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Editorial:

THE LIWAG SPEECH

The Manila Lions speech of Secretary Liwag, assailing the Supreme Court, after President Macapagal had expressed his disagreement with the decisions of the Supreme Court in the Garcia and Faypon cases, and rebuked one of its justices who rendered a concurring opinion in the Garcia case, continues to be the subject of popular comment, and while the speech has had its share of partisan support, including that of a law school dean who was subsequently designated assistant legal adviser to Malacañang, there appears no question but that the weight of public opinion has reacted adversely to it.

This editorial has no quarrel with the proposition that free speech encompasses the right to disagree with and publicly criticize the actions and decisions of men in government service, and these include supreme court justices, and the Supreme Court itself. Where the learned Secretary appears to have transgressed the bounds of propriety, however, was in confusing action *with* motive. *Some sectors of public opinion, for instance, have criticized Presidential* action *and* decision *in authorizing the hasty deportation of Harry Stonehill, but even Secretary Liwag, who cannot possibly question thé* right *of public opinion tó criticize* actions *of the President, will surely consider it beyond the rule of fair play if criticism of Presidential decision were to include* imputation *óf* malevolent motive *to it. Even the severest critics of the President in the Stonehill deportation case did not dare publicly impute to the President improper* motives *behind his decision. In brief, Secretary Liwag, himself a highly competent member of the Bar, would have done well to distinguish between an* action *and an* actuation.

But this particular aspect of the Liwag speech has been thoroughly explored by public comment and this Editorial has no desire to further add to the discussion. We are, however, concerned with a disturbing proposition advanced by the Secretary in the course of his speech, a proposition which appears to have been overlooked by its critics. We refer to that portion óf Secretary Liwag's address which reads as follows:

> *"x x x we must advance the proposition that if the President ever abuses his prerogatives, let him be censured and crucified by the people who have elected him to public office.* Let not the members of the Supreme Court, take unto themselves the right and the power to judge the reasonableness or unreasonableness of the acts of their President — *because in a democracy this right and power belong exclusively to the sovereign people."*

We repeat that the foregoing is a disturbing proposition, made more disturbing by the fact that it came no less from the Secretary of Justice. The proposition is fraught with implications subversive of the fundamental principles which underlie our system of checks and balances.

If the Supreme Court, according to Secretary Liwag, has no right to pass upon the reasonableness or unreasonableness of Presidential action, then, who has? Secretary Liwag maintains that only *the electorate does.*

If the President, therefore, chooses to persecute *a private individual without cause, the Supreme Court, by the Liwag proposition, has no right to pass upon the "reasonableness or unreasonableness" of the action of the President, and any attempt to do so will constitute "judicial exhuberance". What then is the recourse of the individual? By the Liwag thesis, that individual must go to the electorate and present his cause. This is novel political theory and one finds it rather difficult to comprehend how the learned Secretary contrived the same.*

We have always understood it that under our system of checks and balances, designed precisely to avoid a regime of dictatorship, the Supreme Court has been vested not only with the constitutional function, but with the constitutional duty, *to pass upon the reasonableness or unreasonableness of Presidential action, particular insofar as the same affects statutory rights whether of private individuals or public officials. To advance the proposition that under our scheme of government, only the electorate is vested with the right to pass upon the reasonableness or unreasonableness of Presidential action is to suggest a shocking naivete, not only of the law, but of the facts of public life. Under Liwag's theory, Dr. Paulino Garcia should have taken his cause, not before the Supreme Court, but before the people, barrio-to-barrio style.*

Suppose the President, sensing a hostile Congress, were to issue an executive order suspending this co-equal branch of government and, assisted by the Armed Forces, of which he is the Commander in Chief, were to arrest every Congressman and Senator who attempts his way to the session hall?

Under the Liwag theory, the recourse of each senator and congressman is, not the Supreme Court, but the sovereign people.

We find it difficult to interpret the Liwag proposition in any other way. As a trained practitioner and member of the Bar, not to mention as Secretary of Justice, Secretary Liwag must be presumed to be a man who measures not only his statements but the logic and implication of the same. This Editorial has measured the speech of Secretary Liwag, and measurement has defied legal comprehension.

We can only hope that the Secretary's novel statement does not constitute the measure of his legal advice to the President.

THE SUPREME COURT: GUARDIAN OF THE CONSTITUTION

By Atty. ABRAHAM VERA

The Constitution is the fundamental law of the land and the Supreme Court is the vigilant and zealous guardian of this priceless document. This herculean task the highest court has to attack frontally to keep a close watch over the ramparts of individual freedoms and liberties and to give life and vigor to a truly democratic government.

This inescapable role of the tribunal as a citadel and bulwark of liberty and democracy is projected to its zenith in times of stress — in times like the present when the sacred rights of individuals are likely to grapple with the encroaching arms of government interests. Now seems the time when the "eleven wise men" of the tribunal have only one alternative — to enforce the mandate and command of the sovereign as embodied in the Constitution.

A searching look at contemporary events reveals the delicate job the justices have been shouldering in their efforts to inject more and more blood to the living and dynamic instrument — the Constitution.

Typical of this delicate job is the decision the tribunal had to hand down recently in a bold move by the government to take over a sizeable portion of the sprawling tract of land owned by former Speaker Jose Yulo and his family in Canlubang, Laguna.

Under the Constitution, the Yulo property may be expropriated for public use after payment of just compensation. Thus the government move could appear laudable if one considers that the fundamental charter ordains that "the promotion of social justice to insure the well being and economic security of the people should be the concern of the state".

The decision on the question of whether the Yulos should remain undisturbed in their Canlubang property or whether the government should be permitted to intervene for the tenants among whom the property may be apportioned hinges on the thinking of the high court. Meanwhile, in implementing its role as a stabilizing governmental institution, the Supreme Court has restained the Laguna court of first instance from taking any steps towards condemning the Yulo property in favor of the State.

The Supreme Court has also notably extended its shield of justice to two cases involving no less than Senator Fernando Lopez and his brother, industrialist Eugenio, who are considered to be the "pet hates" of President Macapagal. One of the Lopezes' suits involves their properties — radio stations from as far north as Laoag, Ilocos Norte, to as down south as Zamboanga City. The other litigation refers to the Lopezes alleged tax liability in connection with their ownership of vast diversified businesses.

Acting with dispatch to aid the accused Lopezes before the Manila fiscal's office, the high court blocked the filing of any tax evasion charges against the wealthy and affluent brothers. The high court will yet decide if a case brought by the Lopezes before the court of tax appeals contesting the revenue assessment of P7-million should take priority over the government's tax evasion raps. In the first case, the high court has stopped the Radio Control Board from supposedly harassing the Lopez-owned radio stations.

Hardly had President Macapagal assumed office when his conduct was question before the tribunal. The core of the controversy was the President's adminlstrative order no. 2 recalling all ad interim appointments extended by ex-President Garcia after the latter had lost the elections. The legal question cropped up when Dominador Aytona, whose appointment as Central Bank governor was cancelled, decided to fight the designation of Andres Castillo by President Macapagal to the same post.

Invoking the principle of separation of powers, which is deeply imbeded in the Constitution, the tribunal politely declined to set aside administrative order no. 2. Though taking this somewhat passive action, the tribunal made the cynical observation that Mr. Garcia should not have wielded his powers as President "to continue political warfare that had ended or to avail himself of presidential prerogatives to serve partisan purposes" after "the electorate had spoken." Exercising its judgment and discretion, the tribunal junked Aytona's claim.

In the process of minutely interpreting the provisions of the Constitution involved in the Aytona case, Justices Sabino Padilla, Arsenio Dizon, and Felix Bautista Angelo wrote concurring opinions, Justice Roberto Concepcion a concurring and dissenting opnion and Justice Jesus G. Barrera a dissenting opinion, all in addition to the majority opinion penned by Chief Justice Cesar Bengzon.

Then there was the decision on the case of Dr. Paulino J. Garcia. Upholding the security of tenure of government officials and maintaining a robust and efficient civil service, the high court directed the reinstatement of Dr. Garcia to his post as chairman of the National Science and Development Board. The tribunal reaffirmed this lofty stand when it also directed the reinstatement of former Ilocos Sur Gov. Perfecto Faypon as member of the board of the Philippine Virginia Tobacco Administration. Undoubtedly, President Macapagal was irritated by these verdicts but in line with his oath to "preserve and defend its Constitution" he, nevertheless, abided with them.

There are at least six cases pending with the tribunal where it has to pass upon the legality of the President's appointment One case centers on the President's appointment of Cesar Miraflor as a member of the commission on elections, a constitutional body, in place of Genaro Visarra, an appointee of President Garcia. The other notable case involves the President's appointment of Carlos Quirino as director of public libraries, an appointment which has been contested by Ernesto R. Rodriguez. Jr., a Garcia appointee.

Admittedly, the President has the constitutional power to appoint men to top public positions But, definitely, a decision on the legality of the President's action lies within the exclusive domain of the Supreme Court.

By way of drawing parallels, the name of the late President Quirino had also been repeatedly haled to the temples of justice.

On October 22, 1950, President Quirino issued a proclamation suspending the writ of habeas corpus. The presidential edict was decreed four days after the army's military intelligence service rounded up 105 alleged Communists, including nine members of the national secretariat of the local Communist Party. Three months later, MIS agents continued with the roundup of a Manila councilor and five newspapermen.

Even against a backdrop of communist aggression in southeast Asia and an immediate peril to national security then poised by the communist plot to take over the government, the proclamation drew a volley of protest from civil libertarians. But there were those who bravely stood by the proclamation and saw in it the need of curtailing, in effect, the individual rights for the sake of national survival.

(Continued next page)

SUPREME COURT AND THE RULE OF LAW*

By Sec. JUAN R. LIWAG

We are pleased to think that the Philippines being a Republican State, ours is indeed "a government of laws and not of men." But we like to think further that this government of laws must forever recognize the supremacy of the Rule of Law.

The Supreme Court, by common consent, is recognized as the last bulwark of democracy, the guardian of our civil liberties, the arbiter of constitutional controversies. As the Highest Tribunal of the land it is ordained by the constitution to interpret the law. It is the indestructible bastion of the rule of law in our country.

But let us not look at the Supreme Court as if it were a paragon of perfection, or that it is a body composed of supermen incapable of committing errors. Let us not worship the members of our Supreme Court as gods with supernatural powers or, better still, as sacred cows who are beyond the reach of human touch and beyond reproach. Rather let us look at our Supreme Court as a body of men with feelings, affected by prejudices, possessed of caprices and susceptible to other frailties of human nature, whose imperfections are often reflected, wittingly or unwittingly, in their judicial pronouncements.

Guided by this realization and at the risk of being misunderstood by some sectors of our society, I have taken it upon myself as a public duty to expose what I consider the abuses of the Supreme Court committed in the name of judicial supremacy. Let me give the assurance, however, that I am not motivated by any personal or ulterior design as I have, in fact, the highest respect for the individual members of the Court as men of integrity, probity and competence. What motivates me, here and now, is a genuine desire to awaken our people from the passive thinking verging on blind submission which has taken the better hold of them and make them adopt a more aggressive trend of thinking conducive to active sovereign participation in public affairs and the molding of a militant and vigilant public opinion. Neither is it my intention to undermine the people's faith in the Supreme Court; rather, I should like to arouse our people, in the name of free speech, to break away from the kind of sub-conscious indoctrination which seeks to perpetuate a seemingly popish image of infallibility in the Supreme Court in matters of law and justice — a myth of invincibility and untouchability certainly obnoxious to the letter and spirit of the Constitution.

Judicial supremacy does not imply and much less mean the subordination of the executive and the legislative to the judiciary. It does not envision a judiciary higher than, and superior to, the other two co-ordinate and co-equal branches of the government in the manner of a hierarchical system. It does not import aristocracy. But rather, it means the power of judicial review, or the authority to declare statutes and other governmental acts invalid when these are repugnant to the Constitution. It is the power to interpret the law and not to reform the law through judicial amendment.

Much has been said of the excesses of the executive and the legislative branches of our government, but strange as it may seem, little or none has been said of the excesses of the Supreme Court and the other courts of the land. Recent events, however, indicate that the Supreme Court has, time and again, perpetrated a veiled assault on purely executive functions, thereby abusing its power of judicial review. It is strange that while in many

(Continued next page)

* Speech delivered before the Manila Lions Club on January 9, 1963.

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In cases which cropped up because of the proclamation, the Supreme Court justices, for lack of the requisite votes, were not able to rule squarely on the effect of the suspension of the privilege of habeas corpus on the right to bail accused persons.

In a long line of cases, the tribunal has likewise imprinted in bold letters the spirit and intent of the organic law. The tribunal has set the pace in the nationalistic movement by upholding the government's move to nationalize not only the retail trade but also the labor in retail establishments. It has zealously protected the right of Filipinos in the acquisition of public agricultural lands and has closed the door to aliens desirous of securing the Filipinos' privilege under the Constitution. Further blaring out the nationalistic tone, the tribunal has parried attempts by alien-opportunists for naturalization.

During the past years, the tribunal has underscored its judicial power as it declared as unconstitutional the redistricting law, a congressional brainwork, which reapportioned the various congressional districts.

Chief Justice Bengzon and his ten learned associates have to slosh through legal perplexities and dilemma many times in transforming into realities the noble and lofty exhortations woven in the Constitution's priceless fabric.

No matter how alert and vigilant is the Supreme Court in safekeeping the Constitution, the noble ideals and revered traditions and institutions enmeshed in this living instrument will be meaningless if the people themselves will not be as active and ever watchful.

The late U.S. Justice Robert H. Jackson forcefully lectured on the role of both the people and the courts in guarding individual liberties: "If an organized society wants the kind of justice that an independent, professional judicial establishment is qualified to administer, our judiciary is certainly a most effective instrument for applying law and justice to individual cases and for cultivating public attitudes which rely upon law and seek justice. But I know of no modern instance in which any judiciary has saved a whole people from the currents of intolerance, passion, usurpation and tyranny which have threatened liberty and free institutions."

Continuing with this thesis, Justice Jackson said: "It is not idle speculation to inquire which comes first, either in time of importance, an independent and enlightened judiciary or a free and tolerant society. Must we first maintain a system of free political government to assure a free judiciary, or can we rely on an aggressive, activist judiciary to guarantee free government? While each undoubtedly is a support for the other, and the two are frequently found together, it is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions."

Justice Jackson, summing up, emphasized: "However well the court and its bar may discharge their tasks, the destiny of this court is inseparably linked to the fate of our democratic system of representative government. Judicial functions, as we evolved them, can be discharged only in that kind of society which is willing to submit its conflict to adjudication and to subordinate power to reason. The future of the court may demand more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time than upon the merit which is its own."

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previous cases, the Supreme Court has consistently assumed a hands-off policy when called upon to decide questions involving legislative acts in deference to the theory of Separation of Powers, the anxiety to poke "its finger on the pie" when it came to executive acts has apparently developed into a "magnificent obsession." The most recent examples of what may be called, for lack of a better term, as judicial exuberance are the cases of Dr Paulino Garcia and Mr. Perfecto Faypon.

We will recall that Dr. Garcia was appointed chairman of the National Science Development Board during the administration of President Garcia and was suspended by President Macapagal in February pending his investigation on charges of dishonesty and electioneering. On May 5, 1962, the 76th day of his suspension, Dr Garcia brought suit with the Supreme Court for his immediate reinstatement invoking Section 35 of the Civil Service Act which provides for the lifting of preventive suspension 60 days after date of suspension pending administrative investigation by the Commissioner of the Civil Service. Under Section 33, those removable by order of the Commissioner of Civil Service are officials and employes of subordinate rank and not presidential appointees. Dr. Garcia, a presidential appointee, was then being investigated not by the Commissioner of Civil Service but by a committee created by the President for that purpose. Preceding Section 35 which was invoked by Dr. Garcia is the provision of Section 34 which empowers the President to suspend any officer appointed by him pending administrative investigation but which does not provide for any time limit of suspension. The only issue then before the Supreme Court was very simple, namely, **whether or not the 60-day limit of suspension was applicable to presidential appointees.**

Unfortunately, the Supreme Court did not decide this sole issue. According to the decision, some members of the Court were of the opinion that the 60-day period was applicable to "a presidential appointee" as accordingly, Section 35 "evinces a legislative policy." "Other justices," however, were of the opinion that "while said period may not apply strictly to cases of presidential appointees facing administrative charges to be decided by the President, the preventive suspension shall nevertheless be limited to a reasonable period." Evidently, it is the view of such other "justices" which prevailed. Here is a positive dictum by "other justices" that the 60-day period of preventive suspension did not apply to presidential appointees and yet, in the same breath, the Supreme Court found the period to be unreasonable at the time that it promulgated its decision on Sept. 13, 1962. I wonder if the Supreme Court would have found the period of suspension unreasonable if it had promptly promulgated its decision in the month of May when the case was submitted to it for decision. By its inaction in deciding the case after the lapse of **four months** from submission for decision, the Supreme Court had in effect created a factual situation by which a ruling of unreasonableness of the presidential suspension has become possible. The four months' delay which the Supreme Court had allowed to lapse without the issuance of a writ of mandatory injunction for reinstatement — which it could have issued in May if it deemed then that the period of suspension was unreasonable — must have lured the executive into a sense of belief and confidence in the validity of the suspension. The delay in deciding had slowly formed the trap for the President. People in a democracy are generally a patient people — but they often wonder why it takes the High Court such a long time to decide.

But apart from this consideration, the more fundamental factor is the abuse by the Supreme Court of its power of judicial review. In the Garcia case, the Supreme Court found it convenient to skirt the sole issue; whether or not the 60-day period provided for in Section 35 of the Civil Service Act applies to presidential appointees. Instead, it delved into the vague realm of **propriety**, — because what is reasonable or unreasonable in the absence of a clear legislative standard borders indeed, on **propriety**. While the Supreme Court had to recognize the authority of the President to suspend a presidential appointee, significantly, nowhere in its lengthy decision did it rule that the period of suspension had became **illegal**. Of course, the Supreme Court could not have called the period of suspension illegal because there was nothing in the law which expressly or impliedly limited the period of suspension of a presidential appointee. In making a finding of unreasonableness of the period of suspension without any legal justification whatsoever to support its conclusion, the Court had manifestly gone out of legal bounds.

In the case of Dr. Garcia, the Supreme Court found the period of seven months of suspension as unreasonableness. In the case of Mr. Faypon, the Supreme Court declared a suspension of 3-1/2 months as unreasonable and ordered reinstatement in a writ of mandatory injunction which, as previously pointed out, could have likewise been done in the case of Dr. Garcia. But by what yardstick did the Supreme Court arrive at its varied conclusion? By what basic value would such fluctuating and equally indefinite pronouncements become justified? Even the driver of a car would know when he is overspeeding because he sees a 60-mile limit on the road. By such variable, is not the Supreme Court attempting to impose under the guise of judicial review the 60-day limit of suspension on presidential appointees? And by what "rule of law," may I ask, can the Supreme Court do this?

According to the decision, there was unanimity of opinion among the members of the Court that the period of suspension of public officers, be they presidential appointees or not, cannot be indefinite. And yet, while they cannot agree on whether or not the 60-day limit of suspension for subordinate officials should apply to presidential appointees as well, the Court has found the period of suspension to be unreasonable. It seems that the only basis for the finding of unreasonableness is predicated on **indefiniteness of suspension**. The decision itself reflects a secret longing for the filling up of an omission left void by the legislature. If the Supreme Court believes that the legislature should have made the period of suspension of presidential appointees definite, why point its accusing finger at the executive. Why blame the President for the failure of the legislature to fix in the law the period of suspension of presidential appointees? The "rule of law" directs the President to execute the law only as his conscience and sound judgment dictate and the same "rule of law" will not countenance any attempt of the Supreme Court to censure in the guise of judicial supremacy, an act of the President done faithfully and pursuant to that law.

The act of the Supreme Court in its unprecedented action in the Garcia and Faypon cases constitutes an encroachment on legislative and executive prerogatives. When the Court imposes a time-limit on the suspension of presidential appointees through a resort to so-called legislative policy where the legislature had provided for no period at all, it clearly transgresses on a purely legislative function. And when the legislature has deemed it proper, by a conspicuous omission of any such time-limit on presidential appointees, to leave the matter to the sound discretion of the President, who under the Constitution has plenary control and supervisions over all executive officials, the Supreme Court in effect trenches upon a purely executive function when it tries to peg the President to a time-limit of suspension by substituting its own opinion in place of executive discretion. It goes without saying that when the Supreme Court encroaches on executive or legislative power, it does violence to the system of checks and balances and offends the Rule of Law which it is supposed to uphold by deed, by precept and example as the highest tribunal of the land.

It is our good fortune that we have a President who has expressly and publicly declared that he would comply with the decisions of the Supreme Court, whatever may be his personal

convictions to the contrary. And yet, it has been written that the origin of government may be traced to a monarch in the forest who, weary of his responsibilities "delegated some of them to followers who eventually became 'courts,' and shared others with a more numerous body of subjects who in due time organized themselves into a 'legislature.' And the indefinite residium, called 'executive power,' he kept for himself" (Corwin, The President).

From then on, the prestige and dignity of the Office of the Presidency developed through the ages into a traditional concept. The President is said to be "the representative of no constituency, but of the whole people." As the "people's choice," he embodies the sovereign authority and symbolizes the nation. In the words of Woodrow Wilson, "His is the **only** national voice in affairs."

It is on this concept of the dignity, prestige, and responsibility of the Office of the Presidency that we must advance the proposition that if the President ever abuses his prerogatives, let him be censured and crucified by the people who have elected him to public office. Let not the members of the Supreme Court, take unto themselves the right and the power to judge the reasonableness or unreasonableness of the acts of their President—because in a democracy this right and power belong exclusively to the sovereign people.

It may be argued that without the Court's interference, the President is liable to abuse his powers. But what power of government is not susceptible to abuse? As the Supreme Court has significantly declared in Angara vs. Electoral Commission, "the possibility of abuse is not an argument against the concession of the power as there is no power that is not susceptible of abuse." The only basic and, mind you, vital difference, besides the system of checks and balances as provided for in the Constitution, is that the abuses committed by the political agencies of the government, President and members of Congress, are passed upon by the sovereign authority, the electorate, while those committed by the Supreme Court are not. The members of the court can go on a spree of abuse in wielding their judicial power and yet continue to remain secure with Olympian equanimity atop their ivory towers until they reach the constitutional retirement age of 70. Is it therefore fair for the Supreme Court to arrogate unto itself an excess of judicial power over the two other branches of government simply because such political agencies do not possess an effective check against the Tribunal's decisions and have no recourse but to enforce them, notwithstanding personal or official belief to the contrary? Is not the better part of judicial prudence and statesmanship that in case of doubt, a controversial issue be resolved in favor of the exercise of the power belonging to the other branches of government? In the language of the late Justice Malcolm, **"To doubt is to sustain."**

What I cannot understand is why the Supreme Court can easily find the faults and mistakes of the other branches of government but does not seem to see its own. How many more questions involving life, liberty and property of citizens are awaiting decisions by the Supreme Court? Has anyone ever condemned as unreasonable the long years of delay in deciding cases by the Supreme Court involving as they do more basic private rights than the alleged right to a public office? If the Supreme Court has felt free to condemn as unreasonable the period of 7 months or 3½ months' suspension for presidential appointees through a declaration of legislative policy in the Civil Service Law which limits to 60-day the period of suspension for subordinate officials and employes who are not presidential appointees, may we not likewise feel free to condemn as unreasonable the long years, not merely months, of delay in the decision of cases long pending before the Supreme Court through a similar appeal to legislative policy as embodied in the Judiciary Act of 1948, which limits to 90 days the period for promulgating decisions by the Courts of First Instance and other inferior courts? If the Supreme Court could make the sweeping conclusion that the unreasonable suspension of Paulino Garcia and Faypon was tantamount to a virtual removal from office without cause, may we not likewise conclude that the unreasonable delay in the decision of cases by the Supreme Court, especially those of detained prisoners who may yet be acquitted amounts to a deprivation of life, liberty and property without due process of law?

And yet, paradoxically in our scheme of government, the very Court which is called upon to check the so-called executive and legislative abuses, cannot in turn be checked in the commission of its own. Except for the pardoning power of the President which is available only after final conviction and in criminal cases, there appears to be no effective power that can stop judicial abuses. If, out of sheer respect and recognition of a purely judicial prerogative the executive or the legislative has politely refrained from denouncing as unreasonable the long delay in the decision of cases by the Supreme Court may we not expect from the Court the same token of statesmanship, propriety and courtesy for the co-equal branches of the government borne out of a similar respect and recognition of constitutional prerogatives? At this juncture, may I be allowed to recall the biblical account of how an unruly multitude had chased Mary Magdalene to the wall and when they were about to stone her, Christ intervened and cried, "Let him who is without sin cast the first stone." No one dared to do so.

I dread to see the day when the Supreme Court would virtually run the affairs of government under the guise of judicial review for then the Court will cease to be the ultimate court of law and become a third "political agency," and thereby "break away from these checks and balances of government which were meant, under our system of government, to be **checks of cooperation and not of antagonism or mastery."** (Abueva et al vs. Wood et al. 45 Phil. 612). To be sure, the Constitution never contemplated nor intended a Supreme Court that would virtually lord it over all. The penumbra of the Supreme Court which Justice Holmes speaks of in describing the powers of government should not cast a shadow which engulfs if not completely obliterates the constitutional sphere assigned to the other branches of the government.

In the ultimate analysis, therefore, the only limit to the Supreme Court's inordinate use of its power may be found in the Court itself. An enlightened sense of self-restraint can alone provide a check on the exercise of the very delicate power of judicial review and enjoin the Court from extending the borders of its competence. It is in this light that I envision, along with that great American jurist, Justice Frankfurter, a Supreme Court whose members are endowed with breadth of vision, with imagination, with capacity for disinterested judgment with power to discover and to suppress their own prejudices. I like to believe that the Supreme Court justices have the capacity to transcend the boundaries of their own individual feelings and to foresee the harmful consequences that the immoderate flow of judicial power may bring.

And so it is that, in the words of the eminent Frankfurter, "the men who are given this ultimate authority over the legislature and the executive, whose vote may determine the well-being of millions and affect the country's future, should be subjected to the most vigorous scrutiny before being given that power. In theory, judges wield the people's power. Through the effective exertion of public opinion, the people should determine to whom that power is entrusted. The country's well-being depends upon a farsighted and statesmanship Court. And the Court's ultimate dependence is upon the confidence of the people."

Indeed, if ours is "a government of laws and not of men" and "the law is what the judges say it is," then it is not perhaps too much to ask that they interpret and apply the law as **men in the government** but under the Rule of Law.

THE SECRETARY OF JUSTICE VS. THE SUPREME COURT

By LEONARDO P. VALMONTE
Member, Philippine Bar

Still puzzling and in a sense intriguing the public are several unanswered questions raised in the wake of what has been incorrectly called the "blast" of the Secretary of Justice against the Supreme Court. Incorrectly we say advisedly because a blast is all wind or hot air and his unprovoked attack was not entirely.

This severe censure and lecture, it will be remembered, he launched last January 9 before the Manila Lions Club. The members were reportedly so stunned that they could roar neither their approval nor disapproval. Maybe they were too polite to show their reaction.

Some of the questions persistently asked are: Did the Liwag criticism constitute contempt of court? Was it libelous? Was it proper, considering the peculiar position of Secretary Liwag in the judiciary? Did President Macapagal give it his sanction, tacit or otherwise, before its delivery?

The defense that the Supreme Court is open and subject to criticism is hardly relevant or pertinent. Never claiming infallibility, the Court itself has invariably sustained the citizen's right to criticize its decisions. Too well it knows that it is composed of human beings, and to err is human. But how can the Secretary of Justice dissociate himself from his high office when he takes it upon himself to criticize the Court and attributes to it dubious motives?

Let us consider some of the things he said, not, surely, as a private citizen, but as a high government official and member of the party in power, patently with an ax to grind.

After admitting that the Supreme Court is "the last bulwark of democracy, the guardian of our civil liberties, the arbiter of constitutional controversies, the indestructible bastion of the rule of law," and other high-sounding cliches, Secretary Liwag invites us to "look at our Supreme Court as a body of men" hardly worthy of respect or praise. They are, he affirms, "affected by prejudices, possessed of caprices and susceptible to other frailties of human (beings) whose imperfections are often reflected, wittingly or unwittingly, in their judicial pronouncements."

Making his preliminary encomium sound hollow, if not insincere, he tries to disarm suspicion by assuring his audience that he has "the highest respect for the individual members of the Court." Evidently and quite strangely, that high respect does not apply to them as a body. Why not? Because the Court, according to him, has "committed abuses in the name of judicial supremacy" whatever he meant by the term. He disclaims any intention of "undermining the people's faith in the Supreme Court," and yet what is he doing when he asserts that its members, for whom he has "the highest respect," are "affected by prejudices," that they are capricious and frail, and plagued with such imperfections that their decisions often reflect them?

Coming to the point after beating so much about the bush, the President's chief legal adviser and extension of his personality charges the Supreme Court with having "time and again, perpetrated", presumably as part of its so-called excesses, 'a veiled assault on purely executive functions, thereby abusing its power of judicial review." Worse, he charges the Supreme Court with partiality. It is partial, he claims, to the legislative body since it has adopted the "hands-off policy when called upon to decide questions involving legislative acts." And yet, he says, the Court displays "anxiety to poke 'its finger on the pie" when it comes to "executive acts." As a result, it betrays "magnificent obsession" and "judicial exuberance," when the party involved is the executive branch.

To prove his point, Secretary Liwag cites two cases. The first was that of Dr. Paulino Garcia, chairman of the National Science Development Board, who after the 76th day of his suspension by the President, brought an action before the Supreme Court for his immediate reinstatement. Secretary Liwag contends that for allowing to elapse four months before promulgating its decision, the Supreme Court "had in effect created a factual situation by which a ruling of unreasonableness of the presidential suspension has become possible." So, he concludes, "The delay in deciding had slowly formed the trap for the President." Stripped of its legal verbiage, the Secretary's affirmation means that the Supreme Court has deliberately set the "trap for the President." Not content with so serious an accusation, he charges the Supreme Court in the "abuse of its power of judicial review" with finding it "convenient to skirt the sole issue: whether or not the 60-day period provided for in Section 35 of the Civil Service Act applies to presidential appointee." He argues that it does not.

Secretary Liwag went further. "In making a finding of unreasonableness of the period of suspension," he said, "without any legal justification whatsoever to support its conclusion, the Court had manifestly gone out of legal bounds. In short, in Secretary Liwag's opinion, the Supreme Court was so prejudiced that it set a trap for the President in violation of the law.

Similar in nature is the other case the Secretary cites. It involved Perfecto Faypon, another presidential appointee, whose suspension of more that three months the Supreme Court also ruled as unreasonable. Through the use of an abstruse logic difficult to understand, the cabinet member impugns the Court's decision in the Faypon case, contending that presidential appointees do not fall within the purview of the Civil Service Act. But if the 76-day suspension is unreasonble as the Court decided, why should it be less reasonable when the suspension lasted three months and half?

Understandably enough, the Secretary of Justice accuses the Supreme Court of bad faith by alleging that its decision in the Faypon case "reflects a secret longing for the filling up of an omission left void by the legislature." So fiercely does he castigate the Court that one is tempted to ask who actually is abusing its power and for whom?

Secretary Liwag, if we understand him, seems to sustain the thesis that since the President is the supreme authority, only the people can "censure and crucify him" at the polls, and that the Supreme Court, acting under the democratic doctrine of checks and balances, has no right or power to pass judgment on "the reasonableness or unreasonableness of his acts." Does not this theory, if accepted, lead to dictatorship?

It may be argued, he admits, "that without the Court's interference, the President is liable to abuse his powers." But that ought not matter at all, because after all, "what power of government," he asks, "is not susceptible to abuse?" Evidently, its susceptibility to abuse is sufficient excuse for him to sanction it. One could cite as a typical and unfortunate instance, the Secretary's right and power to excoriate the Court in the guise of criticism and in the name of politics.

The idea that the abuses committed by the President and members of Congress "are passed upon by the sovereign authority, the electorate, while those committed by the Supreme Court are not," seems to have a peculiar appeal to the Secretary of Justice. Does he imply that the alleged abuses by the highest

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UNITED STATES COURT OF APPEALS DECISION

District of Columbia Circuit

KONINKLIJKE LUCHTVAART MAATSCHAPPLI
N.V. KLM ROYAL DUTCH AIRLINES HOLLAND,
et al, Appellants,

v.

Gertrude Owen TULLER, individually as
Executrix under the will of William
Gordon Tuller, deceased, et al., Appellees.
No. 15716

(292 F. 2d 775, (1961)

Argued Oct. 21, 1960
Decided June 23, 1961

An action was brought against an airline company and its ground agent for the wrongful death of an airplane passenger, who drowned after the airplane crashed in the tidewaters of a river about 7,000 feet from the end of the airport runaway at Shannon, Ireland. The United States District Court for the District of Columbia, MacGuire, J., rendered a judgment for $350,000, and the airline and its ground agent appealed. The Court of Appeals, Burger, Circuit Judge, held that the evidence authorized a finding by the jury that the airline company and its ground agent were guilty of willful misconduct, so that the $8,300 liability limitation of the Warsaw Convention was not applicable.

Judgment affirmed.

1. **Courts 406.5(6)**

Court of Appeals, on appeal by defendants, was required to take that view of evidence most favorable to plaintiffs and give them benefit of all inferences which might reasonably be drawn from evidence, in considering whether defendants' motion to dismiss complaint for all amounts in excess of certain sum should have been granted.

2. **Federal Civil Procedure 2127**

On motion for directed verdict, evidence must be construed most favorably to plaintiff, and to such end he is entitled to full effect of every legitimate inference therefrom.

3. **Federal Civil Procedure 2127**

On motion for directed verdict, case should go to jury, if, on evidence, construed most favorably to plaintiff, reasonable men might differ, but motion should be granted if no reasonable man could reach verdict for plaintiff.

4. **Carriers 318 (13)**

Evidence authorized finding in action for wrongful death of airline passenger, who drowned after airplane crashed in tidewaters of river, that failure of airline to establish and execute procedures to instruct passengers as to location and use of life vests was conscious and willful omission to perform positive duty and constituted reckless disregard of consequences, so that liability of airline could not be limited to $8,300 under Warsaw Convention. Warsaw Convention, art. 25, 49 Stat. 3020.

5. **Carriers 307 (6)**

In determining whether failure of airline to establish and execute procedures to instruct passengers as to location and use of life vests was conscious and willful omission to perform positive duty and constituted reckless disregard of consequences, so that $8,300 limit under Warsaw Convention was not applicable in action for death of passenger who drowned after airplane crashed in tidewaters of river, court was not bound by limit of Irish Government's regulations relating to life vest instructions on airplanes.

6. **Carriers 318 (13)**

Evidence warranted conclusion by jury in action for wrongful death of airline passenger, who drowned after airplane crashed in tidewaters of river, that airline's agents were guilty of willful misconduct in failing to send distress radio message, and that therefore the $8,300 liability limit under the Warsaw Convention was not applicable. Warsaw Convention, art. 25, 49 Stat. 3020.

7. **Carriers 318 (13)**

Evidence authorized finding by jury in action for wrongful death of airline passenger who drowned after airplane crashed in tidewaters of river, that failure of crew of airplane to take available steps to provide for passenger's safety after airplane crashed was conscious omission made with reckless disregard of consequences, so that $8,300 liability limit under Warsaw Convention was not applicable. Warsaw Convention, art. 25, 49 Stat. 3020.

8. **Carriers 318 (13)**

Evidence authorized finding by jury, in action for wrongful death of airline passenger, who drowned after airplane crashed

(Continued next page)

THE SECRETARY ..... **(Continued from page 6)**

tribunal of the land should also be passed upon by the electorate at the polls every four or six years as the case may be? Would not that mean ultimately that the country would not need jurists for its Supreme Court but politicians? Of course, "the rule of law is unsafe hands when the courts cease to function as courts and become organs for control of policy," as one-time Justice Robert H. Jackson says, but why should that matter?

In his highly instructive book, **The Struggle for Judicial Supremacy**, the same former Supreme Court Justice relates that when Howard H. Taft was President Harrison's Solicitor General, he sarcastically referred to the members of the Federal Supreme Court as a "lot of mummies." He was then expressing his "great irritation and contempt for their attitude" towards his President's administration. Years later, Taft had reason to eat his words. That was when ironically he became the leading mummy or Chief Justice of the same Court.

It is possible that Secretary Liwag may eventually have the same experience, considering the strange vicissitudes of politics. In fact, he may feel the same reaction as that of a senator who used to attack with acerbity a certain agency of the government until he became a leading member of it. Asked why he ceased to be critical of it, he frankly answered, "Because now I know better."

in tidewaters of river, that failure of airline's ground agent to be aware of loss of radio communication with airplane and to initiate prompt search and rescue operations was conscious omission of performance of positive duties, so that $8,300 liability limit under Warsaw Convention was not applicable. Warsaw Convention, art. 26, 49, Stat. 3020.

9. **Federal Civil Procedure 1973**

Application of Irish Government's order relating to life vests in airplanes as fair subject of comment in argument to jury in action for wrongful death of airline passenger, who drowned after airplane crashed in tidewaters of river about 7,000 feet from end of Irish airport runway.

10. **Carriers 317 (11)**

Pages of airline manual relating to duties of radio operator when there is ditching of airplane were properly admitted in action for wrongful death of passenger, who drowned when airplane crashed in tidewaters of river.

11. **Appeal and Error 315 (1) 216 (1)**

Appellants were precluded from raising objection on appeal that contract was not construed by trial court and was subject of argument in appellee's summation, where appellants did not request specific instructions on meaning of contract and made no objection after charge. Fed. Rules Civ. Proc. rule 51, 28 U.S.C.A.

12. **Evidence 123 (11)**

Statement made by radio operator of airplane to inspector of accidents at airport eight or ten hours after airplane crashed was not admissible as part of res gestae in action for wrongful death of passenger.

13. **Evidence 243 (2)**

Statement made by radio operator of airplane to inspector of accidents at airport, as part of authorized inquiry into causes of crash of airplane and relating to radio operator's duties and acts within scope of his employment, was properly admitted in evidence in action for wrongful death of airplane passenger.

14. **Appeal and Error 215 (1) 216 (1)**

Alleged error because of failure of federal district court to give certain instruction could not be considered by Court of Appeals on appeal, where no such instruction was requested, and no objection was taken to charge because there was no such instruction, and appellants had full uninhibited opportunity to object to charge.

15. **Death 67**

Evidence that income of deceased would have increased over full span of life expectancy should have been received on issue of damages in action for wrongful death.

16. **Courts 406.5 (21)**

Reviewing court may reverse, if at all, for excessiveness of verdict only if verdict is so grossly excessive or monstrous as to demonstrate clearly that federal trial court abused discretion in permitting it to stand.

17. **Courts 99 (1)**

Award of $350,000 for wrongful death of one who had life expectancy of 36 1/2 years, and who earned salary of about $27,000 to 20,000 a year after taxes, was not so excessive that it should have been set aside by federal District Court.

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Mr. William J. Junkerman, New York City, for appellants.

Mr. Murdaugh Stuart Madden, Washington, D.C. for appellees.

Messrs. Theodore E. Wolcott and John S. Chapman, Jr., New York City, both of the Bar of the Supreme Court of the State of New York, were allowed to argue pro hac vice for appellees, but did not argue.

Before Mr. Justice REED,* and WILBUR K. MILLER, Chief Judge, and BURGER, Circuit Judge.

BURGER, Circuit Judge.

This is an appeal from $350,000 judgment for the appellees in an action for wrongful death. The decedent, William Gordon Tuller, was a passenger on a flight of Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airline Holland, (KLM), from Amsterdam to New York which crashed approximately one minute after take-off from its intermediate stop at Shannon, Ireland. The plane crashed in the tidewaters of the Shannon River some 7,000 feet from the end of the airport runway. As the wheels of the plane left the ground, the control tower radioed its precise take-off time but the acknowledgement required to complete the take-off procedure was not forthcoming from the plane. Receiving no response, the tower made repeated attempts to make radio contact, without success. SABENA (Societe Anonyme Belge d'Exploitation De La Navigation Aerienne) KLM's agent and flight representative at Shannon, had a radio capable of monitoring such messages. On this occasion the monitor was turned off immediately after the tower sent its part of the take-off message without awaiting the plane's response. As a consequence SABENA officials were not aware for some time of the failure of the KLM flight to answer. When the tower eventually notified SABENA of the loss of radio contact, SABENA did not advise Aer Lingus, KLM's operational representative, although it was SABENA's duty under its contract to inform Aer Lingus of probable interruptions of service or retarded progress of the flight "as soon as possible". In the KLM plane three radio microphones were available to the flight crew, the pilot, co-pilot and radio officer, and each microphone was tuned to the tower frequency. Notwithstanding this, no distress message was transmitted either when the plane began to descend or after the crash. When the plane "shuddered "in a stall the radio officer primarily charged with radio communications was thrown from his seat because he had failed to fasten his seat belt as required by operating regulations.

After the crash in shallow water, the crew evacuated most of the passengers to two rubber dinghies, which were moved along the side of the plane by means of rope fastened to the fuselage. Tuller and another passenger made their escape through a rear window and stood on the tail of the airplane without life preservers. When their shouts were heard by the members of the crew in the second dinghy, the crew attempted to maneuver the dinghy around the wing. Finding the tow line too short, they cast off the line and attempted to paddle the dinghy to the tail, but their efforts were unsuccessful due to the tide and wind and the inadequate size of the paddles. Additional ropes were available in the cockpit but were not used. The ship's officers made no effort to determine the condition of the passengers on the tail of the plane or to ascertain whether they had life vests.

For over four hours Tuller and his companion remained on the tail in a rising tide. Near dawn, information of the crash and its location finally reached the tower, and a launch was dispatched to the crash scene. Just as the launch approached, with the water by then chest high, Tuller lost his footing and slipped into the water; his body was later recovered. His companion was rescued.

A booklet inserted in the back of each seat of the plane stated that life vests could be found in one of three locations in KLM planes, but at no time was the matter of life vests brought to the attention of the passengers nor had they been told the specific location of the vests in this airplane or how they should be fastened or inflated.

The jury was instructed that under the Warsaw Convention, which the court ruled governed the liability of the airlines, the damages were to be limited to $8,300 unless the defendants were guilty of "willful misconduct", in which case the $8300 limit did

* Sitting by designation pursuant to 28 U.S.C. 294 (a).

not control.[1] The jury returned a verdict for the plaintiff in the amount of $350,000.

The appeal presents these issues:

(1) Was there sufficient evidence of "willful misconduct" to go to the jury?

(2) Was there error in the reception in evidence of

(a) an Irish order pertaining to instruction on use and location of life vests,

(b) pages of a KLM manual relating to ditching procedures,

(c) the contract between KLM and SABENA,

(d) a statement made by the radio operator at a hearing before Irish authorities some twelve hours after the crash?

(3) Was there reversible error in the failure of the trial judge, absent request or objection, to clarify the impact of KLM's negligence on SABENA's liability?

(4) Was there sufficient evidence to support the damage award?

Evidence of Wilful Misconduct

[1-3] At the close of the case appellants moved to dismiss the complaint for all amounts in excess of $8300 and for a directed verdict in favor of appellees for $8300 for want of evidence of wilful misconduct under the terms of the Warsaw Convention. In considering whether the appellants were, as they claim, entitled to the relief they sought by their motion we are, of course, obliged to take that view of the evidence most favorable to appellees and give them the benefit of all inferences which might reasonably be drawn from the evidence. Gunning v. Cooley, 1930, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720.

> On a motion for a directed verdict, "x x x it is well settled that the evidence must be construed most favorably to the plaintiff; to this end he is entitled to the full effect of every legitimate inference therefrom. If upon the evidence, so considered, reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted." Jackson v. Capital Transit Co., 1938, 69 App. D.C. 147, 148, 99, F. 380, 381, certiorari denied, 1939, 306 U.S. 630, 59 S. Ct. 464, 83 L. Ed. 1032, quoted in Kendall v. Gore Properties, Inc., 1956, 98 U.S. App. D. C. 378, note 3, 236 F. 2d 673, 679 note 3.

The jury was instructed that "wilful misconduct is the intentional performance of an act with knowledge that the * * * act will probably result in injury or damage, or * * * in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means * * * failure to act" in such circumstances. This was substantially the charge approved by this court in American Airlines, Inc. v. Ulen, 1949, 87 U.S. App. D. C. 307, 186 F. 2d 529, where we also suggested that wilful misconduct means "a deliberate purpose not to discharge some duty necessary to safety." Id., 87 U.S. App. D.C. at page 311, 186 F. 2d at page 533.

The phrase "wilful misconduct" occasioned considerable discussion in the drafting of the Warsaw Convention in 1929. Liability was limited to 125,000 French Francs (then approximately $12,500 — and now approximately $8,300) for a single passenger unless Article 25 of the Convention applied. See note 1, supra. The United States was not a participant but in the discussions relating to the meaning of the French word "dol" used in the text of Article 25 as the English delegate said "I wish it to be noted on the record that as a result of the explanations we translate these words as 'wilful misconduct,' a well-understood expression in our law."[2]

The alleged wilful misconduct of the appellants in this case resolves itself into four elements: (1) failure to properly instruct passengers of the location of life vests and in their use; (2) failure to broadcast an emergency message; (3) failure to take steps to provide for the safety of Tuller after his peril was known; (4) failure of SABENA to be aware of the loss of radio communication with the plane and to initiate prompt search and rescue operations.

(1) The evidence showed that Tuller was alive within seconds before the rescue launch reached the airplane, but that he lost his footing, fell into the water, and was lost. Since the parties stipulated that Tuller was not injured in the crash, the jury could reasonably have inferred that if Tuller had been wearing a life vest his life could have been saved. Significantly, the crew members, who knew the location of life vests, realized the need and promptly put them on.

There was testimony that no announcements or instructions concerning life vests were made to passengers before take-offs or during the flight, and the passenger who stood with Tuller on the tail testified that he did not know where the life vests were located. The descriptive booklets inserted in the back of each seat stated that the life vests could be found in one of three places, but at no time were the passengers informed where they could be found in this particular aircraft. Regulations of the Irish Government do not require life vest instructions unless a flight is more than 30 minutes travel from land. This flight was always within 30 minutes flight from land, provided it maintained normal flying speed—and remained airborne, which of course it did not.

[4-5] In view of the gravity of the harm which would follow an emergency landing on water on a night flight which contemplated landings and take-offs at least two airports near the sea, the jury could reasonably find that the failure of KLM to establish and execute procedures to instruct passengers as to the location and use of life vests was a conscious and wilful omission to perform a positive duty and constituted reckless disregard of the consequences. We are not bound by the limits of the Irish Government's regulations as to when life vest instructions should be given to fulfill the duty of care owed to passengers. Cf Horobin v. British Airways Corp. (1952) 2 A. E. R. 1016, 1019. (Q.B.)

(2) A distress message could have been sent merely by uttering the universal signal in the words "King Yoke Mayday" or even "Mayday." Immediately before take-off the radio officer was at his desk in the plane with a microphone before him tuned to the tower frequency. But during the descent he was thrown to the floor because he had failed to take his seat and fasten his seat belt. The KLM operations manual required all personnel to have a "conscious anticipation prior to take-off of possible failure", and to send a distress message as soon as an emergency arose.[3] Regulations of the Irish Government also required public transport aircraft to notify appropriate author-

1. The Warsaw Convention provides:
"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." Warsaw Convention, Art. 25, 49 Stat. 3020 (1934).

2. "We have in our country the expression 'wilful misconduct' * * *. it covers not only acts accomplished with deliberation, but also acts of carelessness without regard of the consequences." ProcesVerbaux II Conference Internationale de Droit Aerien, 4-12 Octobre 1929, Varsovie, p. 40-42, published by the Ministry of Foreign Affairs of Poland, 1930. The declaration of adherence to the Convention as advised by the Senate was accompanied by an English translation which used the words "wilful misconduct" to translate "dol". 49 Stat. 3020 (1934). This was the English translation before the Senate for consideration. 78 Cong. Rec. 11580 (1934).

3. The KLM operating manual, page 36, states:
"Surface stations and ships should be informed of the existence of an emergency as soon as it arises. This should be done even if it is not certain that the airplane will have to be ditched. It is easy enough to cancel the call after the emergency is over."

ities "by the quickest means available" of any accident involving the aircraft. The plane was equipped with radio microphones at three positions; the pilot's, the co-pilot's and the radio operator's. Here there was a brief period, even if only seconds, as to which a jury could reasonably find that the behavior of the plane gave notice of a possible crash and time sufficient to utter the distress signal. Furthermore, there was no attempt to send a message after the crash; there was evidence that the electrical system was so organized that the plane's radio would operate from independent power after the main ignition switch was thrown to avoid explosion and fire. In addition there was a portable emergency radio operable by hand crank in the rear of the plane.

[6] Had a message been sent the control tower by any of the available means, the authorities would have been immediately aware of the crash and rescue equipment could have been dispatched promptly rather than some four hours later. Accordingly, the jury was warranted in concluding that KLM's agents, in failing to send a distress message, committed wilful misconduct.

(3) After the first dinghy was filled with passengers, the captain and radio officer made a final check for passengers in the cabin and then boarded the second dinghy. Shouts were heard from the passengers on the tail, and the crewmen attempted to maneuver the dinghy around the wing with the ropes attached to the fuselage. Finding the rope too short, and fearing to take the dinghy over the sharp edge of the wing, they released the rope and tried to paddle the dinghy. But the round rubber vessel would not respond to their small paddles and instead drifted with the tide toward the shore. The crewmen had no experience in the use of the dinghies except in a large swimming pool.

[7] The crew was aware that it was possible to manuever the dinghy by ropes attached to the fuselage because they had previously maneuvered it to the main door in that fashion. Moreover, additional lengths of rope sufficient to reach the tail were available in the cockpit. Various alternatives were plainly available: one of the crew could have swum to the tail of the plane with the rope and pulled the dinghy to the men or vice versa, as had been done with respect to moving the dinghy in earlier maneuvering. No effort was made to put a crew member on top of the cabin by use of ropes thrown, or carried by a swimmer, to the opposite wing engines. Had this been done the tail passengers might well have been guided over the top of the cabin to the dinghy. The jury could reasonably find that under these circumstances, the failure to take available steps to provide for Tuller's safety was a conscious omission made with reckless disregard of the consequences when it was known he was in a position of peril. There is no suggestion that the departure of the second dinghy without making some effort to provide for Tuller's safety was necessary to protect the lives of the occupants of that dinghy.

(4) As agent for KLM, SABENA was charged by contract[4] with checking the progress of the flight and notifying Aer Lingus, the operational representative of KLM, in the case of retarded progress of the flight. However, as a result of the switching off of the SABENA monitor radio without waiting for the completion of the take-off message and before it was known whether the airplane had failed to respond together with the absence of SABENA employees from the office at subsequent periods, Aer Lingus was not notified of the loss of communication, for several hours, nor was the KLM station manager so notified.[5]

While the control tower personnel had broad duties with respect to contact with the plane and did in fact remain aware of the plane's failure to respond, SABENA as KLM's agent had contract duties as noted in the margin. But SABENA was seemingly satisfied with the loss of contact with the KLM plane at the critical moments of take-off, landings and take-offs being the most hazardous of their operations. In view of this it is less surprising that the tower personnel did not pursue the matter agressively. The vital importance of communication between pilot and control tower is suggested by the severe governmental sanctions for failure to perform required acts of communication. The search and rescue organization of the Shannon airport did not have its own planes. As KLM's operational representative, Aer Lingus was the local facility capable of instituting a search. In recognition of this, the contract between KLM and SABENA, as we have noted, required SABENA to advise Aer Lingus immediately of any facts related to an interruption of service, and to keep Aer Lingus informed of the movements of the aircraft. Some forty-eight minutes after take-off, a SABENA agent learned from the control tower that radio contact with the plane had ceased shortly after take-off. Nevertheless, Aer Lingus was not notified of this fact for another hour and thirty minutes. Finally aware of loss of contact and the plane's failure to report a safe and completed take-off SABENA as KLM's representative had a duty to "take action necessary for the safety of the flight" and press every available inquiry and initiate through Aer Lingus emergency surface craft investigation in the area of the known take-off pattern.

[8] Here no real effort was made to check on the "missing" plane until nearly two hours after take-off when the tower sighted flares in the take-off pattern of the KLM plane. Even then no surface craft were dispatched. Later another plane in routine flight sighted the crashed ship in the growing light of dawn and finally surface craft were dispatched. SABENA's failure to inform Aer Lingus of the loss of communication with the plane it was responsible for, plainly delayed emergency search and rescue action which, had it been initiated in these circumstances even as much as five minutes earlier, could have prevented Tuller's death. The defaults of SABENA as KLM's ground agent were conscious omissions of performance of positive duties relating directly to the safety of passengers.

We hold that as to each of the categories of alleged wilful misconduct of KLM there was sufficient evidence from which a jury could reasonably find that KLM was guilty of wilful misconduct as that term has been interpreted by this court under the Warsaw Convention; we hold also that there was sufficient evidence from which a jury could reasonably find that SABENA was guilty of wilful misconduct as that term has been interpreted by this Court under the Warsaw Convention. There is also evidence from which a jury could reasonably find that as to each category of wilful misconduct the negligence in question contributed proximately to Tuller's death.

4. SABENA contracted to "render * * * services to the Carrier's (KLM's) flight operating within the area of responsibility (at Shannon) as described in Paragraph 3 of this Annex thereby maintaining close liason with the operational representative (Aer Lingus) designated by the Carrier so as to coordinate his requirements.

* * *

"Maintain contact with all flights within his area of responsibility noting advanced or retarded progress as compared with flight plan and inform the operational representative (Aer Lingus) designated by the Carrier.

* * *

'In the event of an emergency, take action necessary for the safety of the flight being guided by the instructions in the relevant Operations Manual * * *.

* * *

"Report the complete facts of any incident of a flight operations nature which causes delay or interruption of a flight to the operations department of the Carrier.

"Ensure that probable or known interruptions to schedules for flight operational reasons * * * are given as soon as possible to the operational representatives designated by the Carrier."

5. There was evidence that it was the established practice that a radio message was not regarded as complete until acknowledged by the recipient. The tower continued to request acknowledgment of its take-off message.

[9] (1) **Irish order as to life vests.** Appellants' objections go solely to the interpretation put upon this order by appellees' counsel in argument to the jury. The applicability of the order was a fair subject of comment in argument and there is no substantial basis for disturbing the verdict on this ground.

[10] (2) **KLM manual.** Pages of a KLM manual relating to the duties of the radio operator were admitted over objection. The ground of the objection was that the manual applied only to planned and controlled emergency landing on water and not to an involuntary crash landing. As a result of questions by the appellees' counsel, and questions by the trial judge after impeachment of the witness by a prior deposition, a sufficient foundation was laid for the admission of this manual in evidence. The radio operator finally admitted that if a crash occurred it was the duty of the crew to carry out as many as possible of the planned ditching procedures.

[11] (3) **KLM-SABENA contract.** It is urged as error that the contract between KLM and SABENA was not construed by the trial court and was the subject of argument in appellees' summation. Appellants did not request specific instructions on the meaning of the contract and made no objection after the charge; they are precluded from raising this objection now. Fed. R. Civ. P. 51, 28, U.S.C.

(4) **Radio operator's statement.** Appellees took the deposition of the KLM radio operator, Oudshorn, after his employment with KLM was terminated. In the deposition, which was received as part of the appellees' case in chief, the radio operator stated that he did not send a distress passage before the plane crashed because there was no sufficient time to do so. He was then asked if he had made a statement to the Inspector of Accidents at the Shannon Airport some hours after the crash. The witness admitted making statements at the hearing in question, which he said was attended by "one of our chief flight engineers of KLM *** one of the people of the Dutch Dutch CAA" and others. At this point appellees offered and the court received over objection a transcript of the radio operator's statement at the hearing before the Inspector of Accidents. Appellants objected to the proffered transcript of Oudshorn's statement on the ground that "it is not part of the res gestae", thus indicating that the statement was challenged as hearsay. After argument the District Court after first indicating that he regarded it as part of the res gestate, then reconsidered and ruled that

> "The statement refers to the accident, otherwise there would be no purpose in having the statement made. It was made * * * at Shannon on the same (488) day of the accident and in response to the particular question as to why he didn't send the message.
>
> "I think it is admissible and I will let it in".

The pertinent part of the statement made by Oudshorn at that time was

> "We were tuned at frequency of 118.7, the tower frequency, and I honestly must say that I did not think when it happened, to take the microphone and tell people there was something wrong on the plane. I could tell you that would never happen. **You first think of your skin, and then of the microphone.** That was my feeling, because it happened so fast." (Emphasis added.)

The trial judge did not try to limit the effect of this statement in any way. Realistically it could not have been admitted merely for purposes of impeachment in the circumstances shown here.[6] The challenged statement must be viewed as an important piece of substantive evidence on the issue of willful misconduct. As such it disclosed an awareness of the existing risks and had a direct bearing on whether there was reckless disregard of the dangers to which the plane and its passengers were exposed.

([12] Appellants argue that the challenged statement does not fall within any of the exceptions to the hearsay rule pointing out particularly that the hearing at which it was made occured 8 to 10 hours after the crash. We agree that the utterance was too remote after the crash. We agree that the utterits admission as part of the res gestae. However spontaneous in the contest of the hearing, it does not meet the standards of res gestae, in relation of the accident.

Appellees contend that Oudshorn's post-accident statement is admissible because it was made while he was an employee of KLM and was his explanation of his performance of duties within the scope of his employment. From this they urge that the utterance is imputable to KLM. In answer to this appellants contend that the radio operator was not a KLM employee when the deposition was taken or when the testimony was read into evidence at trial, and that the radio operator had no duty or authority to make declarations binding on KLM at the hearing of the Inspector of Accidents.

The radio operator was a KLM employee when he uttered the challenged statement. It is true that members of the flight crew of an airline are hired primarily to work for the airline, not to speak for it. But in this context, having in mind the public nature of the duties of crew members toward common carrier passengers, it was as much a part of the crew's duties to account to public authority for the manner in which those duties were discharged as it would be to account or report to the employer. Whether KLM acquiesced in the inquiry, or whether it had no choice in the matter is not entirely clear from the record; however the record discloses that a KLM representative was present at the hearing and that Oudshorn's statements were recorded without objection.

Many writers on evidence[7] have urged that rejecting early post-accident statements of an employee while receiving the employee's considered statements in the courtroom perhaps several years after the event is to give preference to the weaker over the stronger evidence. Had Oudshorn made substantially the same utterance within the hearing of passenger as he emerged from the cabin of the plane we would permit the passenger to testify to what was said as part of the res gestae; yet the passenger's testimony might well come three or four years after the event and be dependent upon his recollection of the words uttered. That, surely, is not more reliable than Oudshorn's statement against his interest, uttered and recorded some eight hours after the rescue, in a formal process of reporting to the Irish Government concerning the occurence.

Apparently with this in mind the proposed Model Code of Evidence rule 508 (a) admits the employee's statement if "the declaration concerned matter within the scope" of the declarant's employment. See also Slifka v. Johnson, 2 Cir., 161 F. 2d 467, certiorari denied, 1947, 332 U.S. 758, 68 S. Ct. 57, 92 L. Ed., 344; Martin v. Savage Truck Line, D.C.D.C. 1954, 121 F. Supp. 417. Oudshorn's statement clearly concerned a matter within the scope of the radio operator's employment, since his

6. Appellants' contention that the appellees improperly impeached their own witness, Oudshorn, is contradicted in appellants' own brief by the argument that:

> "The foregoing statement was actually not a contradiction of Oudshorn's testemony that the accident happened so fast that there was not time to switch the frequencies in order to send out a message and that he did not think of doing so. The statement made some 12 hours after the accident that at the time of an airplane crash one thinks of one's skin before thinking of a microphone, was no more than a mental reaction at the time it was given — it had no probative value other than to stir up passion, bias and prejudice on the part of the jury that is exactly the way plaintiffs' counsel used it."

7. See McCormick, Evidence, Sec. 244, at 519; (1954).

compliance with undisputed safety regulations was in question.[8] Had he been at his assigned post with his microphone at hand and his instruments tuned to the tower frequency, as they were, he could have uttered the "Mayday" distress signal in a fraction of a second. His explanation of his failure to do this was within the scope of his duties.

Since reliability is the basic test for the admission of any hearsay statement, the interest of the one who utters it and one to be charged is always important. That this statement is adverse to the interest of KLM is plain. The statement was also adverse to Oudshorn's personal interest in that it entailed the possible loss of his employment, impairment of his future employment opportunities, possible civil liability for Tuller's death, and even the possibility of criminal sanctions. We think that such a recorded statement meets any reasonable test of reliability. The official nature of the inquiry which elicited the statement, the independent recording of the statement, the source of the utterances, and the interest of the utterer all combine to give the statement the earmarks of reliability absent in Palmer v. Hoffman, 1943, 318 U.S. 109, 63 S. Ct. 477, L. Ed. 645. Surely it cannot be said, as to the employee who uttered it or the employer who is charged with it, that its "primary utility is litigating * * *." Id., 318 U.S. at page 114, 63 S. Ct. at page 481. See Pekelis v. T.W.A., 2 Cir., 187 F. 2nd 122, 130, 23 A.L.R. 2d 1349. Certiorari denied 1951, 341 U.S. 951, 71 S.Ct. 1020, 95 L. Ed. 1374.

The Second Circuit considered the application of the federal shop book rule, 28 U.S.C. Sec: 1732 (1958)to a similar situation in Pekelis v. T. W. A., supra. There reports of an airline accident investigation conducted by the airline for its own purposes were held admissible. Noting that the challenged material was not favorable to the airline's interests, that court gave the interest factor significant weight in determining "their earmarks of reliability" and in distinguishing Palmer v. Hoffman, supra. We need not reach the question whether the challenged statement here is admissible under the federal shop book rule in light of our holding that it is admissible on other grounds.

We emphasize that we are not here confronted with the problem of the admissibility of opinion evidence. See New York Life Ins. Co. v. Taylor, 1944, 79 US. App. D.C. 66, 147 F. 2d 297; Washington Coca-Cola Bottling Works, Inc. v. Tawney, 1956, 98 U.S. App. D.C. 151, 233 F. 2d 353. An added distinguishing factor is that KLM had full opportunity to cross-examine Oudshorn when the deposition was taken for the purposes of this case.

We are not unaware of the traditional arguments which can be advanced that exclusion of post-accident statements of this type may have value in that it tends to encourage free and full disclosure of information. See McCormick, Evidence Sec. 78, at 160-61 (1954). But the problem is one of balancing competing considerations and on balance we think the ends of justice are better served by receiving such statements when found to be reliable.

[13] We hold that the statement made by Oudshorn, the KLM radio operator, as part of the authorized inquiry into the causes of the crash and relating to his duties and acts within the scope of his employment was properly admitted in evidence.

Alleged Errors in Instructions

Appellants' brief does not assert any errors in the trial courts' instructions to the jury. However, it is contended that the trial judge precluded exceptions to the charge, and that error occurred in the charge with respect to the liability of SABENA. Appellants' supplemental memorandum suggests that the trial court failed to instruct correctly on the liability of SABENA in that the jury was told that a finding of wilful misconduct by either or both defendants would bring them to the issue of proximate cause. At no point did the court instruct the jury that if the wilful musconduct were committed solely by KLM, the principal, SABENA, the agent, could not be held liable. No such instruction was requested and no noted objection was taken to the charge in this respect. It should be noted that KLM and SABENA were represented by the same counsel, although obviously at this point their interests inevitably diverged. Rule 51 of the Fed. R. Civ. P. requires that objection be taken to errors in the charge in order to claim error on appeal. Some courts have taken the view that "the plain error rule may not be utilized in civil appeals to obtain a review of instructions given or refused, where the ground was not raised in the trial court." Bertrand v. Southern Pac. Co., 9 Cir., 1960, 282 F. 2d 569, 572, certiorari denied 1961, 365 U.S. 816, 81 S.Ct. 697, 5 L.Ed. 2d 694.

[14] Of course, if the trial court in fact **prevented** the objection from being made, an inviting case for the application of the "plain error" rule would be presented. We have examined the portions of the record relied on by appellants to show that the District Judge in some way impeded or prevented the recording of a timely objection. We are satisfied that appellants had full and uninhibited opportunity to object to the charge concerning the liability of SABENA if they desired but failed to do so. The trial of this cause was long and expensive and the contentions underscore the need for strict compliance with the rule which treats as waived that to which no timely objection is made.

The claimed error in the scope of appellees' arguments to the jury does not merit comment.

Damages

[15] The jury returned a verdict of $350,000 for the appellees. The evidence on the damage issue showed a life expectancy of 36½ years. Tuller earned a salary of approximately $27,000 or $20,000 a year after taxes as vice-president incharge of engineering at Melpar, a division of Westinghouse Airbrake.[9] Besides his widow, Tuller was survived by two children then aged four and eight respectively.

[16, 17] The award of $350,000 is attacked as so excessive that it should have been set aside by the District Court. We pointed out in Hulett v. Brinson, 1955, 97 U.S. App. D.C. 139, 141, 229 F. 2d 22, 25, certiorari denied 1956, 350 U. S. 1014,

(Continued next page)

8. Oudshorn testified:
"Q. Did every member of the flight crew have a seat with a seat belt? A. That's right.
"Q. What is the purpose of seat belts? A. Well in case of an accident, or in sudden stop or acceleration, that you are not thrown out of your chair.
"Q. And you can continue your duties? A. That's right.
"Q. If you are not thrown out of your chair? A. That's right.
"Q. Is there any regulation requiring that these seat belts be fastened at any particular time? A. Yes, during take off and landing they are supposed to be fastened.
"Q. When you say during take off,' how much time does that encompass during the take off? A. Well, that means from when you start off blocks until the Captain gives the command to switch off the sign 'Fasten seat belts.'
* * *
"Q. Did you feel at the time you felt this shudder, and when you were thrown out of your seat, (466) that the plane was going to crash? Did you have that sensation, that you were going to crash? A. I, personally, had that sensation when I felt this unusual shudder and going down, that this was a crash. My personal opinion was that it was that."

9. The appellees tendered but the District Court rejected proffered evidence purporting to show that Tuller's income would increase over the full span of life expectancy. Such evidence was relevant and should have been received. O'Connor v. United States, 2 Cir., 1959; 269 F.2d 578.

I

Rep. of the Philippines, Plaintiff-appellant, vs. Damian P. Ret, Defendant-appellee, G.R. No. L-13754, March 31, 1962, Paredes, J.

1. INCOME TAX; LIMITATION OF ACTION TO COLLECT; THREE YEAR PRESCRIPTIVE PERIOD IN SECTION 51 (d), NATIONAL INTERNAL REVENUE CODE, AS LIMITATION FOR THE GOVERNMENT TO COLLECT TAXES BY SUMMARY PROCEEDINGS.—The three-year prescriptive period provided for in section 51 (d) of the National Internal Revenue Code was meant to serve as a limitation on the right of the government to collect income taxes by the summary methods of distraint and levy, said period to be computed from the time the return is filed, or if there has been a neglect or refusal to file one from the date the return is due, which is March 1st of the succeeding year. (Collector vs. Zulueta, 53 O.G., 6532, Oct. 15, 1957).

2. ID.; ID.; ID.; CASES WHERE PRESCRIPTIVE PERIOD WERE MADE APPLICABLE.—The prescriptive period of three years was intended to be a general limitation on the right of the government to collect income taxes by summary proceedings, irrespective of whether the tax-payer filed a return or not, or whether his return was true and correct or erroneous or fraudulent."

3. ID.; ID.; SEC. 51 (d), NATIONAL INTERNAL REVENUE CODE DOES NOT PROVIDE PRESCRIPTIVE PERIOD FOR COLLECTION OF INCOME TAX BY JUDICIAL ACTION; SEC. 331 OF SAID CODE IS THE APPLICABLE PROVISION.—Section 51 (d) of the National Internal Revenue Code, which refers to the collection of income tax, does not provide for any prescriptive period insofar as the collection of income tax by judicial action is concerned, the prescriptive period therein mentioned being merely applicable to collection by summary methods, as interpreted by Supreme Court. Considering this void in the law applicable to income tax, and bearing in mind that Section 331 of the Code which provides for the limitation upon assessment and collection by judicial action comes under Title IX Chapter II, which refers to "CIVIL REMEDIES FOR COLLECTION OF TAXES," it may be concluded that the provisions of said Section 331 are general in character which may be considered supletory with regard to matters not covered by the title covering income tax. In other words, Title II of the Code is a special provision which governs exclusively all matters pertaining to income tax, whereas Title IX, Chapter II, is a general provision which governs all internal revenue taxes in general, which cannot apply insofar as it may conflict with the provisions of Title II as to which the latter shall prevail, but that in the absence of any provision in said Title II relative to the period and method of collection of the tax, the provisions of Title IX, Chapter II, may be deemed to be supletory in character. Hence, the Court of Tax Appeals did not err in holding that the right of the Government to collect the deficiency income taxes for the years 1945, 1946, and 1947 has already prescribed under section 331 of the National Internal Revenue Code. (Coll. of Int. Rev. v. Bohol Land Trans. Co. G.R. Nos. L-13099 & 13463, Apr. 2, 1960).

4. ID.; ID.; SEC. 332, NATIONAL INTERNAL REVENUE CODE NOT APPLICABLE TO COLLECTION OF INCOME TAXES BY SUMMARY PROCEEDINGS; APPLICABLE TO COLLECTION OF SAID TAXES BY COURT ACTION.—Section 332 of the Internal Revenue Code does not apply to income taxes if the collection of said taxes will be made by summary proceedings, because this is provided for by Section 51 (d) of said Code; but if the collection of income taxes is to be effected by court action, then section 332 will be the controlling provision.

5. ID.; ID.; ALTERNATIVES GIVEN TO COLLECTOR OF INTERNAL REVENUE UNDER SECTION 332, REVENUE CODE, TO COLLECT INCOME TAXES.—Under Section 332, National Internal Revenue Code, the Collector of Internal Revenue is given two alternatives: (1) to assess the tax within 10 years from the discovery of the falsity, fraud or omission, or (2) to file an action in court for the collection of such tax without assessment also within 10 years from the discovery of the falsity, fraud, or omission. In the case at bar an assessment had been made and this fact has taken out the case from the realms of the provisions of section 332 (a) and placed it under the mandates of section 332 (c), National Internal Revenue Code which is the law applicable in the case at bar and general enough to cover the present situation.

6. ID.; PRESCRIPTION OF ACTION TO COLLECT INCOME TAX; CASE AT BAR.—The Collector of Internal Revenue issued income tax notices to appellee on January 20, 1951, urging to pay the sums mentioned therein but said appellee refused to pay the said amount. Upon recommendation of the collector, appellee was prosecuted for a violation of sections of 45 (a), 51 (d), and 72 of the National Internal Revenue Code, penalized under Section 73 of the same (Criminal Cases Nos. 19037 and 19038). He pleaded guilty to the 2 criminal cases and was sentenced to be fined for each. After his conviction, on September 21, 1957, the Republic of the Philippines filed court action for the recovery of appellee's deficiency taxes plus 5% surcharge and 1% monthly interest. Instead of answering the complaint, he presented a motion to dismiss, claiming that the cause of action have already prescribed. The lower court granted the motion to dismiss. The government filed a motion for reconsideration of the order which was denied on March 10, 1958. The Republic appealed. HELD: Under section 332 (c) of the National Internal Revenue Code, court action for the collection of the income tax may be brought only within 5 years from the date of the assessment of the tax. It was only on September 5, 1957, that the action was filed in Court for the collection of alleged deficiency income tax — far beyond the 5 year period.

7. ID.; ID.; PENDENCY OF CRIMINAL CASE FILED AGAINST TAXPAYER FOR VIOLATION OF PROVISIONS OF INTERNAL REVENUE CODE DOES NOT PROHIBIT FILING OF CIVIL ACTION FOR COLLECTION OF TAXES.—The defendant-appellee was prosecuted for two criminal cases for a violation of sections 45 (a), 51 (d), and 72 of the National

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U. S. COURT . . . (Continued from page 20)

76 S.Ct. 659, 100 L.Ed. 874, "that the rule in the Federal courts is that an appellate court may reverse, if at all, for excessiveness of verdict only where the verdict is so grossly excessive or monstrous as to demontrate clearly that the trial court has abused its discretion in permitting it to stand." See Affolder v. New York, C. & St. L. R. Co., 1950, 339 U.S. 96, 101, 70 C. Ct. 509, 94 L. Ed. 683. On the whole record we cannot say that the action of the District Judge who tried the case and heard the post-trial motions constitutes an abuse of discretion or that appellate action with respect to damages is required.

Affirmed.

Internal Revenue Code, penalized under Section 73, thereof. He pleaded guilty to the two cases and was sentenced to pay a fine of ₱300.00 in each. Plaintiff-appellant argues that during the pendency of the criminal cases, it was prohibited from instituting the civil action for the collection of the deficiency taxes. HELD: This contention is untenable. The present complaint against the defendant-appellee is not for the recovery of civil liability arising from the offense of falsification; it is for the collection of deficiency income tax.

8. ID.; ID,; PRESCRIPTION; FILING OF CIVIL ACTION FOR COLLECTION OF CIVIL LIABILITY ARISING FROM CRIMINAL OFFENSE DOES NOT SUSPEND RUNNING OF PRESCRIPTIVE PERIOD TO FILE CIVIL SUIT TO COLLECT TAXES.—The provisions of Section 1, Rule 107, Rules of Court that "after criminal action has been commenced, no civil action arising from the same offense can be prosecuted" is not applicable. The criminal cases filed against the appellee would not affect, one way or another, the running of the prescriptive period for the commencement of the civil suit to collect taxes. The criminal actions are entirely separate and distinct from the said civil suit. There is nothing in the law which would have stopped the Collector of Internal Revenue from filing the civil suit simultaneously with or during the pendency of the criminal cases. Assuming the applicability of the rule, at most, the prosecution of the civil action would be suspended but not its filing within the prescribed period.

9. ID.; ID.; ID.; SUSPENSION OF THE RUNNING OF STATUTORY LIMITATION FOR THE COLLECTION OF TAXES.—Section 332 of the Tax Code provides "the running of the statutory limitation x x x shall be suspended for the period during which the Collector of Internal Revenue is prohibited from making the assessment, or beginning distraint or levy or a proceeding in court, and for sixty days thereafter". In the case at bar, the Collector of Internal Revenue was not prohibited by any order of the court or by any law from commencing or filing a proceeding in court to collect the taxes in question.

10. ID.; ID.; ID.; AGREEMENT THAT MAY SUSPEND THE RUNNING OF PRESCRIPTIVE PERIOD TO COLLECT INCOME TAXES.—In the case of Collector vs. Solano, G.R. No. L-11475, July 31, 1958, it was held that the only agreement that could have suspended the running of the prescriptive period to collect income taxes was a written agreement between Solano and the Collector, entered before the expiration of the five (5) year prescritive period, extending the period of limitations prescribed by law sec. 322[c] N. I. R. C.) which "Rule is in accord with the general law on prescription that requires a written acknowledgment of the debtor to renew the cause of action or interrupt the running of the limitation period (Act 190, sec. 50, new Civil Code, Art. 1155". In the instant case. there is no such written agreement, and there was nothing to agree about. The letter of demand by the Collector on January 13, 1951, was made prior to the issuance of the assessment notice to the defendant appellee, made on January 20, 1951. from which date, the 5 year period was to be counted. The letter of demand could not suspend something that started to run only on January 20, 1951.

11. ID.; ID.; PRESCRIPTIBILITY OF JUDICIAL ACTION TO COLLECT INCOME TAX.—The very provisions of sections 331, 332 and 333 of the National Internal Revenue Code specially the last, support the theory of prescriptibility of a judicial action to collect income tax. To hold otherwise, would render said provisions idle and useless. It is true that in earlier decisions, there was a declaration to the effect that the action to collect income tax is imprescriptible (Vina v. Government, 63 Phil. 262; Phil. Sugar Dev. v. Posadas, 68 Phil. 216). More recent decisions, however, recognized the prescriptibility of such actions.

12. ID.; ID.; ID.;—"The 'judicial action' mentioned in the Tax Code may be resorted to within five (5) years from the date the return has been filed, if there has been no assessment, or within five (5) years from the date of the assessment made within the statutory period, or within the period agreed upon, in writing, by the Collector of Internal Revenue and the taxpayer, before the expiration of said five-year period, or within such extension of said stipulated period as may have been agreed upon, in writing, made before the expiration of the period previously stipulated, except that in the case of a false or fraudulent return with intent to evade tax or for failure to file a return the judicial action may be begun at any time within ten (10) years after the discovery of the falsity, fraud or omission (Sections 331 and 332 of the Tax Code)" Gancayco v. Coll. of Int. Rev. G.R. No. L-13323, April 10, 1961).

D E C I S I O N

On February 23, 1949, Damian Ret filed with the Bureau of Internal Revenue his Income Tax Return for the year 1948, where he made it appear that his net income was only ₱2,252.53 with no income tax liability at all. The BIR found out later that the return was fraudulent since Ret's income, derived from his sales of office supplies to different provincial government offices, totaled ₱94,198.76. The BIR assessed him ₱34,907.33 as deficiency income tax for 1948, inclusive of the 50% surcharge for rendering a false and/or fraudulent return.

Defendant Ret failed to file his Income Tax return for 1949, notwithstanding the fact that he earned a net income of ₱150,-447.32, also from sale of office supplies. His income, as assessed for tax purposes, showed a deficiency tax of ₱68,338.40 for 1949, inclusive of the 50% surcharge.

On January 13, 1951, the Collector of Internal Revenue demanded from Ret the payment of the above sums, but he failed and/or refused to pay said amounts. On January 20, 1951, the Collector issued income tax assessment notices to Ret, urging him to pay the sums mentioned, but with the same result.

Upon recommendation of the Collector, Ret was prosecuted for a violation of Sections 45 [a], 51 [d] and 72, of the N.I.R.C. penalized under Sec. 73, thereof (Crim. Cases Nos. 19037, and 19038. He pleaded guilty to the two (2) cases and was sentenced to pay a fine of ₱300.00 in each.

After his conviction, on September 21, 1957, the Republic filed the present complaint for the recovery of Ret's deficiency taxes in the total sum of ₱103,245.73, plus 5% surcharge and 1% monthly interest. Instead of answering, he presented a motion to dismiss on February 8, 1958, claiming that the "cause of action had already prescribed." The CFI headed down an Order, the pertinent portions of which are reproduced below:

> "There is no question that the assessment of the income tax of the defendant for 1948 and 1949 was made within the period of limitation, that is; on or before January 20, 1951, but the present suit to the collect the same was brought outside the five-year period, to wit, on September 5, 1957, counted from the date of the assessment of said tax.
>
> There can be no question that the above-quoted provisions of Section 332, letter (c) of the National Internal Revenue Code, apply to all internal revenue taxes including income tax. The language therein used is all-embracing, and nowhere in said code is found any other provsion governing collection of income tax by judicial action.
>
> WHEREFORE, the five-year period fixed by law for the filing of suit for the collection of income tax having already expired, the plaintiff has no cause of action against the defendant and the motion to dismiss should be and is hereby granted, and the case is dismissed without pronouncement as to costs."

Plaintiff's motion for reconsideration of the above Order, was

denied on March 10, 1958. It appealed.

The dominant issue raised in this appeal is whether or not appellant's right to collect the income taxes due from appellee through judicial action has already prescribed.

The basis of the motion to dismiss is section 332 of the Revenue Code, which provides —

"(a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun **without assessment**, at any time within ten years after the discovery of the falsity, fraud, or omission.

x x x x

(c) Where the assessment of any internal revenue tax has been made within the period of limitation above prescribed such tax may be collected by distraint or levy or by a proceeding in court, but only if began (1) **within five years after the assessment of the tax**, or (2) prior to the expiration of any period for collection agreed upon in writing by the Collector of Internal Revenue and the taxpayer before the expiration of such five-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

The position of the Government may be stated as follows:—

1. The provisions of section 332 (c) of the N.I.R.C. do not apply to income taxes. It premised its argument on the ruling in the case of Collector vs. Avelino and CTA (G.R. No. L-9202, Nov. 19, 1956), wherein it was held that sections 331 and 332 of the Tax Code "x x x merely apply to internal revenue taxes in general and not to income taxes, the collection of which is specifically provided for under a different title of the same law x x x"; that the special provision alluded to is section 51 (d), Title II, of the Code, which refers only to the collection of income tax thru the summary remedies of distraint and levy within three years after the return was filed or should have been filed (Collector v. Villegas, 56 Phil. 654; Collector v. Haygood, 65 Phil. 520; De la Viña v. Government, 65 Phil. 265; Phil. Sugar Estate, Inc. v Posadas, 68 Phil. 216; Collector v. A. P. Reyes, L-8685, Jan. 31, 1957; Collector v. Zulueta, No. L-8840, Feb. 8, 1957), and after the lapse of the three year period, collection of income taxes must be had thru judicial action (Sec. 316 [b] N.I.R.C.); but in all these decisions, it is alleged, no mention of any period of limitation for the collection of income tax thru judicial action has been made.

2. Even granting that section 332 (N.I.R.C.) is applicable, the Government is not barred from instituting the present action, as shown by the very wordings of said section. It is claimed that as appellee Ret had admitted that he filed a false and fraudulent income tax return for 1948 and unlawfully failed to file his income tax return for 1949, for which he pleaded guilty in the two criminal cases heretofore mentioned, the collection of the tax may be enforced by a proceeding in court within 10 years after the discovery of the falsity, fraud, or omission (see also Avelino case, **supra**). And the present action was filed within 10 years from the discovery of the falsity, fraud or omission (sec. 332 [a]) N.I.R.C.

3. Further granting, that section 332, aforecited is applicable, the Government claims that it is not barred from instituting the present action because the period within which to collect the taxes due was suspended upon the filing of the two informations against the defendant-appellee on May 29, 1952, and began to accrue again from the receipt of the decision on April 20, 1955. In support of this contention, plaintiff-appellant cites section 1, of Rule 107, Rules of Court and sec. 333 of N.I.R.C. These provisions state —

"SEC. I. **Rules governing civil actions arising from offenses.**—Except as otherwise provided by law, the following rules should be observed

x x x x

(b) Criminal and civil actions arising from the same offense may be instituted separately, but after the criminal action has been commenced, the civil action cannot be instituted until final judgment has been rendered in the criminal action;

(c) After a criminal action has been commenced, no civil action arising from the same offense can be prosecuted; and the same shall be suspended, in whatever stage it may be found, until final judgment in the criminal proceeding has been rendered'";

"SEC. 333. **Suspension of running of statute.**—The running of the statute of limitations provided in section three hundred thirty-one or three hundred thirty-two on the making of assessments and the beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Collector of Internal Revenue is **prohibited** from making the assessment or beginning distraint or levy or a proceeding in court, and for sixty days thereafter."

Under the above-quoted provisions, it is alleged that from January 20, 1951 (date of assessment) to May 29, 1952 (date of filing of the informations), there is an interval of 1 year, 4 months and 9 days, and from April 20, 1955 (date of decision in the criminal cases which plaintiff-appellant assume to be the date of receipt, as this does not appear) to September 4, 1957 (date of filing of the complaint at bar), there is an intervening period of 2 years, 4 months and 15 days; and in all, the Government has only consumed a total of 3 years, 8 months and 24 days from the date the income tax assessment notice was issued to the date of filing of the complaint, of the 5 years prescribed by law. The government further alleged that the Collector was prohibited from going to court for the collection of the taxes due from the defendant-appellee, in view of the filing of the two criminal cases, the nature of which covered the subject-matter of the civil complaint; and there was need for the criminal charges to be determined first by the lower court, before a civil action for the collection of the tax could be resorted to. In other words, it is contended, that the filing of the criminal actions constituted a prejudicial question which should be resolved before the Civil Action for collection could be filed. And this was the very thing the Government did in the instant case. Moreover, the period of prescription was suspended because of the written extra-judicial demand made by the Collector, citing Art. 1155 of the N.C.C. in support thereof.

4. The Government submits also that the collection of income tax thru judicial action is imprescriptible, relying upon certain rules of statutory construction and the decision of this Court in the case of Estate of De la Viña, v. Government of the Philippine Islands, 65 Phil. 263, holding that "x x x the statutes of limitations do not run against the State; and this principle is applicable to action brought for the collection of taxes (26 R.C.L., 338; 37 C.J., 711.)" The doctrine was reiterated in the case of Philippine Sugar Estate Development Co. v. J. Posadas, et al., 68 Phil. 222, declaring that "x x x when the taxpayer paid the additional tax under protest and brought the corresponding action to recover the protested additional payment, the collection became judicial and the right of the Collector of Internal Revenue to effect the collection through that means has not prescribed."

5. Assuming **arguendo**, that the action is prescriptible, then the provisions of Art. 1144 of the N.C.C. on prescription of actions is applicable, inasmuch as aside from sections 331, 332 and 51 (d), there is no provision in the Revenue Code which deals on the limitation of action for the collection of income tax thru judicial action. The plaintiff-appellant argues that the income tax liabilities of the defendant-appellee being an obligation created

by law and that the right of action having accrued on January 20, 1951, the date of assessment, and the complaint at bar having been filed on September 5, 1957, within the ten year period, the cause of action has not prescribed.

After going over the law and jurisprudence pertinent to the issues raised, we have come to the conclusion that the cause of action has already prescribed.

It is true that this Court has declared in the Avelino case (1956, **supra**), that sections 331 and 332 of the Revenue Code do not apply "to income taxes, the collection of which is specifically provided for under a different title to the same law". But plaintiff-appellant overlooked the fact that this Court was only referring to the collection of income tax by **summary proceeding and not by court action.** Clarifying this matter, in the more recent case of Collector v. Solano & Court of Tax Appeals, G.R. No. L-11475, July 31, 1958, this Court held.—

"x x x. The decision in the Avelino case was closely followed by our holding in the case of Collector v. Zulueta, 53 O.G. No. 19, 6532, that the three-year prescriptive period provided for in section 51 (d) of the Code was meant to serve as a limitation on the right of the government to collect income taxes by the **summary methods of distraint and levy,** said period to be computed from the time the return is filed or if there has been a neglect or refusal to file one from the date the return is due, which is March 1st of the succeeding year. **Thus our decision makes it clear that prescriptive period of three years was intended to be a general limitation on the right of the government to collect income taxes by summary proceedings,** irrespective of whether the taxpayer filed a return or not, or whether his return was true and correct or erroneous or fraudulent".

Again we declared —

"We notice, however, that Section 51 (d) of the National Internal Revenue Code, which refers to the collection of income tax, does not provide for any prescriptive period insofar as the collection of income tax by **judicial action** is concerned, the prescriptive period therein mentioned being merely applicable to collection by **summary methods,** as interpreted by this Court. Considering this void in the law applicable to income tax, and bearing in mind that Section 331 of the Code which provides for the limitation upon assessment and collection by judicial action comes under Title IX, Chapter II, which refers to "CIVIL REMEDIES FOR COLLECTION OF TAXES", we may conclude that the provisions of said Section 331 are **general in character** which may be considered **suppletory** with regard to matters not covered by the title covering income tax. In other words, Title II, of the Code is a special provision which governs exclusively all matters pertaining to **income tax,** whereas Title IX, Chapter II, is a general provision which governs all internal revenue taxes in general, which cannot apply insofar as it may conflict with the provisions of Title II as to which the latter shall prevail, but that in the absence of any provision in said Title II relative to the period and method of collection of the tax, the provisions of Title IX Chapter II, may be deemed to be suppletory in character. Hence, in our opinion, the Court of Tax Appeals did not err in holding that the right of the Government to collect the deficiency income taxes for the years 1945, 1946 and 1947 has already prescribed under section 331 of the National Internal Revenue Code. x x x (Coll. of Int. Rev. v. Bohol Land Trans. Co. G.R. Nos. L-13099 & 13463, April 2, 1960).

From all of which, it may be reasonably inferred that section 332 of the Revenue Code does not apply to income taxes if the collection of said taxes will be made by summary proceedings, because this is provided for by Section 51 (d) aforementioned; but if the collection of income taxes is to be effected by court action, then section 332 will be the controlling provision. It is alleged, however, that this Court did not mention any period of limitation for the collection of income tax thru judicial action. To this, it may be observed that it was unnecessary to do so because the said section (332) has already so provided. In the Solano case, it was declared, "Even so, section 332 (e) of the National Internal Revenue Code provides that such action may be brought only within five years from the time of the assessment of the tax".

Plaintiff-appellant maintains that granting the applicability of section 332, still, according to paragraph (e) thereto (**supra**), it has 10 years from the discovery of the falsity, fraud or omission within which to file the present action. Under said section, the Collector is given two alternatives: (1) to assess the tax within 10 years from the discovery of the falsity, fraud, or omission, or (2) to file an action in court for the collection of such tax **without assessment** also within 10 years from the discovery of the falsity, fraud, or omission. In the case at bar, an assessment had been made and this fact has taken out the case from the realms of the provisions of section 332 (e) and placed it under the mandates of section 332 (c), (supra), which is the law applicable hereon and general enough to cover the present situation.

As heretofore stated, the plaintiff-appellant made the assessment on January 20, 1951 and had up to January 20, 1956 to file the necessary action. It was only on September 5, 1957, that the action was filed in Court for the collection of alleged deficiency income tax — far beyond the 5 year period. This notwithstanding, plaintiff-appellant argues that during the pendency of the criminal cases, it was prohibited from instituting the civil action for the collection of the deficiency taxes. This contention is untenable. The present complaint against the defendant-appellee is not for the recovery of civil liability arising from the offense of falsification; it is for the collection of deficiency income tax. The provisions of Section 1, Rule 107 (supra) that "after a criminal action has been commenced, no civil action arising from the same offense can be prosecuted", is not applicable. The said criminal cases would not affect, one way or another, the running of the prescriptive period for the commencement of the civil suit. There is nothing in the law which would have stopped the plaintiff-appellant from filing this civil suit simultaneously with or during the pendency of the criminal cases. Assuming the applicability of the rule, at most, the prosecution of the civil action would be suspended but not its filing within the prescribed period. Section 332 of the Tax Code provides "the running of the statutory limitation x x x shall be suspended for the period during which the Collector of Internal Revenue **is prohibited** from making the assessment, or beginning distraint or levy or a proceeding in court, and for sixty days thereafter". As heretofore stated, the plaintiff-appellant was not prohibited by any order of the court or by any law from commencing or filing a proceeding in court. It is also averred that the period of prescription for the collection of tax was suspended because of the written extrajudicial demand made by the Collector against the defendant-appellee, citing Art. 1155 N.C.C. Again, in the Solana case, (supra), We held that the only agreement that could have suspended the running of the prescriptive period was a **written** agreement between Solano and the Collector, entered before the expiration of the five (5) year prescriptive period, extending the period of limitation prescribed by law (sec. 332 [c] N.I.R.C.) which "Rule is in accord with the general law on prescription that requires a written acknowledgment of the debtor to renew the cause of action or interrupt the running of the limitation period (Act. 190, sec. 50; new Civil Code, Art. 1155". In the instant case, there is no such written agreement, and there was nothing to agree about. The letter of demand by the Collector on January 15, 1951, was made **prior** to the issuance of the assessment notice to the defendant-appellee, made on January 20, 1951, from which date, the 5 year period was to be counted. The letter of demand could not suspend something that started to run only on January 20, 1951.

The very provisions of sections 331, 332 and 338 of the N.I.R.C. specially the last, heretofore quoted, support the theory of prescriptibility of a judicial action to collect income tax. To hold otherwise, would render said provisions idle and useless. It is true that in earlier decisions, there was a declaration to the effect that the action to collect income tax is imprescriptible (Viña v. Government, 65 Phil. 262; Phil. Sugar Dev. v. Posadas, 68 Phil. 216). More recent decisions, however, recognized the prescriptibility of such actions. Thus, it has been held: —

> "The 'judicial action' mentioned in the Tax Code may be resorted to within five (5) years from the date the return has been filed, if there has been no assessment, or within five (5) years from the date of the assessment made within the statutory period, or within the period agreed upon, in writing, by the Collector of Internal Revenue and the taxpayer, before the expiration of said five-year period, or within such extension of said stipulated period, as may have been agreed upon, in writing, made before the expiration of the period previously stipulated, except that in the case of a false or fraudulent return with intent to evade tax or for failure to file a return the judicial action may be begun at any time within ten (10) years after the discovery of the falsity, fraud or omission (Sections 331 and 332 of the Tax Code)". (Gancayco v. Coll. of Int. Rev. G.R. No. L-13323, April, 20 1961).

In view of the conclusions reached, it is deemed unnecessary to pass upon the other issues raised.

The decision appealed from is affirmed, without special pronouncement as to costs.

Bengzon, C.J., Bautista Angelo, Labrador, Concepcion, J.B.L. Reyes, Barrera, Dizon and De Leon, concurred.

Padilla, J., took no part.

II

Dasalla, et al., Petitioners-Appellants vs. City Attorney of Quezon City and Koh, Respondents-Appellees, G. R. No. L-17338, May 30, 1962, Padilla, J.

1. CRIMINAL PROCEDURE; PREJUDICIAL QUESTION; CRIMINAL PROCEEDINGS CANNOT BE SUSPENDED DURING PERIOD OF PRELIMINARY INVESTIGATION ON GROUND OF PREJUDICIAL QUESTION: CASE AT BAR. — In an amended complaint dated June 9, 1959, filed in the Court of First Instance of Rizal, Quezon City branch, the petitioners alleged that on September 28, 1956 they were induced to sign an instrument mortgaging their two parcels of land situated in Quezon City; that under the terms and conditions thereof the Philippine Bank of Commerce was to grant them a loan of ₱8,500, and, for and in consideration of ₱850, the Republic Surety & Insurance Co., Inc. was to guarantee the payment of the loan; that in default of such payment, the surety company bound itself to pay it and was granted the right to foreclose the mortgage on the two parcels of land; that on April 9, 1959 they found out that the Philippine Bank of Commerce had not granted any loan to them and the Republic Surety & Insurance Co., Inc. had not assumed any guaranty obligation; and that on May 9, 1959, the defendants twice attempted to enter forcibly upon their property but failed because of police intervention; and prayed that a writ of preliminary injunction issue to restrain the defendants from entering upon their property; that the instrument purporting to constitute a mortgage on their two parcels of land be declared null and void; that transfer certificates of title Nos. 23595 and 23596 in the name of the Republic Surety & Insurance Co., Inc., issued in lieu of their certificates of title, be cancelled; that the extra-judicial foreclosure of the mortgage by the surety company also be declared null and void; that the defendants Francisco Koh and the Republic Surety & Insurance Co., Inc. be ordered to pay them the sum of ₱10,000 as moral damages and also the costs and for just and equitable relief (Annex B, Civil Case No. Q—4328).

On May 15, 1959, the respondent Francisco T. Koh, as president of the Republic Surety & Insurance Co., Inc., filed against the petitioners three complaints before the City Attorney of Quezon City for usurpation (I.S. No. 1893, Annex A), grave coercion (I.S. No. 1894, Annex A-1) and estafa (I.S. No. 1895, Annex A-2. On August 18, 1959, the petitioners asked the Quezon City Attorney to suspend the preliminary investigation of the criminal complaints on the ground that there was a prejudicial question raised in a civil action that had been filed by them and was pending trial in the Court of First Instance of Rizal, Quezon City branch (Annex C). On September 1, 1959, the Quezon Assistant City Attorney set the resumption of the investigation for the 16th day of the same month and notified the parties thereof "in view of certain points which need clarification" and the petition to suspend the investigation would be acted upon after the parties against whom the complaints had been filed shall have been heard (Annex D). On September 14, 1959, the petitioners filed in the Court of Appeals a petition for a writ of prohibition against the respondents, the Quezon City Attorney and Francisco T. Koh, docketed as CA-G.R. No. 25313-R (Annex E). On October 26, 1959, the Court of Appeals denied the petition (Annex F). On November, 1959, the Quezon Assistant City Attorney set anew the resumption of the preliminary investigation of the criminal complaints for November 27, 1957 at 3:00 p.m. To prevent him from proceeding with the preliminary investigation, on November 16, 1959 in the Court of First Instance of Rizal, Quezon City branch, the petitioners commenced a special civil action for prohibition against the City Attorney of Quezon City and Francisco T. Koh (No. 4800). On January 13, 1960, the Quezon Assistant City Attorney filed an answer to the petition for prohibition, and on the same day respondent Francisco T. Koh, a motion to dismiss. On January 19, 1960, the petitioners objected to the motion to dismiss. On May 20, 1960, the lower court dismissed the petition for lack of merit and from that order the petitioners have appealed. **Held:** Granting that the prejudicial question raised by the appellants be legally correct still the time or moment to ask for the suspension of the criminal proceedings is not during the period of preliminary investigation by the city prosecuting officer but after such investigation and after he shall have filed the information against the respondents-appellants.

2. ID.; ID.; ID.; REASON OF NOT SUSPENDING PRELIMINARY INVESTIGATION ON GROUND OF PREJUDICIAL QUESTION.—If the prosecuting officer should find that the mortgage on the parcels of land in question was not really executed, or, if executed, it was through deceit and misrepresentation, he certainly would not file the information.

D E C I S I O N

Appeal from an order entered on 20 May 1960 by the Court of First Instance of Rizal, Quezon City branch, dismissing for lack of merit a petition which sought to prohibit the City Attorney of Quezon City or his assistants from proceeding with the preliminary investigation of three criminal complaints for usurpation, grave coercion and estafa filed against the petitioners.

In an amended complaint dated 9 June 1959 filed in the Court of First Instance of Rizal, Quezon City branch, the petitioners alleged that on 28 September 1956 they were induced to sign an instrument mortgaging their two parcels of land situated in Quezon City; that under the terms and conditions thereof the Philippine Bank of Commerce was to grant them a loan of ₱8,500, and, for and in consideration of ₱850, the Republic Surety & Insurance Co., Inc. was to guarantee the payment of the loan; that in default of such payment, the surety company bound itself to pay it and was granted the right to fore-

close the mortgage on the two parcels of land; that on April 9, 1959 they found out that the Philippine Bank of Commerce had not granted any loan to them and that Republic Surety & Insurance Co., Inc. had not assumed any obligation; and that on 9 May 1959 the defendants twice attempted to enter forcibly upon their property but failed because of police intervention, and prayed that a writ of preliminary injunction issue to restrain the defendants from entering upon their property; that the instrument purporting to constitute a mortgage on their two parcels of land be declared null and void; that transfer certificates of titles Nos. 23595 and 23596 in the name of the Republic Surety & Insurance Co., Inc., issued in lieu of their certificates of title, be cancelled; that the extra-judicial foreclosure of the mortgage by the surety company also be declared null and void; that the defendants Francisco T. Koh and the Republic Surety & Insurance Co., Inc. be ordered to pay them the sum of ₱10,000 as moral damages and also the costs, and for just and equitable relief (Annex B, civil case No. Q-4328).

On 15 May 1959 the respondent Francisco T. Koh, as president of the Republic Surety & Insurance Co., Inc., filed against the petitioners three complaints for usurpation (I.S. No. 1893, Annex A), grave coercion (I.S. No. 1894, Annex A-1) and estafa (I.S. No. No. 1895, Annex, A-2). On 18 August 1959 the petitioner asked the Quezon City Attorney to suspend the preliminary investigation of the criminal complaints on the ground that there was a prejudicial question raised in a civil action that had been filed by them and was pending trial in the Court of First Instance of Rizal, Quezon City branch (Annex C). On 1 September 1959 the Quezon Assistant City Attorney set the resumption of the investigation for the 16th day of the same month and notified parties thereof "in view of certain points which need clarification" and the petition to suspend the investigation would be acted upon after the parties against whom the complaints had been filed shall have been heard (Annex D). On 14 September 1959 the petitioners filed in the Court of Appeals a petition for a writ of prohibition against the respondents, the Quezon City Attorney and Francisco T. Koh, docketed as CA-G.R. No. 2513-R (Annex E). On 26 October 1959 the Court of Appeals denied the petition (Annex F). On 4 November 1959 the Quezon Assistant City Attorney set anew the resumption of the preliminary investigation of the criminal complaints for 27 November 1959 at 2:00 p.m. To prevent him from proceeding with the preliminary investigation, on 16 November 1959 in the Court of First Instance of Rizal, Quezon City branch the petitioners commenced this special civil action for prohibition against the same parties (No. 4800). On 13 January 1960 the Quezon Assistant City Attorney filed an answer to the petition for prohibition; and on the same day respondent Francisco T. Koh, a motion to dismiss. On 19 January 1960 the petitioners objected to the motion to dismiss. As already stated, on 20 May 1960 the Court dismissed the petition for lack of merit and from that order the petitioners have appealed.

The petitioners insist that there is a prejudicial question brought about by the institution of the civil case that puts in issue the validity of the mortgage and foreclosure of the two parcels of land that precisely are involved in or connected with the criminal complaints for usurpation, grave coercion and estafa filed against them. They contend that the investigation by the Quezon Assistant City Attorney should be stopped or suspended until after the prejudicial question shall have been determined or decided in the aforementioned civil case, for, they argue, if the mortgage on the two parcels of land referred to and their extra-judicial foreclosure be annulled, the criminal complaint for usurpation, grave coercion and estafa, all in connection with the mortgage of the aforesaid two parcels of land, their extra-judicial foreclosure and the attempts by the complainants to take possession of the parcels of land, would no longer have any ground on which to stand.

Instead of filing a brief, respondent-appellee Francisco T. Koh, moved for the dismissal of the appeal on the ground that there is no specific assignment of errors in the petitioners-appellants' brief and that the appeal is frivolous.

Granting that the prejudicial question raised by the appellants be legally correct still the time or moment to ask for the suspension of the criminal proceedings is not during the period of preliminary investigation by the city prosecuting officer but after such investigation and after he shall have filed the informations against the appellants. Should the prosecuting officer find that the mortgage on the parcels of land was not really executed, or, if executed, it was through deceit and misrepresentation, the certainly would not file the informations.

Tho order appealed from is affirmed, without pronouncement as to costs in both instances.

Bautista Angelo, Concepcion, Barrera and Dizon, JJ., concurred.

Labrador, J., took no part.

J.B.L. Reyes, J., concurred in the result.

III

Manuel F. Cabal, Petitioner, vs. Hon. Ruperto Kapunan, Jr. et al. Respondents, G.R. No. L-19052, Dec. 29, 1962, Concepcion, J.

1. ANTI-GRAFT LAW; FORFEITURE OF PROPERTY TO THE STATE IS PENAL IN NATURE. — Where the purpose of the charge against a public officer or employee is to apply the provisions of Republic Act No. 1379, as amended, otherwise known as the Anti-Graft Law, which authorizes the forfeiture to the State of property of a public officer or employee which is manifestly out of proportion to his salary as such public officer or employee and his other lawful income and the income from legitimately acquired property, such forfeiture has been held to partake of the nature of a penalty.
2. ID.; CONSTITUTIONAL LAW; PROCEEDINGS FOR FORFEITURE OF PROPERTY ARE DEEMED CRIMINAL OR PENAL; EXEMPTION OF DEFENDANTS IN CRIMINAL CASE TO BE WITNESSES AGAINST THEMSELVES ARE APPLICABLE THERETO. — Proceedings for forfeiture of property are deemed criminal or penal, and hence, the exemption of defendants in criminal case from the obligation to be witnesses against themselves are applicable thereto. In Boyd vs. U.S. (116, 29 L. ed. 746), it was that the information, in a proceeding to declare a forfeiture of certain property because of the evasion of a certain revenue law, "though **technically a civil proceeding, is in substance and effect a criminal** one", and that suits for penalties and forfeitures are within the reason of criminal proceedings for the purposes of that portion of the Fifth Amendment of the Constitution of the U.S. which declares that no person shall be compelled in a criminal case to be a witness against himself.
3. ID.; ID.; ID.; RIGHT AGAINST SELF-INCRIMINATION; APPLICABLE TO CASES TO TRY AND PUNISH PERSONS CHARGED WITH COMMISSION OF PUBLIC OFFENSES.— A proceeding for the removal of an officer was held, in Thurston vs. Clerk (107 Cal. 265, 40 p. 435, 437), to be **in substance criminal**, for said portion of the Fifth Amendment providing the right against self-incrimination applies "to all cases in which the action prosecuted is not to establish, recover or redress **private** and civil rights, but to try and punish persons charged with the commission of public offenses" and "a criminal case is an action, suit or cause instituted to punish an infraction of the criminal laws, and, with this object in view, **it matters not in what form a statute may clothe is; it is still** a criminal case x x x". This view was, in effect confirmed in Less vs. U.S. (37 L. Ed. 1150-1151). Hence the Lawyers Reports Annotated (Vol. 29, p. 8), after an extensive examination of pertinent cases, concludes that said constitutional provi-

sion applies whenever the proceeding is not "purely remedial", or intended "as a redress for a **private grievance**", but primarily to punish **"a violation of duty or a public wrong to deter others from offending in a like manner** x x x".

4. ID.; ID.; ID.; ID.; DOCTRINE IN ALMEDA VS. PEREZ INAPPLICABLE TO THE CASE AT BAR. — In the case of Almeda vs. Perez, G.R. No. L-18428, Aug. 30, 1962, it was held that after filing of an answer to a petition for forfeiture under Republic Act 1379, the petition may be amended for said proceeding for forfeiture is a civil proceeding. This doctrine refers, however, to the purely procedural aspect of said proceeding and has no bearing on the substantial rights of the respondents therein, particularly their constitutional right against self-incrimination.

D E C I S I O N

This is an original petition for certiorari and prohibition with preliminary injunction, to restrain the Hon. Ruperto Kapunan, Jr. as Judge of the Court of First Instance of Manila, from further proceeding in Criminal Case No. 60111 of said court and to set aside an order of said respondent, as well as the whole proceedings in said criminal case.

On or about August 2, 1961, Col. Jose C. Maristela of the Philippine Army filed with the Secretary of National Defense a letter-complaint charging petitioner Manuel F. Cabal, then Chief of Staff of the Armed Forces of the Philippines, with "graft, corrupt practices, unexplained wealth, conduct unbecoming an officer and gentleman, dictatorial tendencies giving false statements of his assets and liabilities in 1958 and other equally reprehensible acts". On September 6, 1961, the President of the Philippines created a committee of five (5) members, consisting of Former Justice Marcelino B. Montemayor, as Chairman, former Justices Buenaventura Ocampo and Sotero Cabahug, and Generals Basilio J. Valdez and Guillermo E. Francisco, to investigate the charge of unexplained wealth contained in said letter-complaint and submit its report and recommendations as soon as possible. At the beginning of the investigation, on September 15, 1961, the Committee, upon request of the complainant, Col. Maristela, ordered petitioner herein to take the witness stand and be sworn to as witness for Maristela, in support of his aforementioned charge of unexplained wealth. Thereupon, petitioner objected, personally and through counsel to said request of Col. Maristela and to the aforementioned order of the Committee, invoking his constitutional right against self-incrimination. The Committee insisted that petitioner take the witness stand and be sworn to, subject to his right to refuse to answer such questions as may be incriminatory. This notwithstanding, petitioner respectfully refused to be sworn to as a witness or take the witness stand. Hence, in a communication dated September 18, 1961, the Committee referred the matter to respondent City Fiscal of Manila, for such action as he may deem proper. On September 28, 1961, the City Fiscal filed with the Court of First Instance of Manila a "charge" reading as follows:

> "The undersigned hereby charges Manuel F. Cabal with contempt under section 580 of the Revised Administrative Code in relation to section 1 and 7, Rule 64 of the Rules of Court, committed as follows:
>
> That on or about September 15, 1961, in the investigation conducted at the U.P. Little Theater, Padre Faura, Manila, by the Presidential Committee, which was created by the President of the Republic of the Philippines in accordance with law to investigate the charges of alleged acquisition by respondent of unexplained wealth and composed of Justice Marceliano Montemayor, as Chairman, and Justices Buenaventura Ocampo and Sotero Cabahug and Generals Basilio Valdez and Guillermo Francisco, as members, with the power, among others to compel the attendance of witnesses and take their testimony under oath respondent who was personally present at the time before the Committee in compliance with a subpoena duly issued to him, did then and there willfully, unlawfully, and contumaciously without any justifiable cause or reason, refuse and, fail and still refuses and fails to obey the lawful order of the Committee to take the witness stand be sworn and testify as witness in said investigation, in utter disregard of the lawful authority of the Committee and thereby obstructing and degrading the proceedings before said body.
>
> "WHEREFORE, it is respectfully prayed that respondent be summarily adjudged guilty of contempt of the Presidential Committee and accordingly disciplined as in contempt of court by imprisonment until such time as he shall obey the subject order of said Committee."

This charge docketed as Criminal Case No. 60111 of said court, was assigned to Branch XVIII thereof, presided over by respondent judge. On October 2, 1961, the latter issued an order requiring petitioner to show cause and/or answer the charge filed against him within ten (10) days. Soon thereafter on October 4, 1961, petitioner filed with respondent Judge a motion to quash the charge and/or order to show cause, upon the ground: (1) that the City Fiscal has neither authority nor personality to file said charge and the same is null and void for, if criminal, the charge has been filed without a preliminary investigation, and, if civil, the City Fiscal may not file it, his authority in respect of civil cases being limited to representing the City of Manila; (2) that the facts charged constitute no offense, for section 580 of the Revised Administrative Code, upon which the charge is based, violates due process in that it is vague and uncertain as regards the offense therein defined and the fine impossible therefore and that it fails to specify whether said offense shall be treated as contempt of an inferior court or of a superior court; (3) that more than one offense is charged for the contempt imputed to petitioner is sought to be punished as contempt of an inferior court, as contempt of a superior court and as contempt under section 7 of Rule 64 of the Rules of Court; (4) that the Committee had no power to order and require petitioner to take the witness stand and be sworn to upon the request of Col. Maristela, as witness for the latter, inasmuch as said order violates petitioner's constitutional right against self-incrimination.

By resolution dated October 14, 1961, respondent Judge denied said motion to quash. Thereupon, or on October 20, 1961, petitioner began the present action for the purpose adverted to above alleging that, unless restrained by this Court, respondent Judge may summarily punish him for contempt, and that such action would not be appealable.

In their answer, respondents herein allege, inter alia, that the investigation being conducted by the Committee above referred to is administrative, not criminal, in nature; that the legal provision relied upon by petitioner in relation to preliminary investigation (Section 38-C, Republic Act No. 409, as amended by Republic Act No. 1201) is inapplicable to contempt proceedings; that, under section 580 of the Revised Administrative Code, contempt against an administrative officer is to be dealt with as contempt of a superior court; that petitioner herein is charged with only one offense; and that, under the constitutional guarantee against self-incrimination, petitioner herein may refuse, not to take the witness stand, but to answer incriminatory questions.

At the outset, it is not disputed that the accused in a criminal case may refuse, not only to answer incriminatory questions, but, also, to take the witness stand (3 Wharton's Criminal Evidence, pp. 1955-1960; 98 C.J.S., p. 264). Hence, the issue before us boils down to whether or not the proceedings before the aforementioned Committee is civil or criminal in character.

In this connection, it should be noted that, although said

Committee was created to investigate the administrative charge of unexplained wealth, there seems to be no question that Col. Maristela does not seek the removal of petitioner herein as Chief of Staff of the Armed Forces of the Philippines. As a matter of fact he no longer holds such office. It seems, likewise, conceded that the purpose of the charge against petitioner is to apply the provisions of Republic Act No. 1379, as amended, otherwise known as the Anti-Graft Law, which authorizes the forfeiture to the State of property of a public officer or employee which is manifestly out of proportion to his salary as such public officer or employee and his other lawful income and the income from legitimately acquired property. Such forfeiture has been held, however, to partake of the nature of a penalty.

"In a strict signification, a forfeiture is a divestiture of property without compensation, in consequence of a default or an offense, and the term is used in such a sense in this article. A forfeiture, as thus defined, is imposed by way **of punishment**, not by the mere convention of the parties, but by the lawmaking power, to insure a prescribed course of conduct. It is a method deemed necessary by the legislature **to restrain the commission of an offense and to aid in the prevention of such an offense.** The effect of such a forfeiture is to transfer the title to the specific thing from the owner to the sovereign power (23 Am. Jur. 598) Bold types ours.)

"In Black's Law Dictionary a 'Forfeiture' is defined to be "the incurring of a liability to pay a definite sum of money as the consequence of violating the provisions of some statute or refusal to comply with some requirement of law.' It may be said to be **penalty** imposed for misconduct or breach of duty." (Com. vs. French, 114 S. W. 255.)

As a consequence, proceedings for forfeiture of property are deemed criminal or penal, and, hence the exemption of defendants in criminal case from the obligation to be witnesses against themselves are applicable thereto.

"Generally speaking, informations for the forfeiture of goods that seek no judgment of fine or imprisonment against any person are deemed to be civil proceedings **in rem. Such proceedings are criminal in nature to the extent that where the person using the res illegaly is the owner or rightful possessor of it, the forfeiture proceedings is in the nature of a punishment.** They have been held to be so far in the nature of **criminal** proceedings that a general verdict on several counts in an information is upheld if one count is good. **According to the authorities such proceedings, where the owner of the property appears, are so far considered as quasi criminal proceedings as to relieve the owner from being a witness against himself and to prevent the compusory production of his books and papers.** x x x (23 Am. Jur. 612; bold types ours.)

"Although the contrary view **formerly** obtained, the later decisions are to the effect that suits for forfeiture incurred by the commission of offenses against the law are so far of a quasi-criminal nature as to be **within the reason of criminal proceedings for all purposes of x x x that portion of the Fifth Amendment which decisions that no person shall be compelled in any criminal case to be a witagainst himself.** x x x It has frequently been held upon constitutional grounds under the various State Constitution that a witness ex party called as a witness cannot be made to testify against himself as to matters which would subject his property to forfeiture. At early common law **no person could be compelled to testify against himself** or to answer any question which would have had a purpose, as well as to incriminate him. Under this common-law doctrine of protection against compulsory disclosures which would tend to subject the witness to a forfeiture, such protection was claimed and availed of in a some early American cases without placing the basis of the protection upon constitutional grounds." (23 Am. Jur., 616; bold types ours.)

"Proceedings for forfeitures are generally considered to be civil and in the nature of proceedings **in rem.** The statute providing that no judgment or other proceedings in civil cases shall be arrested or reversed for any defect or want of form is applicable to them. **In some aspects, however suits for penalties and forfeitures are of quasi criminal nature and within the reason of criminal proceedings for all the purposes of x x x that portion of Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.** The proceedings is one against the owner, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture and his property is sought to be forfeited." (15 Am. Jur., Sec. 104, p. 368; bold types ours.)

"The rule protecting a person from being compelled to furnish evidence which would incriminate him exists **not only** when he is liable criminally to prosecution and punishment, **but also when his answer would tend to expose him to a x x x forfeiture. x x x."** (50 Am. Jur., Sec. 43, p. 48; bold types ours.)

"As already observed, the various constitutions provide that no person shall be compelled in any criminal case to be a witness against himself. This prohibition against compelling a person to take the stand as a witness against himself applies only to criminal, quasi-criminal, and penal proceedings, **including a proceeding civil in form for forfeiture of property by reason of the commission of an offense** but not a proceeding in which the penalty recoverable is civil or remedial in nature, x x x." (58 Am. Jur., Sec. 44, p. 49; bold types ours).

"The privilege of a witness not to incriminate himself is not infringed by merely asking the witness a question which he refuses to answer. The privilege is simply an option of refusal and not a prohibition of inquiry. A question is not improper merely because the answer may tend to criminate, but, where a witness exercises his constitutional right not to answer, a question by counsel as to whether the reason for refusing to answer is because the answer may tend to incriminate the witness is improper.

"The possibility that the examination of the witness will be pursued to the extent of requiring self-incrimination will not justify the refusal to answer questions, **However, where the position of the witness is virtually that of an appeal on trial, it would appear that he has invoked the privilege in support of a blanket refusal to answer any and all questions."** (98 C.J.S., p. 252; bold types ours.)

"A person may not be compelled to testify in an action against him for a penalty or to answer any question as a witness which would subject him to a penalty or forfeiture, where the penalty or forfeiture is imposed as a vindication of the public justice of the state.

"In general, both at common law and under a constitutional provision against compulsory self-incrimination, a person may not be compeled to answer any question as a witness which would subject him to a penalty or **forfeiture,** or **testify** in an action against him for a penalty.

"The privilege applies where the penalty or forfeiture is recoverable, or is imposed in vindication of the public justice of the state, as a statutory fine or penalty, or a fine or penalty for violation of a municipal ordinance, even though the action or proceeding for its enforcement is not brought in a criminal court but is prosecuted through the modes of procedure applicable to an ordinary civil remedy." (98 C.J.S., pp. 276-6)

Thus, in Boyd vs. U.S. (116, 29 L. ed. 746), it was that the information, in a proceeding to declare a forfeiture of certain property because of the evasion of a certain revenue law, "though

technically a civil proceeding, is in substance and effect a criminal one", and that suits for penalties and forfeitures are within the reason of criminal proceedings for the purposes of that portion of the Fifth Amendment of the Constitution of the U.S. which declares that no person shall be compelled in a criminal case to be a witness against himself. Similarly, a proceeding for the removal of an officer was held, in Thurston vs. Clerk (107 Cal. 285, 40 P. 435, 437), to be **in substance criminal** for said portion of the Fifth Amendment applies "to all cases in which the action prosecuted is not to establish, recover or redress **private** and civil rights, but to try and punish persons charged with the commission of public offenses" and a criminal case is an action, suit or cause instituted to punish an infraction of the criminal laws, and, with this object in view, **it matters not in what form a statute may clothe is**; it is still a criminal case x x x". This view was in effect confirmed in Less vs. U.S. (37 L. Ed. 1150-1151), Hence, the Lawyers Reports Annotated (Vol. 29, p.8) after an extensive examination of pertitinent cases, concludes that **said constitutional provision applies whenever the proceeding is not "purely remedial"**, or intended "as a redress for a **private** grievance", but primarily to punish **"a violation of duty or a public wrong and to deter others from offending in a like manner** x x x".

We are not unmindful of the doctrine laid down in Almeda vs. Perez, L-18428 (August 30, 1962) in which the theory that, after the filing of respondents' answer to a petition for forfeiture under Republic Act No. 1379, said petition may not be amended as to substance pursuant to our rules of criminal procedure, was rejected by this Court upon the ground that said forfeiture proceeding is civil in nature. This doctrine refers, however, to the purely procedural aspect of said proceeding, and has no bearing on the substantial rights of the respondents therein, particularly their constitutional right against self-incrimination.

WHEREFORE, the writ prayed for is granted and respondent Judge hereby enjoined permanently from proceeding further in Criminal Case No. 60111 of the Court of First Instance of Manila.

IT IS SO ORDERED.

Padilla, Bautista Angelo, Labrador, J.B.L. Reyes, Barrera, Paredes, Dizon, Regala and Makalintal, JJ., concurred.

Bengzon, C.J., is on leave.

IV

People of the Philippines, Plaintiff-Appellant, vs. Ching Lak alias Ang You Chu, Defendant-Appellee, G.R. No. L-10609, May 23, 1958, Endencia, J.

1. CRIMINAL ACTION FOR VIOLATION OF INTERNAL REVENUE LAWS; PRESCRIPTION; LAW APPLICABLE. — Acts 3326 and 3585 were not repealed by Act 3815 otherwise known as the Revised Penal Code. It follows that Article 90 of the Revised Penal Code would not apply to prescription of violations of special laws or part of laws administered by the Bureau of Internal Revenue for Article 10 of said law provides that offenses which are or in the future may be punishable under special laws are not subject to the provisions of the Revised Penal Code.
2. ID.; ID.; PERIOD. — In accordance with Sec. 1 of Act 3585 which amended Act 3326, all offenses against any law or part of law administered by the Collector of Internal Revenue shall prescribe after five years.
3. ID.; ID.; CASE AT BAR.—Anent the theory that in the present case the period of prescription should commence from the time the case was referred to the Fiscal's Office, suffice it to state that such theory is not supported by any provision of law.
4. ID.; ID.; RECONSIDERATION, PETITION FOR. — A petition for reconsideration of assessment may affect the suspension of the prescriptive period for the collection of taxes, but not the prescriptive period of a criminal action for violation of law.
5. ID.; NATURE OF. — Clearly, under Section 5 of Republic Act No. 55, the moment a person fails to pay his war profits taxes within the period specified therein, he should be considered as having violated the law and no other action would be necessary for his prosecution. The offense is not a continuing one.

DECISION

On March 31, 1954, the defendant-appellee was charged with having violated Section 5(b) in connection with Section 8 of Republic Act No. 55 in an information which reads as follows:

> "That on or about the 17th day of February, 1948, in the City of Manila; Philippines, the said accused did then and there willfully and unlawfully fail and refuse to pay, and continue to do so, the war profits taxes due from him in favor of the Republic of the Philippines in the total amount of ₱33,643.65, Philippine currency."

After his arrest, he was arraigned, duly assisted by his attorney, and entered the plea of not guilty. Thereafter he filed a motion to quash the information on the ground that the criminal action or liability charged therein had been extinguished by prescription, and the court, after proper hearing, sustained the motion.

The provisions of Sections 5(b) and 8 of Republic Act No. 55, are as follows:

> "SEC. 5(b) Time of Payment. — The total amount of the tax imposed by this Act shall be paid on or before the last day of the sixth month following the approval hereof. The deficiency tax due on the amended return required to be filed under section 4(b) of this Act on account of the receipt of payment for war damage or other claims shall be paid within thirty days from the receipts of the assessment of the Collector of Internal Revenue. To any sum or sums due and unpaid after the date prescribed for the payment of the same there shall be added the surcharge of fifteen **per centum** on the amount of the tax unpaid and interest at the rate of one **per centum** per month upon said tax from the time the same becomes due."
>
> SEC. 8. Penalty. — Any individual or responsible officer of a partnership, company or corporation violating any provision of this Act or of the regulations promulgated hereunder, or any person conniving with such individual or responsible officer for the purpose of evading the tax herein imposed, shall, upon conviction, be punished by imprisonment from five years to twenty years or a fine of not less than five thousand pesos but not more than thirty thousand pesos, or both, in the discretion of the court."

Evidently, in the information quoted above, the accused herein was charged with an offense against a law administered by the Collector of Internal Revenue, for it clearly appears from the provisions of Republic Act, No. 55 especially from Sec. 9 thereof, that the execution of all its provisions was entrusted to the Collector of Internal Revenue; and in accordance with Sec. 1 of Act 3585 which amended Act 3326, all offenses against any law or part of law administered by the Collector of Internal Revenue shall prescribe after five years.

Act 3326, enacted on December 4, 1926, is "An Act to establish periods of prescription for violations penalized by special acts and municipal ordinances and to provide when prescription shall begin to run." It reads as follows:

> "SECTION 1. Violations penalized by special acts, unless otherwise provided in such acts, prescribe in accordance with the following rules: (a) after a year for offenses punished only by a fine or by imprisonment for not more than one month, or both; (b) after four years for those punished by imprisonment for more than one month, but

less than two years; (c) after eight years for those punished by imprisonment for two years or more, but less than six years; and (d) after twelve years for any other offense punished by imprisonment for six years or more, except the crime of treason, which shall prescribe after twenty years. Violations penalized by municipal ordinances shall prescribe after two months.

SEC. 2. Prescription shall begin to run from the day of the commission of the violation of the law, and if the the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.

"The prescription shall be interrupted when proceedings are instituted against the guilty person and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.

"SEC. 3. For the purposes of this Act, special acts shall be acts defining and penalizing violations of the law not included in the Penal Code.

"SEC. 4. This Act shall take effect on its approval."

Act No. 3326 was amended by Act No. 3585 which reads as follows:

"SECTION 1. Violations penalized by special acts shall, unless otherwise provided in such acts, prescribed in accordance with the following rules: (a) after a year for offenses punished only by a fine or by imprisonment for not more than one month, or both; (b) after four years for those punished by imprisonment for more than one month, but less than two years; (c) after eight years for those punished by imprisonment for two years or more; but less than six years; and (d) after twelve years for any other offense punished by imprisonment for six years or more, except the crime of treason, which shall prescribed after twenty years; Provided, however, That all offenses against any law or part of law administered by the Bureau of Internal Revenue shall prescribed after five years. Violations penalized by municipal ordinances shall prescribe after two months."

Acts 3326 and 3585 were not repealed by Act 3815 otherwise known as the Revised Penal Code; their provisions remained intact and in full force. It follows that Article 90 of the Revised Penal Code providing for the prescription of crimes would not apply to prescription of violations of special laws or part of laws administered by the Bureau of Internal Revenue, for Article 10 of said law (Act 3815) clearly provides as follows:

"Offenses not subject to the provisions of this Code. — Offenses which are or in the future may be punishable under special laws are not subject to the provisions of this Code. This Code shall be supplementary to such laws, unless the latter should specially provide the contrary."

In view of the foregoing provisions, defendant herein filed his motion to quash on the ground that since February 7, 1948 up to the filing of the information on March 31, 1954, more than five years have elapsed, contending that if he had ever violated Republic Act. No. 65, that violation must have taken place either on February 7, 1948, as alleged in the information, or on April 30, 1947, which was the last day of the sixth month following the approval of said Act within which the tax in question should haev been paid, otherwise the defendant would incur the penalty prescribed by Section 8 of said Act. This contention was upheld by the lower court, presided by Hon. Antonio G. Lucero, in the decision appealed from, as follows:

"From the certified copies of the documents presented by the defense, it appears that on May 22, 1947, Collector Bibiano L. Meer, of the Bureau of Internal Revenue, sent to the accused an assessment for war profits tax amounting to P219,842.00 and required him to pay in on or before June 15, 1947. On June 4, 1947. Atty. Modesto Formilleza, as counsel for said accused, contested the assessment in a letter he sent to the Collector of Internal Revenue in which he expressed his reasons why his client could not see his way to paying said assessment. In a well-reasoned motion to quash, Atty. Cesar Miraflor argued that from whatever angle the case is viewed, it is apparent that the criminal action or lability on the part of the accused, if any, has already been extinguished. Before connecting premise and conclusion, it is essential to discuss the law applicable. Defense counsel contended that the prescriptive period applicable in this case is that found in Act 3585, approved by the Philippine Legislature on November 27, 1929, which provides in its pertinent portion that all offenses against any law or part of law administered by the Bureau of Internal Revenue shall prescribed after five years. It is worthy to note in this connection that Act 3585 establishes period of prescription for violations penalized by Special Acts, as its caption so states, and there can be no question that Republic Act No. 55 is a special Act. There can be also no question that Republic Act No. 55 is being administered by the Bureau of Internal Revenue, as shown not only by the notice of assessment sent to the accused on May 22, 1947, but also by the provisions of Section 9 of said Rep. Act No. 55 which states that "all administrative, special and general provisions of law, including the laws in relation to the assessment, remission, collection and refund of National Internal Revenue taxes, are hereby extended and made applicable to all the provisions of this law (Rep. Act No. 55) and to the tax herein imposed." This provision is quite clear as to require interpretation. On the other hand, Asst. Fiscal Reyes argued that the provisions of the Revised Penal Code on prescription should govern this case. However, whatever strength this argument might carry is totally destroyed by Article 10 of the Revised Penal Code which provides that offenses which are, or in the future may be punishable under special laws are not subject to the provision of this Code. It is, therefore clear that the provisions of the Revised Penal Code do not govern offenses punishable under special laws. Besides, Article 367 of the Revised Penal Code, which enumerates the special acts repealed by said code, does not mention Act 3585, and so the prescriptive periods of Act 3585 still stand. As a desperate move to be able to wiggle out of the legal predicament, the presecution contended that the crime charged in the information is continuing offense but, as the defense counsel has correctly stated, for a continuing crime to exist, there should be plurality of acts performed, and on this criterion, it is evident that this argument is without foundation. Even if this Court should hold that the prescriptive period provided for in Section 354 of the National Internal Revenue Code could be applied on the case, the period prescribed thereunder is five years, which is the same period prescribed in Act 3585. Whether this Court takes as basis, for prescription May 22. 1947, which is the date when Collector Meer sent the assessment to the herein accused, or June 4, 1947, the date when the accused wrote the letter to the Collector of Internal Revenue wherein he stated his reasons for refusing to pay the assessment, or February 17, 1948, the date alleged in the information as the time when the accused refused unlawfully to pay his war profit tax, the conclusion will not alter, namely, that the five-year period from the date of the discovery of the offense has already prescribed when the information was filed on March 31, 1954. This conclusion would not also alter whether this Court applies Act 3585 or the National Internal Revenue Code."

The Solicitor General claims that the lower court erred (1) in holding that the criminal liability of the defendant had been extinguished by prescription; (2) that denying appellee's motion for reconsideration dated January 25, 1956; and (3) in dismiss-

ing the criminal case against the defendant. Mainly, the contention of the Solicitor General is to the effect (a) that the laws of presciption applicable to the present case are Articles 90 of the Revised Penal Code; (b) that the violation of law is a continuing offense and, therefore, does not prescribe notwithstanding the lapse of five years from February 17, 1948 up to the filing of the information; and (3) that the period of prescription in the case at bar should commence from the time the tax violation was referred to the fiscal's office for investigation, claiming that "Under Section 2, Act No. 3326, when the date of the violation needs to be discovered, as in the case here, the prescription begins 'from the discovery thereof and the institution of judicial proceedings for its investigation and punishment."

Upon careful perusal of these contentions, we find them completely untenable, under the facts of the case because it cannot be disputed that Articles 90 and 91 of the Revised Penal Code do not govern offenses punishable under special laws that Republic Act No. 55 is a special law and therefore, the prescriptive law applicable to the instant case should be Act 3326 as amended by Act 3585, it being a well-known principle in statutory construction that in case of conflict between a special law and general law, the former should govern.

As to appellant's contention that the offense charged in the information is a continuing one, we cannot subscribe to that theory for the simple reason that, under the provisions of Republic Act No. 55, upon failure of the herein defendant-appellee to pay the taxes in question on February 17, 1948, or on April 30, 1947, there has been a complete violation of law for which he should have been immediately prosecuted. Clearly, under Section 5, paragraph (b) of Republic Act No. 55, the moment a person fails to pay his war profits taxes within the period specified therin, he should be considered as having violated the law and no other action would be necessary for his prosecution.

Anent the theory that in the present case the period of prescription should commence from the time the case was referred to the Fiscal's Office, suffice, it to state that such theory is not supported by any provision of law and we need not elucidate thereon. Moreover, the record of the case shows that on May 22, 1947, Collector Bibiano L. Meer of the Bureau of Internal Revenue assessed the war profits tax in question against the accused and fixed June 15, 1947 as the date of its payment without the herein accused paying it, and, according to the information, the accused, on February 17, 1948, willfully and unlawfully failed to pay said tax. Therefore, the violation of law in question was known to the presecution, it was not concealed, and consequently it cannot now be pretended that same has not yet prescribed because it was not discovered until the papers of the case were sent to the Fiscal's Office of the City of Manila. Certainly appellant had knowledge of the illegal acts of the accused even before February 17, 1948, and that knowledge precludes the appellant from evading the operation of the Statute of Limitations.

The Solicitor General contends, however, that at the behest of appellee, the Internal Revenue examiners asigned to the case submitted an amended assessment of February 25, 1950 and, therefore, the prescriptive period for violation of the war profits tax law should be considered as having been suspended up to the aforementioned date, because up to that time it was legally impossible for appellant to charge appellee criminally in view of the fact that the war profits tax was as yet undetermined and, in support of that contention, in the case of Lattimore vs. U.S., 12 F. Supp. 895, was invoked, wherein it was held:

> "It is important to recognize that the ordinary period of limitation may be extended or suspended not only by what has come to be recognized as a 'waiver' but also by the acts of the taxpayer involved. It is also been held, for example, that where the taxpayer has strenuously objected to collection of the tax and has urged the Commissioner to withhold collection pending the adjustment of the controversy between him and the Commissioner and where the Commissioner yielded to the request and postponed collection until after the statute had run on collection was not timely." (Mertens Law of Federal Income Taxation, Vol. 10, Sec. 57, 41 p. 195, 1953 ed.)

We have carefully examined this Lattimore case and we find it completely inapplicable to the case at bar, for it refers to civil action for collection of taxes and not to criminal prosecution for violation of law for non-payment of taxes. We hold that a petition for reconsideration of assessment may affect the suspension of the prescriptive period for the collection of taxes, but not the prescriptive period of a criminal action for violation of law.

Wherefore, finding no error in the order appealed from, the same is hereby affirmed.

Paras, C.J., Bengzon Montemayor, Reyes, Bautista Angelo, Labrador, Concepcion, J.B.L. Reyes and Felix, J.J., concurred.

V

People of the Philippines, Plaintiff-appellant, vs. Guillermo Manantan, Defendant-appellee, G.R. No. L-14129, July 31, 1962, Regala, J.

1. ELECTIONS; ELECTIONEERING; PERSON PROHIBITED FROM INFLUENCING ELECTIONS; JUSTICES OF THE PEACE INCLUDED IN SECTION 54, REVISED ELECTION CODE.—It is to be noted that under Section 449 of the Revised Administrative Code, the word "judge" was modified or qualified by the phrase "of First Instance," while under Section 54 of the Revised Election Code, no such modification exists. In other words, justices of the peace were expressly included in Section 449 of the Revised Administrative Code because the kinds of judges therein were specified, i.e., judge of the First Instance and justice of the peace. In Section 54, however, there was no necessity anymore to include justices of the peace in the enumeration because the legislature had availed itself of the more generic and broader term, "judge." It was a term not modified by any word or phrase and was intended to comprehend all kinds of judges, like judges of the courts of First Instance, judges of the courts of Agrarian Relations, judges of the courts of Industrial Relations and justices of the peace.
2. ID.; ID.; JUSTICE OF THE PEACE CONSTRUED AS A JUDGE.—It is a well known fact that a justice of the peace is sometimes addressed as "judge" in this jurisdiction. It is because a justice of the peace is indeed a judge.
3. PUBLIC OFFICER; JUDGE; DEFINED. — AS INCLUDING JUSTICE OF THE PEACE.—A "judge" is a public officer, who, by virtue of his office, is clothed with judicial authority (U.S. v. Clark 25 Fed. Cas. 441, 442). According to Bouvier Law Dictionary, "a judge is a public officer lawfully appointed to decide litigated questions according to law. In its most extensive sense the term includes all officers appointed to decide litigated questions while acting in that capacity, including justices of the peace, and even jurors, it is said, who are judges of facts."
4. ELECTION LAW OF THE PHILIPPINES; HISTORY.—The first election law in the Philippines was Act No. 1582 enacted by the Philippine Commission in 1907, and which was later amended by Act Nos. 1669, 1709, 1725 and 1768. (Of these 4 amendments, however, only Act No. 1709 has a relation to the discussion of the instant case as shall be shown later.) Act No. 1582, with its subsequent 4 amendments were later on incorporated in Chapter 18 of the Administrative Code. Under the Philippine Legislature, several amendments were made through the passage of Act Nos. 2310, 3336 and 3387. (Again, of these last 3 amendments only Act No. 3387 has pertinence to the case at bar shall be seen later.) During the time of the Commonwealth, the National Assembly passed

Commonwealth Act No. 233 and later on enacted Commonwealth Act No. 357, which was the law enforced until June 21, 1947, when the Revised Election Code (Republic Act 180) was approved. Included as its basic provisions are the provisions of Commonwealth Acts Nos. 233, 357, 605, 657. The present Code was further amended by Republic Acts Nos. 599, 867, 2242 and again, during the session of Congress in 1960, amended by Rep. Acts Nos. 3036 and 3038.

5. ID.; ID.; OMISSION OF "JUSTICE OF THE PEACE" IN SECTION 54 OF THE REVISED ELECTION CODE.—The first omission of the word "justice of the peace" in the election law was effected in Section 49 of Commonwealth Act No. 357 and not in the present Election Code. Note carefully, however, that in the two instances when the words "justice of the peace" were omitted in Com. Act No. 357 and Rep. Act No. 180, the word "judge" which preceded in the enumeration did not carry the qualification "of the First Instance." In other words, whenever the word "judge" was qualified by the phrase "of the First Instance," the words "justice of the peace" would follow; however, if the law simply said "judge," the words "justice of the peace" were omitted.

6. STATUTORY CONSTRUCTION; RULE OF "CASUS OMISUS PRO OMISSO HABENDUS EST."—Under the rule of "casus omisus pro omisso habendus est" that a person, object or thing omitted from an enumeration must be held to have been omitted intentionally.

7. ID.; ID.; APPLICATION OF MAXIM "CASUS OMISUS".—The maxim "casus omisus" can operate and apply only if and when the omission has been clearly established.

8. ID.; ID.; JUSTICES OF THE PEACE WERE CALLED JUDGES UNDER SECTION 54, REVISED ELECTION CODE.—Under Section 54 of the Revised Election Code, justices of the peace were called "judges."

9. ID.; ID.; APPLICATION OF THE RULE "CASUS OMISUS" NOT PROCEED FROM THE FACT THAT A CASE IS CRIMINAL IN NATURE.—The application of the rule of "casus omisus" does not proceed from the mere fact that a case is criminal in nature, but rather from a reasonable certainty that a particular person, object or thing has been omitted from a legislative enumeration. In the present case, there has been no such omission. There has only been a substitution of terms.

10. ID.; PENAL STATUTES; RULE THAT PENAL STATUTES BE STRICTLY CONSTRUED NOT ONLY THE FACTOR CONTROLLING THE INTERPRETATION OF SUCH LAWS.—The rule that penal statutes are given a strict construction is not the only factor controlling the interpretation of such laws; instead, the rule merely serves as an additional, single factor to be considered as an aid in determining the meaning of penal laws. This has been recognized time and again by decisions of various courts (3 Sutherland, Statutory Construction, p. 56.) Thus, cases will frequently be found enunciating the principle that the intent of the legislature will govern (U.S. vs. Corbet, 215, U.S. 233).

11. ID.; STRICT CONSTRUCTION NOT PERMITTED TO DEFEAT THE POLICY AND PURPOSE OF STATUTE.—A strict construction should not be permitted to defeat the policy and purposes of the statute (Ash Shrop Co. v. U.S. 252 U.S. 195).

12. ID.; SPIRIT AND REASON OF A STATUTE CONSIDERED IN INTERPRETATION THEREOF.—The court may consider the spirit and reason of a statute in the interpretation of a statute where a literal meaning would lead to absurdity, contradiction, injustice, or would defeat the clear purpose of the law makers (Crawford, Interpretation of Laws, Sec. 78, p. 294).

13. ID.; PENAL STATUTES; CONSTRUED TO HARMONIZE WITH THEIR INTENT AND PURPOSE.—The strict construction of a criminal statute does not mean such construction of it as to deprive it of the meaning intended. Penal statutes must be construed in the sense which best harmonizes with their intent and purpose. (U. S. v. Batteridge, 43 F. Supp. 53, 56, cited in 3 Sutherland Statutory Construction 56.)

14. ELECTIONS; ELECTIONEERING; JUDICIAL OFFICERS PROHIBITED FROM AIDING CANDIDATE IN ELECTION UNDER SECTION 54, REVISED ELECTION CODE.—Justices of the Supreme Court, the Court of Appeals, and various judges, such the judges of the Court of Industrial Relations, Judges of the Court of Agrarian Relations, etc., who were not included in the prohibition under the old statute, are now within the encompass of Section 54, Revised Election Code.

15. ID.; ID.; REASON WHY JUSTICES OF THE PEACE ARE PROHIBITED FROM ELECTIONEERING.—The weakest link in our judicial system is the justice of the peace court, and to so construe the law as to allow a judge thereof to engage in partisan political activities would weaken rather than strengthen the judiciary. On the other hand, there are cogent reasons found in the Revised Election Code itself why justices of the peace should be prohibited from electioneering. Along with Justices of the appellate courts and judges of the Courts of First Instance, they are given authority and jurisdiction over certain election cases (See Secs. 103, 117-123 Revised Election Code). Justices of the peace are authorized to hear and decide inclusion and exclusion cases and if they are permitted to campaign for candidates for an elective office the impartiality of their decisions in election cases would be open to serious doubt. We do not believe that the legislature had, in Section 54 of the Revised Election Code, intended to create such an unfortunate situation.

16. ID.; ID.; EXECUTIVE DEPARTMENT HAS REGARDED JUSTICES OF THE PEACE WITHIN PURVIEW OF SECTION 54, REVISED ELECTION CODE.—The administrative or executive department has regarded justices of the peace within the purview of Section 54 of the Revised Election Code.

17. STATUTES; PROPOSED AMENDMENT; UNTIL IT BECOMES A LAW, CANNOT BE CONSIDERED TO CONTAIN ANY LEGISLATIVE INTENT.—Proposed amendment, until it has become a law, cannot be considered to contain or manifest any legislative intent.

18. ID.; MOTIVES, OPINIONS, AND REASON EXPRESSED BY INDIVIDUAL LEGISLATIVE MEMBER CANNOT BE TAKEN IN ASCERTAINING MEANING OF STATUTE.—The motives, opinions, and the reason expressed by the individual members of the legislature, even in debates, cannot be properly taken into consideration in ascertaining the meaning of a statute (Crawford, Statutory Construction, Sec. 213, pp. 375-376).

19. ELECTION; ELECTIONEERING; LEGISLATURE CONSISTENTLY PROHIBITED JUSTICES OF THE PEACE FROM PARTICIPATING IN PARTISAN POLITICS.—Our law-making body has consistently prohibited justices of the peace from participating in partisan politics. They were prohibited under the old Election Law since 1907 (Act No. 1582 and Act No. 1709). Likewise, they were so enjoined by the Revised Administrative Code. Another law which expressed the prohibition to them was Act No. 3387, and later Com. Act No. 357.

20. ID.; ID.; STATUTORY CONSTRUCTION; SECTION 54, REVISED ELECTION CODE; RULE OF EXPRESIO UNIUS EST EXCLUSIO ALTERIUS; ERRONEOUSLY APPLIED BY THE TRIAL COURT AND COURT OF APPEALS.—If the legislature had intended to exclude a justice of the peace from the purview of Section 54, neither the trial court nor the Court of Appeals has given the reason for the exclusion. Indeed, there appears no reason for the alleged change. Hence, the rule of expresio unius est exclusio alterius has been erroneously applied.

21. STATUTORY CONSTRUCTION; RULE OF "EXPRESIO UNIUS EST EXCLUSIO ALTERIUS"; WHEN SHOULD NOT BE INVOKED.—Where a statute appears on its face to limit the operation of its provisions to particular persons or things by enumerating them, but no reason exists why other persons or things not so enumerated should not have been included, and manifest injustice will follow by not so including them, the maxim expresio unius est exclusio alterius, should not be invoked. (Blevins v. Mullally, 135 P. 307, 22 Cal. App. 619)

DECISION

This is an appeal of the Solicitor General from the order of the Court of First Instance of Pangasinan dismissing the information against the defendant.

The records show that the statement of the case and of the facts, as recited in the brief of plaintiff-appellant, is complete and accurate. The same is, consequently, here adopted, to wit:

> "In an information filed by the Provincial Fiscal of Pangasinan in the Court of First Instance of that Province, defendant Guillermo Manantan was charged with a violation of Section 54 of the Revised Election Code. A preliminary investigation conducted by said court resulted in the finding of a probable cause that the crime charged was committed by the defendant. Thereafter, the trial started upon defendant's plea of not guilty, the defense moved to dismiss the information on the ground that as justice of the peace, the defendant is not one of the officers enumerated in Section 54 of the Revised Election Code. The lower court denied the motion to dismiss, holding that a justice of the peace is within the purview of Section 54. A second motion was filed by defense counsel who cited in support thereof the decision of the Court of Appeals in People vs. Macaraeg, C.A-G.R. No. 15613-R, 54 Off. Gaz. pp. 1873-76) where it was held that a justice of the peace is excluded from the prohibition of Section 54 of the Revised Election Code. Acting on this second motion to dismiss, the answer of the prosecution, the reply of the defense, and the opposition of the prosecution, the lower court dismissed the information against the accused upon the authority of the ruling in the case cited by the defense."

Both parties are submitting this case upon the determination of this single question of law: Is a justice of the peace included in the prohibition of Section 54 of the Revised Election Code?

Section 54 of the said Code reads:

> "No justice, judge, fiscal, treasurer, or assessor of any province, no officer or employee of the Army, no member of the national, provincial, city, municipal or rural police force, and no classified civil service officer or employee shall aid any candidate, or exert any influence in any manner in any election or take part therein, except to vote, if entitled thereto, or to preserve public peace, if he is a peace officer."

Defendant-appellee argues that a justice of the peace is not comprehended among the officers enumerated in Section 54 of the Revised Election Code. He submits that the aforecited section was taken from Section 449 of the Revised Administrative Code, which provided the following:

> "Sec. 449.—PERSONS PROHIBITED FROM INFLUENCING ELECTIONS.—No judge of the First Instance, justice of the peace, or treasurer, fiscal or assessor of any province and no officer or employee of the Philippine Constabulary, or any Bureau or employee of the classified civil service, shall aid any candidate or exert influence in any manner in any election or take part therein otherwise than exercising the right to vote."

When, therefore, Section 54 of the Revised Election Code omitted the words "justice of the peace," the omission revealed the intention of the Legislature to exclude justices of the peace from its operation.

The above argument overlooks one fundamental fact. It is to be noted that under Section 449 of the Revised Administrative Code, the word "judge" was modified or qualified by the phrase "of First Instance," while under Section 54 of the Revised Election Code, no such modification exists. In other words, justices of the peace were expressly included in Section 449 of the Revised Administrative Code because the kinds of judges therein were specified, i.e., judge of the First Instance and justice of the peace. In Section 54, however, there was no necessity anymore to include justices of the peace in the enumration because the legislature had availed itself of the more generic and broader er term, "judge." It was a term not modified by any word or phrase and was intended to comprehend all kinds of judges. like judges of the of the courts of First Instance, judges of the courts of Agrarian Relations, judges of the courts of Industrial Relations, and justices of the peace.

It is a well known fact that a justice of the peace is sometime addressed as "judge" in this jurisdiction. It is because a justice of the peace is indeed a judge. A "judge" is a public officer, who, by virtue of his office, is clothed with judicial authority (U.S. v. Clark 25 Fed. Cas. 441, 442). According to Bouvier Law Dictionary, "a judge is a public officer lawfully appointed to decide litigated questions according to law. In its most extensive sense the term includes all officers appointed to decide litigated questions while acting in that capacity, **including justices of the peace**, and even jurors, it is said, who are judges of facts."

A review of the history of the Revised Election Code will help to justify and clarify the above conclusion.

The first election law in the Philippines was Act No. 1582 enacted by the Philippine Commission in 1907, and which was later amended by Act Nos. 1669, 1709, 1726 and 1768. (Of these 4 amendments, however, only Act No. 1709 has a relation to the discussion of the instant case as shall be shown later.) Act No. 1582, with its subsequent 4 amendments were later on incorporated in Chapter 18 of the Administrative Code. Under the Philippine Legislature, several amendments were made through the passage of Acts Nos. 2310, 3336 and 3387. (Again of these last 3 amendments, only Act No. 3387 has pertinence to the case at bar as shall be seen later.) During the time of the Commonwealth, the National Assembly passed Commonwealth Act No. 233 and later on enacted Commonwealth Act No. 357, which was the law enforced until June 21, 1947, when the Revised Election Code was approved. Included as its basic provisions are the provisions of Commonwealth Acts Nos. 233, 357, 605, 666, 657. The present Code was further amended by Republic Acts Nos. 599, 867, 2242 and again, during the session of Congress in 1960, amended by Rep. Acts Nos. 3036 and 3038. In the history of our election law, the following should be noted:

Under Act 1582, Section 29, it was provided:

> "No public officer shall offer himself as a candidate for elections, nor shall he be eligible during the time that he holds said public office to election at any municipal, provincial or Assembly election, except for reelection to the position which he may be holding, and no judge of the First Instance, **justice of the peace**, provincial fiscal, or officer or employee of the Philippine Constabulary or of the Bureau of Education shall aid any candidate or influence in any manner or take part in any municipal, provincial, or Assembly election under the penalty of being deprived of his office and being disqualified to hold any public office whatsoever for a term of 5 years: Provided, however, that the foregoing provisions shall not be construed to deprive any person otherwise qualified of the right to vote at any election. (Enacted January 9, 1907; Took effect on January 15, 1907.)

Then, in Act 1709, Sec. 6, it was likewise provided:

> "x x x No judge of the First Instance, justice of the

peace, provincial fiscal or officer or employee of the Bureau of Constabulary or of the Bureau of Education shall aid any candidate or influence in any manner or take part in any municipal, provincial or Assembly election. Any person violating the provisions of this section shall be deprived of his office or employment and shall be disqualified to hold any public office or employment whatever for a term of 5 years. Provided, however, that the foregoing provisions shall not be construed to deprive any person otherwise qualified or the right to vote at any election. (Enacted on August 31, 1907; Took effect on September 15, 1907.)

Again, when the existing election laws were incorporated in the Administrative Code on March 10, 1917, the provisions in question read:

"Sec. 449—PERSONS PROHIBITED FROM INFLUENCING ELECTIONS.—No judge of the First Instance, **justice of the peace**, or treasurer, fiscal or assessor of any province and no officer or employee of the Philippine Constabulary, or any Bureau or employee of the classified civil service, shall aid any candidate or exert influence in any manner in any election or take part therein otherwise than exercising the right to vote." (Bold types supplied.)

After the Administrative Code, the next pertinent legislation was Act No. 3387. This Act reads:

"Sec. 2635—OFFICERS AND EMPLOYEES MEDDLING WITH THE ELECTION.—Any judge of the First Instance, **justice of the peace**, treasurer, fiscal or assessor of any province, any officer or employee of the Philippine Constabulary or of the police of any municipality, or any officer or employee of any Bureau or the classified civil service, who aids any candidate or violated in any manner the provisions of this section or takes part in any election otherwise by exercising the right to vote, shall be punished by a fine of not less than P100.00 nor more than P2,000.00, or by imprisonment for not less than 2 months nor more than 2 years, and in all cases by disqualification from public office and deprivation of the right of suffrage for a period of 5 years." (Approved December 3, 1927.) (Bold types supplied.)

Subsequently, however, Commonwealth Act No. 357 was enacted on August 22, 1938. This law provided in Section 48:

"Sec. 2635—OFFICERS AND EMPLOYEES MEDDLING FICERS AND EMPLOYEES.—No justice, judge, fiscal, treasurer or assessor of any province, no officer or employee of the Army, the Constabulary of the National, provincial, municipal or rural police, and no classified civil service officer or employee shall aid any candidate, nor exert influence in any manner in any election nor take part therein, except to vote, if entitled thereto, or to preserve public peace, if he is a peace officer."

This last law was the legislation from which Section 54 of the Revised Election Code was taken.

It will thus be observed from the foregoing narration of the legislative development or history of Section 54 of the Revised Election Code that the first omission of the word "justice of the peace" was effected in Section 48 of Commonwealth Act No. 357 and not in the present Code as averred by defendant-appellee. Note carefully, however, that in the two instances when the words "justice of the peace" were omitted in Com. Act No. 357 and Rep. Act No. 180, the word "judge" which preceded in the enumeration did not carry the qualification "of the First Instance.' In other words, whenever the word "judge" was qualified by the phrase "of the First Instance," the words "justice of the peace" would follow; however, if the law simply said "judge," the words "justice of the peace" were omitted.

The above-mentioned pattern of congressional phraseology would seem to justify the conclusion that when the legislature omitted the words "justice of the peace" in Rep. Act No. 180, it did not intend to exempt the said officer from its operation. Rather, it had considered the said officer as already comprehended in the broader term "judge".

It is unfortunate and regrettable that the last World War had destroyed congressional records which might have offered some explanation of the discussion of Com. Act No. 357, which legislation, as indicated above, had eliminated for the first time the words "justice of the peace." Having been completely destroyed, all efforts to seek deeper and additional clarification from these records proved futile. Nevertheless, the conclusions drawn from the historical background of Rep. Act No. 180 is sufficiently borne out by reason and equity.

Defendant further argues that he cannot possibly be among the officers enumerated in Section 54 inasmuch as under that said section, the word "judge" is modified or qualified by the phrase "of any province." The last mentioned phrase, defendant submits, cannot then refer to a justice of the peace since the latter is not an officer of a province but of a municipality.

Defendant's argument in that respect is too strained. If it is true that the phrase "of any province" necessarily removes justices of the peace from the enumeration for the reason that they are municipal and not provincial officials, then the same thing may be said of the Justices of the Supreme Court and of the Court of Appeals. They are national officials. Yet, can there be any doubt that Justices of the Supreme Court and of the Court of Appeals are not included in the prohibition? The more sensible and logical interpretation of the said phrase is that it qualifies fiscals, treasurers and assessors who are generally known as provincial officers.

The rule of "casus omisus pro omisus habendus est" is likewise invoked by the defendant-appellee. Under the said rule, a person, object or thing omitted from an enumeration must be held to have been omitted intentionally. If that rule is applicable to the present, then indeed, justices of the peace must be held to have been intentionally and deliberately exempted from the operation of Section 54 of the Revised Election Code.

The rule has no applicability to the case at bar. The maxim "casus omisus" can operate and apply only if and when the omission has been clearly established. In the case under consideration, it has already been shown that the legislature did not exclude or omit justices of the peace from the enumeration of officers precluded from engaging in partisan political activities. Rather, they were merely called by another term. In the new law, or Section 54 of the Revised Election Code, justices of the peace were just called "judges."

In insisting on the application of the rule of "casus omisus" to this case, defendant-appellee cites authorities to the effect that the said rule, being restrictive in nature, has more particular application to statutes that should be strictly construed. It is pointed out that Section 54 must be strictly construed against the government since proceedings under it are criminal in nature and the jurisprudence is settled that penal statutes should be strictly interpreted against the state.

Amplifying on the above argument regarding strict interpretation of penal statutes, defendant asserts that the spirit of fair play and due process demand such strict construction in order to give "fair warning of what the law intends to do, if a certain line is passed, in language that the common world will understand." (Justice Holmes, in McBoyle v. U.S. 283 U.S. 25, L. Ed. 816).

The application of the rule of "casus omisus" does not proceed from the mere fact that a case is criminal in nature, but rather from a reasonable certainty that a particular person, object or thing has been omitted from a legislative enumeration. In the present case, and for reasons already mentioned, there has been no such omission. There has only been a substitution of terms.

The rule that penal statutes are given a strict construction is not the only factor controlling the interpretation of such laws; instead, the rule merely serves as an aid in determining

the meaning of penal laws. This has been recognized time and again by decisions of various courts. (3 Sutherland, Statutory Construction, p. 56) Thus, cases will frequently be found enunciating the principle that the intent of the legislature will govern (U.S. vs. Corbet, 215, U.S. 233). It is to be noted that a strict construction should not be permitted to defeat the policy and purposes of the statute (Ash Sheep Co. vs. U.S. 252, U.S. 159). The court may consider the spirit and reasons of a statute, as in this particular instance, where a literal meaning would lead to absurdity, contradiction, injustice, or would defeat the clear purpose of the law makers (Crawford, Interpretation of Laws, Sec. 78, p. 294). A Federal District court in the U.S. has well said:

> "The strict construction of a criminal statute does not mean such construction of it as to deprive it of the meaning intended. Penal statutes must be construed in the sense which best harmonizes with their intent and purpose." (U.S. v. Betteridge, 43 F. Supp. 53, 56, cited in 3 Sutherland Statutory Construction 56.)

As well stated by the Supreme Court of the United States, the language of criminal statutes, frequently, has been narrowed where the letter includes situations inconsistent with the legislative plan (U.S. v. Katz, 271 U.S. 354; See also Ernest Brunchen, Interpretation of the Written Law (1915) 25 Yale L. J. 129.)

Another reason in support of the conclusion reached herein is the fact that the purpose of the statute is to enlarge the officers within its purview. Justices of the Supreme Court, the Court of Appeals, and various judges, such as the judges of the Court of Industrial Relations, etc., who were not included in the prohibition under the old statute, are now within its encompass. If such were the evident purpose, can the Legislature intend to eliminate the justices of the peace within its orbit? Certainly not. This point is fully explained in the brief of the Solicitor General, to wit:

> "On the other hand, when the legislature eliminated the phrases "Judge of First Instance" and "justice of the peace", found in Section 449 of the Revised Administrative Code, and used "judge" in lieu thereof, the obvious intention was to include in the scope of the term not just one class of judge but all judges, whether of first Instance, justices of the peace or special courts, such as judges of the Court of Industrial Relations." x x x
>
> "The weakest link in our judicial system is the justice of the peace court, and to so construe the law as to allow a judge thereof to engage in partisan political activities would weaken rather than strengthen the judiciary. On the other hand, there are cogent reasons found in the Revised Election Code itself why justices of the peace should be prohibited from electioneering. Along with Justices of the appellate courts and judges of the Courts of First Instance, they are given authority and jurisdiction over certain election cases (See Secs. 103, 106, 117-123). Justices of the peace are authorized to hear and decide inclusion and exclusion cases, and if they are permitted to campaign for candidates for an elective office the impartiality of their decisions in election cases would be open to serious doubt. We do not believe that the legislature had, in Section 54 of the Revised Election Code, intended to create such an unfortunate situation." (pp. 7-8. Appellant's Brief.)

Another factor which fortifies the conclusion reached herein is the fact that even the administrative or executive department has regarded justices of the peace within the purview of Section 54 of the Revised Election Code.

In Tranquilino O. Calo, Jr. v. The Executive Secretary, the Secretary of Justice, etc. (G.R. No. L-2601), this Court did not give due course to the petition for certiorari and prohibition with preliminary injunction against the respondents, for not setting aside, among others, Administrative Order No. 237, dated March 31, 1957, of the President of the Philippines, dismissing the petitioner as justice of the peace of Agusan. It is worthy of note that one of the causes of the separation of the petitioner was the fact that he was found guilty in engaging in electioneering, contrary to the provisions of the Election Code.

Defendant-appellee calls the attention of this Court to House Bill No. 2676, which was filed on January 25, 1955. In that proposed legislation, under Section 56, justices of the peace are already expressly included among the officers enjoined from active political participation. The argument is that with the filing of the said House Bill, Congress impliedly acknowledged that existing laws do not prohibit justices of the peace from partisan political activities.

The argument is unacceptable. To begin with, House Bill No. 2676 was a proposed amendment to Republic Act No. 180 as a whole and not merely to section 54 of said Rep. Act No. 180. In other words, House Bill No. 2676 was a proposed recodification of the existing election laws at the time that it was filed. Besides, the proposed amendment, until it has become a law, cannot be considered to contain or manifest any legislative intent. If the motives, opinions, and the reasons expressed by the individual members of the legislature, even in debates, cannot be properly taken into consideration in ascertaining the meaning of a statute (Crawford, Statutory Construction, Sec. 213, pp. 376-376), **a fortiori** what weight can we give to a mere draft of a bill.

On law, reason and public policy, defendant-appellee's contention that justices of the peace are not covered by the injunction of Section 54 must be rejected. To accept it is to render ineffective a policy so clearly and emphatically laid down by the legislature.

Our law-making body has consistently prohibited justices of the peace from participating in partisan politics. They were prohibited under the old Election Law since 1907 (Act No. 1582 and Act No. 1709). Likewise, they were so enjoined by the Revised Administrative Code. Another law which expressed the prohibition to them was Act No. 3387, and later, Com. Act No. 357.

Lastly, it is observed that both the Court of Appeals and the trial court applied the rule of "expressio unius, est exclusio alterius" in arriving at the conclusion that justices of the peace are not covered by Section 54. Said the Court of Appeals: "Anyway, guided by the rule of exclusion, otherwise known as **expresio unius est exclusio alterius**, it would not be beyond reason to infer that there was an intention of omitting the term "justice of the peace from Section 54 of the Revised Election Code. x x x"

The rule has no application. If the legislature had intended to exclude a justice of the peace from the purview of Section 54, neither the trial court nor the Court of Appeals has given the reason for the exclusion. Indeed, there appears no reason for the alleged change. Hence, the rule of **expressio unius est exclusio alterius** has been erroneously applied. (Appellant's Brief, p. 6.)

> "Where a statute appears on its face to limit the operation of its provisions to particular persons or things by enumerating them, but no reason exists why other persons or things not so enumerated should not have been included, and manifest injustice will follow by not so including them, the maxim expressio unius est exclusio alterius, should not be invoked." (Blevins v. Mullally, 135 P. 307, 22 Cal. App. 519.)

For the above reasons, the order of dismissal entered by the trial court should be set aside and this case is remanded for trial on the merits.

Bengzon, C.J., Bautista Angelo, Labrador, Concepcion, Barrera, and Makalintal, JJ., concurred.

Padilla and Dizon, JJ., took no part.

J.B.L. Reyes, J., on leave.

VI

Resurreccion de Leon, et al, Plaintiffs-appellees, vs. Emiliana Molo Peckson et al., Respondents-appellants, G.R. No. L-17809, December 29, 1962, Bautista Angelo, J.

1. TRUST; DECLARATION OF TRUST; DEFINED. — A declaration of trust has been defined as an act by which a person acknowledges that the property, title to which he holds, is held by him for the use of another (Griffith v. Masfield, 51 S.W. 832, 66 Ark. 513, 521).

2. ID.; EVIDENCE: PROOF NECESSARY TO ESTABLISH A TRUST.—True it is that to establish a trust the proof must be clear, satisfactory and convincing. It cannot rest on vague, uncertain evidence, or on loose, equivocal or indefinite declaration (In:re Tuttle's Estate, 200 A. 921, 132 Pa. Super 356);

3. ID.; RIGHT CREATING A TRUST; NEED NOT BE CONTEMPORANEOUS OR INTER-PARTIES.—It has been held that the right creating or declaring a trust need not be contemporaneous or inter-parties (Stephenson v. Stephenson, 171 S.W. 2d 265, 351 Mo. 8; In re Corbin's Trust Orph. 57 Work Leg. Rec. 201).

4. ID.; EXPRESS TRUST; WRITTEN DECLARATION MADE AFTER LEGAL ESTATE HAS BEEN VESTED IN THE TRUSTEE.—It was even held that an express trust may be declared by a writing made after the legal estate has been vested in the trustee (Kurtz v. Robinson, Tex. Civ. App. 256 S.W. 2d 1003).

5. ID.; ID.; CREATED BY A DEED; IT MAY BE SHOWN BY A SEPARATE WRITING.—The fact that an express trust was created by a deed which was absolute on its face may be shown by a writing separate from the deed itself (Mugan v. Wheeler, 145 S.W. 462, 241 Mo. 376).

6. ID.; BENEFICIARIES; ABSENCE OF NOTIFICATION OF EXISTENCE OF TRUST; EFEFCT OF.—The fact that the beneficiaries were not notified of the existence of the trust or that the latter have not been given an opportunity to accept it, is of no importance, for it is not essential to the existence of a valid trust and to the right of the beneficiaries to enforce the same that they had knowledge thereof at the time of its creation. (Stoehr v. Miller, 296 F. 414).

7. ID.; ID.; CONSENT TO THE CREATION OF TRUST, NOT NECESSARY. — It is not necessary that the beneficiary should consent to the creation of the trust (Wickwire-Spencer Steel Corporation v. United Spring Mgf. Co.; 142 N.E. 758, 247 Mass. 565) In fact it has been held that in case of a voluntary trust the assent of the beneficiary is not necessary to render it valid because as a general rule acceptance by the beneficiary is presumed (Article 1446, new Civil Code; Cristobal v. Gomez, 50 Phil., 810).

8. ID.; VOLUNTARY TRUST; REVOCATION.—The rule is that in the absence of any reservation of the power to revoke a voluntary trust is irrevocable without the consent of the beneficiary (Allen v. Safe Deposit and Trust Co. of Baltimore, 7A. 2d 180, 177 Md. 26). It cannot be revoked by the creator alone, nor by the trustee (Fricks v. Weber, C.C.A. Ohio, 145 F. 2d 737). Hughes v. C.I.R. C.C.A. 9, 104 F. 2d 144; Ewing v. Shannahan, 20 S.E. 1065, 113 Mo. 188).

9. ID.; EXPRESS TRUST CONSTITUTED BEFORE EFFECTIVITY OF NEW CIVIL CODE; LAWS GOVERNING THE SAME.—The express trust was constituted during the lifetime of the predecessor-in-interest of appellants, that is, before the effectivity of the new Civil Code, although the instrument recognizing and declaring such trust was executed on December 5, 1950, after the effectivity of said Code. The Civil Code of 1889 and previous laws and authorities on the matter, therefore, should govern the herein trust under the provisions of Article 2253 of the new Civil Code.

10. ID.; LAWS ON TRUSTS IN THIS JURISDICTION BEFORE THE EFFECTIVITY OF THE NEW CIVIL CODE.—The Civil Code of 1889 contains no specific provisions on trust as does the new Civil Code. Neither does the Code of Civil Procedure of 1901 for the same merely provides for the proceeding to be followed relative to trusts and trustees (Chapter XVIII). This silence, however, does not mean that the juridical institution of trusts was then unknown in this jurisdiction, for the principles relied upon by the Supreme Court before the effectivity of the new Civil Code were these embodied in Anlo-American jurisprudence as derived from Roman and Civil Law principles (Government v. Abadilla, 46 Phil., 42).

D E C I S I O N

Resurreccion de Leon, et al, filed on November 13, 1958 before the Court of First Instance of Rizal a complaint seeking to compel Emiliana Molo-Peckson, et al to convey to the former ten parcels of land located in Pasay City with an area of 1,749 sq. m. upon payment of ₱1.00 per parcel upon the plea that said lots were willed or donated in 1948 to the latter by their foster parents Mariano Molo y Legaspi and Juana Juan with the understanding that they should sell them to the plaintiffs under the terms above-stated.

Defendants, in their answer, disclaimed any legal obligation on their part to sell the above properties to the plaintiffs for the nominal consideration of ₱1.00 per lot alleging that if they executed the document on which the complaint is predicated it was on the mistaken assumption that their foster parents had requested them that they donate the properties to plaintiffs for which reason they executed on August 9, 1956 a document revoking said donation which was acknowledged before Notary Public Leoncio C. Jimenez.

No testimonial evidence was presented by either party. Instead, both agreed to submit the case upon the presentation of their respective exhibits which were all admitted by the trial court.

After trial on the merits the court a quo rendered on September 21, 1960 a decision wherein it held that, under the facts established by the evidence, trust has been constituted by the late spouses Mariano Molo and Juana Juan over the ten parcels of land in question in favor of plaintiffs as beneficiaries and as a consequence, concluded:

"Considering all the foregoing, the Court orders:

"1. The defendants, jointly and severally to free the said ten (10) parcels of land from the mortgage lien in favor of the Rehabilitation Finance Corporation (now Development Bank of the Philippines) and Claro Cortez, and thereafter to sign and execute in favor of the plaintiffs a deed of absolute sale of the said properties for and in consideration of TEN (₱10.00) PESOS already deposited in Court after all conditions imposed in Exhibit A have been complied with;

"2. That in the event the defendants shall refuse to execute and perform the above, they are ordered, jointly and severally, to pay the plaintiffs the value of said ten (10) parcels of land in question, the amount to be assessed by the City of Pasay City as the fair market value of the same, upon orders of the Court to assess said value;

"3. The defendants jointly and severally pay the plaintiffs' Attorney's fees in the amount of ₱3,000.00, as defendants acted in gross and evident bad faith in refusing to satisfy the plaintiffs' plainly valid, just and demandable claim, under Article 2208 sub-paragraph 5 of the New Civil Code;

"4. The defendants to render an accounting of the fruits of said ten (10) parcels of land from the time plaintiffs demanded the conveyance of said parcels of land on August 11, 1956 as per Exhibits B and C, in accordance with the provisions of Article 1164, New Civil Code which provides that the creditor has a right to the fruit of the thing from the time the obligation to deliver it arises; and

"5. The defendants to pay the costs."

Defendants took the present appeal.

On January 24, 1941, Mariano Molo y Legaspi died leaving a will wherein he bequeathed his entire estate to his wife, Juana Juan. This will was probated in the Court of First Instance of Pasay City, Rizal, which was affirmed by the Supreme Court on November 26, 1956 (G. R. No. L-8774). On May 11, 1948, Juana Juan in turn executed a will naming therein many devises and legatees one of whom is Guillerma San Rafael, mother of the plaintiffs and defendant Pilar Perez Nable. On June 7, 1948, however, Juana Juan executed a donation inter vivos in favor of Emiliana Molo-Peckson and Pilar Perez Nable of almost all of her entire property leaving only about ₱16,000.00 worth of property for the devises mentioned in the will. Among the properties conveyed to the donees are the ten parcels of land subject to the present action. Juana Juan died on May 28, 1960.

On December 5, 1950, Emiliana Molo-Peckson and Pilar Perez Nable executed a document which they called "MUTUAL AGREEMENT" the pertinent provisions of which are:

"That the above named parties hereby mutually agree by these presents x x x that the following lots should be sold at ONE (1) PESO each to the following persons and organization:

x x x x x x

"TO — JUSTA DE LEON and RESURRECCION DE LEON, several parcels of land located at Calle Tolentino (South of Tenorio and Kapitan Magtibay), Pasay City, share and share alike or half and half of TEN (10) LOTS described in:

"Transfer Certificate of Title No. 28157 — and allocated as follows:

"(a) To JUSTA DE LEON, Five (5) Lots.
"(b) To RESURRECCION DE LEON, the remaining Five (5) Lots.

"That this agreement is made in conformity with the verbal wish of the late Don Mariano Molo y Legaspi and the late Dona Juan Francisco Juan y Molo. These obligations were repeatedly told to Emiliana Molo Peckson, before their death and that same should be fulfilled after their death."

On August 9, 1956, however the same defendants, assisted by their husbands, executed another document in which they revoked the so-called mutual agreement mentioned above, and another relating to the same subject matter, stating therein that the parties, "after matured and thorough study, realized that the above-mentioned public instruments x x x do not represent their true and correct interpretations of the verbal wishes of the late spouses Don Mariano y Legaspi and Dona Juana Francisco Juan y Molo." But after the execution of this document that is, on August 11, 1956, the beneficiaries Resurreccion de Leon and Justa de Leon, thru their counsel, demanded the conveyance to them of the ten parcels of land for the consideration of ₱1.00 per parcel as stated in the document of December 5, 1950. And having the defendants refused to do so, said beneficiaries consigned on July 8, 1957 the amount of ₱10.00 as the consideration of the ten parcels of land.

In this appeal, appellants assign the following errors:

I

THE LOWER COURT ERRED IN HOLDING THAT THE SPOUSES, MARIANO MOLO AND JUANA JUAN, CONSTITUTED A TRUST OVER THE PROPERTIES IN QUESTION WITH PLAINTIFFS-APPELLEES AS BENEFICIARIES.

II

THE LOWER COURT ERRED IN APPLYING ARTICLES 1440, 1441, 1449, 1453, and 1457 OF THE NEW CIVIL CODE TO THE CASE AT BAR.

III

THE LOWER COURT ERRED IN HOLDING PLAINTIFFS-APPELLEES' EXHIBIT 'A' TO BE A DECLARATION AGAINST INTEREST AND AN ADMISSION BY DEFENDANTS-APPELLANTS.

IV

THE LOWER COURT ERRED IN HOLDING THAT DEFENDANTS-APPELLANTS HAD NO RIGHT TO REVOKE EXHIBIT 'A'.

V

THE LOWER COURT ERRED IN ORDERING APPELLANTS TO RENDER AN ACCOUNTING OF THE FRUITS OF THE PROPERTIES IN QUESTION.

VI

THE LOWER COURT ERRED IN ORDERING APPELLANTS TO FREE THE PROPERTIES FROM THE MORTGAGE LIENS IN FAVOR OF THE DEVELOPMENT BANK OF THE PHILIPPINES AND CLARO CORTEZ.

VII

THE LOWER COURT ERRED IN AWARDING ATTORNEY'S FEES TO THE APPELLEES.

VIII

THE LOWER COURT ERRED IN NOT DISMISSING THE COMPLAINT."

There is no merit in the claim that the document executed on December 5, 1950 does not represent the true and correct interpretation by appellants of the verbal wish of their foster parents relative to the conveyance for a nominal consideration to appellees of the ten parcels of land in question considering the circumstances obtaining in the present case. To begin with, this document was executed by appellants on December 5, 1950, or about two years and six months from the time they acquired title to the lands by virtue of the donation inter vivos executed in their favor by their foster mother Juana Juan and six months after the death of the donor. There is nobody who could cajole them to execute it, nor is there any force that could coerce them to make the declaration therein expressed, except the constraining mandate of their conscience to comply with "the obligations repeatedly told to Emiliana Molo Peckson," one of appellants, before their death, epitomized in the "verbal wish of the late Don Mariano Molo y Legaspi and the late Dona Juana Francisco y Molo" to convey after their death said ten parcels of land at ₱1.00 a parcel to appellees. In fact, the acknowledgment appended to the document they subscribed states that it was "their own free act and voluntary deed."

Indeed, it is to be supposed that appellants understood and comprehended the legal import of said document when they executed it more so when both of them had studied in reputable centers of learning, one being a pharmacist and the other a member of the bar. Moreover, they have more than ample time — the six months intervening between the death of the donor and the execution of the document — to ponder not only on the importance of the wish of their predecessors-in-interest but also on the proprietary of putting in writing the mandate they have received. It is, therefore, reasonable to presume that

that document represents the real wish of appellants' predecessors-in-interest and that the only thing to be determined is its real import and legal implications.

That the document represents a recognition of pre-existing trust or a declaration of an express trust impressed on the ten parcels of land in question is evident. A declaration of trust has been defined as an act by which a person acknowledges that the property, title to which he hold, is held by him for the use of another (Griffith v. Maxfield, 51 S.W. 832, 66 Ark. 513, 521.) This is precisely the nature of the will of the donor: to convey the titles of the land to appellants with the duty to hold them in trust for the appellees. Appellants obligingly complied with this duty by executing the document under consideration.

True it is that to establish a trust the proof must be clear, satisfactory and convincing. It cannot rest on vague uncertain evidence, or on a loose, equivocal or indefinite declaration (In re Tuttle's Estate, 200 A. 921 132 Pa. Super 356); but there the document in question clearly and unequivocally declares the existence of the trust even if the same was executed subsequent to the death of the trustor, Juana Juan, for it has been held that the right creating or declaring a trust need not be contemporaneous or inter-parties (Stephenson v. Stephenson, 171 S.W. 2d 265, 351 Mo. 8; In re Corbin's Trust Orph., 57 York Leg. Rec. 201). It was even held that an express trust may be declared by a writing made after the legal estate has been vested in the trustee (Kurtz v. Robinson, Tex. Civ. App. 256 S.W. 2d 1003). The contention, therefore, of appellants that the will and the donation executed by their predecessors-in-interest were absolute for it did not contain a hint that the lots in question will be held in trust by them does not merit weight because the fact that an express trust was created by a deed which was absolute on its face may be shown by a writing separate from the deed itself (Mugan v. Wheeler, 145 S.W. 462, 241 Mo. 376).

The fact that the benefriciaries were not notified of the existence of the trust or that the latter have not been given an opportunity to accept it is of no importance, for it is not essential to the existence of a valid trust and to the right of the beneficiaries to enforce the same that they had knowledge thereof at the time of its creation (Stoehr v. Miller, 296 F. 414). Neither is it necessary that the beneficiary should consent to the creation of the trust (Wickwire Spencer Steel Corporation v. United Spring Mfg. Co., 142 N.E. 758, 247 Mass. 565). In fact, it has been held that in case of a voluntary trust the assent of the beneficiary is not necessary to render it valid because as a general rule acceptance by the beneficiary is presumed (Article 1446, new Civil Code; Cristobal v. Gomez, 50 Phil., 819).

It is true, as appellants contend that the alleged declaration of trust was revoked, and having been revoked it cannot be accepted, but the attempted revocation did not have any legal effect. The rule is that in the absence of any reservation of the power to revoke a voluntary trust is irrevocable without the consent of the beneficiary (Allen v. Safe Deposit and Trust Co. of Baltimore 7 A. 2d 180, 177 Md. 26). It cannot be revoked by the creator alone, nor by the trustee (Fricke v. Weber, C.C.A. Ohio, 145 F. 2d 737; Hughes v. C.I.R. C.C.A. 9, 104 F. 2d 144; Ewing v. Shannahan, 20 S.W. 1065, 113 Mo. 188). Here there is no such reservation.

Appellants contend that the lower court erred in applying the provisions of the new Civil Code on trust. This is correct. The express trust was constituted during the lifetime of the predecessor-in-interest of appellants that is, before the effectivity of the new Civil Code, although the instrument recognizing and declaring such trust was executed on December 5, 1950, after the effectivity of said Code. The Civil Code of 1889 and previous laws and authorities on the matter, therefore, should govern the herein trust under the provisions of Article 2253 of the new Civil Code.

But the Civil Code of 1889 contains no specific provisions on trust as does the new Civil Code. Neither does the Code of Civil Procedure of 1901 for the same merely provides for the proceeding to be followed relative to trusts and trustees (Chapter XVIII). This silence, however, does not mean that the juridical institution of trust was then unknown in this jurisdiction, for the principles relied upon by the Supreme Court before the effectivity of the new Civil Code were those embodied in Anglo-American jurisprudence as derived from Roman and Civil Law principles (Government v. Abadilla, 46 Phil., 42). And these are the same principles on which we predicate our ruling heretofore stated and on which we now rely for the validity of the trust in question.

The trial court ordered appellants to render an accounting of the fruits of the properties in question even if appellees did not expressly ask for it in their prayer for relief. We, however, believe that this is covered by the general prayer "for such other relief just and equitable under the premises." What is important is to know from what date the accounting should be made. The trial court ordered that the accounting be made from the time appellant demanded the conveyance of the ten parcels of land on August 11, 1956 in accordance with Article 1164 of the new Civil Code which provides that the creditor has a right to the fruit of the thing from the time the obligation to deliver it arises. But this cannot be done without first submitting proof that the conditions stated in the mutual agreement had been complied with. And this only happened when the decision of the Supreme Court in G. R. No. L-8774 became final and executory. The ruling of the trial court in this respect should therefore be modified in the sense that the accounting should be made from the date of the finality of said decision.

We find no error in the directive of the trial court that appellants should free the lands in question in favor of the encumbrance that was created thereon by them in favor of the Development Bank of the Philippines and one Claro Cortez, for as trustees it is their duty to deliver the properties to the **cestui que trust** free from all liens and encumbrances.

To recapitulate, we hold: (1) that the document executed on December 5, 1950 creates an express trust in favor of appellees; (2) that appellants had no right to revoke it without the consent of the **cestui que trust**; (3) that appellants must render an accounting of the fruits of the lands from the date the judgment rendered in G. R. No. L-8774 became final and executory; and (4) that appellants should free said lands from all liens and encumbrances.

Wherefore, with the modification as above indicated with regard to accounting, we hereby affirm, the decision appealed from, without pronouncement as to costs.

Labrador, J..BL. Reyes, Barrera, Paredes, Dizon, Regala and Makalintal, JJ., concurred.

Concepcion and Padilla, JJ., took no part.

VII

In the Matter of the Petition of Wang I Fu to be admitted a citizen of the Philippines, Wang I Fu, Petitioner-Appellant vs. Rep. of the Phil., Oppositor-Appellee, G.R. No. L-15312, Sept. 29, 1962, Regala, J.

1. NATURALIZATION; USE OF DIFFERENT ALIASES BY PETITIONER IS GROUND FOR DENYING APPLICATION FOR NATURALIZATION.—The evidence really shows that petitioner has been using some aliases. In his landing certificate, immigrant certificate of residence and alien certificate of regis-

tration, petitioner's name appears as Wang I Fu. However, in his marriage contract, he gave his name as George Wang I Fu, while in the birth certificates of his children he used the **alias** George Ong. Aside from George Wang and George Ong, petitioner also uses the **alias** Ong Hay Kuan. The use of said **aliases** is not explained and there is no showing that it has been authorized as required by the Alias Law (Commonwealth Act No. 142). Being violative of the law, we think this act of petitioner is not beyond reproach and is, therefore, a ground for denying his application for naturalization.

2. ID.; PETITIONER'S CHILDREN USING DIFFERENT SURNAMES IS CONTRARY TO CUSTOMS AND TRADITIONS OF THE FILIPINOS. — It also appears from petitioner's evidence that in the birth certificates and certificates of registration of his daughters Maria Teresita and Maria Nancy, their surname is Ong, but in petitioner's testimony he mentions Wang as the surname of these two children. As correctly observed by the trial court, this using of different names is not in accordance with customs and traditions of the Filipino people.

3. ID.; PETITIONER DID NOT MAKE ANY EFFORT TO SEE HIS MOTHER IN CHINA SINCE 1934 AND THIS ATTITUDE IS NOT EMBRACING THE CUSTOMS, TRADITIONS, AND IDEALS OF THE FILIPINOS. — Apparently, petitioner had not seen his mother since 1934 when he came to live in this country, yet he made no efforts to inquire about her. If he should have the concern that a Filipino has for his mother, he should have, at least, corresponded with his brothers in China about their mother's well-being. Again petitioner's attitude in this regard does not speak well of his claim to have embraced the customs, traditions, and ideals of the Filipino people.

4. ID.; PETITIONER IS AGAINST THE FILIPINO FIRST POLICY AND PREFERS TO ASSOCIATE WITH HIS CO-CHINESE. — Petitioner's membership in the Philippine Chinese Glassware Merchants Association, and his acquiescence to the resolution against the Filipino First Policy, indicate that he prefers to associate with his co-Chinese and his sympathy is with them and not with the Filipinos.

5. PETITIONER FAVORS CHINESE CITIZENS TO BE EMPLOYED IN HIS BUSINESS.—Even in the selection of his employees, petitioner has shown himself to be partial in favor of Chinese citizens, because, as pointed out above, out of the seven employees in his business, only the driver and cargador are Filipinos, and the responsible positions are held by Chinese.

6. ID.; CHILDREN OF PETITIONER ARE STUDYING IN CHINESE SCHOOLS WHICH AFFECTS HIS SINCERITY TO BECOME A FILIPINO CITIZEN. — Another observation that bespeaks of petitioner's indifference to the Filipinos is that all of his children are studying in Chinese schools namely, the Immaculate Conception Anglo-Chinese Academy and the Huang Chi School. The names of these schools convey the impression that they are not for Filipinos and where there is no mingling among Chinese with Filipino children. We have already observed in previous cases (Garchitorena v. Republic, G.R. No. L-15102, April 20, 1961; Hao Su Siong alias Ramon Cuenco v. Republic, G.R. No. L-13045, July 30, 1962) that this circumstance affects the sincerity of petitioner's intention to become a Filipino citizen.

7. ID.; APPLICANT MUST SHOW OVERT ACTS TO MINGLE AND ASSOCIATE WITH FILIPINOS. — One of the essential requisites for naturalization is the actual desire and overt acts on the part of the applicant for naturalization to mingle and associate with Filipinos. The purpose of this policy is to permit gradual assimilation of naturalization citizens. It would be violative of this policy to admit aliens who evince a desire to preserve their identity as aliens. (Ong Ching v. Republic, G.R. No. L-15691, March 27, 1961.)

8. ID.; PETITIONER'S WITNESSES CAME TO KNOW APPLICANT ONLY IN 1943 AND 1945 RESPECTIVELY AND ARE INCAPABLE TO TESTIFY IRREPROACHABLE CONDUCT OF APPLICANT. — The law requires proper and irreproachable conduct during the applicant's **entire period** of residence in the Philippines. Since the only witnesses presented by petitioner — Alfredo Penalosa and Jose Bernabe — came to know the petitioner only in 1943 and 1945, respectively, they are not in a position to testify as to applicants' conduct from the time he arrived in the Philippines in May 1934. It should take more than uncorroborated assertions of petitioner himself to establish this vital fact.

D E C I S I O N

This is an appeal taken by a Chinese named Wang I Fu from the decision of the Court of First Instance of Manila, in Civil Case No. 32003, denying his petition for naturalization.

It appears that petitioner was born on February 16, 1918 in Chingkang, China. On May 14, 1934, he came to the Philippines where he has continuously resided since then. He is married to Maria Sun also a Chinese, and out of said marriage were born five children, namely: Maria Teresita, George, Eduardo, Glayda and Maria Nancy. Petitioner is engaged in the glassware business from which he derives an average annual income of P8,000.00. He speaks and writes English and Tagalog. He has enrolled his minor children of school age in private schools in Manila — his two sons at the Huang Chi School and his three daughters at the Immaculate Conception Anglo-Chinese Academy.

The lower court has found that petitioner is not opposed to organized government, and that there is no evidence that he associated with any group of persons who uphold the doctrine opposed to organized government; neither is he in favor of using violence for the success of one's ideals; he is not a polygamist nor a believer in the practice thereof; he has not been convicted of any crime involving moral turpitude; neither is he suffering from any mental alienation or incurable contagious disease.

Despite petitioner's possession of the above qualifications, the court, however, denied his petition on the following grounds: (1) Petitioner has been using **aliases** and two of his children have different surnames from those of the other three; (2) He was educated in the Anglo-Chinese School where he had no Filipino classmates and he has always been residing in neighborhood's inhabited by Chinese; (3) He has no love for his mother in China as shown by the fact that he never sent her money and that he did not know whether or not she is still alive; (4) Fu is a member of the Philippine-Chinese Glassware Merchants Association which is composed entirely of Chinese. Said association has passed a resolution against the Filipino First Policy to which resolution he did not object; (5) Among the seven employees of petitioner only two are Filipinos; and (6) It has not been suffieiently shown that his witnesses have such a close contact with petitioner as to be able to testify on his character and morality, as well as his qualifications to become a citizen.

The petitioner has appealed.

A review of the record convinces Us that petitioner does not deserve to be admitted to Philippine citizenship.

The evidence really shows that petitioner has been using

some **aliases**. In his landing certificate, immigrant certificate of residence and alien certificate of registration, petitioner's name appears as Wang I Fu. However, in his marriage contract, he gave his name as George Wang I Fu, while in the birth certificates of his children he used the **alias** George Ong. Aside from George Wang and George Ong, petitioner also uses the alias Ong Hay Kuan. The use of said **aliases** is not explained and there is no showing that it has been authorized as required by the Alias Law (Commonwealth Act No. 142). Being violative of the law, We think this act of petitioner is not beyond reproach and is, therefore, a ground for denying his application for naturalization. (See Koa Gui v. Republic, G.R. No. L-17317, July 31, 1962; Lim Bun v. Republic, G.R. No. L-12822, April 26, 1961; and Ng Liam Keng v. Republic, G.R. No. L-14146, April 29, 1961.)

It also appears from petitioner's evidence that in the birth certificates and certificates of registration of his daughters Maria Teresita and Maria Nancy their surname is Ong, but in petitioner's testimony he mentions Wang as the surname of these two children. As correctly observed by the trial court, this using of different names is not in accordance with customs and traditions of the Filipino people.

As to petitioner's not having serious concern over his mother whereabouts or existence, the lower court made the following observation:

> "Petitioner also testified that he went to Hongkong in 1964, but he did not see his mother because she was residing in Chingkang, China which was under the Communist regime then and up to the present; but admitted that there was a regular postal system between the Philippines and Red China and he was writing to his mother since 1947 and and 1948. He further claimed that although he went to Hongkong in 1954 he did not send his mother any money in spite of his claim that he owns a business in the Philippines worth ₱150,000.00. When pressed for an explanation for his mother, petitioner explained that he did not send money to his mother because he believes that his brother will take care of his mother.
>
> "During the latter part of his testimony petitioner sought to give an additional explanation for his failure to send money to his mother by stating that he did not know whether she is still alive or not. This statement was contradicted by his earlier testimony when he testified that one week before he went to Hongkong he wrote a letter to his mother notifying her that he was going to Hongkong. The foregoing, in the mind of the Court shows that petitioner has no love for his mother."

Apparently, petitioner had not seen his mother since 1934 when he came to live in this country, yet he made no efforts to inquire her. If he should have the concern that a Filipino has for his mother, he should have, at least, correspond with his brothers in China about their mother's well-being. Again petitioner's attitude in this regard does not speak well of his claim to have embraced the customs, traditions, and ideals of the Filipino people.

Petitioner's membership in the Philippine Chinese Glassware Merchants Association, and his acquiescence to the resolution against the Filipino First Policy, indicate that he prefers to associate with his co-Chinese and his sympathy is with them and not with the Filipinos.

Even in the selection of his employees, petitioner has shown himself to be partial in favor of Chinese citizens, because, as pointed out above, out of the seven employees in his business, only the driver and cargador are Filipinos, and the responsible positions are held by Chinese.

Another observation that bespeaks of petitioner's indifference to the Filipinos is that all of his children are studying in Anglo-Chinese schools, namely, the Immaculate Conception Anglo-Chinese Academy and the Huang Chi School. The names of these schools convey the impression that they are not for for Filipinos and where there is no mingling among Chinese with Filipino children. We have already observed in previous cases (Garchitorena v. Republic, G.R. No: L-15102, April 20, 1961; Hao Su Siong **alias** Ramon Cuenco v. Republic, G.R. No. L-13045, July 30, 1962) that this circumstance affects the sincerity of petitioner's intention to become a Filipino citizen. As properly stated in a previous case:

> "x x x. One of the essential requisites for naturalization is the actual desire and overt acts on the part of the applicant for naturalization to mingle and associate with Filipinos. The purpose of this policy is to permit gradual assimilation of naturalized citizens. It would be violative of this policy to admit aliens who evince a desire to preserve their identity as aliens. "Ong Ching Guan v. Republic G.R. No. L-16691, March 27, 1961.)

Lastly, We feel that the evidences adduced is not sufficient to show that petitioner is morally irreproachable. The law requires proper and irreproachable conduct during the applicant's **entire period** of residence in the Philippines. Since the only witnesses presented by petitioner — Alfredo Peñalosa and Jose Bernabe — came to know the petitioner only in 1943 and 1945, respectively, they are not in a position to testify as to applicant's conduct from the time he arrived in the Philippines in May 1934. It should take more than corroborated assertions of petitioner himself to establish this vital fact. (Chua Pun v. Republic, G.R. No. L-16825, December 22, 1961.)

In view of the foregoing, the decision dismissing Wang I Fu's petition for naturalization is hereby affirmed. Costs against the petitioner-appellant.

Bengzon, C.J., Padilla, Bautista Angelo, Labrador, J.B.L. Reyes, Paresdes, Dizon and Makalintal, JJ., concurred.

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