of the law determining what degree of proof or conclusiveness of presumption is sufficient to justify a denial of bail. This is evident not only from various expressions used in the decisions, but also from a consideration of the facts on which the courts have refused to allow bail". (Ex parte Varden 237 S.W. 734, 291 Mo. 562-6 C. J. p. 957 note 46).

It has been equally decided that "to sustain a refusal of bail in a capital case, it is enough that evidence induces the belief that accused may have committed the offense." (Ex parte Page 255, p. 887, 32 Cal. App. 576). The test, therefore, is not whether the evidence establishes the guilt beyond a reasonable doubt, but whether it shows evident guilt or a great presumption of guilt. (5 C.J.S. 57, sec. 34).

Thus, the mere fact that the evidence as to the accused's guilt is conflicting, even on a vital issue, (N.M. — Ex parte Wright, 283, p. 35; Okl. — Ex parte Burks, (Or.) 60 P. 2d) 401; Ex parte Orme, (Cr.) 60 P. (2d) 213; Tex - Ex parte Shaw, 257 S. W. 835 etc.); or the fact that defensive issues are raised by the accused on the application for bail, is not sufficient in itself to entitle him to bail, where the proof of his guilt for a capital offense is evident or the presumption great. (8 C.J.S. 62).

As has been cogently pointed out, the phrases "proof is evident" and "presumption great" are as definite to the legal mind as any words of explanation could make them, and they are intended to indicate the

same degree of certainty whether the evidence is direct or circumstantial. These statements lead unerringly to the conclusion that a mere conflict in one's testimony is parsimoniously insufficient of itself to warrant the grant of bail, and the same also holds true of the fact that the evidence against the accused is circumstantial. (6 Am. Jr. 54, Sec. 13).

Speaking of "summary hearing", the Supreme Court meant by it such brief and speedy method of receiving and considering the evidence of guilt as is practicable and consistent with the purpose of the hearing which is merely to determine the weight of the evidence for purposes of bail. (Ocampo v. Rilloraza, supra).

Consequently, it may be stated that the procedure in the reception of evidence in bail hearings in this jurisdiction is well-settled. The prosecution assumes the vital burden of showing that the incontrovertible evidence of guilt is strong the accused marshalls definite and effectual evidence to establish the contrary. Furthermore, the accused is entitled to go behind the indictment and introduce evidence affecting or going to the merits of the case. In all those circumstances, both sides are afford ed the opportunity to cross-examine the witnesses presented. While the heinous guilt or spotless innocense of the accused is not to be determined, still the quantity and character of the proof on these points are, for the special purpose in hand, necessarily considered, because the Constitution requires the court to determine conclusively for itself whether or not the proof is evident or presumption great in a given case.

Thus, where a well-founded doubt of guilt can even be entertained, the evidence of guilt cannot be said to be strong (Ex parte Bridwell, 57 Miss. 39, 43); Crit. Comm. v. Prison Keeper, 2 Ashm (Pa), 227; cited in **Francisco's Crim. Procedure & Forms**, Vol. 1, p. 87); or the lower court itself could not pronounce the evidence strong, but merely considered it only 'sufficient', a word that does not convey the idea involved in the constitutional requirement (Enage v. Pilot. Warden, Davao City, G. R. No. L-2495, Oct. 23, 1948); or the evidence of the witness does not make out a **prima facie** case against the accused (Ocampo v. Rilloraza, supra), bail shall be granted as a matter of right and the Court is not justified to deny the same.

On the other hand, it has been held that if the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he will probably be punished capitally if the law is administered (Ex parte McAnally, 53 Ala. 495); or where the evidence if true is sufficient to warrant the court in upholding a capital conviction (3 R. C. L. 10), bail is not a matter of right and the court should deny the same. Indeed, in some jurisdictions the allowance of bail is forbidden by law where proof of guilt of a capital offense is evident or the presumption is great. (C. J. S. 34, b. (1) p. 54-55).

In ascertaining the meaning of the word "capital" as used in the Constitution or statute on an application for bail, the question is whether the offense is of the character which may be punished capitally. In this regard, the nature of the crime is the first consideration, and the gravity of the offense is characterized by the statutory penalty prescribed against its commission. (Ex parte Barry, 88 P., 2d), 427, (1939) VIII L. J. 555).

It follows that the determination of whether the evidence of guilt is or is not strong, will necessarily rest upon and find support in the quality of the evidence presented by the prosecution and considered vis-a-vis with that adduced by the defense. In other words, the prosecution cannot ingeniously build up its case on the impotent weakness of the defense but must rely solely on its own.

V—EVALUATION OF EVIDENCE

And now, to evaluate the evidence on record. The prosecution established the complicity of the petitioner, Senator Montano, in the conspiracy to do away with the victims of the Maragondon raid by testimonies of two prosecution witnesses, Antonio Macailan and Eugenio Maglian, who were present in the Senator's residence at the time they plotted and decided to execute that infamous raid. The testimonies of a participant, Cornelio Monzon, and two eyewitnesses to the raid, Bayani de los Reyes and Cirilo Hernandez, were likewise presented to show the facts and circumstances surrounding the execution of the raid by the co-conspirators. This raid resulted in the kidnapping and death of four persons, all public officials, under very gruesome circumstances, and in the serious wounding of two others which would have equally produced their death were it not for the timely intervention of skilled medical assistance. The impregnable evidence of that massacre leaves no room for uncertainty that the execution of the plot was schemed and decided in Senator Montano's house in the evening of August 31, 1952, it having been shown that (a) the intended victims (Villanueva or Rillo) actually sought out by the raiders were those they had planned to "get" in that conference; (b) the perpetrators of the raid were principally the co-conspirators present at such conference with the Senator and their followers; (c) Mayor Rillo, one of the victims, belonged to the rival political faction opposed to that of the Senator; and, finally, (d) the place, Maragondon, and the date, September 2nd, of the raid were those agreed upon by them.

Senator Montano is thus being charged not as a direct participant in the physical execution of the actual kidnapping and killings, but as the mastermind who directly induced others to commit the same either by agreement, by order, or by any other similar act constituting a true intentional incitement, deliberately, directly, and efficaciously made.

On this score, there is nothing in the record that may indicate an unholy motive on the part of those witnesses in testifying against Senator Montano in the manner they did. As a whole, their testimonies which were given in a frank and straightforward manner, have remained unimpeached in all their material aspects, in spite of the rigid cross-examination by the able and distinguished defense counsels. It is true that Macailan, for one, incurred some minor contradictions, particularly on the period of time during which the conference with Senator Montano lasted and on the precise time they left the Senator's home. But it will be recalled that, by the witness' own admission, he is unlettered and has had no schooling and was in no position to tell the time by the hands of a watch. In effect, his knowledge of the hours of the day or of the night is being based merely on rough estimation or wild guesses, his stomach serving in most cases as his obviously fallible guide in reckoning the time. Thus, he is wont to consider as 12:00 o'clock noon the time when he eats his lunch and as 6:30 to 7:00 o'clock in the evening when he takes his supper. (t.s.n. 276-78). However, he was steadfast and definite in asserting that they actually arrived at the residence of Senator Montano at dusk (**nag-aagaw and liwanag at dilim**) and that their stay was brief. (t.s.n. 272, 276).

It is true that in his affidavit (Exhibit "2-A") before Captain Aramos, Macailan stated that he and his companions had stayed for about an hour in the Montano residence during that conference. But, as he himself clarified, his own calculation of one hour is not very long. (t.s.n. 278). At any rate, even a comparison between his said sworn statements and his testimony on the stand would readily reveal a ringing harmony in all their important details: the plan conceived at the Montano residence, the role played by Senator Montano in that conference, and the actual execution of the Maragondon raid. Whatever inconsistencies may be buoyed to the surface by a searching analysis of his two declarations are sufficiently explained by the witness himself when he testified that, during his investigation by Captain Adamos, he was so tired and confused because it was conducted from noon till midnight without any respite.

Another thing that cannot escape notice is the frankness and candor which characterized Macailan's admission as to his reason in securing a medical certificate of his supposed illness in order to obtain a postponement of his case in Cavite City scan-

duled for hearing on the day following the raid, as advised by Magno Iruguin. It has been held that where a witness under a severe cross-examination tells or admits truth extremely disagreeable to himself, in a manly manner, it is logical to conclude that he has adhered to the truth when testifying to facts which he had no interest in concealing. (Moore on Facts).

All things considered, the Court after observing the witnesses' demeanor and manner on the stand believes that their testimonies bear the signposts of truth. Of course, this Court is aware of the fact that even truthful witnesses do not make perfect witnesses. Their degree of education, their mental condition, even the solemnity of court proceedings often account for many defective answers. But judges are trained to make allowances. They pay extreme care and attention to the sincerity of the witness and his willingness to tell the whole story. (People v. Mandiego, G. R. No. L-2233, May 31, 1949).

The defense hints and argues in its memorandum that Governor Camerino is cooperating with the Army in the investigation of the Maragondon massacre, following his heated verbal altercation with Senator Montano — must have furnished the evidence in support of his theory that the killings in Maragondon were politically inspired, instead of Huk-engineered; and that Senator Montano equally cooperated with the Army by placing at the latter's disposal every bit of information and clue coming to his knowledge which might lead to the apprehension of the guilty parties, and by causing all his political followers suspected of being implicated in those killings to voluntarily submit themselves to the Army authorities for investigation, as may be seen from supposed newspaper reports quoted in said memorandum.

It is public knowledge that no less than a stoical man in the person of Secretary Magsaysay had taken an interest and a hand in the investigation of the Maragondon killings, resulting in the prosecution of all known suspects. It is sheer folly, therefore, to believe in the absence of a powerful motive that the Army under Secretary Magsaysay, which is widely known to have been instrumental in bringing about a clean and orderly election in 1951, would allow itself to be a ready, subservient tool and a doge of a provincial Governor for the promotion and gratification of the latter's political designs.

The defense likewise advances the theory that the incrimination of Senator Montano in the conspiracy must have been the reward for Macalian's subtle efforts to be excluded from the information as a defendant. This was followed by newspaper reports of the alleged statements of Senator Montano to the press, pleading his innocence and expressing his full faith and trust in our courts of justice, apparently to show that he is unperturbed because of his clean conscience.

On this point, suffice it to say that the alleged "cooperation" and the avowal of innocence by Senator Montano, in the wake of his arrest, are merely based on newspaper reports not offered as evidence during the hearing, and are inherently hearsay, if not self-serving. A newspaper account of an event or an occurrence has been characterized as "hearsay evidence, twice removed." (3 Jones on Evidence, 2d ed., sec. 1084 a). As to the presumed reward to Macalian, it is to be observed that such a "whitewash" is a mere conjecture and cannot be made the basis of a legal conclusion. Besides, the non-inclusion of Macalian in the information, considered in the light of his testimony on the stand admitting his complicity in the conspiracy as a direct participant, even before he was previously charged and then discharged, is, at most, detrimental only to Macalian's own penal interest and cannot be a bar to his subsequent prosecution. In this respect, it would seem unreasonable to disbelieve a witness upon mere prejudiced assumptions. For, as Judge Brawley aptly put it in Traveller's Ins. Co. v. Salden (C. C. A.) 78 Fed. Rep 286, 288, conjectures cannot be allowed to displace proofs, and where the weight of credible testimony proves the existence of a fact, it must be accepted as a fact.

The defense has similarly advanced by way of reasoning that Senator Montano, with all his intelligence, could not have been so foolhardy as to unravel his mind about such a criminal plan in the presence of total strangers, like Macalian and Marlan, and to discuss its execution in so brief a time in his residence without any regard as to its grave nature. But the meeting of August 31, 1952, — judging by the manner Senator Montano greeted Magno Iruguin and his companions: "How are you boys? Why have you come just now?" and the familiar way Iruguin introduced Nandong Putik to the Senator as one who could betrusted — leads one to believe the existence of some previous plan and of earlier meetings or negotiations toward a common end. Those men went there prepared for a pre-concerted action: To that extent, the nature of the greetings sufficed to convey intelligence from one to the other. And this must have been the reason why the petitioner was not wary nor mindful in expressing his impatience and in giving final instructions to his men, followed by the delivery of money to Iruguin who was given its free disposition.

Vis-a-vis the foregoing evidence of the prosecution, the petitioner interposed the defense of alibi. Before going at length into the discussion of its weight and probative value, the Court deems it necessary to pass upon certain questions which came up during the hearing: First, the motion of the defense to strike out a portion of the testimony of the prosecution witness, Antonio Macalian, (t.s.n. 99-100), resolution on which has been reserved, (t.s.n. 106): Second, the effect of the filing of the amended information upon the competency of certain portions of the evidence introduced prior to its filing, (t.s.n. 158, et seq.), and Third, whether or not the evidence regarding the raid at Maragondon is material to the present hearing for bail of herein petitioner, Senator Justiniano S. Montano, (t.s.n. 198 et seq.).

Anent the effect of the introduction of the amended information, this Court is of the opinion that the alleged inadmissibility of certain portions of the evidence presented before the amendment, has been cured by the presentation of the amended information to the extent that they are admissible if reintroduced after such filing on October 3, 1952, (t.s.n. 159). This is so because even assuming them to be inadmissible for lack of sufficient allegation in the original information, the filing of the amended information supplied the basis for their admission and only the physical act of reintroducing them under the amended information is needed. However, the move of the prosecution to reproduce under the amended informtion all the evidence presented previous to the amendment takes the place of the physical act of reintroducing the same.

The manifestation of the defense to the effect that their objections which were previously made under the old information and the rulings thereto, predicated upon the lack of sufficient allegations therein and should therefore not be considered as cured, (t.s.n. 161) becomes pointless in the light of the amendment.

With respect to the motion to strike out (t.s.n. 100 et seq.) portions of the testimony of Macalian referred to above, it is the opinion of this Court that while his questioned testimony is hearsay and is furthermore ordinarily excluded under the rules of evidence, particularly under the doctrine of *res inter alios acta*, and under the original information apparently immaterial in the absence of an allegation regarding the plot to take the life of Governor Camerino, the general rule of exclusion does not apply to said testimony in the presence of proofs of conspiracy, which thereby rendered it admissible as an exception to both the hearsay and *res inter alios acta* rules. The test is not whether the offered evidence tends to prove an independent offense but whether it is relevant as tending to prove any fact material to the issue in the case before the Court. (State vs. Caesar, 72 Mont. 252, 232 Pac. 1109). Under the amended information, the question of testimony thus becomes competent and relevant and, therefore, admissible against the herein petitioner.

Section 12 of Rule 123 provides:

"The act or declaration of a conspirator relating to the conspiracy and during its existence, may be given in evid-

ence against the conspirator after the conspiracy is shown by evidence other than such act or declaration."

It is obvious that the record abounds with proof of the conspiracy, to wit, through the testimonies of Maglian and Maclian, as to the conference in Senator Montano's residence, and through those of Monzon, De los Reyes and Hernandez as to the execution of the plot to kill the intended victims of the Maragondon raid. It is true that other pertons not particularly singled out to be liquidated in the plot hatched at the residence of the petitioner were among the victims of that raid. It is equally true nevertheless, that it is not necessary that the crime for which the defendant is on trial should be the crime which was the particular object of the conspiracy. Where several persons conspired to commit a wrongful act, the execution of which makes probable a crime not specifically designed but incidental to the object of the conspiracy, all acts or declarations of co-conspirators made during the pendency of the conspiracy and in furtherance thereof are admissible in a prosecution of one of the conspirators for the crime incidentally committed. (16 C.J. Sec. 1337, p. 668).

It follows that the amended information having cured the defect of the previous absence of sufficient allegation regarding the attempt on Governor Camerino's life, the petition to strike is sworn of its merit and should, therefore, be denied.

With respect to the materiality of the evidence adduced by the prosecution regarding the raid at Maragondon, this Court is of the opinion and so holds that the same is admissible. It constitutes proof of the execution of the alleged conspiracy and is, a fortiori, proper as evidence of the existence of the conspiracy. It is noteworthy that the execution of a conspiracy by acts of the co-conspirators is one of the best evidence to establish the existence of the conspiracy. It is to be noted that in the evidence presented by the prosecution regarding the alleged conspiracy in the house of Senator Montano on August 31, 1952, particular mention was made of Maragondon, the persons to be taken, namely, Board Member Villanueva or Mayor Rillo and the date when the raid was to be executed. Most significant of all, the persons present in that conference were practically the very persons who participated in the killing at Maragondon. Thus it has been held that the existence of assent of minds which is involved in conspiracy may be heard, from the secrecy of the crime, usually must be inferred by the Court from proof of facts and circumstnces which, taken together, apparently indicate that they are merely part of some complete whole. (Underhill's Criminal Evidence, p. 795, par. 291; People vs. Carbonell, 48 Phil. 69).

"The general rule in no way prevents the proof of proper facts and circumstances to connect the defendant with the crime charged, even though the evidence tends to show such defendant to be guilty of another crime." (State v. Campbell, 209 Iowa 519, 228 N. W., 23).

"The general rule (res inter alios acta) cannot be applied where the facts which constitute distinct offenses are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible." (Par Kennedy, J., in Rex v. Bond, (1906) 2 K. B. 389, 400.)

Expressions accompanying or following an act may be shown as indicating what was in the mind of the actor, on the ground that they are res gestae of the act in question. Such statements of the accused to third parties are received without reference to the truth of the statement, being merely indicative of a state of mind.

As stated, alibi was the defense. Take note that the crux of the alibi is that Senator Montano was not in his residence after dusk on August 31, 1952, or, more specifically, between 6:30 and 7:00 o'clock p.m., and so he could not have met and entered into a conspiracy with the nine men concerned in the Maragondon liquidations. However the evidence presented in support of that defense is made up mostly of the loose statements of Januario Soller and Ben Castillo, and those of Mrs. Edgaya N. Montano to the effect that the Senator and his wife were in the Mendoza residence where they played mahjong from 2:00 o'clock in the afternoon of that day until sometime after 7:00 o'clock in the evening, when they left in a taxi for the Lyric Theatre, arriving there between 7:20 and 7:45 o'clock. As may be readily seen, the efficacy of this defense would depend largely upon the credibility of said witnesses, as well as on the weight that could be given to the negative testimonies of Gerardo La Torre and Godofredo Celmiar (both intimate friends of the Montanos) to the effect that they were at the Montano residence where they had their lunch and that during all that time that they were there from the moment they arrive up to past 8:00 o'clock in the evening, they had neither seen any of the nine men in the house nor Senator and Mrs. Montano, for that matter.

After analyzing the testimonies of each of the defense witnesses, it is the considered opinion of the Court that the alibi, instead of overthrowing or weakening the evidence for the prosecution, produced the contrary effect and made it all the more plausible and convincing.

To start with, Januario Soller pretends to recall to the smallest detail everything that happened in the mahjong party held at the residence of Mrs. Mendoza, especially the movements of Senator Montano and the other players. Yet, his mind seemed to have passed into a state of amnesia when he was met with the questions as to (a) the time when he met Senator Montano for the first time in a mahjong game which took place in the same house in that same month of August, 1952; (b) the date when he played mahjong for the first and second time in the house of Mr. Filadelfo Roxas in the month of July, 1952; and (c) the date when he played mahjong in Malolos, Bulacan, only several days before his appearance as a witness in Court on October 16, 1952.

Furthermore, although Soller declared that the last time he played with Senator Montano was on August 31, 1952, he admitted on cross-examination that the last time he played with the accused was on a Thursday, in the middle of August, 1952, (t.s.n. 762). Aside from this, he reasoned out that he remembered August 31, 1952, as the date when he played with Senator Montano because he had received his salary on the preceding day. On further cross examination, however, he admitted having received his salary only on the day following that same mahjong game (t.s.n. 741-2). The real cause for that admission as to the date when that particular game was played was that he read about it in the newspapers that gave publicty to the news of Senator Montano's participation in the Maragondon incident, without which he would not have had an independent recollection of it. To that degree, the memory of this witness as to time is most unreliable, considering that what made him recall the time of departure of Senator and Mrs. Montano from the house of Mrs. Mendoza was the darkness that had already gathered around them and the supposed remark made in the course of the game by a lady that it was already 7:00 o'clock. The credibility of this witness became more exposed to doubt because of the fact that, although only a Customs Secret Service Agent with a monthly salary of ₱202.00 and with a wife and three children to support, he could still indulge in the luxury of weekly mahjong games where the stakes ran as high as ₱1.00 per point and the losses as big as ₱3.00 per point and the losses as big as ₱600.00. Of course, he claims to have been the winner of a sweepstake prize amounting to ₱19,500.00 in the draw of October, 1951; but, if we consider that he applied ₱6,000.00 of it to the payment of a loan obtained from the Philippine Bank of Commerce and spent another ₱5,000.00 in the purchase of a car, some ₱2,500.00 for income tax and ₱2,000.00 in buying out the interests of his brothers in a real estate property inherited from their father, and located in the province, there would be barely P5,000.00 left from which

to dig up for the upkeep of his house and lot in Quezon City, in which he invested P14,600.00, and for the maintenance of his car and the mahjong game.

Witness Ben Castillo, according to himself is a businessman by occupation. He testified that, although he subsists merely on occasional profits realized from buying jewelry in downtown restaurants and on the financial assistance extended to him by his mother and his sisters in the province, he could, like Soller, afford from time to time the extravagant indulgence of playing mahjong games where stakes are high. His memory appears sharply retentive about the mahjong party of August 31, 1952, including to him, he won P90.00 which he intended to use as payment for his house rent. Nevertheless that retentivity seemed to have been suddenly lost when it came to recalling that particular day in September, 1952, when he supposedly had made a profit of not less than P200.00 from the sale of a piece of jewelry valued at P1,200.00, and which, according to his explanation, was the only big sale he had made so far. He could not also remember a date in September, 1952, when he supposed received from his mother and sisters the sum of P3,000.00 which he applied to the purchase of merchandise worth P2,000.00, although, according to him, it was the only amount he had received and the only purchase he had made from the month of August, 1952, up to the date of his appearance in Court. In short, he pretends to have a good recollection of the names and seating arrangements of the persons who played at different tables in the house of Mrs. Mendoza; of the remark of Mrs. Montano that it was already 7:00 o'clock and that they had to leave for a show; and of his offer to the Montanos of the Taxi which he hailed for himself; but he could not remember that day in September, 1952, when he was asked by Mrs. Montano to testify in this case (t.s.n. 850), nor any of the dates on which he played the other mahjong games with the Senator.

The rule is well-settled that the credibility of a witness may be seriously impaired by a wearing positively and minutely to occurrences which were not of such a nature as to impress forcibly upon his memory. (Lee Sing Far v. U. S., (C.C.A.) 94 Fed. Rep.) Surely it is very rare that we honor with a second thought the many incidents that we experience during the day, nor even the thoughts we think every minute, and the emotions we undergo each hour.

The testimony of Ex-Governor Ignacio deserves only a mere passing benediction considering that, having left the house of Mrs. Mendoza at 5:30 o'clock in the afternoon, that was the last he saw of the Montanos on that day.

Mayor Lacson's declaration that he saw Senator Montano inside the Lyric Theatre at 7:30 o'clock in the evening of August 31, 1952, during the repeat showing of the film "Hoodlum Empire," does not eliminate altogether the possibility that the unholy conference had been, in fact, held shortly after sundown in the Montano residence, considering that that conference did not last long and that Pi y Margal street is within easy riding distance from downtown Manila. It is possible also that Mayor Lacson, being engrossed in learning the operation of the slot machines from the screen, may have honestly mistaken as to the precise time when he saw Senator Montano and his wife entering the theatre, taking into account the mayor's own testimony that he himself left his residence on M. Earnshaw street, Sampaloc, at 7:16 o'clock. The same thing may be said of the testimony of Detective Buenaventura, who claimed to have seen Senator Montano in the Lyric Theatre between 7:20 and 7:45 o'clock on that same evening of August 31, 1952. His recollection of the date was based mainly on the entries on his notebook (Exhibit "4"), which he allegedly prepared as a simple reminder days ahead of his scheduled engagements. His reliability as to dates is; even more affected by his lack of memory of even the more recent date when he allegedly saw Senator Montano for the last time during the heated radio debate which the latter had with Governor Camerino at the Escolta. Being engrossed in shadowing Ben "Kirat," a notorious gangster, by going in and out of the theatre for that purpose, it is very likely that the detective's recollection of the time he allegedly greeted Senator Montano in the theatre must have been inaccurate if not unreliable, considering that it was not his concern to check up on Senator Montano.

The Court will not dwell long on the testimony of Mrs. Montano who, because human nature remains unaltered, cannot be expected to overcome the tendency to picture the incidents in the way the interests of her husband would dictate. If we considered that the mahjong players were served only a light merienda, consisting of pospas, puto, sweets and soft drinks, at about 5:00 o'clock in Mrs. Mendoza's house, it is unlikely that husband and wife would have gone directly to the Lyric Theatre and remained there until 10:00 o'clock without bothering themselves to have at least a snack in their own home to which they had not returned since they left it earlier that noon to attend that party. Being weak because biased, this phase of the defense alibi succumbed too easily to the weight of the testimony in surrebuttal of Tomas de la Rosa, a disinterested witness, who affirmed that he took Senator Montano and a lady companion, presumably Mrs. Montano, in his taxi a little after six o'clock from a house somewhere near the corner of Felix Huertas and San Lazaro streets and drove them directly to their residence at Pi y Margal, corner D. Tuazon, in Quezon City.

The Court was well impressed with the testimony of this witness. The sincerity that pervaded his words rendered them trustworthy, and his whole testimony was made more worthy of credit by the undisputed document, Exhibit "E", evidencing his gross earnings for that day—August 31, 1952,—as a taxi driver, and by his vivid recollection of the experience he had had in having for a passenger no less a prominent personage than Senator Montano, who made that experience much more unusual and singular by the handsome tip which he received from him. All this must have made a lasting impression which can not be erased from his mind so soon. His inability to identify Mrs. Montano during the hearing when she was made to sit with four other women cannot materially affect his credibility. Mrs. Montano is not as widely and nationally known as her husband, and there is enough reason for the saying that strange faces, under ordinary circumstances, arouse neither remark nor attentive scrutiny. While in Camp Murphy, where Senator Montano is, this witness ably pointed him out from a group of six persons selected by the defense and whose resemblance in features to the Senator, including the haircut, was really very striking and identified him as the person who rode in his taxi on that date. (vide, Exh. "F-1" & "9"). It is noteworthy that, upon being asked why it took him over four minutes to determine who of the seven persons was Senator Montano, he replied: "Because that Senator Montano who was a passenger of mine resembles somebody here." (t.s.n. 1158). And when asked on cross-examination why he hesitated, he answered: **"Paano nga po'y mayroon akong pinagdududahan ay baka ako'y magkamali pa."** (t.s.n. 1163). He was positive and certain in his manner of identifying Senator Montano; and his failure to identify him readily in the pictures presented to him previously should be an added credit, rather than discredit, to his credibility. That failure only shows the very index of the fact that this witness has not been trained or coached. Since his acquaintance with Senator Montano is based on the fact that he had taken swift glances of him while dashing along the corridors of Congress, where he used to go in search of a recommendation for employment, and not on his frequent associations with him nor on seeing his pictures on the newspapers, witness de la Rosa was only human when he failed to identify Senator Montano from the newspaper pictures.

It will be recalled that right after it was decided during the hearing in Cavite City that the Court should constitute itself at Camp Murphy for the purpose of having him identify "Senator Montano" who was a passenger in his cab, this witness was thenceforth segregated and placed practically incommunicado, under guard by the Clerk of Court and by representatives of the defense and the prosecution. In point of fact,

he was brought to Camp Murphy in the automobile of Atty. Antonio Barredo, with Atty. Barredo himself in charge of the group. He remained incommunicado until he was finally summoned to the room where the Senator was already seated with the others who were purposely handpicked by the defense for that demonstration.

The negative testimonies of La Torre and Colmenar, close friends of the Montano children, to the effect that they did not see the nine persons who conferred with the Senator in the latter's residence in the afternoon or evening in question, are by no means conclusive evidence that those nine persons were not there.

These two witneses, by their own admissions, are intimate friends and are in close touch with the family life of the Montanos, often passing the night and taking their meals there; their testimonies, therefore, must be weighed and evaluated with utmost caution. For, as rightfully observed, "men are grateful in the same degree that they are resentful. The claims of friendship between a witness and a party are frequently just as powerful an influence in shaping his testimony as any mercenary motive could be." (II Moore on Facts, 1225).

On the testimony of Gerardo la Torre, the Court can only say that the weight of probabilities that it bears, makes it too weak to carry out its mission. Take, for instance, his bold assertion that he left his house to pass the night with the Montanos and to spend the whole of the day and the night that followed without even a hint of it to his parents with whom he is living. His story became more unlikely when the rebuttal witness, Petronilo de la Cruz, testified that he saw la Torre at the latter's house on Lico Street in Tondo with his father, Catalino la Torre, first at eleven o'clock in the morning and then at five o'clock in the afternoon of August 31, 1952.

In an effort to destroy the testimony of Petronilo de la Cruz, the defense attempted to prove through Catalino la Torre that the latter could not have been in Manila at any time on August 31, 1952, because he left for Palawan on the M/S Gen. Malvar on August 26, 1952, returning to Manila on the same boat only on September 2, 1952 from Coron. But it is interesting that nowhere in the passenger manifest for that return trip does his name appear either as a paying passenger or as a recipient of a complimentary ticket. (Exhibits "G-1" to "C-4", Annexes to prosecution's manifestation of November 3, 1952). This gives rise to the possibility that Catalino la Torre might have bought a ticket for Coron but did not use it, or having actually made the trip, he might have returned to Manila on or before August 31, 1952, by plane or some or some other means of transportation.

Guided by these observations, the Court believes that the testimony in chief of Gerardo la Torre was successfully rebutted by the prosecution. On the other hand, the testimony of Tomas de la Rosa, the taxi driver, remains unimpaired; effectively also, it has assailed the dramatic pretensions of the defense witnesses that Senator and Mrs. Montano left Mrs. Mendoza's residence at past seven o'clock in the evening, direct for the Lyric Theatre and that they returned home only after ten o'clock. The prosecution appears successful in unveiling this alibi and in exposing before the Court the correct hue of all the assertions. Faced thus with an overwhelming evidence for the prosecution, the Court is inquisant to honor testimonies proceeding from the lips of witnesses who related the facts as they wanted them to be and not as they were.

The alibi of Iruguin, which purported to show his absence from that unholy conference, cannot prevail over the positive avowals of credible witnesses who attested to the contrary and against whom no improper motive had been ascribed for testifying in the manner they did.

The credibility of Dr. Arca and Dr. Samonte, who claimed that Iruguin was at the birthday party of Ex-Governor Samonte in Cavite City, between six o'clock and 8:00 o'clock P.M. of August 31, 1952, gave way and crumbled too easily under the testimony of Juan de Guzman, an old resident, who affirmed that Iruguin never attended that party and that right in that birthday party the organization of Caballeros Libres held a meeting. The assertion of De Guzman on Iruguin's positive absence from ex-Governor Samonte's party conclusively and directly corroborates the previous testimonies of Magilan and Macailan that Iruguin was with them and was the one who took them and their other companions to the residence of Senator Montano last August 31.

It is true that De Guzman is only one prosecution witness against the defense witnesses Drs. Arca and Samonte who had testified that Iruguin was at the party of the former Cavite governor. Dr. Samonte, however, is an assistant physician of Dr. Arca and his testimony, therefore, must be naturally patterned after that of his chief who comes from Tanza, the hometown of Senator Montano.

There can be no credibility also to the statement of Dr. Arca that he had no personal liking for Senator Montano and yet had to testify freely in favor of the latter. It is going against the grain of human nature if a person who dislikes another, should curb his dislike and testify for the latter. It is more logical and consistent if such person keeps himself away and refrains from taking active stand in favor of the one he dislikes.

Again, it must be considered that the birthday party given by ex-governor Samonte, one of the founders of the Caballeros Libres, was apparently intended for members of this fraternity so that they could discuss and actually turn over then the amount of individual contributions for the construction of the proposed building of the fraternity. Iruguin, who was not a member, certainly would seem to be very much out of place there. If Drs. Samonte and Arca were present, although admittedly not fraternity members, it was because Dr. Samonte, a nephew of the ex-governor, took upon himself to invite his chief, Dr. Arca, and other co-doctors to his uncle's birthday party.

Viewing the side of the defense that Iruguin was at the party, it would seem nevertheless that nobody had invited Iruguin to that party because he was not a member of the Caballeros Libres nor was it made to appear that either ex-governor Samonte or his nephew Dr. Samonte had invited him to come. Moreover, De Guzman, it was brought out, knew Iruguin very well and, although he was in that house from 6:30 to 8:15 o'clock, he was positive Iruguin was not there during that time, much less drink with Drs. Arca, Samonte and Medina and one Eligio Giron. He saw all these gentlemen, but certainly not Magno Iruguin.

With respect to the alibi of Iruguin for September 2, 1952, the statements of Patrolman Basilio de los Santos and Andres Espiritu cannot be trusted because their respective statements are all replete with marked inconsistencies not only in themselves but also with each other. To that extent, in one portion of his testimony, de los Santos says that he does not remember when Iruguin came and sat beside him inside the stadium; but in another portion, he states that Iruguin sat beside him at about nine o'clock. Still, in his statement presented as Exhibit "5", he states that Iruguin arrived when the game between the Harlem Globe Trotters and the New York Celtics was already in progress. Patrolman Espiritu gives a still different version. He stated that Iruguin came in during the last quarter of the Ateneo vs. Sto. Tomas game, which preceded that of the Harlem Globe Trotters. There is, therefore, absolutely no credibility that can be attached to the testimonies of Patrolmen de los Santos and Espiritu. It is obvious that witnesses of this kind cannot successfully support an alibi, especially when, as before stated, such alibi has been destroyed by rebutting witnesses.

It is well-settled that the defense of alibi cannot prevail over positive identification (People v. Faitado, et al., G. R. Nos L-1604, L-1712, & L-1713, June 27, 1949); it is easily manufactured and is usually unreliable such that it can rarely be given credence (People v. Padilla, 48 Phil. 718). Indeed, alibi must be clearly and satisfactorily proved and shown; otherwise, it must be considered as ineffectual (People v. Limbo, 49 Phil. 49). In at least two cases, the defense of alibi set up by the accused has been held as not sufficient to overthrow the evidence of the prosecution where it appears that the place where the offense has been committed is not too distant from the place

set up in the alibi (People v. Resabal, 50 Phil. 280; People v. Maniego, et al. G. R. No. L-2253, May, 1949).

The witnesses for the prosecution testified that Senator Montano left the residence of Mrs. Mendoza sometime before 6:30 o'clock while those of the defense claimed that he left the said residence after 7:00. The distance between the residence of Mrs. Mendoza and that of Senator Montano could be negotiated by car ordinarily from 5 to 10 minutes. In an analogous case, it was held: "Both appellants were that night in places about three or four kilometers distant and it was not impossible for them to be in the scene of the felony even if their witnesses had not deliberately lied, considering that a difference of one hour is not uncommon among people who had no particular interest to be accurate. Anyway, our experience and our rulings hold that such defense is easy to manufacture and is necessarily weak in the face of positive adverse testimony." (People v. Maniego, et. al., supra).

Aside and apart from all the foregoing considerations, this Court is, in conscience, constrained to make the observation that in the reception of the evidence, it has carefully scrutinized the demeanor and the manner in which the different witnesses testified. While it is true that the witnesses for the prosecution, as compared to those of the defense, belong mostly to the rank and file of citizenry, the Court is compelled, because of their sincerity, to give credence and weight to their statements and declarations over those of the defense. These persons are simple-minded and are not equipped with the imagination to present flawless declarations before this Court. On the other hand, the testimonies of the witnesses for the defense had the familiar ring which puts a Court on its guard. To cap it all, they failed to give any convincing basis to support their departure from the home of Mrs. Mendoza. From all appearances, they testified merely to produce the desired result.

Finally, a word about the first ground invoked by the defense in the present application for bail, namely, that "Without need of determining whether the evidence of guilt against Montano is strong or not, the Court can and should grant him bail because his present standing, his background and his conduct in connection with the present case are all sufficient guarantees that he will face trial and will never attempt to escape if released on bail." It is true that there have been some cases, viz. People vs. Sison (L-398, Res. of Sept. 19, 1946), De la Rama vs. People's Court (43 O.G. 4107), People vs. Berg (G. R. No. L-1575), where bail has been granted because of certain special considerations involving risks to the lives of the persons concerned, like critical illness.

But the grant of bail in those cases has been predicated upon humanitarian considerations. Withal such cases cannot be invoked as authority in support of this petition because no evidence was introduced by the defense in the hearing with respect to any special circumstance, let alone that which was held as appropriate basis for the grant of bail in the foregoing cases. Insofar as the resolution of the instant petition is concerned such matters are **aliunde**, because the resolution must necessarily be based solely upon the evidence that have been adduced during the hearing of this petition. The only special consideration advanced, viz., that petitioner will not abscend or thwart the course of justice if released on bail, does not provide sufficient reason in law to grant bail. This is a conclusion, not supported by the evidence introduced during the hearing of the petition, upon which this Court may premise its finding on that score. While this Court may take judicial notice that petitioner is a Senator, that position of the accused standing alone, cannot give him special consideration; it is not a guarantee that he will not abscond or thwart the course of justice, if he so desires. The other consideration springing from his position (which was raised during the early part of the hearing, by way of manifestation) to the effect that the public interest will suffer from his continued detention, also falls short of the standard required in order to justify the granting of bail for a special consideration, after a finding that the presumption of guilt is strong. The constitutional and statutory provisions make no distinction between highly placed public officials and the ordinary citizens. In fact, in respect of constitutional rights, it is the very essence of our Government that all person stand on equal footing before the law.

The cases of Governor Rafael Lacson and Congressman Ramon Durano cannot be invoked in support of this petition. In these cases, there was no opposition to the grant of bail and, therefore, their release under bail became a matter of right.

Over and above, in the determination of the right to bail in capital offense, when it is clear from the evidence that the presumption of guilt is strong, the Constitution and the Rules of Court are mute and affords no discretion which the Court may exercise in admitting the accused to bail under those conditions. Although in some cases, discretion is presumed by the very nature of the functions of the courts, still that discretion must be exercised with extreme caution. For, as Clark says, "where the offense was a felony punishable by death, bail was scarcely ever allowed, for it was not thought that any pecuniary consideration could weight against the desire to live." (Clark's Crim. Procedure, p. 86).

WHEREFORE, in the light of the foregoing considerations and on the basis of the evidence presented, the Court has found the evidence of guilt of the herein petitioner to be strong, and consequently the petition for bail is hereby denied.

In closing, this Court makes it officially public that as a friend and an acquaintance of the accused Senator Justiniano S. Montano, he has found it extremely difficult, embarrassing, and awkward to sit and judge the petition for bail of a national figure who holds one of the highest positions it is within the right and privilege of the Filipino people to bestow. As a friend and an acquaintance of the accused, the person who has the honor to sit and preside over this Court could have closed his eyes perhaps and granted bail. But in this country we hold inviolate and sacred our institution of justice on whose wise principles we have confidently erected the foundations and pillars of our young Republic. Painful and bitter as it has been for this Judge, he had to stick to the norm of all impartial courts regarding the incorruptibility, honesty, and probity of judicial decisions for both rich and poor, and for the weak and influential alike. This Court made this decision guided sincerely and solely by the provisions of the Constitution, the Rules of Court, and the judicial precedents, safe and secure in the legal and moral conviction that he has done full justice to the petition and to the parties that disputed for its resolution.

Finally, as a commentary on the behavior of the parties before it, let it also remain for the record that this Court renders a glowing tribute to the high sense of justice of the defense panel, so ably headed by the Hon. Lorenzo Sumulong, and of the Special Prosecutors. The hearing had been conducted on a lofty plane and as dispassionately as the explosive possibilities—due to the high position of the accused and the political situation in the province of Cavite—permitted. Guided by their ethical sense that the proceedings be conducted in a judicious atmosphere free from the animosities engendered by personal preferences and political partisanships, both prosecution and defense cooperated fully with the Court in a noble manner that speaks highly of their competence, interest, and strict adherence to the principles of justice, rectitude, and impartiality which underlie our judicial system.

IT IS SO ORDERED.

Cavite City, December 2, 1952.

(Sgd.) FELICISIMO OCAMPO
Judge

Republic Acts

[Republic Act No. 739]

AN ACT TO REQUIRE THE RECONSTITUTION OR RECONSTRUCTION, IN THE BUREAU OF MINES, OF LOST OR DESTROYED MINING RECORDS, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. Any locator, lease applicant, permittee, lessee, concessionaire, assignee, owner, or holder of mining claims or concessions the records of which were lost or destroyed, either totally or partially by reason of the last war or the circumstances arising therefrom, and which have not as yet been reconstituted or reconstructed under an administrative proceeding in the Bureau of Mines, shall file a petition under oath with the Director of Mines for the reconstitution or reconstruction of said records within two years from the date of the approval of this Act, and shall prosecute the same with reasonable diligence in accordance with the rules and regulations to be promulgated by the Secretary of Agriculture and Natural Resources: *Provided*, That the rights of said locator, lease applicant, permittee, lessee, concessionaire, assignee, owner or holder over such mining claims or concessions are valid and existing at the time said petition for reconstitution or reconstrucion of records is filed. Failure to file said petition within the period fixed in this Act, or to prosecute the same with due diligence, shall result in the loss of all rights acquired by virtue of the said location, application, permit, lease or concession, and the land covered by the same shall thereupon be open to relocation or application by third parties in the same manner as if no previous location, application, permit, lease or concession for the same land had ever been made or granted.

Sec. 2. Any locator, lease applicant, permittee, lessee, concessionaire, assignee, owner or holder of mining claims or concessions who has in his possession documents pertaining to his mining claim or concession, shall inform the Director of Mines within two years from the date of the approval of this Act, of the existence of such mining claim or concession documents he possesses. If copies of the same are found not existing in the records of the Bureau of Mines or of the mining recorder concerned, the Director of Mines shall so inform the said locator, lease applicant, permittee, lessee, concessionaire, assignee, owner, or holder, who shall, within thirty days from receipt of such information, file with the Director of Mines a petition under oath for the reconstitution of his records in the said offices, accompanying his petition with certified true copies of said mining documents in his possession. Failure to inform the Director of Mines of such documents and to file the petition when required within the period fixed in this Act and to prosecute the same with due diligence in accordance with the rules and regulations to be promulgated by the Secretary of Agriculture and Natural Resources, shall open the area covered by such mining records to relocation or application by third parties in the same manner as if no location, application, permit, lease or concession had ever been made or granted covering the same area.

Sec. 3. Every petition for reconstitution or reconstruction of lost or destroyed mining records filed in the Bureau of Mines in accordance with this Act, shall be accompanied with a filing fee of five pesos.

Sec. 4. Decisions and orders of the Director of Mines on cases pertaining to the reconstitution or reconstruction of mining records as provided for in this Act, may be appealed to the Secretary of Agriculture and Natural Resources by filing with the Director of Mines a notice of such appeal within thirty days after receipt by the party appealing of a copy of such decision or order. If no appeal is made within said period the decision of the Director of Mines shall be final and binding upon the parties concerned. The decision of the Secretary of Agriculture and Natural Resources may be taken to the court of competent jurisdiction as in ordinary civil cases within thirty days from receipt of such decision: *Provided*, That if no such action is taken within the period of thirty days from receipt of such decision, the decision of the Secretary of Agriculture and Natural Resources shall likewise be final and binding upon the parties concerned.

Sec. 5. This Act shall take effect upon its approval.

Approved, June 18, 1952.

[Republic Act No. 740]

AN ACT TO AMEND SECTIONS ONE, TWO, THREE, FOUR, FIVE SIX, SEVEN, AND TEN, TO INSERT SECTION 2—A IN, AND TO REPEAL SECTIONS EIGHT AND NINE OF ACT NUMBERED TWO THOUSAND SEVEN HUNDRED NINETEEN, OTHERWISE KNOWN AS THE COAL LAND ACT, AS AMENDED, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. Sections one, two, three, four, five, six, seven and ten of Act Numbered Two thousand seven hundred nineteen, otherwise known as the Coal Land Act, as amended, are hereby amended so as to read as follows:

"Sec. 1. Coal-bearing lands in the Philippines shall not be disposed of in any manner except as provided in this Act.

"The ownership and the right to the use of land for agricultural, industrial, commercial, residential, or for any purpose other than mining does not include the ownership of, nor the right to extract or utilize, the coal which may be found on or under the surface. The ownership of, and the right to extract and utilize the coal included within all areas for which public agricultural land patents are granted are excluded and excepted from all such patents. The ownership of, and the right to extract and utilize the coal included within all areas for which Torrens titles are granted are excluded and excepted from all such titles.

"Sec. 2. Any unreserved and unappropriated coal-bearing lands may be leased by the Secretary of Agriculture and Natural Resources in blocks or tracts of not less than fifty nor more than twelve hundred hectares each in such manner as may, in the opinion of the Secretary of Agriculture and Natural Resources, allow the economic development and exploitation of the coal deposit: *Provided*, That an applicant may be granted a lease or leases on not more than six separate blocks or tracts of coal land in any one province: *And provided, further*, That the aggregate area of all such blocks or tracts shall not be more than twelve hundred hectares in the whole Philippines. The lease may be granted to any person twenty-one years of age or over who is a citizen of the Philippines or to any association, partnership or corporation organized under the laws of the Philippines: *Provided*, That at least sixty *per centum* of the capital of such corporation or association is owned and held at all times by such citizens.

"Sec. 3. Leases under the provisions

of this Act shall be issued upon publication, in the manner and subject to the rules prescribed by the Secretary of Agriculture and Natural Resources, for a period of not more than twenty-five years, renewable for another twenty-five years subject to such terms and conditions as may be authorized by law at the time of such renewal, and no such lease shall be assigned or sublet except with the consent of the Secretary of Agriculture and Natural Resources, and in this case only to persons, partnerships, associations, or corporations having the qualifications required of lessees: *Provided*, That failure of an applicant to prosecute his coal lease application with reasonable diligence and to have the area covered thereby surveyed within one year from the date said application is filed in the Bureau of Mines shall be considered a waiver of his aforesaid coal lease application. Every lease shall contain a clause by which the lessee shall bind himself to comply with the rules and regulations issued by the Secretary of Agriculture and Natural Resources for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property and for the prevention of undue waste, together with such other rules and regulations as the Secretary may make for the protection of the interests of the Government and for the promotion of the public welfare. For the privilege of mining, extracting, and disposing of the coal in the lands covered by his lease, the lessee shall pay to the Government of the Philippines through the Collector of Internal Revenue, such royalties as may be specified in the lease, which shall not be less than ten centavos per ton of one thousand and sixteen kilos, to be due and payable upon the removal of the coal from the locality where mined and an annual rental, payable in advance on the the date of the approval of the lease and on the same date every year thereafter on the lands covered by such lease, at the rate rate of two pesos and fifty centavos per hectare or fraction thereof for each and every year for the first ten years, and five pesos per hectare or fraction thereof for each and every year thereafter during the life of the lease: *Provided*, That such rental for any year shall be credited against the royalties as they accrue for that year as provided in this Act: *And provided, further*, That such rental and royalties paid during any year shall be credited against the specific tax provided for in section one hundred forty-three of the national internal revenue code, as amended.

"Sec. 4. Any person, association, partnership, or corporation holding a lease of coal lands under this Act may, at any time surrender such lease or any portion thereof, and with the approval of the Secretary of Agriculture and Natural Resources and through the same procedure and upon the same terms and conditions as in the case of the first lease granted under this Act, secure and hold additional leases on such blocks or tracts as provided in this Act, covering additional lands separate from or contiguous to those embraced in the original lease or leases, but in no event shall the total number of such lease exceed six in any one province, or the total area embraced in such original and new leases exceed in the aggregate twelve hundred hectares in the whole Philippines.

"Sec. 5. Subject to the approval of the Secretary of Agriculture and Natural Resources, lessee holding under leases contiguous blocks or areas may consolidate their said leases or holdings so as to include in a single holding a total of not to exceed twelve hundred hectares provided all lessees have at the time of such consolidation complied individually with all their obligations towards the Government.

"Sec. 6. Each lease shall be for such leasing block or tract of land as may be offered or applied for, not less than fifty nor more than twelve hundred hectares of land as hereinabove provided.

"Sec. 7. Any persons, association, partnership or corporation who, without first securing a coal lease, revocable permit or license under the provisions of this Act, shall mine and extract coal belonging to the government and dispose of the same for commercial purposes, or from an area covered by a coal lease, permit or license of another person without his permission, shall be guilty of theft, or qualified theft, as the case may be, and shall be punished, upon conviction, in accordance with the provisions of the revised penal code, besides paying compensation for the damages caused thereby: *Provided*, That in the case of association, partnership, or corporation, the president or manager thereof shall be responsible for the acts committed by such association, partner, or corporation.

"Sec. 10. That in order to provide for the supply of local and domestic needs for fuel, the Secretary of Agriculture and Natural Resources may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section two of this Act, whether or not he is an applicant for, or holder of, one or more coal leases under this Act, not more than three limited licenses or commercial revocable permits granting the right to prospect for, mine, and dispose of coal belonging to the Government on specified separate tracts covering an area of not to exceed four hectares each to any one person, association partnership, or corporation in any one or more coal field for a period of no exceeding ten years, on such conditions not inconsistent with this Act as in his opinion will promote the coal industry and safeguard the public interest upon payment of a royalty of fifty centavos per ton for the coal mined in lieu of the specific tax on coal."

Sec. 2. Section 2-A is hereby inserted between section two and three of Act Numbered Two Thousand seven hundred nineteen, as amended, which shall read as follows:

"Sec. 2-A. In case a coal lease or revocable permit application covers in whole or in part private land, the same shall be accompanied by the written authority of the owner of the land: *Provided*, That in case of refusal of the owner of the land to grant such written authority, the matter as well as the amount of compensation to be paid to the owner of the land shall be fixed by agreement between the applicant and the surface owner, and in case of their failure to agree as to the conditions of the granting of the written permission and the amount of compensation to be paid, all questions issue shall be determined by the court of first instance of the province in which said land is situated in an action instituted for the purpose by the applicant and the permission may be granted by the court as soon as the applicant deposits the amount fixed as compensation for any resulting damage or files a bond to be approved by the court sufficient to insure the payment of the compensation for the owner of the land. The court shall thereupon determine the compensation for an resulting damage, for the purposes for which the land has been applied for, and thereafter grant the written authority required herein. The owner who holds a Torrens title on his land included in a coal lease shall be entitled to receive five per cent of the royalty due to the government on coal extracted from his private land.

Conflicts and disputes arising out of coal lease and/or coal revocable permit applications shall be submitted to the Director of Mines for decision: *Provided*, That the decision or order of the Director of Mines may be appealed to the Secretary of Agriculture and Natural Resources within thirty days from the date of its receipt. In case anyone of the parties should disagree from the decision or order of the Director of Mines or of the Secretary of Agriculture and Natural Resources, the matter may be taken to the court of competent jurisdiction within thirty days from the receipt of such decision or order; otherwise, the decision of the Director of Mines or the Secretary of Agriculture and Natural Resources as the case may be, shall be

final and binding upon the parties concerned."

Sec. 3. Sections eight and nine of Act Numbered Two thousand seven hundred nineteen, as amended, are hereby repealed.

Sec. 4. All laws and regulations or parts thereof, which are inconsistent with the provisions of this Act, are hereby repealed.

Sec. 5. This Act shall take effect upon its approval.

Approved, June 18, 1952.

[Republic Act No. 743]

AN ACT PROVIDING PROTECTION TO LOCATORS, HOLDERS, LESSEES AND OPERATORS OF UNPATENTED MINING CLAIMS AND LEASES BY EXEMPTING THEM FROM THE PERFORMANCE OF ANNUAL LABOR OR ASSESSMENT WORK REQUIRED BY EXISTING LAWS FOR TME YEARS NINETEEN HUNDRED AND FIFTY-ONE TO NINETEEN HUNDRED AND FIFTY-TWO INCLUSIVE.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. Any provisions of existing laws to the contrary notwithstanding, the performance of annual assessment work or improvements, by locators, holders, or operators of unpatented mining claims acquired under the Act of Congress of July one, nineteen hundred and two, as amended, or mining leases granted under the Mining Act, are hereby waived for a period of two years beginning January one, nineteen hundred and fifty-one to December thirty-one, nineteen hundred and fifty-two inclusive.

Sec. 2. This Act shall take effect upon its approval.

Approved, June 18, 1952.

[Republic Act No. 746]

AN ACT TO AMEND SECTIONS TWENTY-EIGHT, FIFTY-NINE, SIXTY-ONE, SIXTY-TWO, SIXTY-FOUR, SIXTY-EIGHT, SEVENTY-THREE, AND ONE HUNDRED, OF COMMONWEALTH ACT NUMBERED ONE HUNDRED THIRTY-SEVEN, AS AMENDED, OTHERWISE KNOWN AS THE MINING ACT.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. Subsection (*a*) of section twenty-eight of Commonwealth Act Numbered One hundred thirty-seven, known as the Mining Act, is hereby amended to read as follows:

"Sec. 28. No prospecting shall be allowed:

"(*a*) In a mineral reserve which has been proclaimed closed to mining locations, and in reservations established for other purposes, except by the Government."

Sec. 2. Section fifty-nine of Commonwealth Act Numbered One hundred thirty-seven, known as the Mining Act, is hereby amended to read as follows:

"Sec. 59. Fifty *per centum* of the fees collected by authority of the preceding section shall accrue to the province and fifty *per centum* of the same, shall accrue to the municipality in which the mining claim is located. In the case of chartered cities the full amount shall accrue to the city concerned. The city or municipality and province shall provide funds for the necessary personnel, postage, supplies and materials, and equipment needed by the mining recorder in the registration and safe keeping of mining documents."

Sec. 3. Section sixty-one of the same Act is hereby amended to read as follows:

"Sec. 61. Conflicts and disputes arising out of mining locations shall be submitted to the Director of Mines for decision: *Provided*, That the decision or order of the Director of Mines may be appealed to the Secretary of Agriculture and Natural Resources within thirty days from the date of its receipt. In case any one of the parties should disagree from the decision or order of the Director of Mines or of the Secretary of Agriculture and Natural Resources, the matter may be taken to the court of competent jurisdiction within thirty days from the receipt of such decision or order; otherwise the said decision or order shall be final and binding upon the parties concerned."

Sec. 4. Section sixty-two of the same Act, as amended, is hereby further amended to read as follows:

"Sec. 62. Any qualified person making a valid location of a mining claim or claims, his successors, and assigns, acquires thereby the right of exploration and occupation from the date of the registry of the claims in the office of the mining recorder; and if he applies for lease of said claim or claims and, upon investigation, it shall be found that it is free of claims and conflicts, or that his application appears to be *prima facie* well founded, subject to the rules and regulations that the Secretary of Agriculture and Natural Resources may prescribe, he shall be entitled, before the lease is granted as provided in this Act, to a temporary permit, to be issued by the Secretary of Agriculture and Natural Resources within forty-five days from the date application for such permit, accompanied by the necessary technical description and survey plan of the mining claim or claims, is filed, to mine, extract and dispose of minerals from said claim or claims for commercial purposes, subject, however, to the payment of royalties provided in the National Internal Revenue Code, as amended, for claims covered by lease: *Provided, however*, That the holders of mining claims located under the Act of Congress of July one, nineteen hundred and two, as amended, who may apply for a lease or leases thereon under the provisions of section sixty-eight of this Act, as amended, subject to the rules and regulations that the Secretary of Agriculture and Natural Resources may prescribe, may extract minerals therefrom for commercial purposes without such temporary permit until such time as the leases applied for are granted subject, however, to the payment of royalties provided for in the National Internal Revenue Code, as amended, for claims covered by leases and to the condition that the mining claim or claims to be developed or exploited shall first be properly surveyed: *Provided, finally*, That the Secretary of Agriculture and Natural Resources may at any time cancel for violaton of laws and regulations and after due hearings the temporary permit granted under the provision of this Act, and in the case of unpatented mining claims located under the Act of Congress of July one, nineteen hundred and two, as amended, stop the extraction of minerals therefrom for commercial purposes, without any responsibility on the part of the Government as to expenditures for development works or exploitation purposes that might have been incurred by the applicants, pending the determination of their applications for lease."

Sec. 5. Section sixty-four of the same Act is hereby amended to read as follows:

"Sec. 64. The Director of Mines may designate competent mineral or deputy mineral land surveyors to survey mining claims for any necessary purpose under the provisions of this Act. He is also hereby empowered to fix the bonds of duly qualified deputy mineral land surveyors and to issue the necessary regulations governing the execution and verification of surveys of mineral lands in the Philippines. All applications for official surveys of mining claims shall be filed with the Director of Mines before or upon the filing of the lease applica-

tion, and the necessary survey of the mining claim or claims shall be made within a reasonable time thereafter, and the expenses of such surveys shall be paid by the applicants. They shall be at liberty to employ any such deputy mineral surveyor to make the survey at the most reasonable rate."

Sec. 6. Section sixty-eight of the same Act, as amended, is hereby further amended to read as follows:

"Sec. 68. Application for a lease on a mining claim shall be filed within four years from the date of the recording of the claim in the office of the mining recorder. Failure to file such application within the period above-mentioned shall be deemed an abandonment of the mining claim, and the land embraced within such claim shall thereupon be open to relocation in the same manner as if no location of the same had ever been made: *Provided*, That the original locator, his heirs, or his assigns, who has or have thus failed to file a lease application on the claim shall not be entitled to relocate, directly or indirectly, the land embraced within such claim, or any part thereof."

Sec. 7. Section seventy-three of the same Act is hereby amended to read as follows:

"Sec. 73. At any time during the period of application, any adverse claim may be filed under oath with the Director of Mines, and shall state in full detail the nature, boundaries, and extent of the adverse claim; and shall be accompanied by all plans, documents, and agreements upon which such adverse claim is based: *Provided, however*, That no adverse claim from any person, association, partnership or corporation, whose protest filed under section sixty-one of this Act has already been finally decided by the Director of Mines and/or the Secretary of Agriculture and Natural Resources, shall be entertained. Upon the filing of any adverse claim all proceedings except the publication of notice of application for lease and the making and filing of the affidavit in connection therewith, as herein prescribed, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the controversy and to prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be considered as a waiver of his adverse claim. After such judgment shall have been rendered, the party whose right to a lease on the mining claim in controversy, or any portion thereof, shall have been established thereby, may, without giving further notice, file a certified copy of the judgment with the Director of Mines, and the description required in such cases, together with the proper fees, whereupon a lease may forthwith be granted thereon on such mining claim or on such portion thereof as the applicant may be entitled to under the decision of the court. If the decision of the court is that several parties are entitled to leases upon separate and different portions of the mining claim, the subject matter of the application, and such parties have theretofore applied therefor, leases may forthwith be issued to the said several parties according to their respective rights as determined by the decision. If in any action brought pursuant to this section a right to a lease upon any of the claim in controversy shall not be established by any of the parties, the court shall so find and judgment shall be entered accordingly. In such case the clerk of the court rendering judgment shall file a certified copy of the judgment with the Director of Mines, whereupon the proceedings under the lease application shall be dismissed and the application denied."

Sec. 8. Section one hundred of the same Act is hereby amended to read as follows:

"Sec. 100. Any person who, without a mines temporary permit or mining lease shall extract minerals and dispose of the same for commercial purposes, belonging to the Government or from a mining claim or claims leased, held or owned by other persons without the permission of the lawful lessee, holder or owner thereof, or shall steal ores or the products thereof from mines or mills, shall, upon conviction, be imprisoned from six months to six years or pay a fine of from one thousand pesos to twelve thousand pesos, or both, in the discretion of the court, besides paying compensation for the damage caused thereby: *Provided*, That in the case of association, partnership, or corporation, the president or manager thereof shall be responsible for the acts committed by such association, partnership or corporation."

Sec. 9. This Act shall take effect upon its approval.

Approved, June 18, 1952.

[Republic Act No. 870]

AN ACT AUTHORIZING THE GUERRILLA AMNESTY COMMISSION TO HEAR AMNESTY APPLICATIONS IN CERTAIN CASES EVEN IF THE SAME HAVE ALREADY BEEN DECIDED BY SUPERIOR COURTS.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. Any law or decision to the contrary notwithstanding, the decision of any superior court in a criminal case finding the acts of the accused for which he has been prosecuted as not falling under Amnesty Proclamation Number eight, dated September seven, nineteen hundred and forty-six, shall not bar him from raising or reopening the issue of amnesty in connection with the said acts before the proper Guerrilla Amnesty Commission: *Provided, however*, That the accused has not previously applied for amnesty in connection with the said acts to any Guerrilla Amnesty Commission or that he has not pleaded amnesty as a defense at the trial of the said criminal case in any inferior court.

Sec. 2. The proper Guerrilla Amnesty Commission referred to in the preceding section shall, upon petition of the accused, receive such evidence or further evidence as he may submit in support of his application.

Sec. 3. The decision of the Guerrilla Amnesty Commission denying the accused the right of amnesty shall be appealable by certiorari to the Supreme Court.

Sec. 4. An application for amnesty may be filed either by the person responsible for the acts for which he invokes amnesty or by his representatives.

Sec. 5 This Act shall take effect upon its approval.

Enacted without Executive approval, June 22, 1952.

THE STAR OF BETLEHEM

As was said in the Book, when the Star did shine in Bethelem on that early morn, it was to apprise the world that the Savior was born in a lowly manger, and to guide the shepherds tending their flocks, and the Wise Men from the East to where He lay.

On this day and age, may that Star indeed shine upon our hearts with deep humility, love and kindness for our fellowmen!—L. D. R.

Book Review

REVISED PENAL CODE: by Vicente J. Francisco, East Publishing, 1952. Vols. 1 & 2, ₱19.00 a volume; ₱35.00 a set.

None has contributed more to the country's legal literature than Dean Vicente J. Francisco. He has written legal treatises and texts on almost every phase of the law, and always, each field of the law upon which his incisive mind has ploughed, has been enriched thereby. Every book he has written is concededly authoritative, and on more than one occasion, the Supreme Court, in its decision, made reference to some of them. And if all the legal treatises and texts he had previously written bear the impress of authority, that impress should be more marked and indubitable on his latest book, the subject of which criminal law—he is most qualified to write about. To this subject, he has dedicated a great portion of his life; to his success in its practice, he owes much of his fame as a legal practitioner. Indeed, the Dean's name has become inextricably linked, has become almost synonymous even, with criminal law. It is not surprising, therefore, that the publication of the present volume has been much awaited and so well received.

The present volume—the most recent of the commentaries on the *Revised Penal Code*,—was prompted by the author's "belief that it is his professional duty to make available to others, his professional experience in the practice of criminal law." All knowledge is vain when it is kept to one's self; it becomes of any use only when imparted to others. The imparting of knowledge, however, will be ineffectual, if not done with a noble purpose. The present work, impelled as it had been by the author's sense of kinship with his fellow lawyers and by his desire "to aid in the fulfillment of the profession's pledge to defend the innocent and bring the guilty to justice," has such a purpose. And in this sense, the book may rightly be called a "labour of love."

Dean Francisco's *Revised Penal Code* makes a welcome departure from the usual technique employed by other commentators on the penal law. The author has not contented himself with citing and reproducing controlling decisions, but has ventured farther afield by setting down principles and commentaries derived from the philosophy and the jurisprudence of criminal law. As a skillful surgeon artfully cuts to get to the affected parts of the human anatomy so that they can be removed or repaired, so had Dean Francisco incisively cut to the deepest philosophical beds underlying each provision of the penal code. This was done, as the preface states, "not out of presumption but in the honest conviction that a collection of provisions of law and decided cases must necessarily be haphazard, confusing, and in the end of little help or value, unless it is brought together and organized on the basis of principles."

At the same time, the emphasis due to judicial interpretation and applications of our criminal law was not neglected. On the contrary, discussion of the decisional law on the subject was made more comprehensive by the manner of presentation adopted; it is made in question and answer form in the manner of Viada. The legal problem posed by every proviso in the penal code and its solution are presented in a direct, dramatic and easily understandable way. Such mode of approach makes possible a comprehensive discussion of almost all the cases decided by the Supreme Court in connection with the particular proviso in question. Thus, the book is not only an analytical study of the philosophy behind each provision of the code; it also serves the purpose of a case-book, with this decided advantage: that it is presented in a form most convenient both for the busy lawyer in the provinces who due to circumstances ofttimes beyond his control, cannot keep abreast with all the decisions of the Supreme Court, as well as for the candidate for the bar, who will find in the novel mode of approach, apt training in how to make effective answers to bar questions.

Taken all together, Dean Francisco's *Revised Penal Code* is the most comprehensive study of criminal law so far published. Each article of the *Revised Penal Code* is treated first, from its historical and philosophical background, followed by the judicial interpretations made thereof. In controversial questions, and in the absence of decisions by the higher courts on the matter, the author suggests possible solutions. In the book, one readily sees the hand of a legal craftsman; it is written in a scholarly, but readable and far from pedantic, manner. It breathes the spirit and intent of the purpose and function of our criminal law. It is compact but thorough in the treatment of the subject matter, and should be a credit to the professional library of judges and lawyers as well as to the bookshelf of students of law.

—ATTY. LOPE E. ADRIANO

IS A LAWYER . . . *(Continued from page 620)*

sent the extenuating facts and circumstances on his client's behalf.

Chicanery and insincerity should be no part of a lawyer's make-up in any case.

Let us return for a moment to the delightful dialogue between Boswell and Johnson. It makes wonderful reading. Is it a real answer to the question posed at the beginning of this article?

Do you, Mr. Lawyer, or indeed any human being possess the ambivalence to dissimulate in the courtroom, and to "resume your usual behaviour" when you come from the Bar? Can you throw off insincerity and dissimulation in the courtroom as though it were a cloak, subdue that dishonest portion of your thinking, and resume being a man of integrity when you return to your office?

Inevitably the two character traits contained in the one body would tend to merge. Obviously, dissimulation and insincerity will eventually overcome integrity.

Whether he walks upon his hands or feet, as Samuel Johnson argues, may not affect the character or soul of the walker. Pleading earnestly a cause which the lawyer knows to be untrue cannot but perniciously affect his character.

Whatever the situation was in Johnson's day, there should be no artifice at the Bar. Nor should a man "resume his usual behaviour" the moment he comes from the Bar. The lawyer's usual behavior both in his office, and at the Bar and in Society, should be that of a man of probity, integrity and absolute dependability.

The argument that a lawyer should be a mouthpiece for his client, indelicate as that connotation may be, is specious and only logical to a limited extent. A lawyer should not be merely a mechanical apparatus reproducing the words and thoughts and alibis of his client, no matter how insincere or dishonest. Rather the lawyer should refuse to speak those words as a mouthpiece, unless the utterances of his client are filtered and purified by truth and sincerity.

Chicanery, dissimulation and insincerity may be words to be found in the dictionary in the lawyer's library. But they should never be found in the lawyer's heart.

LAWYER'S DIRECTORY

(In view of the present difficulty of locating the offices of practicing attorneys, the Journal publishes this directory to acquaint not only their clients but also the public of their addresses. Lawyers may avail themselves of this service upon payment of Two Pesos for each issue of this publication.)

ALMEDA, POLICARPO
R-307, Burke Bldg., Escolta
Tel. 3-37-61 Local 18

ANDRADA, NESTOR M.
R-603 Soriano Bldg.
Plaza Cervantes, Manila
Tel. No. 2-75-90

ANTONIO, ROMAN B
308 Samanillo Bldg., Manila
Tel. 2-92-09

AZCUNES, Dr. PABLO
Lawyer Medico-Legal Expert
Santa Mesa Blvd. corner Sucigo
Manila
Tel. 6-53-76

BARADI, MAURO & GALLARDO, P. P.
M. R.S. Building, Plaza Cervantes
Tels. 2-83-39--2-94-85

BELEN, CAYETANO DE G. &
PADOLINA, JOSE S.
R-206 Kalaw Bldg., 721 Quezon Blvd.
Tel. No. 3-30-78

BUENAVIDES, ROSENDO
R-211 Borja Bldg., 641 Rizal Ave.
Manila

CARDENAS, JOSE PEREZ
405 Aviles, Manila
Tel. 6-71-86

CHAN, ENRIQUE O.
R-315 Ayala Bldg.
Manila
Tel. No. 2-65-10 & 6-79-03

CORPUS, ENRIQUE J. LAW OFFICES
R-204 Cu-Unjieng Bldg. Annex
Escolta, Manila

CRUZ, ALBERTO V.; SANTOS, ACEVEDO P.
Law Offices
R-211 Garcia Bldg.
Rizal Ave., Manila
Tel. 3-22-43

DACAYO, LEON P.
394 Bambang, Sta. Cruz
Manila

DALUPAN & SANCHEZ
R-314 Regina Bldg.
Escolta, Manila
Tel 3-27-57

FERNANDEZ JR., ESTANISLAO A.
308 Samanillo Bldg., Manila
DIAL Tel. 3-22-13 Call: 4326

FRANCISCO, ALBERTO J.
R-201 Samanillo Bldg., Manila
Tel: 3-33-64

FRANCISCO, VICENTE J.
R-201 Samanillo Bldg., Manila
Tel: 3-33-64

GOMEZ, AMADOR E.
689 Pasaje Rosario
Paco, Manila
Tel.: 5-46-12

GUERRERO, BERNARDINO
774 Legarda, Sampaloc, Manila
Tel. No. 6-79-19

GUEVARA, DAVID & GUEVARA, JOSE S.
R-314 Regina Bldg.
Escolta, Manila
Tel. 3-27-57
Res.: Malabon, Rizal

GUZMAN, PRUDENCIO DE
R-201, York Town Bldg.
420 Rizal Avenue
Tel. No. 3-21-79

MURILLO, ALFREDO M.
R-404 Samanillo Bldg., Escolta,
Manila. Tel. 3-20-81 Local 44

JALANDONI, RODEGELIO
R-201 Samanillo Bldg., Manila
Tel: 3-33-64

MACAPAGAL, PUNSALAN & YABUT
Suites 218-220 Consolidated Investment Bldg.
Manila

MARASIGAN, FRANCISCO
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

OCHOA, JOSE F.
Legal Dept. Botica Boie
Tel. 3-23-56

PACHECO, EMERENCIANA S.
371 San Anton, Manila

QUISUMBING, SYCIP, QUISUMBING &
SALAZAR LAW OFFICES
5th Floor, Trade and Commerce Bldg.
123 Juan Luna, Manila
Telephones: 2-73-89 & 2-93-26

SALAZAR, AMADO G.
R-505 Samanillo Bldg., Escolta, Manila
Tel. No. 3-20-81
Local 47

SAN JUAN, AFRICA, YNIGUES & BENEDICTO
Suite 226 Regina Bldg., 2nd Floor
Escolta, Manila, Tel. 3-28-60

SANTOS, JOSE Y. DE LOS, MALIMBAN, R. &
SANTOS, CIRIACO T. DE LOS
Suite 202-206 Pedro Cruz Bldg.
426 Evangelista, Manila
Tel. 3-34-49

SYCIP, SALAZAR, FELIX & HILADO
307 Singson Bldg.
307 Singson Bldg.
Manila
Tel. 3-84-16

SORIANO, MANUEL A. O.
Soriano Law Offices
Suite 405 Samanillo Bldg.
Escolta, Manila

TECHICO, JORDAN LAW OFFICES
Associates: Judge L. J. Mancenido
I. K. Bautista
F. E. Padua
Suites 217-218, 2nd Flr.
562 T. Pinpin corner Ongpin, Manila
Tel. No. 2-87-24

TENZA, ELISEO M.
Suite No. 408, Samanillo Bldg
Escolta, Manila
Tel. 3-20-81 (Local 38)

VERGARA, MATIAS F.
319 Great Eastern Hotel Bldg
Echague Manila