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

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

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

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

V

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

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PROCEDURE; INTERPLEADER; MONEY WHICH IS THE SUBJECT-MATTER OF INTERPLEADER DEPOSITED WITH CLERK OF COURT CANNOT BE WITHDRAWN BY SUBSTITUTING IT WITH A SURETY BOND.—Atkins, Kroll and Co. deposited the sum of ₱21,792.49 with the Clerk of Court and asked the court to decide who among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

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

MR. JUSTICE TUASON, *dissenting.*

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

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

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

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

DECISION

PABLO, *M.:*

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

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

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

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

de resolverla, endosó el expediente al Hon. Juez Ocampo que entonces presidía la Sala 7.a. Oídas las partes en 4 de agosto, al siguiente día, o sea, 5 de agosto, el Hon. Juez Ocampo dictó una orden cuya parte dispositiva es la siguiente:

> THEREFORE, the Court hereby authorizes the Clerk of Court to deliver, out of the sum of P21,792.49 deposited in his office, the sum of P19,800.00 to defendant JESUS L. UY and the balance of P1,992.49 to defendant Cathay Ceramics Inc., upon the filing by the said defendant Cathay Ceramics, Inc., of a surety bond in the sum of P25,000.00, one of the conditions of which shall be that the surety shall pay to the claimants herein upon the adjudication of their several claims by this Court immediately and without the necessity of any further suit in court to enforce collection upon such bond.
>
> "The authority herein granted shall take effect upon the approval of the above-mentioned bond."

Al enterarse de dicha orden, Rizalina S. Rivera y la Associated Insurance & Surety Co., Inc. presentaron una moción urgente de reconsideración, con una petición adicional de que, en el caso de que se denegase su moción de reconsideración, no se efectuara la retirada de la cantidad consignada mientras estuviera pendiente en el Tribunal Supremo una petición de certiorari; que el Juez recurrido significó que denegaría la moción de reconsideración y que ordenaría la ejecución de la orden de 5 de agosto a menos que el recibiera una orden de interdicto.

Los recurrentes acudieron a este Tribunal alegando en su solicitud que el Juez recurrido obró en exceso de su jurisdicción o con grave abuso de su discreción al expedir su orden del 5 de agosto; que no tienen otro remedio fácil, sencillo y expedito en el curso ordinario de los procedimientos sino el presente recurso y pidieron que se revocase la orden impugnada y, mientras tanto, que se expidiese un interdicto prohibitorio preliminar. Se expidió la orden pedida.

Cathay Ceramics, Inc. contiende que no hay ninguna provisión legal que prohiba al Juzgado permitir que una de las partes en una acción de *interpleader* retire el depósito que es el objeto de la acción siempre que los derechos de los otros interesados estén propiamente protegidos por medio de una fianza; y los otros recurridos contienden que dicha orden no es injusta a los recurrentes puesto que la orden discutida está redactada en tal forma que protege ampliamente por medio de una fianza de P25,000 los derechos e intereses de los recurrentes, ye que siendo Cathay Ceramics, Inc. la dueña y suministradora de los rieles de acero, ella tiene derecho de recibir el producto de dichos efectos suministrados. Este último argumento no se ajusta a los hechos: de la cantidad depositada, P19,800 se entregarían, según la orden, a Jesús L. Uy y solamente P1,992.49, a la Cathay Ceramics, Inc.

Hay mucha diferencia entre P21,792.49 depositados en la escribanía, disponibles en cualquier momento por el escribano a la primera indicación del juzgado, y una fianza de P25,000 prestada por una casa aseguradora. El importe de la fianza no es cantidad que puede distribuir el escribano en cualquier tiempo que el juzgado ordene, porque no está en su poder. Para que el escribano pueda entregarlo o distribuirlo, tiene que ordenar antes el juzgado al fiador que lo deposite en la escribanía. Si la casa aseguradora, por algun tecnicismo o ya porque no tenga fondos disponibles o por algun otro motivo, no cumple inmediatamente la orden del juzgado, los reclamantes que tienen derecho a cobrar quedan en la expectativa esperando la voluntad de la casa fiadora. Cuántas causas se incoan en los juzgados porque los fiadores no han cumplido los términos precisos de sus fianzas!

Parte de la orden impugnada dice así: "It is obvious that if by delivering the deposit in the hands of the Clerk of Court to defendant Cathay Ceramics, Inc., and to its co-defendant Jesus L. Uy, said Cathay Ceramics would be aided in a large measure in fulfilling its obligations to the plaintiff, it should likewise be obvious that its co-defendants would be benefited because, then, payments for subsequent shipments would be assured."

La demandante, que no tiene interés en la cantidad de P21,792.49, la deposito en la escribanía con la suplica de que el Juzgado, después de oír a todas las partes interesadas, determinase quien tiene derecho a dicha cantidad y que ordenase su pago a la parte y vencedora; no se depositó esa cantidad para que Cathay Ceramics, Inc. necesitaba dinero para poder cumplir debidamente sus obligaciones, que lo obtenga de otra fuente, de algún banco, y no de la escribanía.

El depositario, dice el Código Civil, no puede servirse de la cosa depositada sin el permiso del depositante. (Art. 1766, Código Civil Español y Art. 1977, Civil Code of the Philippines); como corolario, tampoco puede disponer del mismo para que otro lo utilice. El fin por el cual se deposito la cantidad reclamada por los demandados queda frustrado si uno o dos de ellos la utilizan para su propio provecho.

No puede, por tanto, el juzgado disponer la retirada del depositó de la escribanía para que la Cathay Ceramics, Inc. y Jesús L. Uy puedan usarlo en sus negocios.

Se concede el recurso pedido y los recurridos, excepto el Juez, pagarán las costas.

*Pablo, Jugo, Bautista Angelo, Labrador, Paras, Montemayor* and *Reyes*, J.J. conformes.

*Justice Padilla* took no part.

FERIA, J.: Concurring and dissenting

The present case is not a mere action of interpleader filed by Atkins, Kroll & Co., Inc., a debtor, against several persons claiming preferred right to an obligation or debt due from the plaintiff, in which the law does not require the subject matter of the interpleader to be deposited with the Clerk of Court, as contemplated in the dissenting opinion of Mr. Justice Tuason. Nor is it a case arising from a contract of depositum in which the bailee is obliged to keep the thing deposited and cannot use it without the authority of the bailor under Article 1766 of the old Civil Code cited by the majority in their decision to show that the respondent Judge, as a bailee, had no authority or abused its discretion in issuing its order of August 5 herein complained of, for the simple reason that there was not and could not exist such a contract of depositum between the plaintiff and the respondent Judge.

This is a case of a deposit made by a debtor of the sum of P21,792.49 with the Clerk of Court claimed by several persons as creditors entitled to receive it, in order to relieve himself of any liability under Article 1176 of the Civil Code. Under the provisions of Articles 1176 to 1181 relating to tender of payment and deposit, which are the only provisions of law applicable to the case, the money deposited in court is in *custodia legis* (Manajero v. Buyson Lampa, 61 Phil. 66) and cannot be disposed of by the court except in accordance with the provision of Article 1180 and 1181 of said Code. Therefore, the respondent Judge acted without authority or in excess of the court's jurisdiction in issuing its order complained of.

Therefore, we concur in the result of the majority's decision, but we dissent from the reasons given in support thereof.

TUASON, J., *dissenting*:

The law does not provide that the subject-matter of interpleader be deposited with the clerk of court. By Section 2 of Rule 14 the bringing of the money or property into court is left

to the sound judgment of the judge handling the case. In other jurisdictions it is held that it is not necessary to offer to bring money into court, but only to bring in before other proceedings are taken. (33 C.J. 445.) It has also been held that the stakeholder may be made the bailee of the fund pending the litigation. (33 C.J. 451; Wagoner v. Buckley, 13 N.Y.S. 599.)

Finally Section 6 of Rule 124 provides:

> "Sec. 6. *Means to carry jurisdiction into effect.* — When by law jurisdiction is conferred on a court or judicial officer, all auxiliary writs, process and other means necessary to carry it into effect may be employed by such court or officer; and if the procedure to be followed in the exercise of such jurisdiction is not specifically pointed out by these rules, any suitable process or mode of proceeding may be adopted which appears most conformable to the spirit of said rules."

The court's order of which petitioners complain has for its avowed purpose the promotion of the interest not only of Ceramics but of all the other defendants, and it contains adequate safeguards against any substantial injury to any of the interested parties.

The sole ground of objection to the question order by two of the defendants—to wit: "the surety bond con not be an adequate substitute for money" — is, flimsy; and the fears expressed by this Court regarding the delays and difficulties of enforcing a bond could easily be overcome by the selection of a solvent surety of good standing and adequate provisions in the undertaking insuring prompt payment when the money was needed. If the court can allow the plaintiff to keep the fund in his possession during the pendency of the suit without obligation to give any security, why can it not make a responsible third party, with good and sufficient bond, the bailee of the money? It is of interest to note that the remedy by interpleader is an equitable one (33 C.J. 419), and that even in making the final award the court is not necessarily circumscribed by the legal rights of the parties. Thus, "where the court has properly acquired jurisdiction of the cause as between defendants, it is not bound to award the fund or other thing in dispute wholly to him who has the legal title, but may so shape its decree as to do complete equity between the parties." (33 C.J. 467.)

By the order under consideration the respondent Judge has not violated any positive legal provision, or abused its discretion, or jeopardized any substantial right of any of the defendants, and in interfering with that order this Court has shown rigid paternalism not in accord with its powers of review and the spirit of a sound judicial system.

VI

*EN El Asunto De La Solicitud De Norman H. Ball Para Adoptar Al Menor George William York, Jr., Norman H. Ball, Solicitante-Apelado, contra Republica De Filipinas, Opositora-Apelante, G. R. No. L-5272, Dic.* 21, 1953, *Pablo, M.*:

1. CIVIL CODE; ADOPTION; STEP-FATHER MAY ADOPT STEP-CHILD IF NO IMPEDIMENT EXIST; CASE AT BAR. —B, an American residing in the P.I., wants to adopt W, son of B's wife who is a divorcee. B and wife have a child. The Solicitor General maintains that B cannot adopt W under Article 335 of the Civil Code, which states that those who have legitimate children cannot adopt. The lower court held that B could adopt under Article 338, which states that a step-child may be adopted by the step-father or step-mother. HELD: --Article 338 should be understood in the sense that a step-father or step-mother may adopt a step-child if there is no impediment. If the step-father who adopts has a forced heir, the adoption is not conducive to peace and harmony in the family, because the legitimate child cannot look with favor at his adopted brother who, on account of having been adopted, becomes his co-heir.

2. ID.; ID.; WHAT CONSTITUTE IMPEDIMENT AS WOULD PREVENT SAID ADOPTION.—The possibility of adopting a step-child depends on the non-existence of legitimate heirs of the adopting parent. When the Code Commission said in its report that the adoption of a step-child softens family relations it had in mind a case in which none of the legitimate children will be prejudiced by the said adoption.

3. ID.; ID.; ID.; ART. 335 OF THE NEW CIVIL CODE HAS CHANGED SYSTEM OF ADOPTION UNDER CODE OF CIVIL PROCEDURE.—Article 766 of the Codigo de Procedimiento Civil is of American origin. It does not explicitly prohibit the adoption of a step-child by the step father who has a legitimate child; on the contrary it states that the step-father may ask for the adoption of the step-child. The Codigo de Procedimiento Civil has revoked the system of adoption in the Civil Code (In re adoption of Emilia O. Guzman, 40 O.G., 2083), which doctrine was confirmed in Joaquin v. Navarro and Castro in the Intestate Estate of the spouses Angela Joaquin and Joaquin Navarro, 46 O.G., (Supp. 1), 155. In order to change this system of the Codigo de Procedimiento Civil which permits the adoption of a step-child by a step-father who has a legitimate child, an adoption which may produce grave troubles within the family which believes in forced heirs, the Code Commission adopted Article 174 of the Spanish Civil Code with some amendments, which is now Article 335 of the Civil Code of the Philippines.

4. ID.; ID.; ID.; THE WORD "MAY" USED IN ART. 338 INTERPRETED.—Article 338 uses the word "may"; this word may be interpreted in the imperative sense, which imposes an obligation, or permissive, which confers a discretion; its interpretation depends on the intention of the legislator, an intention which may be deduced in relation with the whole law. (Case of Mario Guariña, 24 Jur. Fil. 38.) If it is obligatory, therefore, Article 335 is redundant. It is unfair to suppose that the legislature had included in the Code a rule that is useless or two rules which are contradictory. If one law is susceptible to various interpretation, the Code should adopt that which does not contradict the other rules, but that which supplements them. Therefore the word "may" in this case is interpreted to mean that which confers discretion; it permits, but does not oblige, the adoption of a step-child. Reconciling Article 335 with 338, a step-mother or step-father who has no legitimate child may adopt a step-child; but if they have, they cannot.

*Solicitor General Juan R. Liwag* and *Solicitor Estrella Abad Santos* for appellant.

*J. de Guia* for appellee.

DECISION

PABLO, *M.*:

Norman H. Ball, ciudadano americano y domiciliado en Filipinas, habia pedido la adopción del menor George William York, Jr. que nació en 29 de febrero de 1948. El Ministerio Fiscal se opuso. Después de la vista correspondiente, el Juzgado de Primera Instancia de Manila decretó la adopción de dicho menor de acuerdo con el artículo 338 del Codigó Civil de Filipinas. Contra esta decisión, tal como ha sido enmendada, en 21 de octubre de 1951 apeló el Ministerio Fiscal.

Los hechos son los siguientes: George William York, Jr. es hijo de George William York, Sr. y Sophie S. Farr, los cuales se divorciaron en 1944. Después del decreto de divorcio, este menor continuó bajo el cuidado de su madre. George William York, Sr. ya está casado con otra mujer y vive en San Francisco, California.

El solicitante Norman H. Ball se casó en 5 de agosto de 1947 con la divorciada Sophie S. Farr y con la cual tiene una hija de doces años de edad. La familia vive en la calle Balagtas No.