sence of his father Isidro Rivera, his wife Dominga Camatos and Filomena (Teofila) de la Cruz. The party was commanded by a Japanese officer. Maximo Pacheco, armed with a rifle, tied the hands of the prisoner. Thereafter the captive was marched to the Japanese garrison at Polo, Bulacan, followed by his near relatives already mentioned. The latter waited for him at the gate for two hours, but in vain. The next day, in the afternoon, they returned in time to see him with three other Filipinos, all tied, walking to the Isla bridge, Polo, guarded by four Filipinos, one of them the appellant, plus one or two Japanese soldiers. Near the foot of the bridge the Filipino captives were shot dead. Antonio de Guzman, whose house stood about thirty meters from the place beheld the massacre, which was also seen by Federico San Juan, farmer, 38, and Regino Galicia, employee, 37. Antonio de Guzman swore it was this appellant who shot Ceferino Rivera on that occasion.

Appellant's overt act of taking part in the apprehension of Ceferino Rivera, as a guerrilla suspect was testified to by Isidro Rivera and Dominga Camatos. But the defense contends that the latter is unworthy of credit because whereas she stated in direct examination that her husband had been arrested by four Filipinos (one of them Maximo Pacheco) yet on cross examination she answered it was a Japanese who made the arrest (p. 285 n.) But on the same page this woman declared:

"P Y los otros cuatro filipinos estaban alli mirando en compania del japones, desde luego?
R El que le ato era un filipino.
P Quien de los filipinos ato a su esposo?
R Maximo Pacheco."

There is consequently no reason to doubt her veracity on this score. Other quotations of the testimony of these two witnesses are submitted by appellant's counsel, in an effort to destroy their credibility. They are either explainable, like the one above discussed, or refer to unsubstantial matters. That this appellant took active part in the arrest and execution of Ceferino Rivera, we have no reasonable doubt. His mere denial can not overcome the positive assertion of the witnesses. And his claim that he was also a guerrilla, was held unfounded by the trial judge. Anyway, we have heretofore declared that such claim is no defense against overt acts of treason. (People vs. Jose Fernando, SC-G.G. No. 1-1138, prom. Dec. 17, 1947; People vs. Carmelito Victoria, SC-G. R. No. L-369, prom. Mar. 13, 1947; People vs Carlos Castillo, SC-G. R. No. L-240, prom. April 17, 1947).

The second charge is also adequately proven by the testimony of Judge Eugenio Angeles, his son Gregorio, and Dr. Ciriaco Santiago.

On February 2, 1945 about 7:30 a.m., the three were on their way to Hermoso Drug Store near Divisoria Market, Manila. Crossing a bridge on Azcarraga Street they met Ricardo Urrutia of Polo, friend of Judge Angeles, who stopped to tell them "the Americans were already in Malolos." Hardly had the party crossed the bridge when Judge Angeles was surrounded by five young men all armed. One of them wearing a mask ordered him to proceed to the Air Port studio nearby, which served as Headquarters of the Kempei Tai, dreaded Japanese organization. One of the young men was the herein accused. Dr. Santiago and Gregorio Angeles were not molested.

In the studio Judge Angeles was brought to a room wherein he saw seven Filipinos (including this appellant) headed by one Santos residing in Polo. The latter asked Judge Angeles if he was a guerrilla, and when he replied in the negative he was struck with a piece of lumber. Then he was subjected to several forms of torture. He was boxed and kicked and given the water cure. But he stoutly denied connection with the underground resistance. This accused was in the room and informed the investigators that he (Judge Angeles) was the chief of the guerrillas of Polo. In view of this imputation the tortures continued. Fortunately for Judge Angeles, the Japanese began their retreat from Manila on February 3, the garrison was vacated, and he managed to escape together with other prisoners.

It may be true, as contended by defense counsel that the tortures undergone by Judge Angeles were described by him as the sole witness; but his apprehension as a guerrilla was witnessed and related in open court by Dr. Santiago and his son Gregorio, compliance with the two-witness rule being thereby effected.

Wherefore, after reviewing the whole record we find no hesitation in finding this appellant guilty of treason.

And as the penalty meted out to him accords with section 114 of the Revised Penal Code, the appealed decision should be, and it is hereby, affirmed with costs. So ordered.

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

Mr. Justice Feria took no part.

VIII

Nicanor Jacinto, Petitioner vs. Hon. Rafael Amparo, as Judge of the Court of First Instance of Manila, Branch III, and Jose Cojuangco, Respondents, G. R. No. L-6096, August 25, 1953.

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

Jose P. Laurel for petitioner.
Lorenzo Sumulong for respondents.

DECISION

JUGO, *J.*:

On November 26, 1951, Nicanor Jacinto petitioner herein, filed a complaint against Jose Cojuangco, respondent herein, before the Court of First Instance of Manila, presided over by Judge Amparo, co-respondent herein, in Civil Case No. 15199 of said court, praying for an accounting of the assets of a partnership organized by Nicanor Jacinto and Jose Cojuangco in 1939. Cojuangco filed an answer with a counterclaim, to which Jacinto in his turn filed an answer.

Upon motion of Jacinto, the case was set for trial on February 22, 1952.

On February 8, Jacinto served on Cojuangco a notice for the taking of the latter's deposition by oral examination on February 12, before a Deputy Clerk of the Court of First Instance of Manila.

In the morning of February 12, 1952, the date set for the taking of the deposition of Cojuangco, the latter's counsel, attorney Lorenzo Sumulong, conferred with attorney Fernando Jacinto, son and counsel of Nicanor Jacinto, regarding the possibility of an amicable settlement. In view of this, the taking of the deposition was postponed to February 15, and then to February 18, at 2:00 p.m.

At one o'clock in the afternoon of February 18 or one hour before the time set for the deposition of Cojuangco, the latter served on Jacinto notice of this motion asking the court to order that the deposition be not taken at all, setting said motion for hearing on February 22, the date fixed for the trial. At the same time, Cojuangco served on Jacinto notice that he would take Jacinto's oral deposition at one o'clock p.m. on February 22. Jacinto did not object to the taking of his deposition by Cojuangco, but moved that the hour of the taking be changed for the convenience of both parties. At the hearing of Cojuangco's motion, Jacinto's counsel argued against it. The respondent Judge dictated in open court the following resolution:

"The Court takes exception to the allegation that the taking of a deposition is a matter of absolute right after the answer is filed. See section 16 of the rules. The case is now ready for trial, why don't we proceed? The granting of the taking of a deposition is discretionary to the Court under Section 16. And taking the circumstances, the court finds

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

x x x x

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

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

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

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

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

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

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

IX

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

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

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

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

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

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

DECISION

MONTEMAYOR, *J.*:

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

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