The LAWYERS JOURNAL

MANILA, PHILIPPINES

VOLUME XIX | JUNE 30, 1954 | NUMBER 6

In this issue

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

SUBSCRIPTION AND ADVERTISING RATES: Subscription: ₱18:00 for one year; ₱10.00 for 6 months. Advertising: Full page — ₱105.00; Half page — ₱65.00; One-fourth page — ₱45.00; One-eight page — ₱35.00; One-sixteenth page ₱25.00 Entered as second class mail matter at the Post Office.

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CERTAIN VEXATIOUS QUESTIONS IN OUR NATIONALITY LAWS*

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The question of nationality has in the past been the cause of international complications or even wars that it has become the concern of international bodies which gather in convention or conferences for the purpose of finding ways and means of minimizing as much as possible the conflicts in the Municipal Laws of the various countries of the world. Such problems arise every now and then and there seems to be no end to questions growing out of such conflicts. Our nationality laws cannot be an exception to this.

It is, therefore, my desire to present to you some of the most vexatious questions in our nationality laws.

Firstly: — Whether or not it was ever the policy of the United States to extend to the Philippines the application of the principle of *jus soli* — a doctrine which predominates in the United States— a principle which was applicable in the Philippines during the Spanish Regime.

Secondly: — Whether or not by the marriage of an alien woman to a Filipino citizen which automatically make her a citizen of the Philippines, her minor children previously begotten with a deceased husband or other man, follow her new political status.

Was it ever the policy of the United States to extend to the Philippines the application of the principle of *jus soli* as it applies in the United States — a principle which was applicable in the Philippines under the Spanish regime? Is the principle of *jus soli* as enunciated in the Roa case and other cases based on it, in consonance with law? If not, why? If, in the affirmative, how far is it justified? Does the *jus soli* principle affect those persons born between the period April 11, 1899 and July 1, 1902?

Before the American Occupation in the Philippines, there had not been so much need for clarification of the provisions of the Spanish Civil Code in the matter of citizenship, because there was no such term of "Philippine citizen", or "citizenship of the Philippines", but that the natives of this country, generally, were regarded and denominated as "Spanish subjects", or "subjects of Spain".

In passing, it may be stated that under the Spanish law in the Islands, both the doctrines of *jus soli* and *jus sanguinis* were recognized in this jurisdiction as provided in Articles 17, etc., of the Spanish Civil Code, which enumerates the following as Spaniards: (a) persons born in the Spanish territory; (b) children of a Spanish father or mother, even if they were born outside of Spain; (c) foreigners who have obtained a certificate of naturalization; and (d) those who have not obtained such certificates but have acquired domicile in any town in the Monarchy.

Article 18 of the Civil Code, however, gave to children the nationality of their parents while they remain under parental authority. That in order for those born of foreign parents in Spanish territory to enjoy the benefits which paragraph 1 of Article 17 gave to them, it is indispensable requisite that the parents declare in the manner and before the official in charge of the civil registry specified in Article 19, that they choose in the name of their children, the Spanish nationality, renouncing any other. Article 19 gave to children of foreign parents born in Spanish domains the right to declare within a year following their majority or emancipation, whether they desire to enjoy the Spanish nationality.

With the change of sovereignty, however, the aforesaid provisions pertaining to nationality being political in nature, were *ipso facto* abrogated because, "pursuant to well-established public law, when a nation cedes territory to another, either in view of conquest or for some other cause... such laws which are of a political nature and pertain to the prerogatives of the previous government, immediately ceased upon transfer of sovereignty." (Op. Atty. Gen. U.S., July 10, 1899, cited in Mariano Sy-Jueco v. Manuel A. Roxas, decided by the Court of Appeals, January 31, 1941, CA-G.R. No. 7026, and also in Roa v. Collector of Customs, 23 Phil. 315). Under international practice in general, the inhabitants of ceded territories, not only automatically lose their old political allegiance but also acquire that of the annexing State. Ordinarily, the reservation is made that they conserve their original nationality by means of option. (See Garcia, "Problems of Citizenship in the Philippines", p. 19, and authorities cited).

By Article IX of the Treaty of Paris of December 10, 1898, between the United States of America and Spain, it was provided that "the civil and political status of the native inhabitants of the territories hereby ceded to the United States, shall be determined by the Congress." Filipinos remaining in this country or temporarily sojourning abroad who were not natives of the Peninsula could not, according to the terms of the treaty, elect to retain their allegiance to Spain. By the cession, their allegiance became due to the United States and they became entitled to its protection... (Roa case, supra). Although they did not become citizens of the United States, the Filipinos ceased to be aliens in the sense of the immigration laws. It was not the intention of the Commissioners who negotiated the Treaty to give those inhabitants (of the Philippines and Porto Rico), the status of citizens of the United States. (Garcia, "Problems of Citizenship', p. 21; and Moore, "III Digest of International Law", p. 321.)

Despite the authority conferred upon it by the Treaty, the Congress of the United States did not enact a law to that effect until July 1, 1902, when it approved the Philippine Bill of 1902, which provides as follows:

> "That all inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on the eleventh day of April 1899, and then resided in the Islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain signed at Paris December 10, 1898." (Section 4, Philippine Bill of 1902, which is similar to Section 7 of Act of Congress of the United States establishing civil government for Porto Rico" approved April 12, 1900.)

This is a statement of the policy for those who were Spanish subjects on April 11, 1899, meaning those who were already born and were Spanish subjects on that date; and also as to those who were born on and after the effectivity of the Act of July 1, 1902

The foregoing provision of law did not seem to cover persons born in the Philippines of foreign parents from and after April 11, 1899 to July 1, 1902. For our use in this discussion let this period be called a "vacuum" period in the absence of any law at the time.

Said specific provision was amended by an Act of Congress approved on March 23, 1912 which added the following proviso:

> "Provided, that the Philippine Legislature is hereby authorized to provide by law for the acquisition of Philippine citizenship by those natives of the Philippine Islands who do not come within the foregoing provisions, the natives of other insular possession of the United States, and such other persons residing in the Philippine Islands who could become citizens of the United States, if residing therein."

The provisions of section 4 of the Philippine Bill of 1902 as amended by the Act of March 23, 1912, were embodied substan-

tially in the Philippine Autonomy Act of 1916, otherwise known as the Jones Law approved on August 29, 1916. This provision in addition to the treaty constitutes the basis from which an analysis may be made whether or not it was ever the intention of the United States to apply in this country the principle of *jus soli*, which predominates in the United States as it was also applicable in the Philippines during the former sovereign.

An interpretation of the above provisions of the American Law for the Philippine Islands, which has become a legal doctrine in our jurisdiction and repeatedly followed, is found in the decision of the case of Roa v. Collector of Customs, 23 Phil. 315, which said:

> "Here Congress declared that all inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on the 11th of April, 1899, and then resided in this country, and their children born subsequent thereto, shall be deemed and held to be citizens of this country. According to those provisions it is not necessary for such persons to do anything whatsoever in order that they may acquire full citizenship. The same is true with reference to Spanish subjects who were born in Spain proper and who had not elected to retain their allegiance to the Crown. By section 4 the doctrine or principle of citizenship by place of birth which prevails in the United States was extended to the Philippine Islands, but with limitations. In the United States every person with certain exceptions, born in the United States is a citizen of that country. Under section 4 every person born after April 11, 1899, of parents who were Spanish subjects on that date and who continued to reside in this country are at the moment of birth *ipso facto* citizens of the Philippines."

For our purposes in this discussion, it must be borne in mind that Roa was born in the Philippines in 1889 of a Chinese father and Filipino mother legally married at the time of his birth. His father went to China and died there in 1900. Roa was sent to China by his mother in 1901 for study and returned here in 1910 when he was nearly 21 years of age. The Supreme Court declared him to be a citizen of the Philippines.

This decision has been followed thereafter in a number of cases and became the rule until 30th September 1939, when in the Pas Chua case (G.R. No. 46451, 40 Off. Gaz. 2 Supp. 244), our Supreme Court abandoned it and held that a person of Chinese parentage, born in the Philippines in 1914, is not a citizen thereof, because she followed the citizenship of her parents and she was not a citizen of the Philippnies under Section 2 of the Jones Law, (Act of August 29, 1916). But in Torres v. Tan Chim (G.R. No. 46953, February 3, 1940) and in Gallofin v. Ordoñez (G.R. No. 46782, June 27, 1940, 40 Off. Gaz. 8th Supp. 122, No. 12 September 20, 1940), said Court reverted to the rule of *jus soli*.

Attention is invited to the fact that in the case of Tan Chim, the issue involved is the citizenship of his alleged father, Alejandro Tan Bangco who (latter) was born in Manila in 1893. This case is similar to the Roa case in the sense that in both cases, the subjects involved were born in the Philippines before the advent of the American sovereignty, of Chinese fathers and Filipino mothers. The Court said:

> "We can not reverse the doctrine in Roa case *supra*, if to convert him into an alien after final pronouncement in 1912, that he was a Filipino. If we depart from the rule there established notwithstanding the almost exact analogy between the two cases, nothing short of legal anachronism would follow and we should avoid this result."

In the Gallofin v. Ordoñez case, *supra*, Ordoñez was born in Pasay, Rizal, in 1891 of Chinese father and Filipino mother as illegitimate child.

Similarly, in Yu Ching Po. v. Gallofin, G.R. No. 46795, promulgated on October 6, 1939, it was held that a person born in the Philippines of a Filipino-mestizo father and a mestiza-Chinese mother, notwithstanding vagueness in point of paternity and maternity, because according to our decision, "no decen si es hijo de padre Filipino de madre china, o si lo es de padre chino y de madre Filipino", is a Filipino citizen, for the reason that under article 17, paragraph 1 of the Civil Code, which was in force in that year, he was a Spanish subject, which nationality he conserved.

Again on September 16, 1947, in the case of Jose Tan Chong v. Secretary of Labor, G.R. No. 47616 and Lam Swee Sang v. Commonwealth, G.R. No. 46723, jointly decided by the Supreme Court on that date, it was held that the petitioner in the first case (born in Laguna in July, 1915 of Chinese father and Filipino mother lawfully married) and the applicant in the second case (born in Jolo, Sulu, on May 8, 1900, of Chinese father and Filipino mother) who were born of alien parentage, were not and are not, under this section (section 2 of the Jones Law), citizens of the Philippines.

Then on September 26, 1952, in the case of Talaroc v. Uy, G.R. No. L-5397 in *quo warranto* proceedings instituted by defeated candidate against the election of Alejandro D. Uy on the ground that the latter was a Chinese national, the court held that Uy was a citizen of the Philippines, for having been born on Jan. 28, 1912 in Iligan, Lanao, of Chinese father and Filipino mother while his parents were living as common-law husband and wife; latter contracted religious marriage in March 1914; father having died in Iligan in 1917 and mother died a widow in 1949.

He became a citizen of the Philippines for as a minor at the time of death of his father in 1917, he followed his mother's citizenship who reacquired her original citizenship following the death of her husband.

> (Note: Com. Act 63 approved on October 21, 1936, provides certain procedure for a Filipino woman who lost her original citizenship by marriage to a foreigner, to reacquire her lost citizenship after dissolution of marriage. Hence automatic reversion was abrogated by Com. Act No. 63)

From a review of the different cases which were decided by the Supreme Court following the principle of the Roa Case, it is revealed that in the majority of such cases the persons were born in the Philippines of Chinese fathers and Filipino mothers, legally married, or in some cases born illegitimate and whose births took place before the advent of the American Sovereignty. Among such cases are Vano v. Collector of Customs, 23 Phil. 80 in which subject was born in the Philippines of Chinese father and Filipino mother in 1892; U.S. v. Ong Tianse, 29 Phil. 332, born in Leyte, in 1890 of Chinese father and Filipino mother; U.S. v. Ang, 36 Phil. 858, born in Philippines of Chinese father and Filipino mother; U.S. v. Lim Bin, 36 Phil. 924, born in Philippines in 1882 of Chinese parents; Basilio Santos Co. v. Government 52 Phil. 543, born in Malolos, Bulacan, as illegitimate child of a Chinese father and Filipino mother before the American Regime; Yu Ching Po v. Gallofin, G.R. No. 46795, promulgated on October 6, 1939, father of person involved was born in the Philippines during enforcement of the Civil Code; Mariano Sy- Jueco v. Manuel A. Roxas (Court of Appeals case) CA-G.R. No. 7026, decided on January 31 1941, born as natural son of Chinese father and Filipino mother (parents contracted marriage in 1898); Torres v. Tan Chim, G.R. No. 46953, February 3, 1940, father of person involved was born in Manila in 1893, of Chinese father and Filipino mother; and Gallofin v. Ordoñez, G.R. No. 46782, June 27, 1940, 40 Off. Gaz. 8th Suppl. 122 No. 12 September 20, 1940, born in Rizal in 1891, of Chinese father and Filipino mother (illegitimate).

As to persons born of foreign parents (Chinese parents) during the period covered by the American regime, that is, from April 11, 1899, there are only two cases so far upon which the Supreme Court make pronouncement, because for a long period of

time, the bench, the bar and the public had had the impression that the mere fact of birth in this country, of a child irrespective of the nationality of the parents, conferred citizenship upon such person.

In the case of Teofilo Haw v. Collector of Customs, 59 Phil. 612, in which Haw was born in Tayabas, in 1916, of Chinese parentage, it was held that the "petitioner's birth in the Philippines makes him a citizen of the Philippines". This is the only case decided by our Supreme Court in which the principle of *jus soli* as applied in the United States pursuant to the provision of the 14th Amendment to the Constitution, was actually applied in this jurisdiction covering persons born in the Philippines of foreign parents during the American regime. The reason of the Court was based on the 14th amendment to the Constitution of the United States which pervaded the legal minds of the Court as well as the members of the legal profession at the time, on the assumption that persons of similar circumstances if born in the United States could not have been denied admission in said country being citizens thereof, and on the strength of such an analogy, it was believed that a person born in the Philippines could not have been denied admission into the country of their birth which gave them Philippine citizenship. Such was the real impression at the time, and whether it was the correct view or not, attempt shall be made to analyze the provision of the Congressional Acts to see the real intent of Congress as embodied in the law.

Between the decision of Teofilo Haw case *supra* and that of Paz Chua case *supra*, both of whom were born in the Philippines after July 1, 1902, there is very strong reason supporting the view and which is in consonance with the law, that the *jus soli* principle was not provided in the Philippine Bill and, therefore, the mere fact of birth in this country after that date did not confer Philippine citizenship.

This new ruling on Paz Chua case to the effect that the principle of *jus soli* was not carried on in the Organic Act of 1902, was further strengthened when the same Court decided jointly the two cases by declaring that:

> "x x petitioner Jose Tan Chong in the case of Jose Tan Chong v. Secretary of Labor, G.R. No. 47616 (who was born in Laguna in 1915 of Chinese father and Filipino mother, legally married); and applicant Lam Swee Sang, in the case Lam Swee Sang v. Commonwealth, G.R. No. 47623 (who was born in Sulu, in 1900, of Chinese father and Filipino mother), were not and are not, under section 4, Act of July 1, 1902, and section 2, Act of August 29, 1916, citizens of the Philippine Islands."

Said Court further held:

> "Considering that the common law principle or rule of *jus soli* obtaining in England and in the United States as embodied in the Fourteenth Amendment to the Constitution of the United States, has never been extended to this jurisdiction (Sec. 4, Act of 1 July, 1902; Sec. 5, Act of 29 August 1916); and considering that the law in force and applicable to the petitioner and the applicant in the two cases at the time of their birth is section 4 of the Philippine Bill (Act of 1 July 1902) as amended by Act of 23 March 1912, which provides that only those inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in said Islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands," We are of the opinion and so hold that the petitioner in the first case and the applicant in the second case, who were born of alien parentage were not and are not under said sections citizens of the Philippine Islands."
>
> "Needless to say, this decision is not intended or designed to deprive, as it cannot divest, of their Filipino citizenship, those who were declared to be Filipino citizens, or upon whom such citizenship had been conferred, by the court because of the doctrine or the principle of *res adjudicata*."

The concurring opinion of Mr. Justice Hilado, in the two cases last mentioned is a simple, concise clarification of the issue in certain respects, which says:

> "I concur in the revocation of the doctrine of *jus soli* enunciated, among other cases, in the Roa v. Collector of Customs, 23 Phil. 315. Besides, the ruling of that case can not be invoked in favor of the petitioner in G.R. No. 47616 nor of the applicant in G.R. No. 47623 for the reason that, while Tranquilino Roa in that case was born in the Philippines in the year 1889, when article 17, etc. seq. of the Civil Code were yet in force here and made him Spanish subject, the said petitioner and applicant in the instant cases were born, although also in the Philippines, in 1915 and 1900, respectively, i.e. after the abrogation of said articles, due to political character, upon the change of soverignty following the Treaty of Paris ending the Spanish-American war. (Roa v. Insular Collector of Customs, 23 Phil. 315, 330; Halleck's International Law, Chapter 34, par. 14; American and Ocean Insurance Companies v. 356 Bales of Cotton, Pet (26 U.S.) 511, 542; 7 L. ed. 242). As declared in the majority opinion, *the citizenship of said petitioner and applicant should be determined as of the dates of their respective births.*
>
> "At the time petitioner in G.R. No. 47616 was born (1915) the law on Philippine citizenship was contained in the Philippine Bill, section 4, as amended by the Act of Congress of March 23, 1912. Petitioner could not be a Filipino citizen upon the date of his birth because his father, who was legally married to his mother, was a Chinese citizen and not a subject of Spain on April 11, 1899, like his mother....
>
> "The applicant in G.R. No. 47623 could not possibly be a Filipino citizen upon his birth (1900) because, aside from the fact that his father, who is presumed to have been legally married to his mother, was a Chinese subject, *there was no law on Philippine citizenship at that time*, because firstly even the aforesaid articles of the Civil Code had previously been abrogated, as already stated, by the change of sovereignty in the Philippines following the Spanish-American war, secondly, said articles at any rate did not regulate Philippine citizenship nor did they make said applicant's father a Spanish subject, and thirdly, the Philippine Bill was not enacted until July 1, 1902."

We are fully in accord with the majority and in the concurring opinions in the Tan Chong Case (born in Philippines in 1915) G.R. No. 47616 that the Philippine Bill of 1902 which has no provision on the application of *jus soli* principle, was applied in his case because that was the law in force at the time of his birth. But we humbly dissent from the opinion in the other case of Lam Swee Sang G.R. No. 47623 (born 1900) because there being no law on Philippine citizenship at that time, the principle of *jus sanguinis* was applied to him by the court. In the absence of law at the time of Lam Swee Sang's birth in Sulu, the next question is: How should his citizenship be determined?

The Civil Code provisions on citizenship were by the time of his birth already abrogated; the Philippine Organic Act cannot apply to him for the simple reason that its provisions while determining the political status of the native inhabitants of the Philippines as of April 11, 1889, as agreed in the Treaty of Paris, cannot apply retroactively upon persons born in the Philippines before it became effective in 1902; hence, the Court declared him to be *not* a citizen of the Philippines, for he followed the Chinese nationality of his parents, who were Chinese citizens at the time of his birth.

But the Court failed to consider the case from another angle, that is, it should have laid stress on the fact that at the time of

birth of applicant in this country, the Philippines was already a territory of the United States, in which the democratic way of life was more pronounced than in any part of the world. It should have been borne in mind by said Court that any person born like the circumstances of the applicant (1900) in P.I., began to breath a new air in a new atmosphere, under a democracy whose prevailing rule was to the effect that the mere fact of birth in the United States conferred citizenship upon such person, irrespective of his parents' citizenship. That was the paramount principle which predominated in the new sovereign country then and at the present time. We do not believe that the United States could have disregarded the position of those situated like the applicant, when even the early justices of the Supreme Court of the Philippines entertained the view as Mr. Justice Malcolm said in his concurring opinion in the Lim Bin case *supra*, that the principle of *jus soli* was applicable in this country *with limitation*, on the basis of the case of U.S. v. Wong Kim Ark, 169 U.S. 649. During the period of indecision on the part of the United States until the Organic Act of 1902 was actually enacted, the benefit of such an indecision should be in favor of the persons who would otherwise be prejudiced thereby. And such rights acquired during said vacant period, cannot be abridged by any subsequent legislation in the same way that rights to life, liberty and property should be protected.

Although the Constitution of the United States did not extend to the island *ex propio vigore*, however, the same principle upon which the Government of the United States lies, and which underlie the protection of life, liberty and property, carry with them the right to the possession of a certain kind of political status which should naturally identify them as a result of their birth in a United States territory. The former sovereign actually applied in the Philippines the same principle or doctrine of *jus soli* as it was and is still being applied in the United States. And no justifiable reason may be attributed, why same principle should not be applied in the Philippines during this vacuum period. It would seem an injustice to let such persons' status to hang in the balance during such period of indecision on the part of the United States. Such an indecision on the part of the new sovereign cannot and should not prejudice the rights of person who would have been adversely affected thereby. The fundamental reasons relied upon by the Supreme Court of the Philippines in the Roa case and the subsequent cases based on it, we honestly believe, while not exactly applicable or appropriate on the circumstances of the Roa and similar cases, for they were born during the Spanish Regime, would, undoubtedly, be the very same fundamental and persuasive reasons which very aptly would fit and uphold the rights acquired by the persons born during the vacant (vacuum) period between April 11, 1899 and July 1, 1902, exclusive.

The circumstances of these persons differentiate or distinguish their status from those born after the enactment of the Philippine Bill of 1902, it being the expression of the policy of the United States in the Philippines and should govern in determining the citizenship of persons born after the latter date.

SUMMARY OF PART I

Summarizing our analysis of the antecedents, the development or evolution of the Philippine laws on citizenship, starting from the Spanish Regime, through the period of the Military-Civil Occupation, to the period of the Civil-Autonomous Administration by the United States of America, and the trends of the construction or interpretation of said laws by the Courts of this country, bearing specifically on the present inquiry — whether or not it was ever the policy of the United States to extend here the principle of *jus soli*, it is our conviction that the following points may now be considered as clear and uncontradicted:

Firstly. — That there is actually no basis, and therefore, no justification for the Courts to have over-used the term "*jus soli*" allegedly as a doctrine in this jurisdiction in connection with the interpretation of section 4 of the Philippine Bill of 1902 and section 2 of the Jones Law of 1916, in view of the fact that the persons or individuals whose citizenship was then involved, were persons born in the Philippines of Chinese fathers and Filipino mothers, before the advent of the American sovereignty in the Philippines. Therefore, their citizenship was governed by the law then in force and effect, such as the Spanish Civil Code, and not by the Philippine Organic Acts.

Secondly. — There was actually no specific provision in the Philippine Organic Acts (of 1902 and of 1916) in question, from which it might be considered or inferred that the mere fact of birth in this country from and after July 1, 1902, conferred citizenship upon those born thereafter in this country.

Thirdly. — That the period from April 11, 1899 to July 1, 1902, exclusive, is a vacant or vacuum period which is characterized by the absence of specific law on citizenship.

Fourthly. — That the citizenship of persons born in the Philippines, should be determined as of the dates of their respective births, and by the law then in force at the time.

CONCLUSION TO PART I

Consequently, it may be concluded that in not incorporating the principle of *jus soli* within the terms and provisions of the aforementioned Organic Acts of 1902 and 1916, the United States, either inadvertently or deliberately, did not extend the application of the principle of *jus soli* to the Philippines, at least from and after July 1, 1902, when for the first time, Congress expressed in law its own policy in the Islands. That though said principle or doctrine of *jus soli* was not actually adopted as a policy when Congress enacted the Organic Act of 1902, it should undoubtedly be considered as applying in this jurisdiction *with limitation*, at least from April 11, 1899 to July 1, 1902, exclusive, as a necessary alternative to upset any possible injustice or discrimination against the people affected, and as a necessary consequence of the fundamental principles which underlie the protection of life, liberty and property as embodied in Great Bill of Rights of the United States.

RECOMMENDATION TO PART I

In view of the foregoing clarification, it is our humble and considered view as we strongly recommend to all concerned, that in matters of citizenship, the following rules be adopted in determining questions of citizenship in the manner suggested by Mr. Justice Malcolm of the Supreme Court in the case of U.S. v. Lim Bin, *supra*, and Mr. Justice Jose Lopez Vito, of the Court of Appeals, in the case of Mariano Sy-Jueco v. Roxas, *supra*, with our humble amplifications, to wit:

1. If the child was born before the date on which the Spanish Civil Code took effect in the Philippines, his citizenship should be governed by the laws then in force, especially the Royal Decree of November 17, 1852, the Law of September 18, 1870, and the Law of the 3rd Title, 11th Volume of the 6th Novisima Recopilacion;

2. If he was born after the Spanish Civil Code went into effect in these Islands, but previous to the acquisition of said Islands by the United States, the citizenship of the child must be governed by the provisions of the Civil Code;

3. If he was born after the Philippines were ceded to the United States and before any law was promulgated on July 1, 1902, — defining the status of the natives of the Philippines, his citizenship should be governed by the American law on citizenship, especially the 14th Amendment to the United States Constitution, and the interpretation made by the Supreme Court of the United States in the case of U.S. v. Wong Kim Ark, 1897 (169 U.S. 469), an interpretation which constitutes a legal doctrine applicable to a territory of the United States, at least, during the vacant (vacuum) period when there was no law on citizenship in this jurisdiction;

4. After the acquisition of the Philippine Islands by the United States, by virtue of the Treaty of Paris, and after the actual enactment of the Philippine Bill of July 1, 1902, the citizenship of persons born thereafter must be governed by the said Organic Acts.

— II —

Finally, we come to the second question — whether or not a minor child of an alien woman who automatically becomes a Philippine citizen by reason of her marriage to a Philippine citizen, also becomes *ipso facto* a citizen of the Philippines? That is, does an alien minor step-child of a Filipino citizen step-father become also a Philippine citizen like the mother? Is the citizenship acquired by marriage a naturalization within the meaning of Section 15 of Commonwealth Act No. 473, otherwise known as the Revised Naturalization Law? Is there such thing as naturalization by marriage which may transmit citizenship to the wife's minor children by previous marriage or previous illicit relations with other man? And what is the citizenship of a minor child of a foreign divorcee mother who becomes a Filipino citizen by marriage to a Filipino, assuming that the divorce is cognizable in this country?

The law applicable or which has a bearing on the foregoing questions, is section 15, paragraphs 1 and 3, thereof, which provides as follows:

> "Effect of the naturalization on wife and children. — Any woman who is now or may hereafter be married to a citizen of the Philippines, and who might herself be naturalized, shall be deemed a Philippine citizen.
>
> x x x x x
>
> "A foreign-born minor child, if dwelling in the Philippines at the time of the naturalization of the parent, shall automatically become a Philippine citizen, and a foreign-born minor child, who is not in the Philippines at the time the parent is naturalized, shall be deemed a Philippine citizen only during his minority, unless he begins to reside permanently in the Philippines when still a minor, in which case, he will continue to be a Philippine citizen even after becoming of age."

The foregoing provisions are quoted for purposes of reference whether they really apply to the questions under scrutiny in view of the mother's acquisition of Philippine citizenship by virtue of such marriage, and whether further there is such thing as "naturalization by marriage."

The first paragraph of Section 15 above quoted, confers Philippine citizenship upon alien woman upon her marriage to a citizen of the Philippines, if such alien woman herself might herself be lawfully naturalized. The phrase "who might herself be naturalized", does not require that the woman shall have the qualifications of residence, etc. as in the naturalization proceedings, but merely that she is of the class or race of persons who may be naturalized. Inasmuch as race qualification has been removed from our Naturalization Law, it results that any woman who marries a citizen of the Philippines prior to or after June 17, 1939, and the marriage not having been dissolved, and on the assumption that she possesses none of the disqualifications mentioned in section 4, Commonwealth Act No. 473, follows the citizenship of her Filipino husband. (Garcia "Problems of Citizenship" p. 122, and authorities cited). Although this paragraph provides for the conferment of citizenship upon the alien wife who marries a Filipino citizen, it cannot be said that she acquires it by naturalization although the provision is included in section 15 of the naturalization law. At most it may be said that marriage is a form of acquisition of citizenship, not necessarily as a form of naturalization, but following the principle of unity of nationality in the family, and following our system of the family in which the father-husband is the head. While marriage is a form of institution and a source of acquisition of citizenship, it is not a kind of naturalization, because naturalization implies certain form of procedure, be it in court or in executive or administrative agency, to be followed with some formality of some kind as a pre-requisite, where the petitioner is the head of the family, that is, the husband-father. In his default, however, if the wife so desires, then she has to comply with certain requirements as to qualifications and disqualifications, etc.

But in case of marriage as a source of citizenship, the fact of marriage alone, without disqualification due to war or due to lack of reciprocity as provided in Section 4, and without even taking an oath of allegiance, confers citizenship of the Filipino husband upon the alien wife. In short, if citizenship is transmitted to the alien wife, it is by her marriage that she acquires a distinct status whose personality is merged with her husband from whom she derives her new political status.

The next question which now presents itself is: Is this new citizenship of the wife transmissible from her to her minor children previously born to her with another man, be it her legal husband or not? Does not the child possess a certain citizenship already conferred upon him by reason of his birth, be it under the principle of *jus soli* or *jus sanguinis?* Could such citizenship of the minor children acquired when born, be merely laid aside as easy as that and get another upon the change of nationality by the mother?

In at least three Opinions, the Secretary of Justice expressed the view based on the alleged rule in the United States, to the effect that minor children of alien woman who automatically became citizens of the Philippines by reason of their marriage to naturalized citizens, also *ipso facto* became citizens of the Philippines. These are Op. No. 1, s. 1954 in the case of Sophie and Betty Lian, 19 and 18 years of age, born in China of Chinese parents; mother, after becoming a widow, married another Chinese, who later was naturalized as citizen of the Philippines, were likewise considered citizens; and Op. No. 111, s. 1953 re-citizenship of Zosimo Tan who was also considered as Filipino citizen, based on similar circumstances. The case of a certain Pascual, Op. No. 147, s. 1953 who was born in 1915 of Spanish parents, his father having died in 1916, his mother married a citizen of the Philippines, was also considered citizen of the Philippines following the same vein as the other two Opinions. These three opinions were based on some American authorities to the effect that:

> "When the husband of an alien woman becomes a naturalized citizen, she and her infant son, dwelling in this country, become citizens of the United States as fully as if they have become such in the special mode prescribed by the naturalization laws. United State ex rel. Fisher V. Rogers, U.S. Com'r et al., 144 Fed. p. 711; 712; United States v. Keller /c.c./13 Fed. 92; Kelly v. Owen, 7 Wall./74 U.S./26 Fed./2nd/148, 149."

Assuming the child in the American cases cited to be that of a previous husband of the woman, that is, step-child of the naturalized citizen, still we cannot be guided by such a ruling in the United States, because, there is such a lot of differences in our Constitution and other laws on citizenship, from the laws on citizenship in the United States. In the United States, an American woman who marries an alien does not follow her husband's nationality, which is opposed to ours. Under the American law they follow certain procedure for naturalization of alien women married to citizens of the United States. Be it as it may, we must bear in mind that we have our own law on the subject which we will attempt to analyze for our clarification

For instance, there is nothing to infer from the provision of paragraph 3 of section 15, Com. Act No. 473, from which it may be inferred that an alien woman who acquired citizenship by reason of marriage, may in turn, transmit, such high privilege of citizenship to her minor children of a previous marriage. In fact the title of section 15, "Effect of naturalization on wife and children", indicates and refer only to the legal wife and legitimate children of applicant-husband-father of the family to which his

step-children —children of his wife with a previous husband, have no relation to him as would have the benefit of the effects of naturalization.

It must be stated further that the foreign wife who becomes a citizen by virtue of the marriage, has no privilege of her own, to re-transmit what has been transmitted to her on the virtuality of that marriage, for her own personality is merged with her Filipino husband who is the head and the fountain source of such right or high privilege. This is founded on the very principle which underlie our unique system of family institution, in which even in questions of inheritance certain legitime is reserved upon the forced heirs, and on this analogy the logical conclusion is that the step-children of the Filipino citizen, husband of the child's mother, shall not have such right of succession to the privilege of citizenship coming solely from the step-father.

But it may be argued that since she is the only surviving guardian of her own minor children, her minor children should follow her citizenship. As a matter of fact, in the dissenting opinion in the case of Villahermoso v. the Commissioner of Immigration, G.R. No. L-1663, March 31, 1948, 45 Off. Gaz. 167, No. 9 Suppl. where a minor child of a Filipino woman married to a Chinese alien, does not follow the mother's citizenship following the death of her alien husband. Messrs. Justices Perfecto and Tuazon (dissenters) argued that under Art. 18 of the Civil Code, "children, while they remain under parental authority, have the nationality of their parents," and that "since minor children depend on their parents for their subsistence, support and protection, it stands to reason that they should follow the nationality of said parents." This was the same argument used in the Roa case, supra, that "the weight of authority is to the effect that the marriage of an American woman to an alien confers upon her the nationality of her husband during coverture; but that thereafter on the dissolution of marriage by death, she converts *ipso facto* to her original status unless her conduct or acts show that she elects the nationality of her deceased husband."

The dissenting opinion, while pointing to natural law as a basis of unity of citizenship, such is not the case in the question at issue, firstly because Article 18 of the Civil Code has already been abrogated by change of sovereignty, and secondly, the principle that "a minor child follows that of its surviving parent-the mother", was abandoned when section 1(4), Art. IV, of the Constitution was adopted to the effect that children of Filipino woman married to foreigner continue to be aliens until upon reaching the age of majority, they elect Philippine citizenship. In view of said Constitutional provision, the Supreme Court held in the Villahermosa case, *supra*, that "Commonwealth Act No. 63, does not provide that upon the repatriation of a Filipina her children acquire Philippine citizenship. It would be illogical to consider Delfin as repatriated like his mother, because he never was a Filipino citizen and could not have acquired such citizenship." Continuing, the Court said:

> "While his Chinese father lived, Delfin was not a Filipino. His mother was not a Filipino; she was a Chinese. After the death of his father, Villahermosa continued to be a Chinese, until she reacquired her Philippine citizenship in April, 1947. *After that reacquisition Delfin could claim that his mother was a Filipina within the meaning of paragraph 4, section 1, of Article IV, of the Constitution; but according to same Organic Act, he had to elect Philippine citizenship upon attaining his majority.*"

If the Philippine Constitution (Sec. 1(4), Art. IV), as interpreted by the Supreme Court in the Villahermosa case, supra, promulgated a policy in which, despite the repatriation of a Filipino woman to her original Philippine citizenship as Filipina after the death of her alien husband, her minor son does not follow the Philippine citizenship of his Filipina mother, considering even the fact that such a child has in his blood 50% alien and 50% Filipino, it would be the height of injustice, and certainly contrary to the spirit of the Constitution, to make as Philippine citizen ipso facto as its worst, any full-blooded alien minor child of full-blooded alien mother who automatically became a citizen by her marriage to a Filipino husband. It could not have been intended by the legislators to provide such an easy way of making alien children citizens of the Philippines, and yet deny similar privilege to a child of a Filipino woman even after her repatriation as such Filipino citizen.

It is true that it used to be the rule in this jurisdiction previous to adoption of the Constitution and the enactment of Com. Act No. 63, that "a Filipino woman married to a Chinese by placing herself within the jurisdiction of the Philippines after the death of her husband *ipso facto* followed her nationality she being the legally surviving guardian." But such old rule (in the Roa case *supra*) was abandoned upon the adoption of the Constitution and the enactment of Com. Act 63, and, therefore, any rule or principle borrowed from the American decisions or jurisdiction which are in conflict with our Constitution and laws should be disregarded and forgotten.

As the Constitution is a key to the interpretation of the provision of the Naturalization Law in question, so is the provision of section 13 of the Philippine Immigration Act of 1940 (Com. Act No. 613) which must be availed of as may aid in the clarification of other provisions of other law. Said Immigration Law provides for admission into the Philippines of certain "non-quota immigrants", without regard to the quota limitations, precisely because of some special consideration such as family relationship to citizen of the Philippines — a provision which forsees a contingency as brought about by cases of a nature like one under inquiry.

Sec. 13 of Com. Act No. 613 provides:

> "Under the conditions set forth in this Act, there may be admitted into the Philippines immigrants termed 'quota immigrants' not in excess of 50 of any one nationality x x x except that the following immigrants, termed 'non-quota immigrants' may be admitted without regard to such numerical limitations. x x x
>
> "(a) The wife or the husband or the unmarried child under twenty-one years of age of a Philippine citizen, if accompanying or following to join such citizen."

In adopting this provision in the Immigration Act, the legislature must have in mind cases like step-children, children, or husband or wife of citizens. To our point of view, and this is the most logical conclusion, that these among others are the very concrete examples of non-quota immigrants who are permitted to come under section 13 of the Immigration Law to enable them to enjoy the company of those under and with whose care and protection they want to come and join in the Philippines. The difference of nationality among members of a family due to inter-marriages, is the very contigency envisioned in this provision of the law, which fortunately, is an aid to the clarification of the naturalization act.

There is another important consideration which supports our view that while the alien woman becomes a citizen by marriage to a Filipino, the children of said woman by previous husband, do not become so, for it would contravene another provision of the naturalization law, for in section 2, par. sixth, among the qualifications required of applicants for naturalization is that "he must have enrolled his minor children of school age, in any of the public schools or private schools x x x where Philippine history, government and civics are taught x x x". The Supreme Court considered this qualification a very important one, stating that "the legislator evidently holds all the minor children of the applicant for citizenship must learn Philippine history, government and civics, *inasmuch as upon naturalization of their father they ipso facto acquire the privilege of Philippine citizenship.*" (underscoring ours). In not granting the application for naturalization of the applicant

(*Continued on page 310*)

I

Alejandro Samson, Petitioner, vs. Andrea B. Andal de Aguila, et al., Respondents, G.R. No. L-5932, Feb. 25, 1954, Paras, C.J.:

OBLIGATION PAYABLE DURING THE JAPANESE OCCUPATION; PAYMENT AFTER LIBERATION MUST BE ADJUSTED WITH THE BALLANTYNE SCHEDULE.— The Supreme Court has heretofore sustained the proposition that, when an obligation is payable within a certain period of time, and the whole or part thereof coincides with the Japanese occupation, payment after the liberation must be adjusted in accordance with the Ballantyne schedule, because the debtor could have paid said obligation in Japanese war notes during the occupation. (Asis vs. Agdamag, G.R. No. L-3709, October 25, 1951; Ang Lam vs. Peregrina, G.R. No. L-4871, January 26, 1953); Jales vs. Gamara, G.R. No. L-4460, Oct. 31, 1953.)

The debtor's mere failure to accomplish payment during the Japanese occupation did not make him liable to pay, as damage or penalty, the difference between the value of the Japanese war notes at the time the obligation became payable and of the Philippine currency at the time of payment. (Gomez vs. Tabia, 47 O.G. 641.)

It is true that the creditors herein could not demand payment prior to October 25, 1945, but this did not preclude the debtor, herein petitioner, from paying his obligation at any time within one year from October 25, 1944, if he had wanted to do so. (Ibid.)

Seven S. Ceniza for petitioner.
Sison, Sevilla, Aquino & Paras and *Pedro P. Colina* for respondents.

DECISION

PARAS, C.J.:

On March 4, 1947, Alejandro Samson filed against Agapito B. Andal and Valentina Berana de Andal in the Court of First Instance of Manila a complaint for declaratory relief, praying that judgment be rendered fixing the amount which Alejandro Samson should pay to Agapito B. Andal and Valentina Berana de Andal under a deed of mortgage executed by the former in favor of the latter, and that the defendants be ordered to cancel the mortgage upon payment of said amount. On August 26, 1949, the court rendered a decision, declaring that the amount due from the plaintiff to the defendants is ₱150.00, Philippine currency, plus annual interest at the rate of 7% from October 25, 1944, and ordering the defendants to execute the proper deed of cancellation upon payment by the plaintiff of said amount. The court applied the Ballantyne scale of values. Agapito B. Andal and Valentina Berana de Andal appealed to the Court of Appeals which, on June 9, 1952, rendered a decision holding that the plaintiff should pay to the defendants ₱6,000.00 (the full amount of the loan obtained by the plaintiff from the defendants on October 25, 1944), in actual Philippine currency, plus the stipulated interest, but subject to the moratorium law. From this decision Alejandro Samson has appealed to this Court by way of certiorari. By resolution of October 17, 1952, Agapito B. Andal and Valentina Berana de Andal (who had died) were ordered substituted as parties respondents by their heirs, Andrea B. Andal de Aguila and others.

The Court of Appeals found that Alejandro Samson, herein petitioner, obtained from Agapito B. Andal and Valentina B. de Andal on October 25, 1944, a loan of ₱6,000.00, with interest at 7% per annum and, to secure its payment, the former executed in favor of the latter a real estate mortgage. That court, in holding that the petitioner should pay ₱6,000.00 in present Philippine currency, argued that while the loan was made during the Japanese occupation, it became due and payable only after said period. We have heretofore sustained the proposition that, when an obligation is payable within a certain period of time, and the whole or part thereof coincides with the Japanese occupation, payment after the liberation must be adjusted in accordance with the Ballantyne schedule, because the debtor could have paid said obligation in Japanese war notes during the occupation. (Asis vs. Agdamag, G.R. No. L-3709, October 25, 1951; Ang Lam vs. Peregrina, G.R. No. L-4871, January 26, 1953.) As Mr. Justice Feria indicated in his concurring opinion in the case of Gomez vs. Tabia, 47 O.G. 641, the debtor's mere failure to accomplish payment during the Japanese occupation did not make him liable to pay, as damage or penalty, the difference between the value of the Japanese war notes at the time the obligation became payable and of the Philippine currency at the time of payment. It is true that the creditors herein could not demand payment prior to October 25, 1945, but this did not preclude the debtor, herein petitioner, from paying his obligation at any time within one year from October 25, 1944, if had wanted to do so.

Wherefore, the decision of the Court of Appeals is hereby reversed, and it is declared that the amount which the petitioner should pay to cancel his mortgage is only the sum of ₱150.00, the equivalent in actual Philippine currency of ₱6,000.00 in Japanese war notes on October 25, 1944, plus annual interest at the rate of 7% on the said sum of ₱150.00 from October 25, 1944. So ordered without costs.

Bengzon, Reyes, Jugo, Bautista Angelo and *Labrador, J.J.*, concur.
Justice Padilla concurred in the result.
Justice Montemayor and *Justice Pablo* took no part.

II

Benita S. Balinon, Petitioner, vs. Celestino M. de Leon et al., Respondents, ADM. Case No. 104, Jan. 20, 1954, Paras, C.J.:

ATTORNEY AT LAW; SUSPENSION; CASE AT BAR. — This Court had heretofore imposed the penalty of suspension upon an attorney who prepared a document stipulating, among other, that the contracting parties, who are husband and wife, authorized each other to marry again and that each renounced whatever right of action one might have against the party so marrying (*In re* Roque Santiago, 40 Off Gaz. [5th Supp.] p. 208). In effect the affidavit prepared and signed by respondent De Leon has similar implication, in that although it does not bluntly authorize said respondent to marry another during his subsisting wedlock with Vertudes Marquez, he made it appear that he could take in another woman as a lifetime partner to whom he would remain loyal and faithful as a lawful and devoted loving husband and whom he could take and respect as his true and lawful wife; thereby virtually permitting himself to commit the crime of concubinage. It is true, as respondent De Leon argues, that the consent or pardon of either spouse constitutes a bar to a criminal prosecution for adultery and concubinage, but, as the Solicitor General observes, said crimes are not thereby legalized, the result being merely that prosecution is such cases would not lie. The contention that the affidavit is only a unilateral declaration of facts is of no moment, since it undoubtedly enabled respondent De Leon to attain his purpose of winning over Regina S. Balinon with some degree of permanence.

First Assistant Solicitor General Ruperto Kapunan, Jr. and *Solicitor Juan T. Alano* for petitioner.
Jose W. Diokno, Justo T. Velayo and *Celestino de Leon* for respondent.

DECISION

PARAS, *C. J.*:

The Solicitor General has filed a complaint against the res-

pondents Celestino M. De Leon and Justo T. Velayo, duly qualified members of the bar in active practice, alleging that, since December, 1949, respondent De Leon, still legally married to Vertudes Marquez lived as husband and wife with Regina S. Balinon; that said respondent prepared and subscribed on February 4, 1949, before respondent Velayo, a notary public, an affidavit which reads as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"I, CELESTINO DE LEON, of legal age, married, filipino citizen, after being duly sworn to according to law depose and say:

"That there exists a contract of separation executed and perfected between my wife, Vertudes Marquez and myself;

"That said contract states among other things that each of us is at liberty and free to take for himself and herself a lifetime partner with the full consent and authorization of each other;

"That by the same contract our conjugal partnership was dissolve and our existing property, rights and interest were divided and apportioned;

"That in the said contract my wife shall have the full control, care and custody of the children, and as such all of our conjugal property rights and interests were apportioned to her with the exception of my private personal belongings and things pertaining to my law profession;

"That, besides the said dissolution and apportionment, said contract further states about my wife's and also my children's share to my current income by way of alimony and support;

"NOW, therefore, by virtue of the said contract of separation, I now by these presents take my new found life-partner REGINA S. BALINON, as my true and lawful wife;

"That, in order to protect her rights and interests with regards to her personality and future property rights, I, hereby voluntarily and of my own free will solemnly swear under oath;

"That I will uphold and defend her honor and dignity and prestige as a woman of the weaker sex as well as any and all members of her family arising by reasons of said relationship;

"That I will maintain and preserve the new existing companionship, the love, respect and goodwill prevailing among the members of her family of which I am now a member as well as equally mine;

"That I will not do any act that may tend to degrade or dishonor her or any member of her family unbecoming the dignity of said relationship but would rather take and respect her as my true and lawful wife;

"That in case of intentional desertion on my part thereby frustrating the true and honest intent of my affirmations, the same may be sufficient ground for my perpetual disbarment upon her instance or any third party in interest;

"That except for such minor dues and allowances by way of alimony and support mentioned above, any and all such future properties, rights and interests that we shall acquire during said relationship shall exclusively appertain and belong to her as her due share and shall bear her name in all such titles and documents thereto, subject to her legal heirs as such;

"That any offspring that we shall bear by reason of said companionship and relationship shall be acknowledge by me as my true and legal child with all the rights and privileges accorded by law pertaining to that of a legitimate child;

"That this contract of companionship is done of my own accord, freely and voluntarily without any mental reservation or purpose of evasion, So HELP ME GOD.

"IN WITNESS WHEREOF, I have hereunto set my signature this 4th day of February 1949.

"SGD.) CELESTINO M. DE LEON
CELESTINO DE LEON

"SIGNED IN THE PRESENCE OF:

"REPUBLIC OF THE PHILIPPINES)
CITY OF BACOLOD) S.S.

"Personally appeared before this 4th day of February 1949, CELESTINO DE LEON with Residence Certificate No. ..... issued at ..... on ..... 1949, who executed the foregoing affidavit with contract of companionship consisting of two pages, and acknowledge by me that the same is his own free and voluntary act and deed.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal on the place and date first wrtiten above.

"(SGD.) JUSTO V. VELAYO"
NOTARY PUBLIC
Until Dec. 31, 1948

"Doc. No. 484
"Page No. 97
"Book No. XVI
"Series of 1949."

The complaint also alleges that, notwithstanding the unlawful and immoral purposes of the foregoing affidavit, respondent Velayo knowingly signed the same in violation of his oath of office as attorney and notary public.

Respondent De Leon admits his continuous cohabitation with Regina S. Balinon during his subsisting marriage with Vertudes Marquez and the fact that he prepared and subscribed the affidavit above quoted, but contends that he has not yet been finally convicted of a crime involving moral turpitude; that while the affidavit may be illicit, it is not an agreement but a mere innocent unilateral declaration of facts; and that while the execution of said affidavit may be illegal and void *ab initio*, no specific law has been violated so as to give rise to an action. Respondent Velayo alleges, on the other hand, that his participation was limited to the task of notorizing the affidavit, as a matter of courtesy to a brother lawyer and without knowing its contents, and this allegation is corroborated by respondent De Leon who further stated that no consideration whatsoever passed to the former.

This Court had heretofore imposed the penalty of suspension upon an attorney who prepared a document stipulating, among other, that the contracting parties, who are husband and wife, authorized each other to marry again and that each renounced whatever right of action one might have against the party so marrying (*In re* Roque Santiago, 40 Off. Gaz. 5th Supp. p. 208). In effect the affidavit prepared and signed by respondent De Leon has similar implication, in that although it does not bluntly authorize said respondent to marry another during his subsisting wedlock with Vertudes Marquez, he made it appear that he could take in another woman as a lifetime partner to whom he would remain loyal and faithful as a lawful and devoted loving husband and whom he could take and respect as his true and lawful wife; thereby virtually permitting himself to commit the crime of concubinage.

pondents Celestino M. De Leon and Justo T. Velayo, duly qualified members of the bar in active practice, alleging that, since December, 1949, respondent De Leon, still legally married to Vertudes Marquez lived as husband and wife with Regina S. Balinon; that said respondent prepared and subscribed on February 4, 1949, before respondent Velayo, a notary public, an affidavit which reads as follows:

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This Court had heretofore imposed the penalty of suspension upon an attorney who prepared a document stipulating, among other, that the contracting parties, who are husband and wife, authorized each other to marry again and that each renounced whatever right of action one might have against the party so marrying (*In re* Roque Santiago, 40 Off. Gaz. 5th Supp. p. 208). In effect the affidavit prepared and signed by respondent De Leon has similar implication, in that although it does not bluntly authorize said respondent to marry another during his subsisting wedlock with Vertudes Marquez, he made it appear that he could take in another woman as a lifetime partner to whom he would remain loyal and faithful as a lawful and devoted loving husband and whom he could take and respect as his true and lawful wife; thereby virtually permitting himself to commit the crime of concubinage.

It is true, as respondent De Leon argues, that the consent or pardon of either spouse constitutes a bar to a criminal prosecution for adultery and concubinage, but, as the Solicitor General observes, said crimes are not thereby legalized, the result being merely that prosecution in such cases would not lie. The contention that the affidavit is only a unilateral declaration of facts is of no moment, since it undoubtedly enabled respondent De Leon to attain his purpose of winning over Regina S. Balinon with some degree of permanence.

It is likewise insisted that the acts imputed to respondent De Leon had no relation with his professional duties and therefore cannot serve as a basis for suspension or disbarment under section 25 of Rule 127. It should be remembered, however, that a member of the bar may be removed or suspended from office as a lawyer on ground other than those enumerated by said provision (In re Pelaez, 44 Phil. 567). Moreover, we can even state that respondent De Leon was able to prepare the affidavit in question because he is a lawyer, and has rendered professional service to himself as a client. He surely employed his knowledge of the law and skill as an attorney to his advantage. (Manalo v. Gan, Adm. Case No. 72, May 18, 1953.)

With reference to respondent Velayo, there is no question that he did nothing except to affix his signature to the affidavit in question as a notary public. While, as contended by his counsel, the duty of a notary public is principally to ascertain the identity of the affiant and the voluntariness of the declaration, it is nevertheless incumbent upon him at least to guard against having anything to do with illegal or immoral arrangement. In the present case respondent Velayo was somewhat negligent in just affixing his signature to the affidavit, although his fault is mitigated by the fact that he had relied on the good faith of his co-respondent.

Wherefore, we hereby decree the suspension from the practice of law of respondent Celestino M. De Leon for three years from the date of the promulgation of this decision. Respondent Justo T. Velayo is hereby merely reprimanded. So ordered.

Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo, Bautista Angelo and *Labrador, JJ.*, concur.

III

King Mau Wu, Plaintiff-Appellee vs. Francisco Sycip, Defendant-Appellant, G. R. No. L-5897, April 23, 1954, Padilla, J.:

PLEADING AND PRACTICE; ACTION BY A NON-RESIDENT PLAINTIFF AGAINST A RESIDENT DEFENDANT. — Where in a contract of agency it is contended that inasmuch as the contract was executed in New York, the Court of First Instance of Manila has no jurisdiction over the case, the contention is without merit because a non-resident may sue a resident in the courts of this country where defendant may be summoned and his property leviable upon execution in case of a favorable, final and executory judgment. (Marshall-Wells Co. vs. Henry W. Elser & Co., 46 Phil. 70; Western Equipment and Supply Co. vs. Reyes, 51 Phil. 115.)

I. C. Monsod for appellant.
J. A. Wolfson and *P. P. Gallardo* for appellee.

DECISION

PADILLA, *J.*:

This is an action to collect P59,082.92, together with lawful interests from 14 October 1947, the date of the written demand for payment, and costs. The claim arises out of a shipment of 1,000 tons of coconut oil emulsion sold by the plaintiff, as agent of the defendant, to Jas. Maxwell Fassett, who in turn assigned it to Fortrade Corporation. Under an agency agreement set forth in a letter dated 7 November 1946 in New York addressed to the defendant and accepted by the latter on the 22nd day of the same month, the plaintiff was made the exclusive agent of the defendant in the sale of Philippine coconut oil and its derivatives outside the Philippines and was to be paid 2-1/2% on the total actual sale price of sales obtained through his efforts and in addition thereto 50% of the difference between the authorized sale price and the actual sale price.

After trial where the depositions of the plaintiff and of Jas. Maxwell Fassett and several letters in connection therewith were introduced and the testimony of the defendant was heard, the Court rendered judgment as prayed for in the complaint. A motion for reconsideration was denied. A motion for new trial was filed, supported by the defendant's affidavit, based on newly discovered evidence which consists of a duplicate original of a letter dated 16 October 1946 covering the sale of 1,000 tons of coconut oil soap emulsion signed by Jas. Maxwell Fassett to the defendant; the letter of credit No. 20122 of the Chemical Bank & Trust Company in favor of Jas. Maxwell Fassett assigned by the latter to the defendant; and letter dated 16 December 1946 by the Fortrade Corporation to Jas. Maxwell Fassett whereby the corporation placed a firm order of 1,000 metric tons of coconut oil soap emulsion and Jas. Maxwell Fassett accepted it on 24 December 1946, all of which documents, according to the defendant, could not be produced at the trial, despite the use of reasonable diligence, and if produced they would alter the result of the controversy. The motion for new trial was denied. The defendant is appealing from said judgment.

Both parties are agreed that the only transaction or sale made by the plaintiff, as agent of the defendant, was that of 1,000 metric tons of coconut oil emulsion f.o.b. in Manila, Philippines, to Jas. Maxwell Fassett, in whose favor letter of credit No. 20122 of the Chemical Bank & Trust Company for a sum not to exceed $400,000 was established and who assigned to Fortrade Corporation his right to the 1,000 metric tons of coconut oil emulsion and to the defendant the letter of credit referred to for a sum not to exceed $400,000.

The plaintiff claims that for that sale he is entitled under the agency contract dated 7 November 1946 and accepted by the defendant on 22 November of the same year to a commission of 2-1/2% on the total actual sale price of 1,000 tons of coconut oil emulsion, part of which has already been paid by the defendant, there being only a balance of $3,794.94 for commission due and unpaid on the last shipment of 379.494 tons and 50% of the difference between the authorized sale price of $350 per ton and the actual selling price of $400 per ton, which amounts to $25,000 due and unpaid, and $746. 52 for interest from 14 October 1947, the date of the written demand.

The defendant, on the other hand, contends that the transaction for the sale of 1,000 metric tons of coconut oil emulsion was not covered by the agency contract of 22 November 1946 because it was agreed upon on 16 October 1946; that it was an independent and separate transaction for which the plaintiff has been duly compensated. The contention is not borne out by the evidence. The plaintiff and his witness depose that there were several drafts of documents or letters prepared by Jas. Maxwell Fassett preparatory or leading to the execution of the agency agreement of 7 November 1946, which was accepted by the defendant on 22 November 1946, and that the letter, on which the defendant bases his contention that the transaction on the 1,000 metric tons of coconut oil emulsion was not covered by the agency agreement, was one of those letters. That is believable. The letter upon which defendant relies for his defense does not stipulate on the commission to be paid to the plaintiff as agent, and yet if he paid the plaintiff a 2-1/2% commission on the first three coconut oil emulsion shipments, there is no reason why he should not pay him the same commission on the last shipment amounting to $3,794.94. There can be no doubt that the sale of 1,000 metric tons of coconut oil emulsion was not a separate and independent contract

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

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

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

DECISION

PADILLA, *J.*:

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

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

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

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

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

Cebu City, Philippines, January 20, 1950.

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

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

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

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

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

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

In an action for refund of municipal taxes claimed to have

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

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

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

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

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

V

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

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

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

MR. JUSTICE TUASON, *dissenting.*

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

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

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

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

DECISION

PABLO, *M.:*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Justice Padilla took no part.

FERIA, J.: Concurring and dissenting

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

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

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

TUASON, J., *dissenting*:

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

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

Finally Section 6 of Rule 124 provides:

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

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

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

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

VI

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

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

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

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

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

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

J. de Guia for appellee.

DECISION

PABLO, *M.*:

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

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

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

168-D, Manila. La madre de George William dió su consentimiento a la adopción de su hijo por el solicitante, el cual, según las pruebas, está en condiciones económicas para educar y mantener al menor.

El Procurador General contiende que el solicitante no puede adoptar al menor porque el articulo 335 del Codigo Civil de Filipinas dispone que no pueden adoptar aquellos que tienen hijos legitimos. Dicho artículo dice así:

"ART. 335. The following cannot adopt:

"(1) Those who have legitimate, legitimated, acknowledged natural children, or natural children by legal fiction;

"(2) The guardian, with respect to the ward, before the final approval of his accounts;

"(3) A married person without the consent of the other spouse;

"(4) Non-resident aliens;

"(5) Resident aliens with whose government the Republic of the Philippines has broken diplomatic relations;

"(6) Any person who has been convicted of a crime involving moral turpitude, when the penalty imposed was six months' imprisonment or more."

El juez *a quo* funda su decisión en el artículo 338 del mismo Codigó que dispone:

"ART. 338. The following may be adopted:

"(1) The natural child, by the natural father or mother;

"(2) Other illegitimate children, by the father or mother;

"(3) A step-child, by the step-father or step-mother."

En apoyo de su interpretación, cita el informe de la Comisión de Codigos del tenor siguiente: "Adoption of a step-child by a step-father or step-mother is advisable for it eases up a strange situation." Este argumento es bueno si él o ella no tiene hijo legitimo; pero si tiene, la adapcion de un hijastro no suaviza las fricciones en la familia; la empeora por el contrario, porque el heredero forzoso no se sentiría feliz con la adopción de su hermanastro; quedaria perjudicado porque no gozaría de todo el cuidado y amor de su padre o madre, y su participación en la herencia, si la tuviere, quedaría mermada o reducida.

La adopción de George no puede, pues, mejorar las relaciones entre el hijo adoptivo y la hija legitima. La disposición del artículo 338 debe entenderse en el sentido de que se puede adoptar a un hijastro por un padrasto o por una madrasta si no existe impedimento alguno. Si el padrasto que adopta tiene un heredero forzoso, la adopción no puede producir paz y armonia en su familia, porque el hijo legitimo no puede ver con buenos ojos al hermanastro que, por haber sido adoptado, se convierte en su coheredero. La posibilidad de la adopcion de un hijastro depende de la no existencia de herederos legitimos del adoptante. Cuando la Comisión dijo en su informe que la adopcion de un hijastro suaviza las relaciones familiares, tenia en la mente el caso en que ningun hijo legitimo quedaria perjudicado con dicha adopción.

El artículo 174 del Codigó Civil español dispone: "Se prohibe la adopción: 1.o x x x. 2.o A los que tengan descendientes legítimos o legitimados. etc." Razón de esta disposición: "También prohibe el Codigó la adopción a los que tengan descendientes legítimos o legitimados, omitiendo a los hijos naturales reconocidos. Aquí puede tener aplicación el art. 29, que declara que 'el concebido se tiene pornacido para todos los efectos que le sean favorables'. El fundamento de esta prohibición es sencillo y evidente tratándose de los que consideran que la adopción tiene por fin proporcionar consuelo al que no tiene hijos, pero no para nosotros que no vemos en aquella obra de misericordia, aunque muy piadosa y loable, la base suficiente de una institución jurídica. Nosotros en contramos legitimada dicha prohibición, teniendo en cuenta los conflictos y diferencias que produciría la entrada del extraño adoptado en una sociedad familiar que cuenta ya con otros individuos a quienes prodigar los cuidados y atenciones a que el adoptado tendriá derecho." (2 Manresa 6.a Ed., 108.)

El articulo 766 del Codigo de Procidimiento Civil dispone así:

"De la adopción por un padrasto.—El habitante de las Islas Filipinas, marido de una mujer que tuviere un menor habido de matrimonio anterior, podrá solicitar del Juzgado de Primera Instancia de la provincia donde residiera, la autorización para adoptarlo y para cambiar su apellido, pero será necesario el consentimiento escrito de dicho menor, caso de que tuviere catorce años, y el de su madre si no padeciere de demencia o embriaguez incurables, sustituyéndole en el último caso el tutor legitimo, y si no lo hubiera, una persona discreta e idonea nombrada por el juzgado actuará como amigo del menor."

Esta ley es de origen americano; no prohibe expresamente la adopción de un hijastro por un padrasto que tiene hijo legítimo; al contrario, dispone que el padrasto puede solicitar la adopcion de un hijastro. El Codigo de Procedimiento Civil ha derogado el sistema de adopcion del Codigo Civil (In re adoption of Emiliano Guzman. 40 O. G., 2083), doctrina confirmada en Joaquin contra Navarro y Castro en Intestate Estate of the Spouses Angela Joaquin y Joaquin Navarro, 46 O. G. (Supp. 1), 155. Para cambiar esta disposición del Codigo de Procedimiento que tiene hijo legitimo, adopción que puede producir graves trastornos dentro de la familia que cree en la herencia forzosa, la Comisión de Codigós adoptó el artículo 174 del Código Civil español con ciertas enmiendas, que es hoy el artículo 335 del Código Civil de Filipinas.

El articulo 338 emplea la palabra *may;* dicha palabra puede interpretarse como imperativa, que impone un deber, o permisiva, que confiere discreción: su interpretación depende de la intención del legislador, intención que puede deducirse del conjunto de toda la ley (Asunto de Mario Guariña, 24 Jur. Fil., 38.) Si es obligatoria, entonces es redundante el artículo 335. Es injusto suponer que el legislador haya incluido en el Código una disposición inútil o dos disposiciones contrarias. Si una ley es susceptible de varias interpretaciones, el tribunal debe adoptar aquella en que no se contradigan sus varias disponsiciones sino que se complementen entre sí.

Declaramos que la palabra *may* esta usada en el sentido de que confiere discreción: permite, pero no obliga la adopción de un hijastro. Armonizando los artículos 335 y 338, el padrasto o la madrasta que no tienen hijo legítimo pueden adoptar a un hijastro; pero si tienen, no pueden hacerlo.

Como Herman Ball tiene una hija legítima, no puede adpotar a George William York, Jr.

Se revoca la decisión apelada.

Paras, Bengzon, Padilla, Tuason, Montemayor, Reyes, Jugo, Bautista Angelo, and *Labrador, J.J.,* conformes

VII

The People of the Philippines, Plaintiff-Appellee vs. Felipe A. Livara, Defendant-Appellant, G. R. No. L-6200, April 20, 1954; Bengzon, J.

CIVIL COURTS AND COURTS-MARTIAL; CONCURRENT JURISDICTION. — The civil courts and courts-martial have concurrent jurisdiction over offenses committed by a member of the Armed Forces in violation of military law and the public law. The first court to take cognizance of the case does so to the exclusion of the other (Grafton v. U. S., 11 Phil. 776; Valdes v. Lucero, 42 O. G. No. 112845).

CRIMINAL LAW; CONSTITUTIONALITY OF ARTICLE 217 OF THE REVISED PENAL CODE. — Article 217 of the Revised Penal Code which reads: "The failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable upon demand by any duly authorized officer, shall be *prima facie* evidence that he has put such missing funds or property to personal uses," is not unconstitutional and the validity of that article was discussed and upheld in People v. Mingoa, L-5371, promulgated March 26, 1953, wherein this court through Mr. Justice Reyes declared: "there is no constitutional objection to the passage of a law providing that the presumption of innocence may be overcome by a contrary presumption founded upon the experience of human conduct, and enacting what evidence shall be sufficient to overcome such presumption of innocence."

Marcelino Lontok for appellant.
Solicitor General Pompeyo Diaz and *Solicitor Isidro C. Borromeo* for appellee.

DECISION

BENGZON, *J*:

After the corresponding trial in the Court of First Instance of Romblon, Felipe A. Livara, was found guilty of malversation of public funds and sentenced to imprisonment from four (4) years, two (2) months and one (1) day of *prison correcional* to ten (10) years of *prision mayor*, with perpetual special disqualification, to pay a fine of ₱5,000.00, to indemnify the government in the sum of ₱5,597.00, without subsidiary imprisonment in case of insolvency, and to pay the costs. From this judgment he appealed on time. Because he assailed the constitutionality of Article 217 of the Revised Penal Code, the *expediente* was forwarded to this Court.

Appellant was from January, 1947 to July 22, 1948, provincial disbursing officer of the Philippine Constabulary in Romblon. As finance and accountable officer, he took charge of paying the salaries and subsistence of the PC officers and enlisted men of that region. On July 22, 1948, he came to Manila carrying some money, and, having secured a Treasury Warrant from the finance officer at Camp Crame for more than ₱8,000.00, he cashed the same in the Finance Building at Taft Avenue. In November, 1948, an examination of his accounts was conducted by Major Emilio Baldia, Chief of the Cash Examination and Inspection Branch of the Finance Service, who found him with a net shortage of ₱9,597.00 unaccounted for. Major Baldia submitted a report of his findings to the Adjutant General of the PC. Days afterwards, a board of officers was created formally to investigate the appellant. That board found him accountable for ₱9,597.00, and recommended his prosecution before the civil courts for malversation of public funds. An information for the crime of malversation of public funds was consequently filed in the Court of First Instance of Romblon on September 10, 1949.

Major Emilio Baldia, testified in the Romblon court that sometime in November 6, 1948, he examined the accountability of Lieutenant Felipe A. Livara and found he had incurred a net shortage of ₱9,597.00; and that in answer to his question, appellant admitted his financial liability but asserted he had lost the money in Manila on his way to North Harbor to board a vessel for Romblon.

Capt. Teofilo V. Dayao, Zone Finance Officer, testified that in the month of August, 1948, he was dispatched to Romblon to pay the salaries and subsistence of the officers and enlisted men of the PC stationed in said province; that he inquired into the whereabouts of Lt. Livara but was informed that he had left for Manila on July 23, 1948, to submit for approval the disbursement he had made and get the return of the same from the PC headquarters; that finding the safe of the accused locked, he sealed it in the presence of Capt. Diaz and Lt. Tañedo and brought it to Manila where it was opened in the presence of eleven officers including the appellant; and that no cash was found in the safe.

Provincial Auditor Aproniano S. Celajes, last prosecution witness, declared that on July 16, 1948, he examined and verified the books of account and money accountability of the appellant and found a balance of ₱14,984.00, represented by cash of ₱6,330.10, actually found on hand and vouchers in the amount of ₱8,654.00.

The appellant Felipe A. Livara was the lone witness for the defense. He declared that on July 22, 1948, he came to Manila and submitted his abstract to the Auditor of the PC; that a treasury warrant was issued to him in the amount of more than ₱8,000.00; that he proceeded to the Finance Building at Taft Avenue and cashed the same; that while riding a public utility jeepney bound for the North Harbor to embark on the S. S. Elena for Romblon, he lost his *portfolio* containing the said money plus about ₱1000 more, and other public documents. He swore to having made efforts to recover the portfolio but the jeepney was nowhere to be found.

There is no doubt about the shortage. It constitutes prima facie evidence that the accused made personal use of the money, unless he gives a satisfactory explanation (Art. 217 Rev. Penal Code). His account of the loss of the portfolio was not believed by the board officers that investigated him, and by the court below. It is really an incredible story. With about ten thousand pesos in it, the portfolio could not have been forgotten for one moment by any passenger, especially a finance officer like the accused. The alleged loss was obviously a ruse to conceal his defalcations. As a matter of fact, even before the Manila trip he was already in the red, as shown by the testimonies of Lt. Bernabe Cadiz, commanding officer of the 83rd PC company and Lt. Damaso C. Quiao, adjutant, supply and finance officer, of Romblon.

If the portfolio had actually been lost as recounted by appellant, he would not be responsible for the money. Yet he admitted his liability, made efforts to pay it, even used for that purpose a false check payable to Colonel Selga of the Constabulary.

Counsel for the appellant contends that the Court of First Instance of Romblon had no jurisdiction over the case, arguing that the alleged crime of malversation of public funds occurred during the incumbency of the accused as an officer of the Philippine Constabulary. Such contention is without merit. The civil courts and courts-martial have concurrent jurisdiction over offenses committed by a member of the Armed Forces in violation of military law and the public law. The first court to take cognizance of the case does so to the exclusion of the other (Grafton v. U.S., 11 Phil. 776; Valdez v. Lucero, 42 O. G. No. 112845). The accused-appellant having been first tried and convicted of the crime by the Court of First Instance of Romblon he cannot now claim that the criminal action should have been brought before a court-martial.

The constitutionality of the last paragraph of Article 217 of the Revised Penal Code is likewise assailed. It reads:

> "The failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable upon demand by any duly authorized officer, shall be *prima facie* evidence that he has put such missing funds or property to personal uses."

Defense counsel maintains the view that this provision is contrary to the constitutional directive that in criminal prosecutions the accused shall be presumed innocent until the contrary is proven.

This contention deserves no merit, inasmuch as the validity of the said article has already been discussed and upheld in People v. Mingoa, L-5371, promulgated March 26, 1953, wherein this court through Mr. Justice Reyes declared: "There is no constitutional objection to the passage of a law providing that the presumption of innocence may be overcome by a contrary presumption founded upon the experience of human conduct, and enacting what evidence shall be sufficient to overcome such presumption of innocence."

WHEREFORE, as this appellant is guilty of malversation of public funds and as the penalty imposed on him accords with the law, we hereby affirm the judgment with costs against him. So ordered.

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

VIII

Santiago Ng, Petitioner-Appellant, vs. Republic of the Philippines, Oppositor-Appellee, G.R. No. L-5253, February 22, 1954, Jugo, J.

1. NATURALIZATION; FULL COMPLIANCE WITH STATUTORY PROVISION BY APPLICANT NECESSARY.—It is not within the courts to make bargains with applicants for naturalization. The courts have no choice but to require that there be full compliance with the statutory provisions. (2 Am. Jur., 577).

2. IBID; IBID.—An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect a matter so vital to the public welfare. (U.S. vs. Ginsberg, 243 U.S., 472; 61 L. ed. 853; 856).

Panfilo M. Manguera for appellant.
Solicitor General Juan R. Liwag and *Solicitor Isidro C. Borromeo* for appellee.

DECISION

JUGO, *J.*:

On October 25, 1949, Santiago Ng filed with the Court of First Instance of Marinduque a petition praying for his naturalization as a Filipino citizen.

The petition was accompanied by the affidavit of Jose Madrigal, Municipal Mayor of Boac, Marinduque, and the affidavit of Filemon Ignacio, Chief of Police of the same municipality, together with two pictures of the petitioner. However, the petition was not accompanied by the declaration of intention to apply for Philippine citizenship presented one year prior to the filing of the petition.

The notice of hearing of the petition had been posted in a conspicuous place in the Capitol Building of Marinduque and published in the newspaper "Nueva Era," a newspaper of general circulation in said province, on October 31, November 7, and 14, 1949, and in the Official Gazette in October, November and December, 1949.

The petition was called for hearing on September 8, 1950, at 9:10 a.m. No opposition was filed, except that of the Provincial Fiscal, which was presented on September 13, 1950.

At the hearing it was established that the petitioner was born on May 28, 1927, at Boac, Marinduque, Philippines, his father being Ng Kin and his mother Ching Kiat, who are still living, both citizens of the Republic of China, the petitioner, therefore, being also a citizen of said country; that the petitioner was 22 years old, single, native and resident of the municipality of Boac, Marinduque, where he had been residing continuously from the time of his birth up to the date of the hearing; that he is of good moral character and believes in the principles underlying the Philippine Constitution; that during his residence he had conducted himself in a proper and irreproachable manner both in his relations with the constituted authorities as well as with the people in the community with whom he mingled; that he has a lucrative and lawful occupation as a trained mechanic; and that he is able to read and write English and Tagalog. He has no children. He has completed the primary and elementary courses and the first and second year high school. After he finished the second year high school he stopped and entered the vocational school known as the National Radio School and Institute of Technology in Manila, Philippines, which is duly recognized by the Philippine Government. He graduated from said school on May 23, 1948, obtaining a diploma.

The court of first instance of Marinduque denied his petition on the ground that he had not made a declaration of intention to become a Filipino citizen one year before he filed his petition.

The petitioner appealed from said decision, alleging that the trial court erred in not exempting him from the requirement of making his declaration of intention to become a Filipino citizen one year before the filing of his petition by virtue of Section 6 of the Naturalization Law, as amended, which, among other things, provides as follows:

> *"Persons exempt from requirement to make a declaration of intention.*—Persons born in the Philippines and have received their primary and secondary education in public schools or those recognized by the Government and not limited to any race or nationality, and those who have resided continuously in the Philippines for a period of thirty years or more before filing their application, may be naturalized without having to make a declaration of intention upon complying with the other requirements of this Act. x x x".

It is clear that he has not resided for thirty years in the Philippines. He has finished only the second year of high school.

The question is whether the course that he took in the National Radio School and Institute of Technology is equivalent to the third and fourth year high school. The court below on this point said:

> "1—The subjects given in the High School course are entirely different from those given in the vocational school; cultural training is emphasized in the first while scientific and practical training in the second;
>
> "2—The number of unit hours required to finish the first and second year High School is much more than those required in finishing the vocational course.
>
> "The petitioner does not have sufficient knowledge of Philippine history, government and civics.
>
> "In view thereof, the Court has come to the conclusion that the vocational course cannot be the equivalent of the third, and fourth year High School course. In other words, the petitioner did not complete his secondary education as required by section 6 of the Revised Naturalizaiton Law for exemption from filing a declaration of intention to acquire Philippine citizenship one year before an alien may file a petition for the acquisition of Philippine citizenship by naturalization."

This Court, in the case of Jesus Uy Yap v. Republic of the Philippines, G. R. No. L-4270, held as follows:

> "Because of petitioner's failure to file his intention to become a citizen of the Philippines, we are constrained to deny his application for naturalization. It would seem rather unfair to do this because outside of his failure to file a declaration of intention, the applicant is clearly entitled to naturalization. According to the findings of the trial court, not impugned by the Government, the applicant was born and raised in the Philippines, resided continuously here up to the time he applied

for naturalization, is married to a Filipino, and is now living as a peaceful resident in this country. Besides possessing all the qualifications required of an applicant for naturalization, the evidence shows that during the last war, he clearly identified himself with the Filipinos, even helping in the underground resistance movement. However, the law must be complied with.

The following authorities may be cited:

"x x x It is not within the province of the courts to make bargains with applicants for naturalizatoin. The courts have no choice but to require that there be a full compliance with the statutory provisions" (2 Am. Jr., 577).

'"An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare"' (U.S. vs. Ginsberg, 243 U.S., 472; 61 L. ed. 853; 856).

In view of the foregoing, the judgment appealed from is affirmed, with costs against the appellant.

SO ORDERED.

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

IX

Allied Workers Association of the Philippines, vs. Insular Lumber Company, G.R. No. L-6128, February 25, 1954, Montemayor, J.

EMPLOYER AND EMPLOYEE; UNFAIR LABOR PRACTICES; CASE AT BAR. — The Insular Lumber Co. employed laborers who belonged either to the Allied Workers Association of the Philippines or to a rival union known as the United Labor Union. Santos, a foreman of the Saw Mill Department of the Company, had previously been an active and leading member of the Allied Workers Association of the Philippines, but recently had been President of a rival union (the United Labor Union). On April 18, 1952, the Allied Workers Association of the Philippines demanded the immediate expulsion and dismissal of Santos, and one of the grounds for the petition was that he had committed and continued to commit acts which constitute unfair labor practices, cruel and detrimental to the members of the Association. These unfair and cruel labor practices consisted in the threats made by Santos against the workers that if they did not join the United Labor Union, they would be expelled from their jobs or reported to the special policemen of Governor Lacson to be manhandled and said laborers were forced to pay P1.00 each and to enter said union against their will and desire, etc. The Lumber Co. filed a motion stating that as may be seen from the charges filed by the Association, the charges against Catalino who was the president of the United Labor union, a rival of the Association had nothing to do with the performance of his duties as an employee of the Lumber company, and that the charges were motivated by the fact of Catalino's being president of the United Labor Union; that the Lumber Company was under no obligation to take any part in the charges and countercharges of rival unions.

HELD: — We cannot agree to the order appealed from stating that the charges against Catalino de los Santos were made against him as president of a rival labor union and in no manner affected the Lumber Company. It will be remembered that Catalino in allegedly making the threats and putting pressure upon the laborers working under him so acted while he was working as a foreman of the Lumber company, exercising the functions and authority of an important employee or official of the Company. Furthermore, if he so acted with the knowledge and consent of the company, the parties to this case and the Court wants to know and have the right to know. We are more inclined to agree with Presiding Judge Roldan in his dissent that under the circumstances the Lumber company should take direct interest in the case, deny or meet the charges for the reason that its good name is involved; that the continued employment of Catalino would in no way solve the industrial conflict between the parties to the case, and that unless the Lumber Company could show that the acts of Catalino complained of, if proven, were individual acts without the authority of the Company, or if authorized, were exceeded, the Company could not escape blame, and that Catalino as foreman exercised to a limited extent managerial functions as a result of which his acts as an agent may be considered as the acts of his principal.

Emilio R. Severino for petitioner.
Ross, Selph, Carrascoso and *Janda* for respondent.

DECISION

MONTEMAYOR, *J.*:

There is no dispute as to the facts. Respondent INSULAR LUMBER COMPANY (later to be referred to as the Lumber Company) is a domestic corporation engaged in the lumber business in Fabrica, Negros Occidental, employing laborers who belong either to the petitioner ALLIED WORKERS ASSOCIATION OF THE PHILIPPINES (later to be referred to as the Association) or to a rival union known as the UNITED LABOR UNION, of which Catalino de los Santos is the President. On April 18, 1952, the petitioner Allied Workers Union sent a letter to the respondent Lumber Company presenting three demands, namely:

(1) The immediate expulsion and dismissal of Catalino de los Santos, foreman of the Sawmill Department of the Insular Lumber Company on the ground that he had committed and continued to commit acts which constitute unfair labor practices, cruel and detrimental to the members of the petitioner;

(2) The standardization of salaries and wages based on proper job classification and evaluation; and

(3) A general daily increase of P2.00 in wages and salaries of all the employees and laborers of the company.

According to the memorandum filed on behalf of the Lumber Company dated January 7, 1953, on April 18, 1952, the company replied to the petition as regards the demand for the expulsion and dismissal of Catalino de los Santos, saying that the latter had been the foreman of the sawmill department of the company for many years, had previously been an active and leading member of the petitioner Association, but recently had been the President of a rival Union (The United Labor Union) of which many employees and laborers of the company were affiliated; that while the accusations made against Catalino might be well founded the company wanted to say that the United Labor Union had made more or less similar charges from time to time against several members of the Association, and that inasmuch as the company had always followed a strictly neutral attitude as between the two unions, said company had ignored said complaints; consequently, the company felt that in order to be fair it should not take the drastic action of dismissal requested but that if the Association sent proof that Catalino had been enriching himself at the expense of the laborers working under him, the company would immediately investigate the matter.

Convinced that the Lumber Company refused and failed to grant the three demands aforementioned, the Association declared a strike in the afternoon of June 7, 1952. On June 9, 1952, the company sought the intervention of the Court of Industrial Relations (CIR) by filing a petition entitled "INSULAR LUMBER COMPANY, petitioner, vs. ALLIED WORKERS ASSOCIATION, respondent, Numbered 705-V".

On June 14, 1952, while the strike was in progress, the Lumber company filed an urgent petition in the CIR asking it to order the strikers back to work. On June 17, 1952, Associate Judge Jose Bautista who was hearing the case issued an order to the laborers and employees of the Lumber Company who were on strike to return to work pending determination of the demands and issues involved in the case. Pursuant to said order the striking laborers and employees returned to work.

Complying with the verbal order of Judge Bautista the Association presented a specification of charges against Catalino de los Santos, dated June 16, 1952. According to this specification, Catalino de los Santos was working as foreman of the sawmill department of the Lumber company, which sawmill department was the biggest department of the Lumber company; that ten laborers whose names were listed, working in said sawmill under Catalino were threatened that if they did not join the United Labor Union they would be expelled from their jobs or reported to the Special Policemen of Governor Lacson (presumably of Negros Occidental) to be manhandled, and said laborers were forced by Catalino to pay ₱1.00 each as entrance fee to said Union against their will and desire; that Antonio Ablando, a laborer in the sawmill department under Catalino was promised by the latter a job provided that in exchange he lent Catalino the sum of ₱10.00; that eventually Ablando was given a job but during the time that he was working with the Lumber Company, Catalino had taken from him the total amount of ₱130.00 allegedly borrowed but never paid, and that Catalino also took one of Ablando's pigs worth ₱30.00 without paying for the same; that about 458 laborers whose names were listed in the specification and who were working in the sawmill department under Ctalino were threatened that if they refused to sign their membership and affiliation with the "VOICE OF THE POOR", a union being organized by Catalino, they would be separated from the service; that the Lumber company had been duly advised of these doings and activities of De los Santos but that the management had not done anything to protect said laborers who had been the object of the threats, intimidation and coercion by Catalino, and that the laborers so mentioned and listed were ready to testify in court.

On June 21, 1952, the Lumber company filed a motion stating that as may be seen from the specification of charges filed by the Association, the charges against Catalino who was the president of the United Labor Union, a rival of the Association had nothing to do with the performance of his duties as an employee of the Lumber company, and that the charges were motivated by the fact of Catalino's being president of the United Labor Union, that there was no law specifying what are unfair labor practices by rival union leaders; that the Lumber company could not act on ex-parte charges; that the Lumber company was under no obligation to take any part in charges and countercharges of rival unions; that Catalino should be served a copy of the charges and given the opportunity to answer the same and make such defenses and present evidence as he may have, with such counsel as he may select for all of which the Lumber company could not be held responsible; that the other issues involved referring to the demands for standardization of and increase in wages could be properly discussed and submitted to the CIR in Manila. The motion concluded with a prayer that the Lumber company be relieved of any obligation or duty to defend Mr. Catalino de los Santos against the charges filed by the Association, and that the CIR dismiss such charges as not a proper issue in the dispute between the petitioner and respondent with the right of course on the part of the Association to present such charges before the proper tribunal.

Acting upon this motion of the Lumber company Judge Bautista issued an order dated June 28, 1952 holding that according to the specification of charges filed by the association against Catalino de los Santos, it was clear that the charges were filed against him as President of a rival union for unfair labor practices and in no manner affected the Lumber company, as the dispute was between two rival unions; however, considering that the said charges against Catalino might involve the Lumber company if not solved in time, the court (CIR) would proceed to investigate said charges, "but in so doing it shall relieve the petitioner Lumber company of the obligation or duty to defend Mr. De los Santos." The order required Catalino to be notified of the same and of the date of hearing of the charges against him in Bacolod City. As to the other demands, namely, standardization of salaries and general increase of wages, the hearing was ordered held in Manila.

The Association filed a motion for reconsideration of the above referred order of June 28, 1952. On said motion for reconsideration the CIR acted in *banc* and Judge Bautista with the concurrence of Associate Judges Castillo and Yanson ruled that the court failed to find sufficient reasons for altering or modifying said order. However, Presiding Judge Roldan and Associate Judge Lanting dissented in separate opinions. The Association is now appealing to this Court from the said order.

We cannot agree to the order appealed from stating that the charges against Catalino de los Santos were made against him as president of a rival labor union and in no manner affected the Lumber company. It will be remembered that Catalino in allegedly making the threats and putting pressure upon the laborers working under him so acted while he was working as a foreman of the Lumber company, exercising the functions and authority of an important employee or official of the Company. Furthermore, if he so acted with the knowledge and consent of the company, the parties to this case and the Court wants to know and have the right to know. We are more inclined to agree with Presiding Judge Roldan in his dissent that under the circumstances the Lumber company should take direct interest in the case, deny or meet the charges for the reason that its good name is involved; that the continued employment of Catalino would in no way solve the industrial conflict between the parties to the case, and that unless the Lumber company could show that the acts of Catalino complained of, if proven, were individual acts without the authority of the Company, or if authorized, were exceeded, the Company could not escape blame, and that Catalino as foreman exercised to a limited extent managerial functions as a result of which his acts as an agent may be considered as the acts of his principal. We also agree with Judge Lanting in his dissent that if it were true as claimed in the order appealed from that the charges against Catalino in no manner affected the lumber company but involved only two rival unions, then the CIR lacked jurisdiction over the subject matter because there was no employer-employee relationship involved; that as a foreman Catalino by his position must have had certain supervisory, if not managerial functions; that when he indulged in the anti-labor practices attributed to him there was the likelihood that he was acting for the Company, and that said Company has the burden of proof to show why it should be exempt from blame for the acts of Catalino, and that even if it was proven that the company did not know of such acts, still it could be compelled to discharge Catalino in order to remove a sure cause of dissension in the Company.

In conclusion, we are of the opinion that the charges against Catalino de los Santos affect and involve the Lumber company. It would appear that as foreman of the sawmill department em-

ploying hundreds of laborers he had the right to employ and discharge laborers or at least the authority to recommend their employment and discharge. Naturally, with such authority, and the laborers knowing it, his urging them to join a certain labor union under threat of dismissal and his requests for loans even when not repaid, could not well be ignored or rejected by them. Of course, as the order appealed from states, the Lumber company cannot be compelled to defend Catalino de los Santos; but that the company should be vitally interested in the investigation against Catalino, there is no doubt. The company is a party to the case. Whether it wants to take part in the investigation and hearing, that is its affair, but it will naturally be bound by any finding and decision of the CIR based on said investigation and hearing. With this understanding and with the consequent modification of the order appealed from, the same is hereby affirmed. No costs.

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

X

Larry J. Johnson, Plaintiff-Appellee, vs. Maj. Gen. Howard M. Turner, et al., Defendants-Appellant, G. R. No. L-6118, April 26, 1954, Montemayor, J.

ACTION AGAINST THE GOVERNMENT OF THE UNITED STATES; JURISDICTION. — Philippine courts have no jurisdiction to try cases against the Government of the United States unless said government has given its consent to the filing of such cases.

Sixto F. Santiago for appellants.
Quintin F. Pidal for appellee.

DECISION

MONTEMAYOR, *J.*:

This is an appeal by the defendants from a decision of the Court of First Instance of Manila ordering them or their successors or representatives to return to plaintiff or his authorized representative the confiscated Military Payment Certificates (SCRIP MONEY) in the reconverted or new series, amounting to $3,713.00. For purposes of the present appeal the pertinent facts not disputed are as follows.

Plaintiff-Larry J. Johnson, an American citizen, was formerly employed by the U. S. Army at Okinawa up to August 5, 1950, when he resigned, supposedly in violation of his employment contract. In the same month he returned to the Philippines as an American civilian, bringing with him Military Payment Certificates (SCRIP MONEY) in the amount of $3,713.00 which sum he claims to have earned while at Okinawa. About five months later, that is, on January 15, 1951, he went to the U.S. Military Port of Manila and while there tried to convert said scrip money into U.S. dollars, allegedly for the purpose of sending it to the United States. Defendant Capt. Wilford H. Hudson Jr., Provost Marshal of the Military Port of Manila in the performance of his military duties and claiming that said act of Johnson in keeping scrip money and in trying to convert it into dollars was a violation of military circulars, rules and regulations, confiscated said scrip money, gave a receipt therefor and later delivered the scrip money to the military authorities. Johnson made a formal claim for the return of his scrip money and upon failure of the military authorities to favorably act upon his claim, on July 3, 1951, he commenced the present action in the Court of First Instance of Manila against Major General Howard M. Turner as Commanding General, Philippine Command (Air Force) and 13th Air Force with office at Clark Field; Major Torvald B. Thompson as Finance Officer, Provost Marshal, 13th Air Force with office at Clark Field; and Captain Wilford H. Hudson Jr. as Provost Marshal attached to the Manila Military Port Area, to recover said amount of $3,713.00 "at the reconverted or new series and to the same full worth and value." It may be stated in this connection that shortly after the confiscation of the scrip money in Manila on January 15, 1951, an order was issued by the U.S. military authorities for the conversion of all scrip money then outstanding into a new series, thereby rendering valueless and of no use the old series of which the scrip confiscated from Johnson formed a part, and that was the reason why the prayer contained in Johnson's complaint is for the return not of the very same scrip money (old series) confiscated, but the sum "at the reconverted or new series and to the same full worth and value."

The defendants through counsel moved for the dismissal of the complaint on the ground of lack of jurisdiction over their persons and over the subject-matter for the reason that they were being sued as defendants in their respective official capacities as officers of the U.S. Air Force and the action was based on their official actuations, and that the U.S. Government had not given its consent to be sued. The motion for dismissal was denied and the case was heard, after which, the trial court found and held that it had jurisdiction because the claim was for the return of plaintiff's scrip money and not for the recovery of a sum of money as damages arising from any civil liability of the defendants;, and that the confiscatory act of the defendants is contrary to the provisions of the Philippine constitution prohibiting deprivation of one's property without due process of law.

Pursuant to rules and regulations as well as the practice in U.S. military establishments in Okinawa and the Philippines, military payment certificates popularly known as "scrip money" is issued to military and authorized personnel for use exclusively within said military establishments and as sole medium of exchange in lieu of U.S. dollars, the issuance of said scrip money being restricted to those authorized to purchase tax free merchandise at the tax-free agencies of the U.S. Government within its military installations. It is said to be intended as a control measure and to assure that the economy of the Republic of the Philippines will be duly protected.

The confiscation of Johnson's scrip money is allegedly based on Circular No. 19, Part I, par. 7(a) of the GHQ, Far East Command, APO 500, dated March 15, 1949, the pertinent provisions of which read thus:

"7. Disposition of Military Payment Certificates.

A. Personnel authorized to hold and use military payment certificates prior to departing on leave, temporary duty, or permanent change of status from a military payment certificate areas to areas where military payment certificates are not in authorized use will dispose of their military payment certificates holding prior to departure. Similarly authorized personnel who lose their authorized status are required at the time of such lose to dispose of their military payment or certificate holdings."

It is the claim of the defendants that Johnson should have disposed of or converted his scrip money into dollars upon his resignation as employee of the U.S. Government when he lost his authorized status. and prior to his departure from Okinawa, and that his possession of said scrip money in the Philippines, particularly in the Manila Military Port Area was illegal, hence the confiscation.

Believing that the main and most important question involved in the appeal is that of jurisdiction, we shall confine our considerations to the same. In the case of Syquia v. Lopez, et al., 47 O.G. 665, where an action was brought against U.S. Army officers not only for the recovery of possession of certain apartments occupied by military personnel under a contract of lease, but also to collect back rents and rents at increased rates including damages, we held:

"We shall concede as correctly did the Court of First Instance, that following the doctrine laid down in the cases of U.S. vs. Lee and U.S. vs. Tindal, supra, a private citizen claiming title and right of possession of a certain property, may, to recover possession of said property, sue as individuals, officers, and agents of the Government who are said to be illegally withholding the same from him, they in doing so, said officers and agents claim that they are acting for the Government and the court may entertain such a suit although the government itself it not bound or concluded by the decision. The philosophy of this ruling is that unless the courts are permitted to take cognizance and to assume jurisdiction over such a case, a private citizen would be helpless and without redress and protection of his rights which may have been invaded by the officers of the Government professing to act in its name. In such a case the officials or agents asserting rightful possession must prove and justify their claims before the courts, where it is made to appear in the suit against them that the title and right of possession is in the private citizen. However, and this is important where the judgment in such a case would result not only in the recovery of possession of the property in favor of said citizen but also a charge against or financial liability to the Government, then the suit should be regarded as one against the government itself, and consequently, it cannot prosper or be validly entertained by the courts except with the consent of said Government."

In the present case, if the action were merely for the return of the scrip money confiscated from plaintiff Johnson, it might yet be said that the action was for the recovery of property illegally withheld by officers and agents of a government professing to have acted as its agents. However, as already stated, the present action is for the recovery not of the very scrip money confiscated but for the amount of said scrip in the new series of military payment certificates, and this was the relief granted by the lower court. Furthermore, if the relief is to be of any benefit to plaintiff and since he has already lost his authorized status to possess and use said scrip money, he will have to be given the equivalent of said scrip money in dollars. It is therefore, evident that the claim and the judgment will be a charge against and a financial liability to the U.S. Government because the defendants had undoubtedly acted in their official capacities as agents of said Government, to say nothing of the fact that said defendants had long left the Philippines possibly for other assignments; that was the reason the decision appealed from directs the return of the scrip money by the defendants *or their successors*. Consequently, the present suit should be regarded as an action against the United States Government.

It is not disputed that the U.S. Government has not given its consent to be sued. Therefore, the suit cannot be entertained by the trial court for lack of jurisdiction.

Another point may be mentioned, tho incidentally, namely, that before the decision was rendered by the lower court the plaintiff filed his claim for the same amount of $3,713.00 with the Claims Division, General Accountinng Office, Washington, D.C. However, the record fails to show the action taken, if any, on said claim.

In conclusion, we find and hold that the present action because of its nature is really a suit against the Government of the United States, and because said Government has not given its consent thereto, the courts, particularly the trial court have no jurisdiction to entertain the same. Because of this, we deem it unnecessary to discuss and rule upon the propriety and legality of the confiscation made by the defendants, particularly Capt. Wilford H. Hudson, of the scrip money from the plaintiff, and whether or not the latter's filing of his claim with the U.S. Government through its Claims Division, constitutes an abandonment of his claim or suit with the Philippine court.

In view of the foregoing, the decision appealed from is hereby reversed and the complaint is dismissed. No pronouncement as to costs.

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

Mr. Justice Padilla did not take part.

XI

Aurelio G. Gavieres, Plaintiff-Appellant vs. Emilio Sanchez, Lorenzo T. Ona, the President of the Hacarin Dairy Farm, Inc., and the President of the Rehabilitation Finance Corporation, Defendants-Appellees G.R. No. L-6206, April 13, 1954, Montemayor, J.

CIVIL ACTION; VENUE. — In several decisions rendered by the Supreme Court, as late as 1950, we have held that under Section 3, Rule 5 of the Rules of Court, an action affecting title to or recovery of possession of real property must be commenced and tried in the province where said property lies; that an action for the annulment or rescission of the sale of property does not operate to efface the fundamental and prime objective and nature of the action which is to recover said real property.

Aurelio G. Gavieres for appellant.

Crispulo T. Manubay, Sixto de la Costa, Alejo F. Candito and *Dominador A. Rodriguez* for appellee.

DECISION

MONTEMAYOR, *J*:

On December 23, 1950, plaintiff-appellant AURELIO G. GAVIERES filed a complaint in the Court of First Instance of Rizal against EMILIO SANCHEZ, LORENZO T. ONA, the President of the HACARIN DAIRY FARM CORPORATION, and the President of the REHABILITATION FINANCE CORPORATION, alleging that in 1931 he was the registered owner and possessor of 1/3 of No. 2386 of Cadastre No. 13 of San Miguel de Mayumo, Bulacan, covered by Original Certificate of Title No. 12463; that on February 6, 1931, he sold his one-third share of the parcel to Emilio Sanchez for ₱10,000.00 payable as follows: ₱200.00 on February 6, 1931, ₱1,800.00 at the end of the month, and the balance of ₱8,000.00 in April of the same year; that Sanchez immediately took possession of the property purchased and that although he had paid only ₱2,470.00 of the entire price of ₱10,000.00, in the same year he sold the property to Lorenzo T. Ona with right to repurchase for ₱4,000.00 and upon his failure to make the repurchase ONA consolidated his ownership and secured the cancellation of Original Certificate of Title No. 12463 and the issuance to him of Transfer Certificate of Title No. 6640; that in 1941 ONA sold the same property to the HACARIN DAIRY FARM CORPORATION resulting in the cancellation of Transfer Certificate of Title No. 6640 and the issuance of Transfer Certificate of Title No. 27257 in the name of the purchaser; and that on September 29, 1947, the Hacarin Dairy Farm Corporation mortgaged the property to the Rehabilitation Finance Corporation in the amount of ₱100,000.00. The complaint prays among other things that plaintiff be declared real owner and possessor of the property; that the sale of the same to Sanchez be declared null and void because of failure to fulfill the conditions of the sale; that the *pacto de retro* sale to Ona be declared illegal, including the issuance of Transfer Certificate of Title No. 6640 to him; that the sale by Ona to the Hacarin Dairy Farm Corporation be declared invalid and illegal, including the issuance of the corresponding transfer certificate of title and that the mortgage in favor of the Rehabilitation Finance Corporation be declared illegal and invalid, and that furthermore defendants be made to pay damages in the sum of ₱20,000.00.

Sanchez filed an answer stating that the facts alleged in the complaint did not constitute sufficient cause of action; that the action had already prescribed, and that the court had no jurisdiction to hear and decide the case. Ona filed a motion to dismiss on the ground of improperly laid venue. The Hacarin Dairy Farm Cor-

poration equally filed a motion to dismiss on the ground of lack of sufficient cause of action and prescription. And, the Rehabilitation Finance Corporation also filed a motion on the ground of lack of sufficient cause of action. Acting upon these pleadings the trial court presided over by Judge Gatmaitan issued an order dated January 20, 1951 dismissing the complaint. We reproduce said order.

"Considering the motion to dismiss filed by Lorenzo T. Ona, the Hacarin Dairy Farm and the RFC, the Court finds that all these motions are well founded. If the action can be considered as an action to recover the property described in the original of Transfer Certificate of Title No. 12463 of Bulacan, it is the Bulacan Court that has jurisdiction; if, on the other hand, it should be considered as an action to rescind the contract on the ground of failure to pay the balance of the purchase price, considering that according to paragraph 2 of the complaint, the period within which to pay the balance of the purchase price expired in April, 1931, the cause of action accrued since then; and as the complaint was filed only on December 23, 1950, a period of more than eighteen (18) years had elapsed from the date when the cause of action accrued to the date when the complaint was filed; in that case, it is clear that the same is already barred by prescription; under Rule 8, Section 1, v subpar. e, prescription may be availed of in a motion to dismiss. Even assuming that the Court has venue over the case, and that the action is to recover real property as from the allegations of the complaint, it is a case where plaintiff, according to him, was deprived of the ownership of the property since 1931; again it will appear that the action has prescribed since defendants got title in 1931. In fact, the complaint should be considered more of an action to recover the property rather than to a sum of money (Inton v. Quintana, L-1236, 26 May 1948; Baguioro v. Barrios, 43 O. G. 2031, August 30, 1946). There is even no showing that defendant Ona, Hacarin Dairy Farm and the RFC were purchasers in bad faith; even as to them, there can be no cause of action. The principal defendant Emilio Sanchez has not filed any motion to dismiss; but considering the tenor of his answer, he also raises the preliminary question that there is no cause for action; that the action has prescribed and that the Court has no jurisdiction over the case. From the view we have adopted as shown in the above discussion, it will appear even as against Emilio Sanchez, the action has prescribed. The result will be that the case shall be dismissed.

IN VIEW WHEREOF, complaint DISMISSMED, without costs.

SO ORDERED."

Plaintiff Gavieres first appealed from the above-quoted order to the Court of Appeals which tribunal after a study of the appeal indorsed the case to us on the ground that only questions of law were involved. After a careful study of the issues involved, we agree with the trial court in its order subject of the present appeal, specially as it holds that venue was improperly laid. In several decisions rendered by this Tribunal, as late as 1950, we have held that under Section 3, Rule 5 of the Rules of Court, an action affecting title to or recovery of possession of real property must be commenced and tried in the province where said property lies; that an action for the annulment or rescission of the sale of property does not operate to efface the fundamental and prime objective and nature of the action which is to recover said real property, and that under Rule 8, section 1 (b), a defendant may file a motion to dismiss the action when venue is improperly laid.[1]

There is no question that the present action should have been brought in the province of Bulacan where the land lies, and that in bringing the action in the province of Rizal, venue was improperly laid thereby justifying the order of dismissal. True, not all the defendants asked for dismissal on this ground but the purpose of their pleadings can well be interpreted as to attack venue. And as to prescription, as already said, there is every reason to believe and to find the dismissal to be well-founded on prescription, whether the action be considered as one to recover a sum of money or to recover real property.

In view of the foregoing, the order appealed from is hereby affirmed, with costs against appellant.

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

(1) Inton v. Quintana, G.R. No. L-1236, 45 O.G. No. 12, p. 5456; Enriquez v. Macadaeg, L-2422, 47 O.G. No. 3, p. 1208; Muñoz v. Llamas, G.R. No. L-2832, Dec. 21, 1950.

XII

Roman Tolsa, Petitioner, vs. Hon. Alejandro J. Panlilio, etc., et al., Respondents, G.R. No. L-7024, May 26, 1954, Montemayor, J.

COURTS; JURISDICTIONAL AMOUNT IN CIVIL CASES. —What determines the jurisdiction of a court in civil cases is not the amount that plaintiff is entitled to recover under the allegations of the complaint and under the law, but the amount sought to be recovered, usually contained in the prayer.

M. S. del Prado for petitioner.
Filemon R. Enrile for respondents.

DECISION

MONTEMAYOR, *J.*:

As a result of the collision in the month of October, 1948, between a truck owned by respondent Atayde Brothers and Company driven by one Elpidio Bamba and a passenger bus owned by petitioner Roman Tolsa, BAMBA was prosecuted in the Court of First Instance of Manila in Criminal Case No. 8748 for damage to property thru reckless imprudence, was found guilty, and sentenced to pay a fine of ₱765.00, to indemnify Tolsa in the same amount, with subsidiary imprisonment in case of insolvency, and to pay the costs. On appeal the decision was affirmed by the Court of Appeals. Bamba failed to pay the two amounts and had to undergo the corresponding subsidiary imprisonment. Because of Bamba's insolvency and his failure to pay the indemnity Tolsa filed in the same Court of First Instance of Manila Civil Case No. 19557 against Atayde Brothers and Company and Elpidio Bamba to recover the amount of ₱2,013.00 consisting of the indemnity of ₱765.00, ₱98.00 as damage to one tire as a result of the collision, ₱950.00 as consequential damages which is the amount Tolsa was supposed to have failed to realize as income during the time that his bus was being repaired, and ₱200.00 as attorney's fees, or a total of ₱2,013.00. Defendants in said civil case answered the complaint and the court set the hearing of the case on August 20, 1953. However, on August 5th, that is, fifteen days before the date set for hearing, respondent Judge Panlilio *motu propio* dismissed the case, without prejudice, on the ground that the court was without jurisdiction to try the same for the reason that the amount sought to be recovered in the action was less then ₱2,000.00. A motion for reconsideration by plaintiff Tolsa was denied and so he filed the present petition for certiorari on the ground that despite the fact that respondent Judge had jurisdiction over the case, he acted in excess of his jurisdiction and with grave abuse of his discretion in dismissing it.

Although respondent Judge in his order of dismissal did not state the reason why he ruled that he had no jurisdiction over the case, we presume that he was of the belief that plaintiff Tolsa

was entitled only to the amount of ₱765.00 awarded to him as indemnity in the criminal case, and that for this reason, the Municipal Court had jurisdiction. We have already held in several decisions that what determines the jurisdiction of a court in civil cases is not the amount that plaintiff is entitled to recover under the allegations of the complaint and under the law but the amount sought to be recovered, usually contained in the prayer. In the recent case of Lim Bing It vs. Hon. Fidel Ibañez, et al., G. R. No. L-5216, March 16, 1953, also a case of certiorari but which we regarded as one for mandamus, wherein the petitioner therein filed an action in the court of First Instance of Manila to recover ₱4,526.30, exclusive of interest, itemized as follows: ₱326.30 for merchandise bought on credit; ₱2,000.00 for damages, and ₱2,200.00 as attorney's fees, and where the trial court pronounced itself as without jurisdiction on the ground that "the cause of action" was only for the amount of ₱326.30, we held that the amount which determines the jurisdiction of the courts of general jurisdiction is the amount sought to recovered and not the amount found after trial to be due; and as we found that the respondent Judge therein erred in holding that he had no jurisdiction, we granted the petition and directed him to decide the case.

Finding the present petitioner for certiorari which we regard as a petition for mandamus to be well-founded, the same is hereby granted, and setting aside the order of dismissal of respondent Judge, he is hereby directed to reinstate Civil Case No. 19557 and hear the same. No costs.

Jugo, Angelo, Labrador, and *Concepcion, J.J.,* concur.
Mr. Justice Padilla did not take part.

XIII

The People of the Philippines, Plaintiff-Appellee, vs. Aquino Mingao, Defendant-Appellant, G.R. No. L-5371, March 26, 1953, Reyes, J.

1. CRIMINAL LAW; CONSTITUTIONALITY OF ARTICLE 217 OF THE REVISED PENAL CODE.—The provisions of Article 217 of the Revised Penal Code create a presumption of guilt once certain facts are proved. It makes the failure of a public officer to have duly forthcoming, upon proper demand, any public funds or property with which he is chargeable *prima facie* evidence that he has put such missing funds or property to personal use. The ultimate fact presumed is that the officer has malversed the funds or property entrusted to his custody, and the presumption is made to arise from proof that he has received them and yet he has failed to have them forthcoming upon proper demand. Clearly, the fact presumed is but a natural inference from the fact proved, so that it cannot be said that there is no rational connection between the two. Furthermore, the statute establishes only a *prima facie* presumption, thus giving the accused an opportunity to present evidence to rebut it. The presumption is reasonable and will stand the test of validity laid down in the above citations.

2. IBID; IBID;.—The validity of statutes establishing presumptions in criminal cases is now a settled matter. Cooley, in his work on constitutional limitations, 8th ed., Vol. I, pp. 639-641, says that "there is no constitutional objection to the passage of a law providing that the presumption of innocence may be overcome by a contrary presumption founded upon the experience of human conduct, and enacting what evidence shall be sufficient to overcome such presumption of innocence." In line with this view, it is generally held in the United States that the legislature may enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the guilt of the accused and shift the burden of proof provided there be a rational connection between the facts proved and the ultimate fact presumed so that the inference of the one from proof of the others is not unreasonable and arbitrary because of lack of connection between the two in common experience. (See annotation on constitutionality of statutes or ordinances making one fact presumptive or *prima facie* evidence of another, 162 A. L. R. 495-535; also, State v. Brown, 182 S. E. 838, without reference to embezzlement.) The same view has been adopted here as may be seen from the decision of this Court in U.S. v. Tria, 17 Phil. 303; U.S. v. Luling, 34 Phil. 725; and People v. Merilo, G.R. No. L-3489, promulgated June 28, 1951)

Marcelino Lontok for appellant.
First Assistant Solicitor General Ruperto Kapunan, Jr. and *Solicitor Federico V. Sian* for appellee.

DECISION

REYES, *J.*:

Found short in his accounts as officer-in-charge of the office of the municipal treasurer of Despujols, Romblon, and unable to produce the missing fund amounting to ₱3,938.00 upon demand by the provincial auditor, the defendant Aquino Mingoa was prosecuted for the crime of malversation of public funds in the Court of First Instance of Romblon, and having been found guilty as charged and sentenced to the corresponding penalty, he appealed to the Court of Appeals. But that court certified the case here on the ground that it involved a constitutional question.

The evidence shows and it is not disputed that upon examination of his books and accounts on September 1, 1949, defendant, as an accountable officer, was found short in the sum above named and that, required to produce the missing fund, he was not able to do so. He explained to the examining officer that some days before he had, by mistake, put the money in a large envelope which he took with him to a show and that he forgot it on his seat and it was not there anymore when he returned. But he did not testify in court and presented no evidence in his favor.

We agree with the trial judge that defendant's explanation is inherently unbelievable and cannot overcome the presumption of guilt arising from his inability to produce the fund which was found missing. As His Honor observes, if the money was really lost without defendant's fault, the most natural thing for him to do would be to so inform his superiors and apply for release from liability. But this he did not do. Instead, he tried to borrow to cover the shortage. And on the flimsy excuse that he preferred to do his own sleuthing, he even did not report the loss to the police. Considering further, as the prosecution points out in its brief, that defendant had at first tried to avoid meeting the auditor who wanted to examine his accounts, and that for sometime before the alleged loss many teachers and other employees of the town had not been paid their salaries, there is good ground to believe that defendant had really malversed the fund in question and that his story about its loss was pure invention.

It is now contended, however, that lacking direct evidence of actual misappropriation the trial court convicted defendant on mere presumptions, that is, presumption of criminal intent in losing the money under the circumstances alleged and presumption of guilt from the mere fact that he failed, upon demand, to produce the sum lacking. The criticism as to the first presumption is irrelevant, for the fact is that the trial court did not believe defendant's explanation that the money was lost, considering it a mere cloak to cover actual misappropriation. That is why the court said that

"whether or not the (defendant) is guilty of malversation for negligence is of no moment x x x." And as to the other presumption, the same is authorized by article 217 of the Revised Penal Code, which provides:

> "The failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable, upon demand by any duly authorized officer, shall be *prima facie* evidence that he has put such missing funds or property to personal use."

The contention that this legal provision violates the constitutional right of the accused to be presumed innocent until the contrary is proved cannot be sustained. The question of the constitutionality of the statute not having been raised in the court below, it may not be considered for the first time on appeal. (Robb vs. People, 68 Phil. 320).

In any event, the validity of statutes establishing presumptions in criminal cases is now a settled matter. Cooley, in his work on constitutional limitations, 8th ed., Vol. I, pp. 639-641, says that "there is no constitutional objection to the passage of a law providing that the presumption of innocence may be overcome by a contrary presumption founded upon the experience of human conduct, and enacting what evidence shall be sufficient to overcome such presumption of innocence." In line with this view, it is generally held in the United States that the legislature may enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the guilt of the accused and shift the burden of proof provided there be a rational connection between the facts proved and the ultimate fact presumed so that the inference of the one from proof of the others is not unreasonable and arbitrary because of lack of connection between the two in common experience. (See annotation on constitutionality of statutes or ordinances making one fact presumptive or *prima facie* evidence of another, 162 A. L. R. 495-535; also, State v. Brown, 182 S E. 838, with reference to embezzlement.) The same view has been adopted here as may be seen from the decisions of this Court in U.S. v. Tria, 17 Phil. 303; U.S. v. Luling, 34 Phil. 725; and Pople v. Merilo, G.R. No. L-3489, promulgated June 28, 1951.

The statute in the present case creates a presumption of guilt once certain facts are proved. 'It makes the failure of a public officer to have duly forthcoming, upon proper demand, any public funds or property with which he is chargeable *prima facie* evidence that he has put such missing funds or property to personal use. The ultimate fact presumed is that the officer has malversed the funds or property entrusted to his custody, and the presumption is made to arise from proof that he has received them and yet he has failed to have them forthcoming upon proper demand. Clearly, the fact presumed is but a natural inference from the fact proved, so that it cannot be said that there is no rational connection between the two. Furthermore, the statute establishes only a *prima facie* presumption, thus giving the accused an opportunity to present evidence to rebut it. The presumption is reasonable and will stand the test of validity laid down in the above citations.

There being no reversible error in the decision appealed from, the same is hereby affirmed, with costs.

Paras, Feria, Pablo, Bengzon, Padilla, Montemayor, Jugo, Bautista Angelo, and *Labrador, J.J.,* concur.

XIV

Pedro Teodoro, Plaintiff-Appellee, vs. Agapito Balatbat, et al., Defendants-Appellee, G.R. No. L-6314 January 22, 1954, Reyes, J.

CIVIL PROCEDURE; ACTION FOR FORCIBLE ENTRY AND DETAINER IN A JUSTICE OF THE PEACE COURT; DEFENDANT'S ALLEGATION OF OWNERSHIP OF THE PROPERTY INVOLVED.—It has been held time and again that the defendants in a case of forcible entry and detainer in a justice of the peace court may not divest that court of its jurisdiction by merely claiming ownership of the property involved. It is, however, equally settled that if it appears during the trial that, by the nature of the proof presented, the question of possession can not properly be determined without settling that of ownership, then the jurisdiction of the court is lost and the action should be dismissed. So, where plaintiff's claim to possession is predicated upon a deed of sale alleged to have been executed by the defendant who in turn alleges said document to be fictitious and fraudulent, and there are no circumstances showing that this claim of defendant is unfounded, the justice of the peace loses its jurisdiction.

T. C. Martin and *A. B. Reyes* for appellants.
Jose B. Bautista for appellee.

DECISION

REYES, *J.*:

This is an appeal from the Court of First Instance of Bulacan certified to this Court by the Court of Appeals for the reason that it involves a purely legal question.

The case originated in the justice of the peace court of Hagonoy, Bulacan, with the filing of a complaint for the recovery of possession of two parcels of land and a house thereon which were allegedly leased by plaintiff to defendants and which the latter refused to vacate after the expiration of the lease despite demands. Answering the complaint, defendants denied the alleged lease, and setting up title in themselves, alleged that the house and land in question were merely mortgaged by them to plaintiff as a security for a usurious loan, but that to cover up the usury the transaction was given the form of a fictitious and simulated contract of sale with right of repurchase, which they consented to sign on the assurance that it was to be a mere evidence of indebtedness and would not be enforced as a true *pacto de retro* sale. After hearing the evidence presented by the parties, the justice of the peace rendered his decision dismissing the case for want of jurisdiction on the theory that the question of possession could not be resolved without first deciding that of ownership. From this decision plaintiff appealed to the Court of First Instance of Bulacan. There defendant filed a motion to dismiss, alleging that the court had no jurisdiction to try the case on the merits. But the motion was denied, whereupon, defendants filed their answer to the complaint and plaintiff, on his part, filed his reply to the answer. On the case coming up for hearing, defendants in open court again raised the question of jurisdiction. But the court rendered an order holding that the justice of the peace had jurisdiction and remanded the case to that court for trial on the merits. It is from that order that defendants have appealed.

It has been held time and again that the defendant in a case of forcible entry and detainer in a justice of the peace court may not divest that court of its jurisdiction by merely claiming ownership of the property involved. It is, however, equally settled that "if it appears during the trial that, by the nature of the proof presented, the question of possession can not properly be determined without settling that of ownership, then the jurisdiction of the court is lost and the action should be dismissed." (II Moran, Rules of Court, 1952 ed., p. 299, and cases therein cited.) So it is held that where plaintiff's claim to possession "is predicated upon a deed of sale alleged to have been executed by the defendant, who in turn alleges said document to be fictitious and fraudulent, and there are no circumstances showing that this claim of defendant is unfounded, the justice of the peace loses its jurisdiction." (Ibid.)

The evidence presented in the justice of the peace court in the

present case is not before us. But from the answer filed by the defendants in the Court of First Instance and plaintiff's reply thereto, it is evident that plaintiff's pretended right to the possession of the property in dispute ultimately rests upon his claim of ownership, a claim based upon a purported contract of sale with right of repurchase admittedly signed by defendants but claimed by them to be a mere simulation to cloak a mortgage obligation tainted with usury. If this contract was really a sale subject to repurchase and the repurchase has, as alleged by the plaintiff, not been made within the time stipulated, plaintiff would already be the owner of the property sold and, as such, entitled to its possession. On the other hand, if the contract was, as defendants claim, in reality a mere mortgage, then the defendants would still be the owner of the property and could not, therefore, be regarded as mere lessees. In the final analysis then, the case hinges on a question of ownership and is for that reason not cognizable by the justice of the peace court.

The case at bar is to be distinguished from that of Sevilla vs. Tolentino, 51 Phil. 333, cited by the learned trial judge in the order appealed from. In that case, defendant was deemed to have impliedly admitted being lessee of the property in dispute and could not for that reason be allowed to claim ownership thereof in the same action. Such is not the situation of the present defendants, who have in their answer denied the alleged lease.

As the justice of the peace court of Hagonoy had no jurisdiction to try the case on the merits, the order appealed from remanding the case to that court must be, as it is hereby, revoked; and, in accord with the precedent established in Cruz et al. vs. Garcia et al., 45 O.G. 227, and the decisions therein cited, the case is ordered returned to the Court of First Instance of Bulacan for that court to proceed with the trial in the exercise of its original jurisdictoin. With costs against the appellee.

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

XV

The People of the Philippines, Plaintiff-Appellant, vs. Ricardo Catchero, Defendant-Appellee, G.R. No. L-6084, *promulgated December* 17, 1953, *Reyes, J.*

CRIMINAL LAW; ILLEGAL POSSESSION OF FIREARMS; EXEMPTION FROM CRIMINAL LIABILITY.—The information alleges that defendant had possession, custody and control of the prohibited articles without the required license. But because it does not allege that defendant made use of them except for self-defense or carried them on his person except for the purpose of surrendering them to the authorities, the lower court found it insufficient in view of our ruling in People vs. Santos Lopez y Jacinto, G.R. No. L-1062 (promulgated November 29, 1947), which was re-affirmed in People vs. Ricardo Aquino y Abalos, G.R. No. L-1429 (promulgated May 16, 1949). The ruling cited is applicable only to violations of the firearm law committed before the expiration of the period fixed in Proclamation No. 1, dated July 20, 1946, for surrendering unlicensed firearms and ammunition, when mere possession of those articles did not make the possessor criminally liable unless he was found making use of them except in self-defense or carrying them on his person except for the purpose of surrendering them.

First Assistant Solicito. General Ruperto Kapunan, Jr. and *Solicitor Jose G. Bautista* for appellant.

No appearance for appellee.

DECISION

REYES, J.:

This is an appeal from an order of the Court of First Instance of Pangasinan, dismissing an information for illegal possession of firearm and ammunition. The dismissal was ordered on a motion to quash on the grounds that the information did not state facts sufficient to constitute an offense.

The information alleges that defendant had possession, custody and control of the prohibited articles without the required license. But because it does not allege that defendant made use of them except for self-defense or carried them on his person except for the purpose of surrendering them to the authorities, the lower court found it insufficient in view of our ruling in People vs. Santos Lopez y Jacinto, G.R. No. L-1062 (promulgated November 29, 1947), which was re-affirmed in People vs. Ricardo Aquino y Abalos, G.R. No. L-1429 (promulgated May 16, 1949).

The ruling cited is applicable only to violations of the firearm law committed before the expiration of the period fixed in Proclamation No. 1, dated July 20, 1946, for surrendering unlicensed firearms and ammunition, when mere possession of these articles did not make the possessor criminally liable unless he was found making use of them except in self-defense or carrying them on his person except for the purpose of surrendering them. This is what we held in case of People vs. Morpus Felinggon, G.R. No. L-3460, promulgated December 29, 1950, from which the following may be quoted:

> "We are of the opinion that the Santos Lopez case does not apply. Therein the possession of firearms and ammunition occured in August 21, 1946; whereas Morpus' possession was alleged to be on September 15, 1949. *Distingue tempora et condordabis jura.* Distinguish time and you will harmonize laws. Up to August 31, 1946—by reason of Section 2 of Republic Act No. 4 and the proclamation of the President — 'criminal liability for mere possession of firearms and ammunition' was in effect 'temporarily lifted' or suspended. Wherefore Santos Lopez' *mere possession* before August 31, 1946 was not punishable. That was our holding in the Santos-Lopez decision. However, on August 31, 1946 the suspension terminated; and thereafter the general rule making it unlawful to manufacture, sell, possess, etc., firearms and ammunition again prevailed. Consequently the herein appellee having been allegedly found in possession of firearms after August 31, 1946 (more specifically on September 15, 1949) be transgressed the law on the matter, unless he proved some valid defense or exculpation."

As the violation charged in the present case is alleged to have be committed on or about August 16, 1949, which was after the deadline (August 31, 1946) fixed for the surrender of unlicensed firearms and ammunition, the ruling applicable is that laid down in the case last cited.

Wherefore, the order appealed from is revoked and the case ordered remanded to the court below for further proceedings.

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

XVI

The People of the Philippines, PlaintiffA-ppellee, vs. Leon Aquino, Defendant-Appellant, G.R. No. L-6063, *April* 26, 1954, *Reyes, J.*

1. CRIMINAL LAW; MALVERSATION OF PUBLIC FUNDS; FUNDS IMPRESSED WITH THE CHARACTER OF "PUBLIC FUNDS".—Even supposing that funds belonging to the NARIC are not public funds, they become impressed with that

character when they are entrusted to a public officer for his official custody (People vs. De la Serna, 40, O.G. [Supp. 12] 159).

2. IBID; IBID.—Red Cross, Anti-Tuberculosis, and Boy Scouts funds delivered to an assistant cashier of a provincial treasurer for his custody acquire the attributes of public funds.

Dominador T. Tugade for appellant.

Solicitor General Juan R. Liwag and *Solicitor Felix V. Makasiar* for appellee.

DECISION

REYES, *J.*:

The accused Leon Aquino was charged in the Court of First Instance of Pangasinan with malversation of public funds for having on or about July 16, 1951, misappropriated public funds amounting to ₱20,944.27 entrusted to his care in his capacity as municipal treasurer and postmaster of Mabini, Pangasinan, and "ex-officio in-charge of the properties and funds of the National Rice and Corn Corporation (NARIC)." Pleading guilty to the charge, the accused was, in accordance with Article 217, paragraph 4, of the Revised Penal Code and the Indeterminate Sentence Law, sentenced as follows:

"(a) In accordance with the Indeterminate Sentence Law and Art. 217, par. 4 of the Revised Penal Code, and taking into account his plea of guilty, to suffer a penalty of EIGHT YEARS and ONE DAY of 'Prision mayor' as a minimum and TWELVE YEARS and ONE DAY of "Reclusion temporal' as a maximum;

"(b) To suffer the penalty of perpetual special disqualification;

"(c) To pay a fine of ₱10,472.13, without subsidiary imprisonment because of the principal penalty imposed;

"(d) To indemnify the National Rice and Corn Corporation in the amount of ₱12,656.83;

"(e) To indemnify the Government of the Republic of the Philippines in the amount of ₱2,910.44;

"(f) To indemnify the Bureau of Posts or the Government of the Republic of the Philippines in the further amount of ₱5,377.00;

"(g) To pay the costs of this case."

From this sentence the accused has appealed, and his attorney in this instance contends that the lower court should have applied paragraph 3 instead of paragraph 4 of the article mentioned. In support of this contention attention is invited to the fact disclosed in the information that ₱12,656.83 of the funds malversed belonged to the NARIC, and, on the theory that NARIC funds are not public funds because the NARIC is a corporation separate and distinct from the Government, counsel argues that with respect to that sum the accused cannot be held guilty of malversation of public funds. With that sum excluded, the amount of public funds malversed, so counsel contends, would only be ₱8,287.44 and would come under paragraph 3 of the article in question, which provides for a penalty lighter than that prescribed in paragraph 4.

The contention is without merit. Even supposing that funds belonging to the NARIC are not public funds, they become impressed with that character when they are entrusted to a public officer for his official custody (People vs. De la Serna, 40 O.G. [Supp. 12] 159). Thus this Court has held that Red Cross, Anti-Tuberculosis, and Boy Scouts funds delivered to an assistant cashier of a provincial treasurer for his custody acquire the attributes of public funds (People vs. Velasquez, 72 Phil. 98).

We find the sentence appealed from in accordance with law. We, therefore, confirm it with costs against the appellant.

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

Mr. Justice Padilla did not take part.

XVII

Carmen Festejo, Demandante-Apelante, contra Isaias Fernando, Director de Obras Publicas, Demandado-Apelado, R.G. No. L-5156, promulgada, Marzo 11, 1954, *Diokno, M.*

PUBLIC OFFICERS; WHEN PERSONALLY LIABLE; CASE AT BAR.—Plaintiff owned some parcels of land totalling about 9 hectares. The Director of the Bureau of Public Works "without authority obtained first from the Court of First Instance of Ilocos Sur, without first obtaining a right way, and without the consent and knowledge of the plaintiff, and against her express objection, unlawfully took possession of portions of the three parcels of land and caused an irrigation canal to be constructed on the portion of the three parcels of land x x x." Consequently, she asked the court "to return or cause to be returned the possession of the portions of land unlawfully occupied and appropriated, etc." The defendant, through the Solicitor General, presented a motion to dismiss on the ground that the court had no jurisdiction over the case in view of the fact that the action was against the Republic of the Philippines and said Republic had not consented to be sued. The inferior court dismissed the case. HELD: The action against the Director of the Bureau of Public Works is one which is directed against him personally for acts which he performed in his capacity as such official. The law does not excuse him from responsibility for acts which he performed or ordered to be performed beyond the scope of his power in the performance of his official functions.

Eloy B. Bello for appellant.

Solicitor General Pompeyo Diaz and *Solicitor Antonio A. Torres* for appellee.

DECISION

DIOKNO, *M.*:

Carmen Festejo, dueña de unos terrenos azucareros, de un total de unas 9 hectareas y media de superficie, demandó a "Isaias Fernando, Director, Bureau of Public Works", "que como tal Director de Obras Publicas tiene a su cargo los sistemas y proyectas de *irrigacion* y es el funcionario responsable de la construccion de los sistemas de *irrigacion* en el pais," alegando que—

> The defendant, as Director of the Bureau of Public Works, without authority obtained first from the Court of First Instance of Ilocos Sur, without obtaining first a right of way, and without the consent and knowledge of the plaintiff, and against her express objection, unlawfully took possession of portions of the three parcels of land described above, and caused an irrigation canal to be constructed on the portion of the three parcels of land on or about the month of Feb. 1951 the aggregate area being 24179 square meters to the damage and prejudice of the plaintiff." — *R. on A. p.* 3.

causando a ella variados daños y perjuicios. Pidió, en su consecuencia, sentencia condenando al demandado:

". . . to return or cause to be returned the possession of

the portions of land unlawfully occupied and appropriated in the aggregate area of 24,179 square meters and to return the land to its former condition under the expenses of the defendant." x x x

"In the remote event that the portions of land unlawfully occupied and appropriated can not be returned to the plaintiff, then to order the defendant to pay to the plaintiff the sum of ₱19,342.20 as value of the portions totalling an area of 24, 179 square meters;" — *R. on A., p.* 5.

y ademas a pagar ₱9,756i19 de daños y ₱5,000 de honorarios de abogado, con las costas, R. on A., pp. 5-6.

El demandado, por medio del Procurador General, presentó mocion de sobreseimiento de la demanda por el fundamento de que el Juzgado no tiene jurisdiccion para dictar sentencia valida cnotra el, toda vez que judicialmente la reclamacion es contra la Republica de Filipinas, y esta no ha presentado su consentimiento a la demanda. El Juzgado inferior estimo la moción y sobreseyó la demanda sin perjuicio y sin costas.

En apelación, la demandante sostiene que fué un error considerar la demanda como una contra la Republica y sobreseer en su virtud la demanda.

La acción contra "Isaias Fernando, Director de Obras Publicas", "encargado y responsable de la construccion de los sistemas de irrigación en Filipinas" es una dirigida *personalmente* contra él, por actos que asumió ejecutar en su concepto oficial. La ley no le exime de responsabilidad por las extralimitaciones que cometa o haga cometer en el desempeño de sus funciones oficiales.

Un caso semejante es el de Nelson v. Babcock (1933) 18 Minn. 584, 24 NW 49, 90 ALR 1472. Alli el Comisionado de Carreteras, al mejorar un trozo de la carretera ocupó o se apropió de terrenos contiguos al derecho de paso. El Tribunal Supremo del Estado declaró que es personalmente responsable al dueño de los daños causados. Declaro ademas que la ratificación de lo que hicieron sus subordinados era equivalente a una orden a los mismos. He aqui lo dijo el Tribunal:

"We think the evidence and conceded facts permitted the jury in finding that in the trespass on plaintiff's land defendant committed acts outside the scope of his authority. When he went outside the boundaries of the right of way upon plaintiff's land and damaged it or destroyed its former condition and usefulness, he must be held to have designedly departed from the duties imposed on him by law. There can be no claim that he thus invaded plaintiff's land southeasterly of the right of way innocently. Surveys clearly marked the limits of the land appropriated for the right of way of this trunk highway before construction began. x x x.

"Ratification may be equivalent to command, and cooperation may be inferred from acquiescence where there is power to restrain.' It is unnecessary to consider other cases cited, x x x, for as before suggested, the jury could find or infer that, in so far as there was actual trespass by appropriation of plaintiff's land as a dumping place for the rock to be removed from additional appropriated right of way, defendant planned, approved, and ratified what was done by his subordinates." — *Nelson v. Babcock*, 90 *A.L.R.* 1472, 1476, 1477.

La doctrina sobre la responsabilidad civil de los funcionarios en casos parecidos se resume como sigue:

"Ordinarily the officer or employee committing the tort is personally liable therefor, and may be sued as another citizen and held answerable for whatever injury or damage results from his tortious act." — 49 *Am. Jur.* 289.

". . . . If an officer, even while acting under color of his office, exceeds the power conferred on him by law, he cannot shelter himself under the plea that he is a public agent."— 43 *Am. Jur.* 86.

"It is a general rule that an officer-executive, administrative quasi-judicial, ministerial, or otherwise who acts outside the scope of his jurisdiction and without authorization of law may thereby render himself amenable to personal liability in a civil suit. If he exceeds the power conferred on him by law, he cannot shelter himself by the plea that he is a public agent acting under color of his office, and not personally. In the eye of the law, his acts then are wholly without authority." — 43 *Am. Jr.* 89-90.

El Art. 32 del Codigo Civil dice, a su vez:

"Art. 32. Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:

x x x x x

"(6) The right against deprivation of property without due process of law;

x x x x x

"In any of the cases referred to in this article, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief. Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence.

"The indemnity shall include moral damages. Exemplary damages may also be adjudicated."

Veanse tambien Lung v. Aldanese, 45 Phil. 784; Syquia v. Almeda, No. L-1648, Agosto 17, 1947; Marquez v. Nelson, No. L-2412, Septiembre 1950.

Se revoca la orden apelada y se ordena la continuación de la tramitacion de la demanda conforme proveen los reglamentos. Sin especial pronunciamiento en cuanto a las costas.

Asi se ordena.

Padilla, Reyes, Jugo, Bautista Angelo, y *Labrador, JJ.;* conformes.
Paras, and *Montemayor, J.J.*, reserved their votes.
Justice Concepcion dissented in a separate opinion.
Pablo, J., took no part.

CONCEPCION, *J.*, dissenting:

To my mind, the allegations of the complaint lead to no other conclusion than that appellee Isaias Fernando is a party in this case, not in his personal capacity, but as an officer of the Government. According to said pleading the defendant is "Isaias Fernando, Director, Bureau of Public Works." Moreover, in paragraphs 4 and 5 of the complaint, it is alleged:

"4. That the defendant as *Director of the Bureau of Public Works* is in charge of irrigation projects and systems, and the official responsible for the construction of irrigation system in the Philippines;

5. That the defendant, *as Director of the Bureau of Public Works*, without authority obtained first from the Court of First Instance of Ilocos Sur, without obtaining first a right

of way, and without the consent and knowledge of the plaintiff, and against her express objection, unlawfully took possession of portions of the three parcels of land described above, and caused an irrigation canal to be constructed on the portion of the three parcels of land on or about the month of Feb. 1951 the aggregate area being 24,179 square meters to the damage and prejudice of the plaintiff." (Underscoring supplied.)

The emphasis thus placed upon the allegation that the acts complained of were performed by said defendant "as Director of the Bureau of Public Works," clearly shows that the designation of his office was included in the title of the case to indicate that he was being sued in his official capacity. This conclusion is bolstered up by the fact that, among othsr things, plaintiff prays, in the complaint, for a judgment

> "Ordering the defendant to return or caused to be returned the possession of the portions of land unlawfully occupied and appropriated in the aggregate area of 24,179 square meters and to return the land to its former condition under the expense of the defendant." (Paragraph a, of the complaint).

We take judicial notice of the fact that the irrigation projects and systems referred to in the complaint—of which the defendant Isaias Fernando, according to the same pleading, is "in charge" and for which he is "responsible" as Director of the Bureau of Public Works—are established and operated with public funds, which, pursuant to the Constitution, must be appropriated by law. Irrespective of the manner in which construction may have been undertaken by the Bureau of Public Works, the system or canal is, therefore, a property of the Government. Consequently, in praying that possession of the portions of land occupied by the irrigation canal involved in the present case be returned to plaintiff herein, and that said land be restored to its former condition, plaintiff seeks to divest the Government of its possession of said irrigation canal, and, what is worse, to cause said property of the Government to be removed or destroyed. As held in Sy Quia vs. Almeda (47 O.G. 670-671), the Government is, accordingly, "the real party in interest as defendant" in the case at bar. In other words, the same partakes of the nature of a suit against the state and may not be maintained without its consent.

Hence, I am constrained to dissent.

I concur in the above dissent. — *Bengzon, J.*

XVIII

Juan Planas and Sofia Verdon, Petitioners, vs. Madrigal & Co., et als, Respondents, G. R. No. L-6570, April 12, 1954, Bautista Angelo, J.:

CIVIL PROCEDURE; EXECUTION OF JUDGMENT; DUTY OF THE SHERIFF. — The duty of the sheriff in connection with the execution and satisfaction of judgment of the court is governed by Rule 39 of the Rules of Court. With regard to the proceedings to be followed where the property levied in execution is claimed by a third person, section 15 provides that if such person makes an affidavit of his title thereto or right to the possession thereof, stating the grounds of such right or title, and serves the same upon the officer making levy, the officer shall not be bound to keep the property unless the judgment creditor, on demand, indemnify the officer against such claim by a bond in a sum not greater than the value of the property levied on. If the third claim is sufficient, the sheriff, upon receiving it, is not bound to proceed with the levy of the property, unless he is given by the judgment creditor an indemnity bond against the claim (Mangaoang v. The Provincial Sheriff, L-4869, May 26, 1952). Of course, the sheriff may proceed with the levy even without the indemnity bond, but in such case he will answer for any damages with his own personal funds. (Waite v. Peterson, et al., 8 Phil. 449; Alzua et al. v. Johnson, 21 Phil. 308; Consulta No. 341 de los abogados de Smith, Bell & Co., 48 Phil. 565.) And the rule also provides that nothing therein contained shall prevent a third person from vindicating his claim to the property by any proper action (Section 15, Rule 39).

Jeremias T. Sebastian for petitioners.
Bausa & Ampil for respondents.

DECISION

BAUTISTA ANGELO, J.:

This is a petition for certiorari seeking to set aside certain orders of respondent Judge with the view to reviving or giving course to the third party claims filed by petitioners with the Provincial Sheriff of Rizal claiming to be the owners of the houses levied in execution and to excluding them from the list of individuals who were ordered to vacate the land of Madrigal & Co. Inc., issued in Civil Case No. 954 of the Court of First Instance of Rizal.

This petition stems from a case of forcible entry and detainer instituted by Madrigal & Co. Inc., against Concepcion L. Planas and Iluminado L. Planas in the Court of First Instance of Rizal (Civil Case No. 954), which culminated in a judgment in favor of plaintiff and against the defendants, whereby the latter were ordered to vacate the property in litigation and to pay to the former the corresponding rentals for their occupancy of the property until it is vacated. This judgment was affirmed by the Court of Appeals and became final and executory.

On November 28, 1952, upon petition of plaintiff, a writ of execution was issued by the court and was given course by the clerk of court by virtue of which the defendants were given 15 days within which to vacate the land. Defendants having failed to do so, plaintiff filed a motion for the issuance of a special order of demolition of the buildings constructed thereon.

On December 16, 1952, Juan Planas filed an action in the same court claiming to be the owner of two of the buildings, plus two other adjacent buildings marked as annexes, contemplated to be demolished and praying for the issuance of a writ of preliminary injunction. The writ prayed for was denied. Instead, the court granted the motion of plaintiff for the demolition of the buildings belonging to the defendants.

On January 23, 1953, the provincial sheriff commenced the demolition of the buildings, whereupon Juan Planas filed on January 28, 1953 with said sheriff a third party claim alleging to be the owner of the four buildings which were ordered to be demolished as belonging to defendants, and on the same date, January 28, 1953, Sofia Verdon filed likewise a third party claim alleging to be the owner of the personal property found in said buildings. At the same time, Juan Planas wrote to the sheriff requesting him to stop the demolition of the buildings and to require the judgment creditor to file an indemnity bond as required by the rules. This request was transmitted by the sheriff to counsel of the plaintiff requesting appropriate action, but instead of heeding the request counsel filed an urgent motion to quash the third party claims filed by Juan Planas and Sofia Verdon. A timely objection was interposed to this motion by the third party claimants.

On February 5, 1953, the court granted the motion to quash and discarded the third party claims as well as the notice given

to the sheriff requiring the plaintiff to post an indemnity bond. The claimants moved for the reconsideration of this order but the same was denied.

On February 9, 1953, to follow up his claim in line with his interest, Juan Planas filed another third party claim with the sheriff requesting the latter to turn over to him all the materials that were dismantled and brought down from the houses that had been demolished, alleging to be the owner thereof, and to require the judgment creditor to put up the necessary indemnity bond for his protection. The sheriff failed to act on this third party claim. Instead, in the afternoon of February 10, 1953, Juan Planas received a copy of an urgent motion to quash said second third party claim filed by counsel for the plaintiff. Juan Planas moved for postponement of the hearing of this motion but his motion was ignored, and on February 11, 1953, the court granted the urgent motion and discarded the second third party claim of Juan Planas.

On February 10, 1953, Juan Planas received a copy of an order of the court issued of February 2, 1953 which directs that certain individuals, including Juan Planas, vacate the land of the plaintiff pursuant to the judgment of the court. On February 17, 1953, these individuals, including Juan Planas, filed a joint petition for the reconsideration of the order of February 2, 1953 but this joint petition was denied. Hence, this petition for certiorari seeking to set aside the orders above adverted to.

The question to be determined is whether the respondent Judge acted with grave abuse of discretion when he ordered the quashing and discarding of the first and second third party claims interposed by petitioners on January 28, 1953, and February 9, 1953, and in ordering petitioner Juan Planas to vacate the land of the plaintiff not being a party to the case of forcible entry and detainer instituted by Madrigal & Co. Inc., against Concepcion L. Planas and Iluminado L. Planas.

The duty of the sheriff in connection with the execution and satisfaction of a judgment of the court is governed by Rule 39 of the Rules of Court. With regard to the proceedings to be followed where the property levied in execution is claimed by a third person, section 15 provides that if such person makes an affidavit of his title thereto or right to the possession thereof, stating the grounds of such right or title, and serves the same upon the officer making the levy, the officer shall not be bound to keep the property unless the judgment creditor, on demand, indemnify the officer against such claim by a bond in a sum not greater than the value of the property levied on. If the third party claim is sufficient, the sheriff, upon receiving it, is not bound to proceed with the levy of the property, unless he is given by the judgment creditor an indemnity bond against the claim (Mangaoang v. The provincial Sheriff, L4869, May 26, 1952). Of course, the sheriff may proceed with the levy even without the indennity bond, but in such case he will answer for any damages with his own personal funds. (Waite v. Peterson, et al., 8 Phil. 449; Alzua, et al. v. Johnson, 21 Phil. 308; Consulta No. 341 de los abogados de Smith, Bell & Co., 48 Phil. 565.) And the rule also provides that nothing therein contained shall prevent a third person from vindicating his claim to the property by any proper action (Section 15, Rule 39).

In the present case, the provincial sheriff departed from the regular procedure prescribed by the rules. He chose to proceed with the levy even without the indemnity bond in view of the urgent motion to quash filed by the judgment creditor in the main case. It should be remembered that the court, after proper hearing, wherein the parties were allowed to submit documentary evidence, found the third party claims to be without merit and ordered that they be discarded and quashed. Indeed, the court found that Juan Planas, the third party claimant, is the son of defendants Concepcion L. Planas and Illuminado L. Planas, and a stockholder of a firm of which Concepcion L. Planas was the principal stockholder. It also found that since the filing of the ejectment case against the spouses Planas up to December 29, 1952, the four houses claimed by Juan Planas were registered in the name of his mother, Concepcion L. Planas, in the assessment rolls of Pasay City, and that it was only on said date that said assessments were transferred to Juan Planas. On the other hand, the answer submitted by spouses Planas in the ejectment case contains a clear averment that the four houses now in dispute were contradicted and were the property of said spouses. Likewise, the letter of Atty. Arcadio Ejercito, counsel of Concepcion L. Planas, sent to the provincial sheriff in connection with the demolition of the four buildings in question, contains an averment which indicates that said buildings belonged to said defendant. This circumstantial evidence must have engendered in the mind of the court the conviction that the claim of ownership put up by Juan Planas at so late an hour is but an eleventh hour attempt to thwart and frustrate the execution of the judgment rendered in the ejectment case.

We hold that the action taken by the respondent Judge on this matter is justified. At any rate, the right of Juan Planas to the property is not completely lost, for the rule reserves to him the right to vindicate his claim in a proper action (Section 15, Rule 39). This he did by bringing an action in court asserting his ownership over the property. This action is still pending and will be decided in due time (Civil Case No. 1961).

Anent the order of respondent Judge dated February 2, 1953 which directs that Jose Isla, Carlos Neri, Jose T. Josue, Juan Planas and the San Miguel Brewery, Inc. vacate the land of plaintiff pursuant to the judgment of the court in the ejectment case, which order is now attacked as illegal because they were not parties to that case, the record shows that, before issuing said order, the court conducted a summary hearing to determine the nature of the possession of the property claimed by Juan Planas and other occupants, and that at that hearing respondent Judge summoned all of them to appear to show cause why they should not be ejected from the premises. And after the hearing was over respondent Judge found that Juan Planas and the other occupants were mere transferees or possessors *pendente lite* of the property in question. Respondent Judge found that if they had any right at all to occupy the property, that right is merely subsidiary to that of defendant Concepcion L. Planas. As such, they are bound by the judgment rendered against the latter in consonance with the doctrine laid down in the cases of Brodett v. De la Rosa, 44 O. G., No. 3, pp. 874-875, and Gozon v. De la Rosa, 44 O. G., pp. 1227-1228. Of course, these are questions of fact as to which there may be controversy, but the proper place where this should be threshed out is not in this proceedings, but in an ordinary action. For the present, we are satisfied that the respondent Judge has acted on the matter in the exercise of his sound discretion.

Wherefore, the petition is dismissed, with costs.

Parás, Pablo, Benzon, Montemayor, Reyes, Jugo, Labrador, and Diokno, J.J., concur.

Justice Concepcion concurred in the result.

XIX

The People of the Philippines, Plaintiff-Appellant, vs. Lee Diet, accused, Rizal Surety and Insurance Company, Bondsman-Appellee, G. R. No. L-5256, November 27, 1953, *Bautista Angelo, J.*

CRIMINAL PROCEDURE; BAIL; DISCHARGE OF SURETIES; CASE AT BAR.—R company was the defendant's surety. On the day of the preliminary investigation of the case, the defendant failed to appear. Counsel for the accused appeared and informed the court for the first time that

the whereabouts of the accused was not known due to the fact that he escaped three days before while under the custody of the Philippine Constbaulary. It appears that the accused while out on bail was rearrested on June 8, 1951, by some agents of the constabulary, but during his detention he escaped. For his failure to appear, the Justice of the Peace declared the bond forfeited and required the surety to produce the body of the accused within thirty days with notice and to show cause why judgment should not be rendered against it for the amount of the bond. Two days later, however, the Justice of the Peace reconsidered his order and remanded the case to the Court of First Instance of Cotabato. On August 2, 1951, on the day of the arraignment, the accused again failed to appear, whereupon the provincail fiscal moved for the confiscation of the bond posted by him for his personal liberty. *Held*: It is true that a surety may also be discharged from the non-performance of the bond when its performance "is rendered impossible by the act of God, the act of the obligee, or the act of the law" (U.S. v. Sunico, 40 Phil., 826-832), but even in these cases there still remains the duty of the surety to inform the court of the happening of the event so that it may take appropriate action and decree the discharge of the surety (Section 16, Rule 110). Here no such steps was taken by the surety when the accused was re-arrested by the constabulary authorities. The surety kept silent since it did not take any of the steps pointed out by law if it wanted to be relieved from its liability under the bond. It only gave notice to the court of that fact when the court ordered the appearance of the accused either for arraignment or for trial. It was only then that it informed the court that the accused was re-arrested and that while he was detained, he made good his escape. Since at that time his bond was still valid and binding, and notwithstanding the re-arrest of the accused the surety kept silent, it must be presumed that the surety chose to continue with its liability under the bond and should be held accountable for what may later happen to the accused.

IBID.; IBID.; WHEN SUBSEQUENT ARREST OF PRINCIPAL DOES NOT OPERATE AS A DISCHARGE OF HIS SURETIES.—It has been held that "The subsequent arrest of the principal on another charge, or in other proceedings, while he is out on bail does not operate *ipso facto* as a discharge of his bail x x x. Thus if, while in custody on another charge, he escapes, or is again discharged on bail, and is a free man when called upon his recognizance to appear, his bail are bound to produce him." (6 C.J., p. 1026.)

First Assistant Solicitor General Ruperto Kapunan, Jr. and *Solicitor Meliton G. Soliman* for appellant.

Padilla, Carlos & Fernando for appellee.

DECISION

BAUTISTA ANGELO, *J.*:

On May 25, 1951, Lee Diet was charged before the Justice of the Peace Court of Cotabato, Cotabato, with the crime of uttering false U.S. gold coins in connivance with some counterfeiters. On the same date, the Justice of the Peace issued a warrant for his arrest and fixed the bail bond for his provisional liberty at ₱12,000. Thereupon, the bond was put up by the Rizal Surety & Insurance Company and the accused was released.

The Justice of the Peace set the preliminary investigation of the case for June 14, 1951. On this date the accused failed to appear. Counsel for the surety however appeared and informed the court that the whereabouts of the accused was not known due to the fact that he escaped three days before while under the custody of the Philippine constabulary. It appears that the accused while out on bail was re-arrested on June 8, 1951, by some agents of the constabulary for questioning regarding his alleged subversive activities, but during his detention he escaped. For his failure to appear, the Justice of the Peace declared the bond forfeited and required the surety to produce the body of the accused within 30 days from notice and to show cause why judgment should not be rendered against it for the amount of the bond. Two days later, however, the Justcie of the Peace reconsidered his order and remanded the case to the Court of First Instance of Cotabato.

On July 2, 1951, the Provincial Fiscal filed the corresponding information against the accused. The arraignment and trial of the accused were set for August 2, 1951, but on said date the accused again failed to appear, whereupon the Provincial Fiscal moved for the confiscation of the bond posted by him for his provisional liberty. Counsel for the surety objected giving as reason for the non-appearance of the accused the same reason given by him before the Justice of the Peace Court of Cotabato. The court denied the motion holding in substance that the reason given by counsel for the surety for the non-appearance of the accused was satisfactory and had the effect of relieving it from its liability under the bond. Hence this appeal.

The only question to be determined is whether, while the accused was out on bail, was picked up by the constabulary authorities in the province for questioning in connection with subversive activities, and thereafter escaped from their custody, will excuse the surety, the Rizal Surety & Insurance Company, from the non-performance of its obligation under the bond.

It is a well-settled doctrine that a surety is the jailer of the accused. "He takes charge of, and absolutely becomes responsible for the latter's custody, and under such circumstance, it is incumbent upon him, or rather, it is his inevitable obligation, not merely a right, to keep the accused at all times under his surveillance in as much as the authority emanating from his character as surety is no more nor less than the Government's authority to hold the said accused under preventive imprisonment." (People v. Tuising, 61 Phil. 404.)

When the surety in this case put up the bond for the provisional liberty of the accused it became his jailer and as such was at all times charged with the duty to keep him under its surveillance. This duty continues until the bond is cancelled, or the surety is discharged. The procedure for the discharge of a surety is clear in the Rules of Court. Thus, it is there provided that the bail bond shall be cancelled and the sureties discharged of libaility (a) where the sureties so request upon surrender of the defendant to the court; (b) where the defendant is re-arrested or ordered into custody on the same charge or for the same offense; (c) where the defendant is discharged by the court at any stage of the proceedings, or acquitted, or is convicted and surrendered to serve the sentence; and (d) where the defendant dies during the pendency of the action. (Section 16, Rule 110.)

It is true that a surety may also be discharged from the non-performance of the bond when its performance "is rendered impossible by the act of God, the act of the obligee, or the act of the law" (U.S. v. Sunico, 40 Phil., 826-832), but even in these cases there still remains the duty of the surety to inform the court of the happening of the event so that it may take appropriate action and decree the discharge of the surety (Section 16, Rule 110). Here no such steps was taken by the surety when the accused was re-arrested by the constabulary authorities. The surety kept silent since it did not take any of the steps pointed out by law if it wanted to be relieved from its liability under the bond. It only gave notice to the court of that fact when the court ordered the appearance of the accused either for arraignment or for trial. It

was only then that it informed the court that the accused was re-arrested and that while he was detained, he made good his escape. Since at that time his bond was still valid and binding, and notwithstanding the re-arrest of the accused the surety kept silent, it must be presumed that the surety chose to continue with its liability under the bond and should be held accountable for what may later happen to the accused. It has been held that "The subsequent arrest of the principal on another charge, or in other proceedings, while he is out on bail does not operate *ipso facto* as a discharge of his bail x x x. Thus if, while in custody on another charge, he escapes, or is again discharged on bail, and is a free man when called upon his recognizance to appear, his bail are bound to produce him." (6 C. J. p. 1026.)

This case should be distinguished from the recent case of People v. Mamerto de la Cruz, G. R. No. L-5794, July 23, 1953, wherein this Court said: "It has been seen that if the sureties did not bring the person of the accused to court, which they were powerless to do due to causes brought about by the Government itself, they did the next best thing by informing the court of the prisoner's arrest and confinement in another province and impliedly asking that they be discharged. On its part, the court, by keeping quiet, and indeed, issuing notices of the hearing direct to the prisoner through the Sheriff of Camarines Norte and ignoring the sureties, impliedly acquiesced in the latter's request and appeared to have regarded the accused surrendered." No such step was taken by the surety in this particular case for it failed even to inform the court of the apprehension made of the accused by the constabulary authorities.

Wherefore, the order appealed from is reversed, without pronouncement as to costs.

Paras, Bengzon, Pablo, and *Padilla J.J.,* concur.
Tuason, Reyes, Jugo, and *Labrador, J.J.,* concur in the result.

MONTEMAYOR, *J.* concurring:

I concur in this opinion penned by Mr. Justice Bautista because it is in accordance with and follows the view maintained in my dissenting opinion in the case of People vs. Mamerto de la Cruz, G. R. No. L-5794, despite an attempt to disitnguish the present Diet case from the Cruz case.

XX

Consolacion C. Vda. De Verzosa, Paz Verzosa, Jose Verzosa, Vicente Verzosa, Crispulo Verzosa and Raymundo Verzosa, Plaintiffs-Appellants, vs. Bonifacio Rigonan, Segundo Nacnac, Nemesio Seguno, Clerk of the Court of First Instance of Ilocos Norte and Ludovico Rivera, Provincial Sheriff of Ilocos Norte, Defendants-Appellees, G.R.No. L-6459, *April* 23, 1954, *Bautista Angelo, J.:*

PLEADING AND PRACTICE; MOTION TO DISMISS; RES ADJUDICATA; PROOF OF THE EXISTENCE OF PRIOR JUDGMENT.—Where, in a motion to dismiss, it is stated that there is a former judgment which bars said action and a copy of the decision is attached to the motion, which is not disputed, the said copy of the decision may be considered as sufficient evidence to prove the existence of the prior judgment between the same parties because under Sec. 3, Rule 8, a motion to dismiss may be proved or disproved in accordance with Rule 123, Sec. 100, which provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits or depositions presented by the respective parties but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Conrado Rubio and *Hermenegildo A. Prieto* for appellants.
Bonifacio Rigonan for appellees.

DECISION

BAUTISTA ANGELO, *J.*:

Plaintiffs instituted this action in the Court of First Instance of Ilocos Norte praying that judgment be rendered (1) declaring null and void the actuations of the clerk of court and of the sheriff of said province on the ground that they are in contravention of law; (2) declaring null and void the order of the court dated July 18, 1941 on the same ground; (3) ordering defendants to pay plaintiffs damages in the amount of ₱10,000; and (4) ordering defendants to pay the costs of action.

The averments of the complaint are: Luis Verzosa, on February 5, 1931, executed a real estate mortgage for the sum of ₱3,500 in favor of Ignacio Valcarcel on a parcel of land situated in the municipality of Dingras, Ilocos Norte. On July 13, 1932, the mortgage creditor filed an action to foreclose the mortgage (Civil Case No. 3537) and after trial, at which the parties submitted a compromise agreement, the court rendered decision in accordance with said agreement. On April 20, 1934, a writ of execution was issued by the clerk of court ordering the sheriff to sell at public auction the property described therein for the satisfaction of the judgment. On November 28, 1934, or seven months after the issuance of the writ, the sheriff returned the writ with a statement of the action he had taken thereon. On December 12, 1934, the clerk of court issued another writ of execution, and the sheriff, acting thereon, announced the sale of twenty parcels of land belonging to the judgment debtor instead of the parcels of land described in the writ. On January 15, 1935, the sheriff sold several parcels of land to Bonifacio Rigonan and Rafael Valcarcel, and on May 21, 1936, the sheriff issued a final deed of sale in their favor.

On March 10, 1936, counsel for judgment creditor requested the clerk of court to return the writ to the sheriff so that other property may be levied in execution for the satisfaction of the balance of the judgment which remained unsatisfied, which request was granted. And on October 15, 1936, the sheriff sold other parcels of land in favor of Bonifacio Rigonan and Irineo Ranjo, the latter in behalf of Rafael Valcarcel, heir of the judgment creditor who had already died.

On July 7, 1938, counsel for judgment creditor again requested the clerk of court for an alias writ of execution, but instead of submitting to the court said request for resolution, the clerk of court issued a decree reiterating the original writ which was carried out by the sheriff. On February 17, 1941, Rafael Valcarcel sold to Bonifacio Rigonan and Segundo Nacnac one of the parcels of land sold by the sheriff for ₱100, and on July 18, 1941, an order was issued placing Bonifacio Rigonan in possession of said property.

The present action was instituted on September 19, 1950 praying for the nullification of the actuations of the clerk of court and the provincial sheriff as stated in the early part of this decision.

Defendants filed a motion to dismiss on the following grounds: (1) that the action of the plaintiffs has prescribed; (2) that there is a former judgment which bars said action; and (3) that the complaint states no cause of action. Copy of the decision above referred to was made a part of the motion.

The above motion having been submitted to the court for decision, the latter found that the action had already prescribed it ap-

pearing that the actuations which are sought to be nullified took place more than ten years ago. As regards the ground that there is a prior judgment which bars the present action, the court ruled that the same cannot be entertained because it involves a question of fact which does not appear admitted in the complaint. The court expressed the opinion that no affidavit or evidence can be considered on a motion to dismiss because the sufficiency of a complaint should be tested on the basis of the facts alleged therein. The court, however, allowed the plaintiffs to amend their complaint within five days from receipt of the order in accordance with the discretion given to it by the rules of court.

Taking advantage of this grace, plaintiffs submitted an amended complaint wherein they reiterated the same facts with some clarifying modifications. Defendants reiterated their motion to dismiss on the same grounds. And finding no substantial difference between the original and the amended complaints, the court ordered the dismissal of the case without pronouncement as to costs. After the case had been taken to the Court of Appeals, it was later certified to this Court on the ground that the appeal involves purely questions of law.

A cursory reading of the amended complaint will reveal that the actuations of the clerk of court, as well as of the sheriff, which are sought to be nullified are: the writ of execution issued by the clerk of court on December 12, 1934, as well as the sales and other actuations executed by the sheriff by reason of said writ of execution; the decree of the clerk of court issued on May 21, 1936, as well as the sales and other actuations of the sheriff made in pursuance thereof; the decree of the clerk of court issued on July 7, 1938, as well as the actuations of the sheriff made in compliance with said decree; and the assignment made by Rafael Valcarcel of his right and interest in the land sold on February 17, 1941 to defendants Bonifacio Rigonan and Segundo Nacnac. And as a necessary consequence, plaintiffs also asked for the nullification of the order of the court dated July 18, 1941 placing Bonifacio Rigonan in possession of the land sold to him.

It appears from the above recital that the acts and decrees which are sought to be nullified took place more than ten years prior to the filing of the present action, and since under Article 44 of Act No. 190 an action of this nature prescribes in ten years, it follows that the action of the plaintiffs is already barred by the statute of limitations. If the aforesaid acts can no longer be nullified, it also follows as a legal consequence that no action can be taken on the order of the court issued on July 18, 1941 directing the sheriff to place Bonifacio Rigonan in possession of the parcel of land sold to him because of the principle that possession must follow ownership unless ordered otherwise.

As regards the second ground invoked in the motion to dismiss no affidavit or extraneous evidence can be considered to test the sufficiency of a complaint except the facts alleged in the same complaint. We hold that under Section 3, Rule 8, a motion to dismiss may be proved or disproved in accordance with Rule 123, Section 100, which provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits or depositions presented by the respective parties but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." And in our opinion the copy of the decision attached to the motion, which is not disputed, may be considered as sufficient evidence under the rule to prove the existence of a prior judgment between the same parties. In this sense, the second ground of the motion to dismiss may also be entertained to test the sufficiency of the cause of action of the plaintiffs.

Wherefore, the order appealed from is affirmed, without pronouncement as to costs.

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

XXI

DECISION

Salvador E. Bimeda, Petitioner, vs. Arcadio Perez and Hon. Jose T. Surtida, Judge of First Instance of Camarines Sur, 10 Judicial District, Respondents, G. R. No. L-5588, Aug. 26, 1953, Bautista Angelo, J.:

1. CERTIORARI; ERROR OF JURISDICTION DISTINGUISHED FROM ERROR OF JUDGMENT. — As a rule, the errors which the court may commit in the exercise of its jurisdiction are merely errors of judgment. In the trial of a case, it becomes necessary to distinguish errors of jurisdiction from errors of judgment. The first may be reviewed in a certiorari proceeding; the second, by appeal. Errors of jurisdiction render an order or judgment void or viodable but errors of judgment or procedure are not necessarily a ground for reversal (Moan, Comments on the Rules of Court, Vol. 2, 1952 ed., p. 158).

2. IBID; WHERE APPEAL IS AN ADEQUATE REMEDY. — A writ of certiorari will be denied where the appeal is an adequate remedy though less speedy than certiorari. Mere possible delay in the perfection of an appeal and in securing a decision from the appellant court is no justification for departing from the prescribed procedure . . . "unless" there was lack or excess of jurisdiction or abuse of discretion and the delay would work injustice to the complaining party.

Dominador P. Padilla for petitioner.
Ramon Imperial for respondents.

DECISION

BAUTISTA ANGELO, *J.*:

This is a petition for certiorari and mandamus with preliminary injunction seeking to compel respondent Judge to allow petitioner to adduce evidence relative to an alleged irregularity committed by the board of inspectors of precinct No. 6, of Pamplona, Camarines Sur, during the election for municipal mayor held on November 13, 1951. The purpose of the injunction is to restrain respondent Judge from proceeding with the trial of the protest pending determination of the issue raised in this proceeding. This injunction was issued as prayed for.

Petitioner was declared elected municipal mayor of Pamplona, Camarines Sur, with the plurality of one vote, in the elections held on November 13, 1951. Respondent Arcadio Perez contested the election in due time.

In his answer, respondent set up a counter-protest averring, among other things, "That he impugns the electoral returns in Precinct No. 6 of Pamplona as well as the votes therein on the ground of wholesale irregularity, gross violation of the election law by the Board of Inspectors, and wanton disregard by said board of the right of some 20 or more voters in said precinct to vote for protestee; it follows that were it not for such irregularity and violation of law, protestee would have obtained 20 or more votes in his favor."

When trial came, and after protestant had concluded presenting his evidence, protestee proceeded to present his evidence to establish not only his special defenses but also his counter-protest relative to the irregularity which he claims to have been allegedly committed in Precinct No. 6 of Pamplona as stated in the preceding paragraph, but respondent Judge, sustaining the opposition of protestant, ruled out such evidence upon the theory that to permit proof of said

irregularity would in effect disfranchise two hundred or more voters if the purpose is to annul the election in the aforesaid precinct. This is now the order subject of the present petition for certiorari.

It should be noted that the main ground of the opposition of protestant to the presentation of the evidence which protestee desires to adduce is the fact that the irregularity which is desired to be established has not been clearly and specifically set out in the answer, which vagueness or generalization makes the avernment utterly inadequate or insufficient to serve as basis for the presentation of evidence, even if at the trial counsel made a verbal manifestation as to the particular acts constitutive of the violation of law on which he bases his plea for the nullification of the election in precinct No. 6 of Pamplona. But it appears that such is not the ground entertained by the respondent Judge in ruling out the evidence, it being a matter which may be subserved with the mere amendment of the pleading, but rather his view, right or wrong, to the effect that such evidence could not serve any useful purpose for, even if it be allowed, it may not have the effect of nullifying the election as such would have the effect of disfranchising two hundred or more legitimate voters whose right has never been assailed. Such being the question before us for determination, we are of the opinion that the action taken by petitioner to correct the ruling of the court is not the proper one, it being a mere error of judgment which should be corrected by appeal, and not an act of lack of jurisdiction or grave abuse of discretion which is the proper subject of a petition for certiorari.

As a rule, the errors which the court may commit in the exercise of its jurisdiction are merely errors of judgment. In the trial of a case, it becomes necessary to distinguish errors of jurisdiction from errors of judgment. The first may be reviewed in a certiorari proceeding; the second, by appeal. Errors of jurisdiction render an order or judgment void or voidable, but errors of judgment or procedure are not necessarily a ground for reversal (Moran, Comments on the Rules of Court, Vol. 2, 1952 ed., p. 158). Again, a writ of certiorari will be denied where the appeal is an adequate remedy though less speedy than certiorari. "Mere possible delay in the perfection of an appeal and in securing a decision from the appellate court is no justification for departing from the prescribed procedure . . . ." unless "there was lack or excess of jurisdiction or abuse of discretion and the delay would work injustice to the complaining party . . ." (*Idem*, pp. 166, 167.)

The order complained of by petitioner is merely interlocutory or peremptory in character which is addressed to the sound discretion of the court. That order may be erroneous, but it is a mere error of judgment which may be corrected by appeal. This remedy is adequate enough, for whatever delay may be suffered in the proceeding would not work injustice to petitioner who sure enough is presently holding the office contested by respondent.

Wherefore, the petition is hereby denied with costs against petitioner.

The writ of injunction issued by this Court is hereby dissolved.

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

XXII

Lazara R. Bien, Petitioner-Appellee, vs. Pedro Beraquit, Respondent-Appellant, G. R. No. L-6855, April 23, 1954, Bautista Angelo, J.:

PLEADING AND PRACTICE; GRANTING EXTENSION OF TIME TO FILE ANSWER AFTER THE REGLAMENTARY PERIOD; DISCRETION OF THE COURT.—The granting of a motion to file an answer after the period originally fixed in the summons, or in the rules of court for that purpose had expired, is a matter that is addressed to the discretion of the court, and under the circumstances obtaining in the case, we find that this discretion has been properly exercised.

Delfin de Veva for appellant.
Ramon C. Fernandez for appellee.

DECISION

BAUTISTA ANGELO, *J.*:

This is an appeal from a decision of the Court of First Instance of Albay declaring respondent Pedro Beraquit ineligible to the office of mayor of the municipality of Malilipot, province of Albay, on the ground that he was not a resident of said municipality one year prior to the elections held on November 13, 1951.

A petition for *quo warranto* was filed by Lazara R. Bien to test the eligibility of Pedro Beraquit to be a candidate for the office of mayor of the municipality of Malilipot, province of Albay. It is alleged that the respondent was ineligible for that position because he was a resident of Baras, Catanduanes, and has not resided for at least six months in Malilipot, Albay, prior to the elections held on November 13, 1951, and that, notwithstanding his ineligibility, he registered his candidacy for that office and was proclaimed duly elected by the municipal board of canvassers on November 17, 1951. It is prayed that his election be declared null and void and the office be declared vacant.

The record shows that upon the filing of the petition for *quo warranto* on November 19, 1951, the court issued an order directing that summons be made immediately upon respondent giving the latter three days within which to answer from service thereof. The hearing was set for December 4, 1951. In compliance with said order, the clerk of court, on November 23, 1951, required the deputy sheriff of Catanduanes to serve the summons at respondent's residence in Baras, Catanduanes, and directed that another summons be served upon him at his residence in Malilipot, Albay. Neither of the summons was served either because of respondent's absence or because of the refusal of the persons found in his residence to accept the service. As a result, substituted service was resorted to as allowed by the rules by leaving a copy of the summons at the residence of respondent.

When the date set for hearing came, neither the respondent, nor his counsel appeared. He did not also file an answer as required by the court. Petitioner asked to be allowed to adduce evidence in the absence of respondent, but the court decided to transfer the hearing to December 7, 1951 in order to give respondent ample opportunity to appear and defend himself. In the same order, the court directed that another summons be served upon respondent. Again, the summons failed for the same reasons. And when the case came up for hearing for the second time, and respondent again failed to appear, the court decided to allow petitioner to present her evidence. Thereafter, a decision was rendered granting the petition. Copy of this decision was received by respondent on December 15, 1951 and on December 18, he filed a motion praying that the decision be set aside and the case be heard on the merits. This motion was granted and the court set the hearing on February 22, 23, and 25, 1952.

On February 22, 1952, petitioner presented four witnesses. On February 23, 1952, she presented one witness, and on February 23, 1952, she presented two more witnesses, plus eleven pieces of documentary evidence. Then she rested her case.

When the turn of respondent came to present his evidence,

counsel for petitioner made a manifestation whereby he made of record his objection to any and all evidence that respondent intends to present on the ground that it would be immaterial and irrelevant for the reason that he has failed to file an answer to the petition. At this juncture, counsel for respondent asked for an opportunity to file an answer, and instead of ruling on this request, the court allowed counsel to present evidence without prejudcie on its part to disregard it if should find later that the question raised is well taken. But after the presentation of one witness, and while the second witness was in the course of his testimony, the court suspended the hearing and required the parties to present memoranda to determine whether or not respondent may be allowed to file his answer and continue presenting his evidence. This was done, and on March 14, 1952, the court issued an order denying the request to file an answer and declaring the case submitted for decision. And on the same date, it rendered decision declaring respondent ineligible as prayed for in the petition. The case is now before us upon the plea that the question involved in this appeal is purely one of law.

The question posed in this appeal is whether the lower court erred in denying the request of respondent to be given an opportunity to file an answer to the petition and, in default thereof, in denying him the right to continue presenting his evidence notwithstanding the action of the court in setting aside its previous decision in order to give him an opportunity to appear and defend himself.

The reasons which the lower court has considered in denying the request of respondent to be given an opportunity to file an answer and to be allowed to present evidence in support of his defense are clearly stated in the decision. Said reasons are: "As above stated, respondent failed to file his answer and when his turn came, and he attempted to present his evidence, counsels for petitioner vehemently objected on the ground that he has not raised any issue. The court, after a careful consideration of all the facts and circumstances surrounding the case, was constrained to sustain the objection of petitioner, and barred respondent from presenting his evidence. For evidently, he is guilty of gross and inexcusable negligence. From the time he voluntarily appeared in court on December 18, 1951 when he filed the motion for reconsideration above adverted to, he submitted himself to the jurisdiction of the court. His voluntary appearance is equivalent to service. Consequently, he should have filed then his answer within the reglamentary period fixed by law, it being his legal duty to do so. At least, he should have filed his answer from the time he received the order setting aside the judgment—that is, on January 21, 1952, and before the 15 days period expired. When he entered trial on February 22, 1952, without filing his answer, there was no issue raised, and a summary judgment for petitioner may be rendered. Indeed, Section 8, Rule 9 of the Rules of Court provides, among others, that material averments in the complaint other than those as to the amount of damage, shall be deemed admitted when not specifically denied; and Section 10 states that defenses and objectoins not pleaded either in a motion to dismiss or in the answer are deemed waived."

We can hardly add to the foregoing reasons of the lower court which we find fully supported by the record. We can only state in passing that the granting of a motion to file an answer after the period originally fixed in the summons, or in the rules of court for that purpose had expired, is a matter that is addressed to the sound discretion of the court, and under the circumstances obtaining in the case, we find that this discretion has been properly exercised. The court has been most liberal to respondent such that it even went to the extent of setting aside its previous decision. And we don't believe that the interest of Justice will be jeopardized if the decision of the lower court is maintained for, while on one hand the evidence adduced by the petitioner appears to be strong, on the other, it does not appear that respondent has made any offer of the evidence he intended to introduce that might give an inkling that, if presented, it may have the effect of offsetting the evidence of petitioner. There is, therefore, no legal basis for concluding that the result of the decision would be changed has respondent been able to complete his evidence. And in the absence of this basis, respondent's plea for equity can deserve but scant consideration.

Wherefore, the decision appealed from is affirmed, without pronouncement as to costs.

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

XXIII

Antonio Mirasol, Petitioner, vs. Porfirio Gerochi y Gamboa, Mariano Gerochi y Gamboa, Juan Navajas y Gamboa, Saturnina Navajas y Gamboa and the Court of Appeals, Respondents, G. R. No. L-4929, promulgated July 23, 1953, Bautista Angelo, J.

LAND REGISTRATION; CERTIFICATE OF TITLE; WHEN PURCHASER IS NOT A "SUBSEQUENT PURCHASER OF REGISTERED LAND." — Where one purchases a registered land from a person who did not have any certificate of title in his name, his only evidence being the deed of sale in his favor, and its annotation on the certificate of title which still appears in the name of the previous owners, most of whom had already died, the purchaser is not a "subsequent purchaser of registered land who takes a *certificate of title* for value and in good faith" and who is protected against any encumbrance except those noted on said certificate, as provided for in Section 39 of Act No. 496.

Jose D. Evangeslista for petitioner.
Luis G. Hofileña and *Cesar T. Martin* for respondents.

DECISION

BAUTISTA ANGELO, *J.*:

This is a petition for review of a decision of the Court of Appeals rendered on June 14, 1951 wherein, among other things, the deed of sale executed by Saturnina Navajas in favor of Antonio Mirasol, petitioner herein, was declared valid in so far as the share and participation of said Saturnina in Lot No. 3760 of the cadastral survey of Iloilo City is concerned, which participation is one-half (1/2) of the undivided one-fourth (1/4) belonging to her mother Dionisia Gamboa; Juan Navajas was declared owner of one-half (1/2) of the same undivided share; and with regard to the cross-claim of Antonio Mirasol, Natividad Escarrilla was ordered to pay him the sum of ₱1,575. In the same decision it was ordered that the judgment be registered and annotated on the original Certificate of Title No. 1399 covering Lot No. 3760.

On July 30, 1946, two deeds of sale were executed, one by Filomeno Ledesma, who posed as only heir of the deceased Teodorica Gamboa, over one-fourth undivided share belonging to the latter in Lot No. 3760 of the cadastral survey of the City of Iloilo, which lot was covered by original Certificate of Title No. 1399, in favor of Salvador Solano, and another executed by Saturnina Gerochi, who posed as only heir of the deceased Dionisia Gamboa, over one-fourth undivided share belonging to the latter in the same Lot No. 3760, in favor of the same purchaser. These two deeds were annotated on the original Certificate of Title No. 1399, as well as on the owner's duplicate of the same title.

On August 1, 1946, Salvador Solano in turn sold with *pacto de retro* for a term of two years the portion bought from Saturnino Gerochi to Natividad Escarrilla for the sum of ₱3,500, and on

August 17, 1946, he sold to the same person and under the same terms the portion he bought from Filomeno Ledesma for the sum of ₱1,400, which was later increased to ₱3,150. These deeds were also annotated on the original as well as on the duplicate certificate of title of the property on September 14, 1946.

When Natividad Escarrilla became the absolute owner of the two portions mentioned in the preceding paragraphs, she transferred her interest, right and participation over one-half of the undivided one-fourth share which was originally acquired from Saturnina Gerochi to Antonio Mirasol for the sum of ₱3,150 on October 21, 1946, and the corresponding deed of sale was likewise annotated on the original and duplicate of the certificate of title of the property.

On October 8, 1947, Porfirio Gerochi, Mariano Gerochi, Juan Navajas and Saturnina Navajas began an action in the Court of First Instance of Iloilo against Natividad Escarrilla, Antonio Mirasol, Salvador Solano and Saturnina Gerochi for the annulment of the deeds above mentioned alleging, on one hand, that Porfirio and Mariano Gerochi were the only heirs of Teodorica Gamboa and, therefore, the owners of the one-fourth undivided share which had been sold by Filomeno Ledesma to Salvador Solano, and on the other, that Saturnina and Juan Navajas were the heirs of Dionisia Gamboa and, therefore, the owners of the one-fourth undivided share which had been sold by Saturnina Gerochi to Salvador Solano, and praying that said deeds be declared null and void and that the plaintiffs be declared respectively owners of the shares and interests therein mentioned.

The court, after receiving the evidence of both parties, dismissed the complaint, with costs against the plaintiffs. The court said that while "plaintiffs Mariano Gerochi and Saturnina Navajas themselves executed exhibits 5-Escarrilla and 8-Escarrilla and therefore are stopped from seeking their annulment on the grounds alleged in the complaint, the same cannot be said with respect to the plaintiffs Porfirio Gerochi and Juan Navajas. Their remedy, however, would seem to lie not in this action but under the provisions of Rule 74, et seq., of the Rules of Court.

Upon appeal taken by the plaintiffs, the Court of Appeals modified the decision appealed from in the following dispositive part:

> "FOR THE FOREGOING CONSIDERATION, the judgment appealed from is hereby modified, and we hereby declare (1) that by virtue of the deeds of sale and conveyance designated as Exhibits 4-Escarrilla and 5-Escarrilla, which we hereby declare valid and executed by Saturnina Navajas, and Annex F, defendant Antonio Mirasol is now the owner of the share and participation of Saturnina Navajas in Lot No. 3760 of the cadastral survey of Iloilo, which participation is one-half (1/2) of the undivided one-fourth (1/4) belonging to her mother Dionisia Gamboa; (2) that the deeds, Exhibits 8-Escarrilla, 7-Escarilla, and 6-Escarilla are null and void, and the annotations thereof on the certificate of title, Exhibit A, ordered cancelled; (3) that Porfirio and Mariano Gerochi continue to be and are the owners of the undivided one-fourth (1/4) share and participation of their deceased owner Teodorica Gamboa in said Lot No. 3760; and (4) that plaintiff Juan Navajas is the owner of one-half (1/2) of the one-fourth (1/4) undivided share and participation of the deceased Dionisia Gamboa in said Lot No. 3760, and we hereby order that this judgment be registered and annotated on Original Certificate of Title No. 1399. The action of the plaintiff-appellant Saturnina Navajas is hereby dismissed. Judgment is also hereby rendered in favor of defendant Antonio Mirasol on his cross-claim against his co-defendant Natividad Escarrilla, who is ordered to pay him the sum of ₱1,575.00. Judgment is also rendered on Natividad Escarrilla's cross-claim in her favor and against Filomeno Ledesma and Salvador Solano, jointly and severally, ordering the latter to indemnify her in the amount of ₱1,750. One-half of the costs shall be taxed against plaintiff-appellant Saturnina Navajas; the other half against defendants-appellants Salvador Solano and Filemon Ledesma."

The case is now before this Court by virtue of the petition for review interposed by Antonio Mirasol who now contends that the Court of Appeals, in deciding the issues involved and raised by the parties, has invoked the pertinent provisions of Act No. 496 and the several decisions of this Court which proclaim the indefeasibility of a torrens title and protect every subsequent purchaser of registered land who takes a certificate of title for value and in good faith against all encumbrances except those noted on the certificate of title. Petitioner claims that, having been found to be purchaser in good faith and for value of a registered land, the deeds of sale subject of the petition for review cannot be declared null and void to his prejudice.

One of the cases cited by petitioner in support of his contention is De la Cruz v. Fabie 35 Phil. 144, wherein it was held that, "even admitting the fact that a registration obtained by means of fraud or forgery is not valid, and may be cancelled forthwith, yet when a third person has acquired the property subject matter of such registration from the person who appears as registered owner of the same, his acquisition is valid in all respects and the registration in his favor cannot be annulled or cancelled; neither can the property be recovered by the previous owner who is deprived thereof by virtue of such fraud or forgery." (See Reynes v. Barrera, 68 Phil. 658.)

The doctrine laid down in the case of De la Cruz v. Fabie was reaffirmed in the subsequent case of Reynes, et al, v. Barrera, et al., 68 Phil. 656, wherein this Court made the following pronouncement:

> "There is no question that the defendant-appellant is a purchaser of Lot No. 471-b in good faith and for a valuable consideration. There was nothing in the certificate of title of Manuel Reynes, from whom she acquired the property, to indicate any cloud or vice in his ownership of the property, or any encumbrance thereon. Where the subject of a judicial sale is a registered property, the purchaser thereof is not required to explore farther than what the Torrens title, upon its face, indicate in quest for any hidden defect or inchoate right that may subsequently defeat his right thereto. If the rule were otherwise, the efficacy and conclusiveness of the certificate of title which the Torrens system seeks to insure, would entirely be futile and nugatory. 'Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value in good faith, shall hold the same free of all encumbrance except those noted on said certificate x x x.' (Sec. 39, Act No. 496, as amended by Act No. 2011.) In De la Cruz vs. Fabie (35 Phil., 144), it was held that, even admitting the fact that a registration obtained by means of fraud or forgery is not valid, and may be cancelled forthwith, yet, when a third person has acquired the property subject matter of such registration from the person who appears as registered owner of same, his acquisition is valid in all respects and the registration in his favor cannot be annulled or cancelled; neither can the property be recovered by the previous owner who is deprived thereof by virtue of such fraud or forgery."

Petitioner herein cannot invoke in his favor the benefit of the salutary doctrine laid down in the cases above adverted to. His situation is different from that of Ramon Fabie in the case of

De la Cruz. In that case, it has been shown "that Ramon Fabie is an innocent holder of a certificate of title for value." Vedasto Velasquez, from whom he bought the property, not only had a title registered in his name, but the same was given to Fabie, who, together with the deed of sale, took it to the Register of Deeds, and obtained the issuance of a title in his name on the strength of said deed of sale, and so it was there declared that "in conformity of the oft-cited section 55 of Act No. 496, he is the absolute owner of the land mentioned in the complaint, and the action for recovery of possession, improperly brought against him, can in no wise prosper."

Antonio Mirasol is in a different predicament. He bought the property from Natividad Escarrilla, who in turn acquired it from Salvador Solano. The different deeds of conveyance were merely annotated on the original and duplicate certificates of title which appear in the name of the previous owners. Neither Solano, nor Escarrilla, nor Mirasol ever secured from the Register of Deeds the transfer of a new certificate of title in their names. In other words, the only picture Mirasol presents before us is that of a purchaser of registered land from a person who did not have any certificate of title in his name, his only evidence being the deed of sale in his favor, and its annotation on the certificate of title which still appears in the name of the previous owners, most of whom had already died. He is not therefore a "subsequent purchaser of registered land *who takes a certificate of title* for value and in good faith" and who is protected against any encumbrance except those noted on said certificate, as provided for in Section 39 of Act No. 496.

The case of petitioner falls squarely within the doctrine laid down in the case of The Director of Lands v. Addison, 49 Phil. 19, wherein this Court ruled that the entry of a memorandum of a conveyance in fee simple upon the original certificate of title without the issuance of a transfer certificate of title to the purchaser is not a sufficient registration of such a conveyance. The issuance of a transfer certificate of title to the purchaser is one of the essential features of a conveyance in fee by registration and in order to enjoy the full protection of the registration system, the purchaser must be a holder in good faith of such certificate. And elaborating on this point, and incidentally in drawing a striking contrast between the case above referred to and that of De la Cruz, this Court said:

> "As will be seen, the issuance of a transfer certificate of title to the purchaser is one of the essential features of a conveyance in fee by registration and in order to enjoy the full protection of the registration system, the purchaser must be a holder in good faith of such certificate. This appears clearly from section 39 of the Land Registration Act which provides that 'every applicant *receiving a certificate of title* in pursuance of a decree of registration, and every subsequent purchaser of registered land who *takes a certificate of title* for value in good faith, shall hold the same free of all encumbrance except those noted on said certificate, and any of the following incumbrances which may be subsisting, namely: (enumeration of subsisting incumbrances).' In fact the register of deeds has no authority to register a conveyance in fee without the presentation of the conveyor's duplicate certificate unless he is ordered to do so by a court of competent jurisdiction (see Land Registration Act, section 55). As we have already shown, neither Pedro Manuntag nor Soledad P. Hernandez ever held a certificate of title to the land here in question and there had therefore been no sufficient legal conveyance in fee to them neither by deed nor by registration. The original certificate of title No. 414 in favor of the Angeles heirs has never been cancelled and is the only certificate in existence in regard to the property.
>
> "In the case of De la Cruz vs. Fabie, *supra*, the situation was entirely different. There the registration of the property in question was decreed in the name of Gregoria Hernandez and a duplicate original certificate of title issued to her. She turned the duplicate certificate over to her nephew, the defendant Vedasto Velasquez, who forged a deed to himself of the property and presenting the same with the duplicate certificate of title to the register of deeds obtained a transfer certificate with its corresponding duplicate in his own name. He thereafter sold the land to his co-defendant Ramon Fabie to whom a transfer certificate of title was issued upon the cancellation of Velasquez' certificate. There was therefore a complete chain of registered title. The purchaser was guilty of no negligence and was justified in relying on the certificate of title held by the vendor. In the present case, on the other hand, the vendor held no certificate of title and there had therefore been no complete conveyance of the fee to him. The purchaser was charged with presumptive knowledge of the law relating to the conveyance of land by registration and, in purchasing from a person who did not exhibit the proper muniments of title, must be considered to have been guilty of negligence and is not in position to complain of his loss."

Wherefore, the decision appealed from is affirmed, with costs against petitioner.

Paras, Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes, and *Jugo, J.J.*, concur.

Mr. Justice Labrador took no part.

XXIV

Arsenio Algarin et al., Plaintiffs-Appellees,, vs. Francisco Navarro et al., Defendants-Appellants, G. R. No. L-5257, *April* 14, 1954, *Labrador, J.*

CIVIL PROCEDURE; SECTION 10 OF RULE 40 OF THE RULES OF COURT CONSTRUED AND APPLIED; CASE AT BAR.—Plaintiffs filed an action against the defendants to recover from the latter the amounts which the plaintiffs earned while working in the construction of defendants' house. The case was tried in the Municipal Court, and after the plaintiffs' had closed their evidence, one of the defendants filed a motion to dismiss, claiming that there is no contractual relation between him and plaintiff, and that as the latter have not shown that he had violated the provisions of Act 3959, he is not liable. The Municipal Court sustained this contention and dismissed the case. The plaintiffs appealed from this decision to the Court of First Instance of Cavite, which found the order of dismissal entered by the Municipal Court to be an error and reversing it and remanding the case to said Court for further proceeding under the authority of Section 10 of Rule 40 of the Rules of Court which states that "where the action has been disposed of by an inferior court upon a question of law and *not after a valid trial upon the merits,* the Court of First Instance shall on appeal review the ruling of the inferior court and may affirm or reverse it . . . ." *Held:* There is no question that there was a trial. The trial was held after issues of fact had been joined by the filing of an answer. And the case was not terminated solely on a question of law, because the court found that the facts proved do not entitle the plaintiffs to recover. Moreover, the mere fact that the municipal court found that there was absence of allegations necessary to entitle the plaintiffs to recover, or evidence to establish said allegations of essential facts, does not mean that there was no valid trial upon the merits.

IBID; IBID.—What section 10 of Rule 40 considers as ter-

mination of a case without a valid trial upon the merits is a dismissal without trial and/or determination of any of the issues of fact raised in the pleadings. Thus, if the hearing is had merely on the lack of jurisdiction or improper venue, without introduction of evidence on the merits, or on the issues of fact which entitle the plaintiff to recover or the defendant to be absolved from the action, there would not be a valid trial on the merits.

IBID; IBID.—The existence of a trial on the merits is the determining factor for the application of the rule (Sec. 10, Rule 40). Even if the case is decided on a question of law, i.e., lack of jurisdiction, provided there was a trial, the case may not be remanded to the inferior court.

Even if the defendants did not present their evidence for the reason that the court found that the plaintiffs had failed to establish a cause of action, it does not mean thereby that the case was terminated on a question of law, and that there was no valid trial upon the merits. There was a valid trial, only that the court found that the trial was of no advantage to the plaintiff, because they failed to prove the facts necessary to entitle them to recover.

The mere fact that the defendant did not present his evidence, because the court found it unnecessary, is no reason for holding that there was no valid trial at all.

As the trial on the merits was held, no matter what the result thereof may have been, whether the court rendered judgment for plaintiff or absolved the defendant or denied the remedy to the plaintiff, as the court has considered the evidence on the merits of the case, there was a valid trial on the merits within the meaning of section 10, Rule 40, of the Rules of Court, and the case may not be remanded for trial.

IBID; PURPOSE OF SECTION 10 OF RULE 40.—It will be noted that the purpose of Section 10 of Rule 40 is to prohibit the trial of a case originating from an inferior court by the Court of First Instance on appeal, without the said inferior court having previously tried the case on the merits. If there was no such trial on the merits, the trial in the Court of First Instance is premature, because the trial therein on appeal is a trial *de novo*, a new trial. There can not be a new trial unless a trial was already held in the court below. It might happen that after the trial on the merits in the lower court the parties may be satisfied with its judgment. So the evident purpose of the rule is to give the opportunity to the inferior court to try the case first upon the merits, and only thereafter should the Court of First Instance be allowed to retry the case, or to conduct another trial thereof on the merits.

Augusto de la Rosa for appellant.
Roberto P. Ancog and *Atanacio A. Mardo* for appellees.

DECISION

LABRADOR, *J.*:

This action originated in the municipal court of Cavite City, where the plaintiffs-appellees filed an action against the defendants to recover from the latter the amounts which the planitiff, who are laborers, earned while working in the construction of the house of defendant Francisco Navarro from September, 1950, to October, 1950. The other defendant, Francisco Legaspi, was the building contractor employed by Navarro. Defendant Francisco Navarro alleges in his answer that he did not enter into a contract with the plaintiffs, nor did he authorize his co-defendant to employ them. As special defenses he asserts that the allegations of the complaint do not constitute a cause of action against him, and that the complaint is premature. The record fails to show whether defendant Francisco Legaspi filed an answer.

The case was tried in the municipal court, and after the plaintiffs had closed their evidence, the defendant Francisco Navarro filed a motion to dismiss, claiming that there is no contractual relation between him and the plaintiffs, and that as the plaintiffs have not shown that he had violated the provisions of Act 3959, he is not liable. The municipal court sustained the contention of the defendant Francisco Navarro that there is no evidence to prove the facts required in Sections 1 and 2 of Act 3959, because it was not shown that the defendant Francisco Navarro did not require the contractor Francsico Legaspi to furnish the bond in an amount equivalent to the cost of labor, and that Francisco Navarro had paid the contractor Legaspi the entire cost of labor without having been shown the affidavit that the contractor had paid the wages of the plaintiffs.

The plaintiffs appealed from this decision to the Court of First Instance of Cavite. There was no trial in that court; it only reviewed the record. Thereafter it rendered judgment finding the order of dismissal entered by the municipal court to be an error and reversing it, and remanding the case to said court for further proceedings under the authority of Section 10, Rule 40, of the Rules of Court. In reversing the order of dismissal the court reasoned:

> x x x. From this discussion, this Court has reached the conclusion that under the proven facts of the case as shown by the plaintiffs evidence, the order of dismissal rendered by the Municipal Judge of the City of Cavite is an error and since the dismissal was prompted by a demurrer to the evidence defendant Francisco Navarro is precluded from introducing evidence in his defense when this case is remanded to the Municipal Court of Cavite City for further proceedings.

Against this order of remand, the defendants have filed on appeal directly to this Court.

Section 10, Rule 40, of the Rules of Court, upon the authority of which the case was dismissed and remanded to the municipal court, provides as follows:

> Sec. 10. *Appellate powers of Courts of First Instance where action not tried on its merits by inferior courts.* — Where the action has been disposed of by an inferior court upon a question of law *and not after a valid trial upon the merits*, the Court of First Instance shall on appeal review the ruling of the inferior court and may affirm or reverse it, as the case may be. In case of reversal, the case shall be remanded for further proceedings. (Underscoring ours)

Th issues involved in this appeal, therefore, are: (1) Was the action disposed of in the municipal court upon a question of law? and (2) Was there a valid trial upon the merits in the municipal court, as defined in the above-quoted section? There is no question that there was a trial. That trial was held after issues of fact had been joined by the filing of an answer. And the case was not termintaed solely on a question of law, because the court found that the facts proved do not entitle the plaintiffs to recover. Moreover, the mere fact that the municipal court found that there was absence of allegations necessary to entitle the plaintiffs to recover, or evidence to establish said allegations of essential facts, does not mean that there was no valid trial upon the merits.

What Section 10 of Rule 40 considers as termination of a case without a valid trial upon the merits is a dismissal without

trial and/or determination of any of the issues of fact raised in the pleadings. Thus, if the hearing is had merely on the lack of jurisdiction or improper venue, without introduction of evidence on the merits, or on the issues of fact which entitle the plaintiff to recover or the defendant to be absolved from the action, there would not be a valid trial on the merits. As stated by Justice Moran, the said section is a restatement of the rulings laid down by the Supreme Court. He cites as example of the application of the rule a case where there is no trial in the inferior court and the case is disposed of upon a question of law, such as the lack of jurisdiction to try the case. In this instance, upon appeal to the Court of First Instance, the only question to be decided in the appeal is the jurisdiction of the inferior court, and if the Court of First Instance finds that the municipal court has jurisdiction, the case is remanded thereto for trial upon the merits, otherwise the dismissal is affirmed. Another example is where the inferior court sustains a motion to dismiss on the ground of failure of plaintiff's complaint to state a cause of action, in which case the appellate power of the Court of First Instance is to review the order of the inferior court sustaining the motion. And if the Court of First Instance finds the order to be wrong, the case has to be remanded to the inferior court for trial upon the merits. (I Moran, 1952 Rev. ed., pp. 889-890.)

It is pertinent to add, by way of clarification, that the existence of a trial on the merits is the determining factor for the application of the rule. Even if the case is decided on a question of law, i.e., lack of jurisdiction, provided there was a trial, the case may not be remanded to the inferior court.

In the case at bar, there was a trial upon the issue as to whether or not the plaintiffs should be entitled to recover. Even if the defendants did not present their evidence for the reason that the court found that the plaintiffs had failed to establish a cause of action, it does not mean thereby that the case was terminated on a question of law, and that there was no valid trial upon the merits. There was a valid trial, only that the court found that the trial was of no advantage to the plaintiffs, because they failed to prove the facts necessary to entitle them to recover. The mere fact that the defendant did not present his evidence, because the court found it unnecessary, is no reason for holding that there was no valid trial at all. As the trial on the merits was held, no matter what the result thereof may have been, whether the court rendered judgment for plaintiff or absolved the defendant or denied the remedy to the plaintiff, as the court has considered the evidence on the merits of the case, there was a valid trial on the merits within the meaning of Section 10, Rule 40, of the Rules of Court, and the case may not be remanded for trial.

It will be noted that the purpose of Section 10 of Rule 40 is to prohibit the trial of a case originating from an inferior court by the Court of First Instance on appeal, without the said inferior court having previously tried the case on the merits. If there was no such trial on the merits, the trial in the Court of First Instance is premature, because the trial therein on appeal is a trial *de novo*, a new trial. There can not be a new trial unless a trial was already held in the court below. It might happen that after the trial on the merits in the lower court the parties may be satisfied with its judgment. So the evident purpose of the rule is to give the opportunity to the inferior court to try the case first upon the merits, and only thereafter should the Court of First Instance be allowed to retry the case, or to conduct another trial thereof on the merits.

FOR THE FOREGOING CONSIDERATIONS, the order appealed from should be, as it is hereby, reversed, and the Court of First Instance of Cavite is hereby ordered to proceed with the trial of the case by virtue of its appellate jurisdiction.

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

XXV

The People of the Philippines, Plaintiff-Appellee, vs. Adelo Aragon, Defendant-Appellant, G. R. No. L-5930, February 17, 1954, *Labrador, J.*

CRIMINAL PROCEDURE; PREJUDICIAL QUESTION DEFINED.—Prejudicial question has been defined to be that which arises in a case, the resolution of which (question) is a logical antecedent of the issue involved in said case, and the cognizance of which pertains to another tribunal (Cuestion prejudicial, es la que surge en un peito o causa, cuya resolucion sea antecedente logico de la cuestion objeto del pleito o causa y cuyo conocimiento corresponda a los Tribunales de otro orden o jurisdiccion. — X Enciclopedia Juridica Española, p. 228). The prejudicial question must be determinative of the case before the court; this is its first element. Jurisdiction to try said question must be lodged in another tribunal; this is the second element. In an action for bigamy, for example, if the accused claims that the first marriage is null and void and the right to decide such validity is vested in another tribunal, the civil action for nullity must first be decided before the action for bigamy can proceed; hence, the validity of the first marriage is a prejudicial question.

IBID.; THERE IS NO PREJUDICIAL QUESTION IN THE CASE AT BAR.—Defendant is charged of the crime of bigamy for having contracted a second marriage with the complainant on September 21, 1947, while his previous valid marriage with Martina Godinez which was still subsisting had not been dissolved. The information is dated May 22, 1951. On October 11, 1951, while the case was pending trial, complainant filed a civil action in the same Court of First Instance of Cebu against the accused, alleging that the latter "by means of force, threats and intimidation of bodily harm, forced plaintiff to marry him," and praying that the marriage on September 21, 1947 be annulled. Thereupon on April 13, 1952 the accused filed a motion on the criminal case of bigamy praying that the criminal charge be provisionally dismissed on the ground that the civil action for annulment of the second marriage is a prejudicial question. HELD: There is no question that, if the allegations of the complaint are true, the marriage contracted by defendant-appellant with Efigenia G. Palomer is illegal and void (Sec. 29, Act 3613 otherwise known as the Marriage Law). Its nullity, however, is no defense to the criminal action for bigamy filed against him. The supposed use of force and intimidation against the woman, Palomer, even if it were true, is not a bar or defense to said action. Palomer, were she the one charged with bigamy, could perhaps raise said force or intimidation as a defense, because she may not be considered as having freely and voluntarily committed the act if she was forced to the marriage by intimidation. But not the other party, who used the force or intimidation. The latter may not use his own malfeasance to defeat the action based on his criminal act. It follows that the pendency of the civil action for the annulment of the marriage filed by Efigenia C. Palomer, is absolutely immaterial to the criminal action filed against defendant-appellant. This civil action does not decide that defendant-appellant did not enter the marriage against his will and consent, because the complaint does not allege that he was the victim of force and intimidation in the second marriage; it does not determine the existence of any of

the elements of the charge of bigamy. A decision thereon is not essential to the determination of the criminal charge. It is, therefore, not a prejudicial question.

Amadeo D. Seno for appellant.

Assistant Solicitor General Francisco Carreon and *Solicitor Ramon L. Avanceña* for appellee.

DECISION

LABRADOR, *J.*:

The defendant in the above-entitled case is charged in the Court of First Instance of Cebu with the crime of bigamy, for having contracted a second marriage with one Efigenia C. Palomer on September 21, 1947, while his previous valid marriage with Martina Godinez was still subsisting and had not been dissolved. The information is dated May 22, 1951. On October 11, 1951, while the case was pending trial, Efigenia C. Palomer filed a civil action in the same Court of First Instance of Cebu against the defendant-appellant, alleging that the latter "by means of force, threats and intimidation of bodily harm, forced plaintiff to marry him," and praying that their marriage on September 21, 1947 be annulled (Annex A). Thereupon and on April 30, 1952, defendant-appellant filed a motion in the criminal case for bigamy, praying that the criminal charge be provisionally dismissed, on the ground that the civil action for annulment of the second marriage is a prejudicial question. The court denied this motion on the ground that the validity of the second marriage may be determined in the very criminal action for bigamy. Against this order this appeal has been presented to this Court.

It is contended that as the marriage between the defendant-appellant and Efigenia C. Palomer is merely a voidable marriage, and not an absolutely void marriage, it can not be attacked in the criminal action and, therefore, it may not be considered therein; consequently, that the civil action to annul the second marriage should first be decided and the criminal action, dismissed. It is not necessary to pass upon this question because we believe that the order of denial must be sustained on another ground.

Prejudicial question has been defined to be that which arises in a case, the resolution of which (question) is a logical antecedent of the issue involved in said case, and the cognizance of which pertains to another tribunal (Cuestion prejudicial, es la que surge en un pleito o causa, cuya resolucion sea antecedente logico de la cuestion objeto del pleito o causa y cuyo conocimiento corresponda a los Tribunales de otro orden o jurisdiccion.—X Enciclopedia Juridica Española, p. 228). The prejudicial question must be determinative of the case before the court; this is its first element. Jurisdiction to try said question must be lodged in another tribunal; this is the second element. In an action for bigamy, for example, if the accused claims that the first marriage is null and void and the right to decide such validity is vested in another tribunal, the civil action for nullity must first be decided before the action for bigamy can proceed; hence, the validity of the first marriage in a prejudicial question.

There is no question that, if the allegations of the complaint are true, the marriage contracted by defendant-appellant with Efigenia G. Palomer is illegal and void (Sec. 29, Act 3613 otherwise known as the Marriage Law). Its nullity, however, is no defense to the criminal action for bigamy filed against him. The supposed use of force and intimidation against the woman, Palomer, even if it were true, is not a bar or defense to said action. Palomer, were she the one charged with bigamy, could perhaps raise said force or intimidation as a defense, because she may not be considered as having freely and voluntarily committed the act if she was forced to the marriage by intimidation. But not the other party, who used the force or intimidation. The latter may not use his own malfeasance to defeat the action based on his criminal act.

It follows that the pendency of the civil action for the annulment of the marriage filed by Efigenia C. Palomer, is absolutely immaterial to the criminal action filed against defendant-appellant. This civil action does not decide that defendant-appellant did not enter the marriage against his will and consent, because the complaint does not allege that he was the victim of force and intimidation in the second marriage; it does not determine the existence of any of the elements of the charge of bigamy. A decision thereon is not essential to the determination of the criminal charge. It is, therefore, not a prejudicial question.

There is another reason for dismissing the appeal. The order appealed from is one denying a motion to dismiss and is not a final judgment. It is, therefore, not appealable (Rule 118, Secs. 1 and 2).

The order appealed from is hereby affirmed, with costs against defendant-appellant.

So ordered.

Paras, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo, and *Bautista Angelo, JJ.*, concur.

XXVI

Francisco Marasigan, Petitioner, vs. Felicisimo Ronquillo, Respondent, G. R. No. L-5810, January 18, 1954, *Labrador, J.*:

1. CIVIL PROCEDURE; FINAL JUDGMENT; AMENDMENT. —The rule is absolute that after a judgment becomes final, by the expiration of the period provided by the rules within which it so becomes, no further amendment or correction can be made by the court except for clerical errors or mistakes.

2. IBID; IBID.—The change ordered by the Court of Appeals was made when the judgment was already being executed; and it cannot be said to merely correct a clerical error because it provides for a contract of lease of nine years and three months duration, from Nov. 10, 1950, which is different from one of ten years from December 1, 1941, excluding the period from September 1, 1942 to August 31, 1947.

Rosendo J. Tansinsin for petitioner.

M. G. Bustos, Ubaldo T. Caparros, Pastor G. Bustos, Teodorico R. Nunga and *Expedito B. Yumul* for respondent.

DECISION

LABRADOR, *J.*:

This is an appeal by certiorari against a decision of the Court of Appeals, in C. A. — G. R. No. 7853-R, Felicisimo Ronquillo, plaintiff-appellant, and Francisco Marasigan, defendant-appellee. The circumstances leading to the appeal may be briefly stated as follows:

1. On April 10, 1943 Ronquillo brought action against Marasigan to compel him to deliver a parcel of nipa land which the latter had agreed to lease to Ronquillo for a period of 10 years and to execute the corresponding deed of lease therefor.

2. After trial and on September 1, 1947, the Court of First Instance rendered judgment ordering,

> "That the defendant Marasigan deliver immediately the possession of the land described in the amended complaint to the plaintiff Ronquillo; that the defendant Marasigan execute a contract of lease covering the said land for a period of 10 years in favor of the plaintiff Ronquillo, as of December 1,

1941, by excluding therefrom the five years period from September 1 ,1942, to August 31, 1947, inclusive, with a consideration of ₱14,000.00 minus the amounts of ₱1,200.00, ₱1,277.70 and ₱600.00, the amount of ₱1,277.70 being additional advances received by the defendant Marasigan and the last amount of ₱600.00 being a reserve fund for the payment of the land taxes; and that the defendant Marasigan will assume his former position as assistant manager with a compensation of ₱60.00 monthly.

The contract of lease embodying the above conditions must be executed and ratified before a notary public within 10 days from the date this decision would become final.

The complaint against the other defendants is dismissed, without pronouncement as to costs.

The defendant Francisco Marasigan shall pay the costs of this action."

3. The case having been brought to the Court of Appeals, this court entered judgment on April 10, 1950 modifying the above judgment in some parts and affirming it as to all others, thus:

"WHEREFORE, the decision appealed from is hereby modified in the sense that defendant Marasigan shall not be compelled to assume his former position as assistant manager in the business of the plaintiff, unless he be willing to serve as such, with compensation at the rate of ₱60.00 per month. The decision is affirmed in all other respects, with the understanding, however, that defendant Marasigan shall pay to the plaintiff the damages that the latter may prove to have suffered if the provision regarding the execution of a new contract of lease of said land could not be carried out for any legal impediment. Without pronouncement as to costs in this instance."

4. After the return of the case to the Court of First Instance for execution and on August 1, 1950, plaintiff deposited the amount of ₱10,922.30 with the clerk of court, in compliance with the judgment, and asked for an order against the defendant to deliver the land immediately to him and execute the deed of lease provided for in the decision. This petition was granted on November 10, 1950 over the defendant's opposition.

5. On November 27, 1950 defendant submitted a draft of deed of lease, which he claimed to conform to the decision of the court, and on December 12, 1950 he was authorized to withdraw the amount deposited by plaintiff. But in an order dated January 18, 1951, the court disapproved the draft of the contract of lease submitted by defendant and approved another one, prepared by the sheriff. This contract merely recites the judgment, insofar as the term of the lease is concerned, but objection to it was interposed by plaintiff on the ground that under its term the duration of the lease would be limited to the period ending November 30, 1951 merely. According to the court, however, the period of lease is ten years from December 1, 1941, the date when plaintiff was placed in possession, excluding the period from September 1, 1942 to August 31, 1947 and, therefore, the lease should end on December 1, 1956 (Orders of January 18, 1951, as amended by order of March 13, 1951.)

6. Upon appeal against the above orders the Court of Appeals promulgated the decision, now appealed from, as follows:

"WHEREFORE, the orders of March 13 and April 19, 1951 are hereby set aside and the defendant Francisco Marasigan is hereby ordered to execute a contract of lease embodying the conditions set forth in the decision of the lower Court, with the understanding that the contract should be for a period of nine (9) years and three (3) months more, to begin from November 10, 1950, until said period is covered in full. If within ten (10) days from the receipt of the corresponding notice from the lower Court after this decision shall have become final the defendant fails to execute in favor of plaintiff Felicisimo Ronquillo the contract of lease herein provided, then, in pursuance of Section 10, Rule 39, of the Rules of Court, the Clerk of the Court of First Instance of Bulacan or any other person whom the lower Court may authorize, shall execute said deed of lease in the precise terms as specified in this decision. No pronouncement as to costs."

In arriving at the above judgment, the Court of Appeals reasoned, thus:

"Predicated on these reasons, we did not modify but affirmed the decision of the lower Court in so far as it refused to award damages to plaintiff. Anyway, and even assuming that we cannot clarify the scope of the decision of the lower Court as slightly modified by us, and that by such decision the contract of lease to be executed by the defendant in favor of the plaintiff should be as decreed in the appealed order of March 13, 1951, we shall not forget that Marasigan demanded and received the sum of ₱14,000.00 as payment in full of a whole term of ten years of lease, and even if by virtue of the decisions rendered in this case he could not be compelled to execute the lease contract for the remaining period of 9 years and 3 months, yet by his own act of withdrawing the sum of ₱10,922.30, which together with other sums previously received made the total of ₱14,000.00 which corresponds to the rentals for the entire period of ten years, he contracted the obligation, independently of said decision, to execute a deed of lease of the property in question for the unenjoyed term of 9 years and 3 months, as otherwise he would receive payment of rents for the period from September 1, 1947, to November 10, 1950, during which he (Marasigan) and not the plaintiff was in possession of the land in controversy and enjoying the proceeds thereof."

The rule is absolute that after a judgment becomes final, by the expiration of the period provided by the rules within which it so becomes, no further amendment or correction can be made by the court except for clerical errors or mistakes. Thus, it has been held:

"The general power to correct clerical errors and omissions does not authorize the court to repair its own inaction, to make the record and judgment say what the court did not adjudge, although it had a clear right to do so. The court cannot under the guise of correcting its record put upon it an order or judgment it never made or rendered, or add something to either which was not originally included although it might and should have so ordered or adjudged in the first instance. It cannot thus repair its own lapses and omissions to do what it could legally and properly have done at the right time. A court's mistake in leaving out of its decision something which it ought to have put in, and something in issue of which it intended but failed to dispose, is a judicial error, not a mere clerical misprision, and cannot be corrected by adding to the entered judgment the omitted matter on the theory of making the entry conform to the actual judgment entered." (Freeman on Judgments, Sec. 141, Vol. I, p. 273.)

"But the failure of the court to render judgment according to law must not be treated as a clerical misprision. Where there is nothing to show that the judgment entered is not the judgment ordered by the courts, it cannot be amended. On the one hand, it is certain that proceedings for the amendment of judgments ought never to be permitted to become revisory or appellate in their nature; ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pro-

nounce, even although the proposed amendment embraces matter which ought clearly to have been so pronounced." (Freeman on Judgments, Vol. I, Sec. 142, pp. 274-275.)

The change ordered by the Court of Appeals was made when the judgment was already being executed; and it can not be said to merely correct a clerical error because it provides for a contract of lease of nine years and three months duration, from November 10, 1950, which is different from one of ten years from December 1, 1941, excluding the period from September 1, 1942 to August 31, 1947. The modification is, however, sought to be justified by two circumstances, namely, the withdrawal by the lessor of the amount of ₱10,922.30, which amount, together with sums previously received, total ₱14,000, and which is the rental for a full ten year term, and the injustice caused to lessee because he was not placed in possession from September 1, 1947 but only on November 10, 1950, when the court ordered the execution of the judgment.

The reasons given above are not entirely without value or merit; but while they may entitle the lessee to some remedy, the one given in the appealed decision flies in the teeth of the pro-procedural principle of the finality of judgments. When the decision of the Court of Appeals on the first appeal was rendered, modification thereof should have been sought by proper application to the court, in the sense that the period to be excluded from the ten-year period of the lease (fixed by the judgment of the Court of First Instance to begin on September 1, 1942 and end on August 31, 1947) be extended up to the date when the land was to be actually placed in the possession of the lessee. This full period should be excluded in the computation of the ten-year lease because the delay in lessee's taking possession was attributable to the lessor's fault. Whether the failure of the lessee to secure this modification in the original judgment as above indicated is due to the oversight of the party, or of the court, or of both, the omission or mistake certainly could no longer be remedied by modification of the judgment after it had become final and executory.

As to the acceptance by the lessor of the full amount of the price of the lease for a full ten year period, from which acceptance the judgment infers an acquiescence in a lease for fully ten years from November 10, 1950 (the date when lessee was placed in possession after judgment), it must be stated that as such act of acceptance was made after the date of the final judgment, it may not be permitted to justify its modification, or change, or correction. Said act of acceptance may create new rights in relation to the judgment, but the remedy to enforce such rights is not a modification of the judgment, or its correction, but a new suit or action in which the new issue of its (acceptance) supposed existence and effects shall be tried and decided.

The judgment appealed from should be as it hereby is, reversed, and the orders of the Court of First Instance of January 18, 1951 and March 13, 1951, affirmed, without costs.

So ordered.

Paras, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo; and *Bautista Angelo, JJ.*, concur.

XXVII

Robustiano Caragao, et als., Petitioners, vs. Hon. Cirilo C. Maceren et al., Respondents, G. R. No. L-4665, October 17, 1952, Labrador, J.:

1. CIVIL PROCEDURE; EXECUTION OF JUDGMENT PENDING APPEAL IN SPITE OF SUPERSEDEAS BOND. — The general rule is that the execution of a judgment is stayed by the perfection of an appeal. While provisions are inserted in the Rules to forestall cases in which an executed judgment is reversed on appeal, the execution of the judgment is the exception, not the rule. And so execution may issue only "upon good reasons stated in the order." The grounds for the granting of the execution must be good grounds. (Aguilos v. Barrios, et al., G.R. No. 47816, 72 Phil. 285.) It follows that when the court has already granted a stay of execution, upon the adverse party's filing a supersedeas bond, the circumstances justifying execution in spite of the supersedeas bond must be paramount; they should outweigh the security offered by the supersedeas bond. In this last case, only compelling reasons of urgency or justice can justify the execution.

2. IBID; IBID. — The "good reason" stated in the order subject of this proceeding is "the better preservation and protection of the property." But we find from the record that the properties are three parcels of land. And we are at a loss to understand how and why they could be better preserved if in the hands of the petitioners, who already have titles thereto, and as there is nothing to indicate that they were acquired in bad faith, the presumption arises that the purchasers are possessors in good faith. It seems, therefore, that the execution of the judgment, after the giving of the supersedeas bond, can not be justified, there being no urgent or compelling reasons for granting the same.

Jose P. Laurel and *Laurel & Salonga* *Arsenio Suazo* for petitiones.

Alex Albert, Margarito G. Añana and *Proculo B. Fuentes* for respondents.

DECISION

LABRADOR, J.:

This is a special action of certiorari to annul and set aside an order for immediate execution issued on March 3, 1951, by the Honorable Cirilo Maceren, judge of the Court of First Instance of Davao, in Civil Case No. 288 of that court entitled G. P. Sebellino, as Administrator of the Estate of Jose Caragao V. Robustiano Caragao, et al. In the jugdment rendered after trial the court found that petitioner herein Robustiano Caragao had secured the transfer to himself of three parcels of land, registered in the name of the intestate Jose Caragao under certificates of title Nos. 331, 608, and 2715, which he sold to his co-petitioners in this proceeding, the first to Isabel Garcia and Bartolome Hernandez, the second to Josefa Caragao, and the third to Gorgonia Jayme. As a result of the conveyances the lands, according to the decision, are now registered in the name of the purchasers under Transfer Certificates of Title Nos. 206, 207, and 208. The court, however, found that the intestate had left a daughter by the name of Laureana Caragao by his first wife named Catalina Baligya, and it, therefore, ordered the cancellation of the new transfer certificates of title in the names of the petitioners, and the issuance of new ones in lieu thereof in the name of Jose Caragao, deceased, and that defendants vacate the lands and pay Jose Caragao's share in the products thereof in the amount of ₱6,000. (Annex A.)

The judgment was rendered on December 28, 1950, and on January 6, 1951, the plaintiff moved for the immediate execution of the judgment (Annex B). Opposition to the motion was registered by the defendants (Annex C). On February 3, 1951, the court granted the motion for immediate execution, but upon motion for reconsideration, it set aside its first order by another dated February 10, 1951, which, in part, reads as follows:

> x x x. It appearing that the plaintiff offers no objection to the filing of the supersedeas bond to answer for damages, the order of the court dated February 3, 1951, is hereby set aside and defendants are ordered to file a bond of ₱6,000 to answer for damages.

The defendants seem to have filed the bond, but opposition to

this was registered by the plaintiff on the ground that it was insufficient, and the latter thereupon filed a counterbond for ₱10,000. Subsequently, the plaintiff also filed a motion for reconsideration dated February 20, 1951, praying that the original order for the execution of the judgment be reinstated. On March 2, 1951, the court set aside its order of February 10, 1951, and directed anew the issuance of an execution, thus:

> x x x. It having been shown that the property would be properly taken care of and administered by the plaintiff herein for the better preservation and protection of same and inasmuch as the issuance of a writ of execution having been determined in its order of February 3, 1951, the order of this court dated February 10, 1951, is hereby set aside, and let execution issue in this case upon filing by the plaintiff of a bond in the total sum of ₱8,000, and an additional bond of ₱1,000 to be filed by the plaintiff G. P. Sebellino as embodied in the order of this court of February 3, 1951.

It is against this order that the present action is filed, petitioners contending that after the filing of the supersedeas bond, the execution of the judgment could not be justified by the reason expressed in the order, i.e., that the property could be better preserved or protected in the possession of the plaintiff.

The general rule is that the execution of a judgment is stayed by the perfection of an appeal. While provisions are inserted in the Rules to forestall cases in which an executed judgment is reversed on appeal, the execution of the judgment is the exception, not the rule. And so execution may issue only "upon good reasons stated in the order." The grounds for the granting of the execution must be good grounds. (Aguilos v. Barrios, et al G. R. No. 47816, 72 Phil. 285.) It follows that when the court has already granted a stay of execution, upon the adverse party's filing a supersedeas bond, the circumstances justifying execution in spite of the supersedeas bond must be paramount; they should outweigh the security offered by the supersedeas bond. In this last case, only compelling reasons of urgency or justice can justify the execution. (Ibid.)

The "good reason" stated in the order subject of this proceeding is "the better preservation and protectoin of the property." But we find from the record that the properties are three parcels of land. And we are at a loss to understand how and why they could be better preserved if in the hands of the administrator. Besides, the judgment shows that the lands are in the hands of the petitioners, who already have titles thereto, and as there is nothing to indicate that they were acquired in bad faith, the presumption arises that the purchasers are possessors in good faith. It seems, therefore, that the execution of the judgment, after the giving of the supersedeas bond, can not be justified, there being no urgent or compelling reasons for granting the same. We, therefore, hold that the execution was granted with grave abuse of discretion.

The petition is, therefore, granted, and the order of the respondent judge of March 2, 1951, is set aside, and that of February 10, 1951, revived. With costs against the respondents.

Paras, Pablo, Bengzon, Padilla, Montemayor, Jugo, and *Bautista Angelo, JJ.*, concur.

XXVIII

Vicenta Ylanan, Plaintiff-Appellee vs. Aquilino O. Mercado, Defendant-Appellant, G. R. No. L-6089, April 20, 1954. Labrador, J.

CIVIL PROCEDURE; PRO FORMA MOTION FOR NEW TRIAL OR RECONSIDERATION. — Where the motion for reconsideration was based on the claim that the finding of the trial court as to the authenticity of the disputed signature, Exhibit "A", was not justified by the evidence submitted which is the testimony of the expert witness denying such authenticity, and said motion points out why the finding of the court is not justified by the evidence, said motion is clearly not a *pro forma* motion for new trial or reconsideration.

Salvadora A. Logroño for appellant.
Pablo Alfeche for appellee.

DECISION

LABRADOR, *J.*:

This is an appeal from an order of the Court of First Instance of Cebu dismissing the above-entitled case, which had been appealed to said court from the municipal court of Cebu City. The appeal was certified to this Court by the Court of Appeals on the ground that only questions of law are raised in the appeal.

The action brought in the municipal court of Cebu City seeks to recover from the defendant the sum of ₱180.50, the balance of the value of furniture and other goods sold and delivered by the plaintiff to the defendant. The main issue of fact involved in the trial was the authenticity of the signature of one Aquilino O. Mercado to Exhibit A. Judgment was entered in said court in favor of the plaintiff and against the defendant for the sum of ₱180.50 as prayed for in the complaint. The decision was rendered on November 18, 1949, and the defendant received notice thereof on November 21, 1949. On December 2, 1949, defendant presented a motion for the reconsideration of the decision, alleging that the same was not justified in view of the fact that the signature to Exhibit A is forged, according to the testimony of an expert witness. It was also alleged that for the sake of justice and equity the court should order the National Bureau of Investigation to examine the disputed signature in Exhibit A. This motion for reconsideration was denied, and the defendant appealed to the Court of First Instance. The appeal was perfected within fourteen days if the period of time taken by the court in deciding the motion for reconsideration is not taken into account. After the defendant had filed an answer in the Court of First Instance, plaintiff moved to dismiss the appeal on the ground that it was filed beyond the period prescribed in the rules. In support thereof it was claimed that the motion for reconsideration filed in the municipal court was a *pro forma* motion, which did not suspend the period for perfecting the appeal. The Court of First Instance sustained the motion to dismiss the appeal, holding that the ground on which the motion for reconsideration is based is not one of those required for a motion for new trial under Section 1 of Rule 37 of the Rules of Court.

The only question at issue in this Court is whether the motion for reconsideration filed in the municipal court is a *pro forma* motion. The question must be decided in the negative. The motion was based on the claim that the finding of the trial court as to the authenticity of the disputed signature to Exhibit A was not justified by the evidence submitted, which is the testimony of the expert witness denying such authenticity. This is a motion which points out why the finding of the court is not justified by the evidence, and is clearly not a *pro forma* motion for new trial or reconsideration. The Court of First Instance erred in holding that it did not suspend the period for perfecting the appeal.

The order of dismissal is hereby reversed, and the case is ordered remanded to the Court of First Instance for further proceedings.

Paras, Pablo, Bengzon, Montemayor, Reyes, Jugo, Bautista Angelo, Concepcion, and *Diokno, JJ.*, concur.
Mr. Justice Padilla took no part.

XXIX

Gorgonio Pandes, Petitioner, vs. Hon. Jose Teodoro, Sr., Judge of the Court of First Instance of Negros Occidental et al., Respondents, G. R. No. L-6666, May 12, 1954, Concepcion; J.:

1. CIVIL PROCEDURE; ATTACHMENT OF PROPERTIES UNDER RECEIVERSHIP. — The exemption from attachment, garnishment or sale under execution of properties under receivership is not absolute. Such properties may not be levied upon "*except by leave of the Court* appointing the receiver" (4 Am. Jur. 808; 45 Am. Jur. 132). This is a mere consequence of the theory that "a receivership operates to protect the receiver against interference, without the consent of the court appointing him, with his *custody and possession* of the property subject to the receivership" (45 Am. Jur. 132; underscoring supplied). Hence, "it has been held x x x that real estate in the custody of a receiver can be levied upon and sold under execution, provided only that the actual possession of the receiver is not interfered with" (45 Am. Jur. 133-134, citing Albany City Bank v. Schermerhorn, 9 Paige [NY] 372, 38 Am. Dec. 551). The reason is that "only a receiver's *possession* of property subject to receivership x x x is entitled to protection x x x against interference" (45 Am. Jur. 134; see, also, 75 C.J.S. 759).

2. IBID; IBID. — The interference enjoined is that resulting from orders or processes of a court "*other*" than that which appointed the receiver (45 Am. Jur. 136), the rule being predicated upon the need of preventing "unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons" (45 Am. Jur. 137).

Manuel T. Tonogbanua and *Alfredo S. Tad-Y* for petitioner.
Arturo Villanueva and *Eufemio Parana* for respondents.

DECISION

CONCEPCION, *J.:*

On December 9, 1952, Uy Tiong Oh instituted in the Court of First Instance of Negros Occidental Civil Case No. 2562, against Gorgonio Pandes, for the recovery of a sum of money (Annex A). Upon the posting of the corresponding bond, a writ of preliminary attachment was issued, on motion of Uy Tiong Oh, "against the properties of the defendant not exempt from execution" (Annex B). Then, the provincial sheriff issued a "Notice of Garnishment" (Annex C) upon "whatever right, interest and participation the defendant Gorgonio Pandes has or might have in" a certain "partnership between Uy Tiong Oh and Ester Pandes, the wife of the defendant, in connection with the Eden Theater of San Carlos, Negros Occidental." Thereafter, Gorgonio Pandes filed an "Answer to Notice of Garnishment of the Provincial Sheriff" (Annex D), praying that said garnishment "be stayed" upon the ground, among others, that said right, interest and participation "is involved in Civil Case No. 2371" of the same court, entitled "Uy King Poe vs. Ester Pandes and Gorgonio Pandes." Admittedly, Uy King Poe, the plaintiff in said case No. 2371, is the same Uy Tiong Oh, the plaintiff in case No. 2562. It would seem, also, that Gorgonio Pandes had never sought any court action on his aforesaid "answer". In due course, a decision was, subsequently, rendered in favor of Uy Tiong Oh in case No. 2562. Said decision having become final, the court ordered, on April 11, 1953, on motion of Uy Tiong Oh, the issuance of the corresponding writ of execution and directed the provincial sheriff to sell, at public auction, "whatever rights, interest and participation the defendant may have on the property levied upon x x x the proceeds thereof to be applied in satisfaction of the judgment rendered" as above stated (Annex E). After issuing the corresponding notice of auction sale (Annex F), on April 30, 1953, the provincial sheriff sold to Uy Tiong Oh for ₱500.00, such right, interest and participation as Gorgonio Pandes has or might have in the partnership aforementioned (Annex 6). Prior thereto, or on April 22, 1953, Gorgonio Pandes had moved for the reconsideration of the order of April 11, 1953, upon the ground that the partnership in question was under receivership and, being as such, under *custodia legis*, said partnership and its assets are not subject to garnishment (Annex G). The motion for reconsideration having been denied by the court, presided over by Hon. Jose Teodoro, Sr., Judge, (Annex H), Gorgonio Pandes instituted the present certiorari proceedings. In his petition to this effect, he prays:

> "1. For the issuance of an order requiring the Clerk of Court of First Instance of Negros Occidental to certify to this Court, a copy of the order of December 10, 1953, a copy of the order of April 11, 1953, all in Civil Case No. 2371 of the said court, that the same may be reviewed by this Court.
>
> "2. That the Hon. JOSE TEODORO, Sr., Judge of the Court of First Instance of Negros Occidental, and JOSE AZCONA, Ex-Officio Provincial Sheriff of Occidental Negros be ordered to refrain from further proceeding in the matter here sought to be reviewed until further order of this Court.
>
> "3. That after hearing the parties, a judgment be rendered declaring the order of April 11, 1953 as improper, null and void as in excess of the jurisdiction of the respondent judge, or as being a grave abuse of his judicial discretion; and that the petitioner be conceded such further and other relief as in the opinion of the Court he is justly and equitably entitled, with costs." (p. 4, petition.)

It appears that on October 17, 1950, Uy Tiong Oh and Ester Pandes, assisted by her husband, petitioner Gorgonio Pandes, executed a contract of partnership, copy of which is appended to respondents' answer, as Annex 1. It is stated therein that Uy King Poe (*alias* Uy Tiong Oh) owns two (2) cinema projectors described therein, with all its accessories; that Mrs. Pandes owns one (1) generator and one (1) motor, with its corresponding accesories, all installed at the Eden Theater, situated at San Carlos, Negros Occidental; and that both parties have agreed to form a partnership for the operation of a cinema house at said Theater, subject to the condition that Uy would contribute said projectors and Mrs. Pandes, the generator and the motor above referred to; that the rentals of the building would be charge against the partnership; that the net profits, after deducting all expenses, would be divided equally between the partners; that Mrs. Pandes would be the managing partner and Uy Tiong Oh, the treasurer; that the employment and dismissal of employees would be determined by both; and that the partnership would exist for five (5) years, subject to renewal.

It further appear that on or about July 2, 1952, Uy King Poe (*alias* Uy Tiong Oh) commenced the aforementioned civil case No. 2371 of the Court of First Instance of Negros Occidental, for the dissolution and liquidation of said partnership and the recovery of the sum of ₱18,000.00, upon the ground that Mrs. Pandes had misappropriated said sum allegedly belonging to the partnership, and that she had prevented the plaintiff and his representatives from inspecting and supervising "the premises of the cinema house, causing bodily harm to said representatives." (Annex 4.) Upon the same grounds and the additional ground that Mrs. Pandes would continue defrauding the partnership and had threatened to damage and destroy his projectors, Uy King Poe moved for the appointment of a receiver, "to take care of the properties contributed" by the partners and, also, of the "administration of the Cinema House" during the pendency of the case (Annex 5). Acting upon this motion, said court, presided over by the same Judge, respondent Jose Teodoro, Sr., appointed one Feljsberto A. Broce, "as receiver x x x with authority to take possession and take charge of the Cinema House denominated and popularly known as Eden Theater, situated at San Carlos, Negros Occidental, Philippines."

(Annex 3.)

The only question for determination in the case at bar is whether or not respondent Judge had, in the words of petitioner herein (par. 10 of the petition), "exceeded his authority when he issued the order of April 11, 1953" (Annex E), directing the provincial sheriff "to sell at public auction whatever rights, interest and participation the defendants may have on the property levied upon x x x the proceeds thereof to be applied in satisfaction of the judgment rendered in this case." Petitioner maintains the affirmative, upon the ground that "said partnership being in the hands of a receiver, the same or the properties thereof cannot be reached by execution." (Par. 10 of the petition.)

This pretense is untenable for the exemption from attachment, garnishment or sale under execution of properties under receivership is not absolute. Such properties may not be levied upon *"except by leave of the Court* appointing the receiver" (4 Am. Jur. 808; 45 Am. Jur. 132). This is a mere consequence of the theory that "a receivership operates to protect the receiver against interference, without the consent of the court appointing him, with his *custody and possession* of the property subject to the receivership" (45 Am. Jur. 132; underscoring supplied). Hence, "it has been held x x x that real estate in the custody of a receiver can be levied upon and sold under execution, provided only that the *actual* possession of the receiver is not interfered with" (45 Am. Jur. 133-134, citing Albany City Bank v. Schermerhorn, 9 Paige [NY] 372, 38 Am. Dec. 551). The reason is that "only a receiver's *possession* of property subject to receivership x x x is entitled to protection x x x against interference" (45 Am. Jur. 134; see, also, 75 C.J.S. 759).

Then, again, the interference enjoined is that resulting from orders or processes of a court *"other"* than that which appointed the receiver (45 Am. Jur. 136), the rule being predicated upon the need of preventing "unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons" (45 Am. Jur. 137). Thus, in Cu Unjieng e Hijos vs. Mabalacat Sugar Co. (58 Phil. 439, 441); this Court said:

> "The fact that the mortgaged properties are in the hands of a receiver appointed by the court which tried the foreclosure suit does not prevent the same court from ordering the sale of the aforesaid mortgaged properties, inasmuch as although the said properties are in *custodia legis* by virtue of the conflict of jurisdiction therein because the court that ordered the sale thereof is the same which ordered that they be placed under receivership."

This view was reiterated and applied in Orlanes & Banaag Trans. Co. vs. Asiatic Petroleum Co. (P.I.), Ltd. and Laguna-Tayabas Bus Co. (59 Phil. 433, 439), in the following language:

> "The appellants contend that inasmuch as the certificates of public convenience in question were in the hands and under the control of a judicial receiver and, therefore, in *custodia legis*, the Court of First Instance of Tayabas had no jurisdiction to order the sale thereof and, consequently, the sale made by the sheriff of the City of Manila to the Asiatic Petroleum Company (P.I.), Ltd., and the assignment for the latter of its rights in favor of the Laguna-Tayabas Bus Company are null and void.
>
> "In the case of Cu Unjieng e Hijos vs. Mabalacat Sugar Co. (58 Phil., 439), which was decided on September 22, 1933, this court held that the court, which ordered the placing of the mortgaged property in the hands of a receiver in a foreclosure proceeding, has jurisdiction to order the sale of said property at public auction even before the termination of the receivership.
>
> "In the case under consideration, it was the same Court of First Instance of Tayabas, which ordered the certificates of public convenience in question placed in the hands of a receiver, appointed the receiver who was to take charge thereof, and ordered the receiver thus appointed to sell said certificates. In accordance with the afore-cited doctrine, said Court of First Instance of Tayabas had jurisdiction to order said sale."

For this reason, respondents maintain that petitioner is not entitled to the relief sought, the garnishment and the sale under execution complained of, having been ordered, not only by the *same court* of First Instance of Negros Occidental which had jurisdiction over the receivership, but, also, by the *same Judge*, respondent Jose Teodoro, Sr., who appointed the receiver

At any rate, the receivership in case No. 2371 is limited to the "possession" and administration "of the Cinema House dominated and popularly known as Eden Theater" (Annex 3). This is not necessarily a receivership of the partnership in question. But, even if it were, neither said possession by the receiver, nor the administration of the Eden Theater are affected by the order complained of (Annex E), the same being directed, not against the partnership or its properties, but against those of Gorgonio Pandes, particularly, "whatever rights, interest and participation" he "has or might have" in said partnership. This right, interest or participation, if any, is a property of *Gorgonio Pandes*, separate and distinct from the properties *of the partnership*, which has a personality of its own, distinct from that of its partners, and, certainly, of said Gorgonio Pandes (Arts. 44 and 1768, Civil Code of the Philippines). Such property, if any, of the latter, is not under receivership. The receiver had no authority to take it under his custody and, in fact, never had it in his possession or under his administration. Consequently, it is not in *custodia legis* and is subject to levy, even without the permission of the court appointing the receiver.

In view of the foregoing, the petition is hereby dismissed, with costs against the petitioner.

IT IS SO ORDERED.

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

Mr. Justice Padilla did not take part.

XXX

Luzon Stevedoring Co., Inc., and Visayan Stevedore Transportation Co., Petitioners, vs. The Public Service Commission and the Philippine Shipowners Association, Respondents, G. R. No. L-5458, September 16, 1953, Tuazon, J.

1. PUBLIC SERVICE LAW; WHAT CONSTITUTES PUBLIC SERVICE OR PUBLIC UTILITY. — It is not necessary, under Sec. 13(b) of the Public Service Law (Commonwealth Act No. 146) that one holds himself out as serving or willing to serve the public in order to be considered public. In Luzon Brokerage Co. v. Public Service Commission, 40 O. G., 7th Supplement, p. 271, this Court declared that "Act 454 is clear in including in the definition of public service that which is rendered for compensation, although limited exclusively to the customers of the petitioner."

2. IBID; IBID. — In the United States where, it is said, that there is no fixed definition of what constitutes public service or public utility, it is also held that it is not always necessary, in order to be a public service, that an organization be dedicated to public use, i.e., ready and willing to serve the public as a class. It is only necessary that it must in some way be impressed with a public interest; and whether the operation of a given business is a public utility depends upon whether or not the service rendered by it is a public character and of public consequence and concern. (51 C. J. 5.) Thus, a business may be affected with public interest and regulated for public good although not under any duty to serve the public (43 Am. Jur. 572.)

3. PUBLIC SERVICE COMMISSION; APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE. — Objection to the appointment of a commissioner to take evidence can not be made for the first time after decision was rendered, for such objection must be deemed waived.

Perkins, Ponce Enrile & Contreras for petitioners.
A. H. Aspiliera, Ozaeta, Roxas, Lichauco & Picazo and *Juan H. Paulino* for respondents.

DECISION

TUASON, *J*:

Petitioners apply for review of a decision of the Public Service Commission restraining them "from further operating their watercraft to transport goods for hire or compensation between points in the Philippines until the rates they propose to charge are approved by this Commission."

The facts are summarized by the Commission as follows:

> "x x x respondents are corporations duly organized and existing under the laws of the Philippines, mainly engaged in the stevedoring or lighterage and harbor towage business. At the same time, they are engaged in interisland service which consists of hauling cargoes such as sugar, oil, fertilizer and other commercial commodities which are loaded in their barges and towed by their tugboats from Manila to various points in the Visayan Islands, particularly in the provinces of Negros Occidental and Capiz, and from said places to Manila. For this service respondents charged freightage on a unit price with rates ranging from ₱0.50 to ₱0.62-1/2 per bag or picul of sugar loaded or on a unit price per ton in the case of fertilizer or sand. There is no fixed route in the transportation of these cargoes, the same being left at the indication of the owner or shipper of the goods. The barge and the tugboats are manned by the crew of respondents and, in case of damage to the goods in transit caused by the negligence of said crews, respondents are liable therefor. The service for which respondents charge freightage covers the hauling or carriage of the goods from the point of embarkation to the point of disembarkation either in Manila or in any point in the Visayan Islands, as the case may be.
>
> "The evidence also sufficiently establishes that respondents are regularly engaged in this hauling business serving a limited portion of the public. Respondent Luzon Stevedoring Co., Inc. has among its regular customers the San Miguel Glass Factory, PRATRA, Shell Co. of P.I., Ltd., Standard Oil Co. of New York and Philippine-Hawaiian; while respondent Visayan Stevedore Transportation Co. has among its regular customers the Insular Lumber, Shell Company, Ltd., Kim Kee Chua Yu & Co., PRATRA and Luzon Merchandising Corp. During the period from January, 1949 and up to the present, respondent Luzon Stevedoring Co., Inc. has been rendering to PRATRA regularly and on many occasions such service by carrying fertilizer from Manila to various points in the province of Negros Occidental and Capiz, such as Hinigaran, Silay, Fabrica, Marayo, Mambaquid, Victorias and Pilar, and on the return trip sugar was loaded from said provinces to Manila. For these services, as evidenced by Exhibits A, A-1, A-2, A-3 and A-4, respondent Luzon Stevedoring Co., Inc. charged PRATRA at the rate of ₱0.60 per picul or bag of sugar and, according to Mr. Mauricio Rodriguez, Chief of the division in charge of sugar and fertilizer of the PRATRA, for the transportation of fertilizer, this respondent charged ₱12.00 per metric ton. During practically the same period, respondent Visayan Stevedore Transportation Co. transported in its barges and towed by its tugboats sugar for Kim Kee Chua Yu & Co. coming from Victorias, Marayo and Pilar to Manila, and for Luzon Merchandizing Corp., from Hinigaran, Bacolod, Marayo and Victorias to Manila. For such service respondent Visayan Stevedore Transportation Co. charged Kim Kee Chua Yu & Co. for freightage ₱0.60 per picul or bag as shown in Exhibits C, C-1, C-2, C-3, C-4, C-5, C-6, C-7 and C-8, and Luzon Merchandising Corp. was also charged for the same service and at the same rate as shown in Exhibits B, B-1 and B-2."

It was upon these findings that the Commission made the order now sought to be reviewed, upon complaint of the Philippine Shipowners' Association charging that the then respondents were engaged in the transportation of cargo in the Philippines for hire or compensation without authority or approval of the Commission, having adopted, fixed and collected freight charges at the rate of ₱0.60 per bag or picul, particularly sugar, loaded and transported in their lighters and towed by their tugboats between different points in the province of Negros Occidental and Manila, which said rates resulted in ruinous competition with complainant.

Section 13 (b) of the Public Service Law (Commonwealth Act No. 146) defines public service thus:

> "The term 'public service' includes every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes any common carrier, railroad, street railway, traction railway, subway, motor vehicle, either for freight or passenger, or both, with or without fixed route and whatever may be its classification, freight or carrier service of any class, express service, steamboat, or steamship line, pontines, ferries, and small water craft, engaged in the transportation of passengers and freight, shipyard, marine railway, marine repair shop, warehouse, wharf or dock, ice plant, icerefrigeration plant, canal, irrigation system, sewerage, gas, electric light, heat and power, water supply and power, petroleum, sewerage system, telephone, wire or wireless telephone, wire or wireless telegraph system and broadcasting radio stations."

It is not necessary, under Sec. 13(b) of the Public Service Law (Commonwealth Act No. 146), that one holds himself out as serving or willing to serve the public in order to be considered public service.

In Luzon Brokerage Co. v. Public Service Commission, 40 O.G., 7th Supplement, p. 271, this Court declared that "Act 454 is clear in including in the definition of a public service that which is rendered for compensation, although limited exclusively to the customers of the petitioner."

In that case, the Luzon Brokerage Company, a customs broker, had been receiving, depositing and delivering goods discharged from ships at the pier to its customers. As here, the Luzon Brokerage was then rendering transportation service for compensation to a limited clientele, not to the public at large.

In the United States where, it is said, there is no fixed definition of what constitutes public service or public utility, it is also held that it is not always necessary, in order to be a public service, that an organization be dedicated to public use, i.e., ready and willing to serve the public as a class. It is only necessary that it must in some way be impressed with a public interest; and whether the operation of a given business is a public utility depends upon whether or not the service rendered by it is of a public character and of public consequence and concern. (51 C. J. 5.) Thus, a business may be affected with public interest and regulated for public good althought not under any duty to serve the public. (43 Am. Jur. 572.)

It can scarcely be denied that the contracts between the owners of the barges and the owners of the cargo at bar were ordinary contracts of transportation and not of lease. Petitioners' watercraft was manned entirely by crews in their employ and payroll, and the operation of the said craft was under their direction and control, the customers assuming no responsibility for the goods handled on the barges. The great preponderance of the evidence contradicts the assertion that there was any physical or symbolic conveyance of the possession of the tugboats and barges to the shippers. Whether the agreements were written or verbal, the manner of payment of freight charges, the question who loaded and unloaded the cargo, the propriety of the admission of certain receipts in evidence, etc.,

to all of which the parties have given much attention — these are matters of form which do not alter the essential nature of the relationship of the parties to the transactions as revealed by the fundamental facts of record.

It is contended that "if the Public Service Act were to be construed in such a manner as to include private lease contracts, said law would be unconstitutional," seemingly implying that, to prevent the law from being in contravention of the Constitution, it should be so read as to embrace only those persons and companies that are in fact engaged in public service" with its corresponding qualification of an offer to serve indiscriminately the public."

It has been already shown that the petitioners' lighters and tugboats were not leased, but used to carry goods for compensation at a fixed rate for a fixed weight. At the very least, they were hired, hired in the sense that the shippers did not have direction, control, and maintenance thereof, which is a characteristic feature of lease.

On the second proposition, the Public Service Commission has, in our judgment, interpreted the law in accordance with legislative intent. Commonwealth Act No. 146 declares in unequivocal language that an enterprise of any of the kinds therein enumerated is a public service if conducted for hire or compensation even if the operator deals only with a portion of the public or limited clientele.

It has been seen that public utility, even where the term is not defined by statute, is not determined by the number of people actually served. Nor does the mere fact that service is rendered only under contract prevent a company from being a public utility. (43 Am. Jur. 573.) On the other hand, casual or incidental service devoid of public character and interest, it must be admitted, is not brought within the category of public utility. The demarkation line is not susceptible of exact description or definition, each case being governed by its peculiar circumstances.

"It is impossible to lay down any general rule on the subject whether the rendering of incidental service to members of the public by an individual or corporation whose principal business is of a different nature constitute such person a public utility. In the result reached, the cases are in conflict, as the question involved depends on such factors as the extent of service, whether such person or company has held himself or itself out as ready to serve the public or a portion of the public generally, or in other ways conducted himself or itself as a public utility. In several cases, it has been held that the incidental service rendered to others constituted such person or corporation a public utility, but in other cases, a contrary decision has been reached." (43 Am. Jur. 573.)

The transportation service which was the subject of complaint was not casual or incidental. It has been carried on regularly for years at almost uniform rates of charges. Although the number of the petitioners' customers was limited, the value of goods transported was not inconsiderable. Petitioners did not have the same customers all the time embraced in the complaint, and there was no reason to believe that they would not accept, and there was nothing to prevent them from accepting, new customers that might be willing to avail of their service to the extent of their capacity. Upon the well-established facts as applied to the plain letter of Commonwealth Act No. 146, we are of the opinion that the Public Service Commission's order does not invade private rights of property or contract.

In at least one respect, the business complained of was a matter of public concern. The Public Service Law was enacted not only to protect the public against unreasonable charges and poor, inefficient service, but also to prevent ruinous competition. That, we venture to say, is the main purpose in bringing under the jurisdiction of the Public Service Commission motor vehicles, other means of transportation, ice plants, etc., which cater to a limited portion of the public under private agreements. To the extent that such agreements may tend to wreck or impair the financial stability and efficiency of public utilities who do offer service to the public in general, they are affected with public interest and come within the police power of the state to regulate.

Just as the legislature may not "declare a company or enterprise to be a public utility when it is not inherently such," a public utility may not evade control and supervision of its operation by the government by selecting its customers under the guise of private transactions.

For the rest, the constitutionality of Commonwealth Act No. 146 was upheld, implicity in Luzon Brokerage Company v. Public Service Commission, *supra*, and explicitly in Pangasinan Transportation Co. v. Public Service Commission, 70 Phil. 221.

Were there serious doubts, the courts should still be reluctant to invalidate the Public Service Law or any provision thereof. Although the legislature can not, by its mere declaration, make something a public utility which is not in fact such, "the public policy of the state as announced by the legislature will be given due weight, and the determination of the legislature that a particular business is subject to the regulatory power, because the public welfare is dependent upon its proper conduct and regulation, will not lightly be disregarded by the courts." (51 C. J. 5.)

The objection to the designation of Attorney Aspillera as commissioner to take the evidence was tardy. It was made for the first time after decision was rendered, following a prolonged hearing in which the petitioners cross-examined the complainant's witnesses and presented their own evidence.

The point is procedural, not jurisdictional, and may be waived by expressed consent or acquiescence. So it was held in Everret Steamship Corporation v. Chua Hiong, G. R. No. L-2933, and La Paz Ice Plant and Cold Storage Co. v. Comision de Utilidades Publicas et al., G. R. No. L-4053.

Upon the foregoing considerations, the appealed order of the Public Service Commission is affirmed, with costs against the petitioners.

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

CERTAIN VEXATIOUS QUESTION...

(*Continued from page 270*)

in Tan Hi v. Republic, G.R. No. L-3354, decided on January 25, 1951, the Supreme Court cited a previous decision of said Court which denied the application on the ground that "the applicant for naturalization had nine children all enrolled in the Philippine schools except one, a minor because she live from infancy in China, where she was enrolled in an English school in Amoy."

From this decision of the Court it appears in bold relief that if in an ordinary naturalization case the non-enrollment of a child because she is studying in her native country is a ground for rejecting an application for naturalization, it results by inference that children of mothers marrying Filipino citizens, much less cannot become citizens of the Philippines for that matter.

CONCLUSION AND RECOMMENDATION TO PART II

Any other interpretation to the contrary, like the three Opinions of the Secretary of Justice hereinabove referred to, would lead to injustice, inequity, and even absurd results, which, perforce, must be avoided, for it would give rise to incongruous possibilities wherein full-blooded aliens with no interest or background on our social, political, and economic way of life could otherwise be Filipino citizens merely on papers contrary to the spirit of our Constitution and laws on the matter.

On the whole, therefore, whether the children of the foreign woman are legitimate or illegitimate, and whether the mother is a divorcee, or not, and on the assumption that such minor children have already citizenship of their own, such citizenship which the Municipal Law of the country of their birth has conferred upon them, be allowed to continue the same citizenship—a suggestion or a course which would tend to reduce conflicting problems of citizenship in the future.

DIGEST OF DECISIONS OF THE COURT OF APPEALS

ESTOPPEL; ESTOPPEL "IN PAIS"; RULE. — While it is true that, because of equitable estoppel, "a party can not, in the course of a litigation, be permitted to repudiate his representations, or occupy inconsistent positions" (Magdalena Estate vs. Myrick, 71 Phil., 344: 3 Moran, Rules of Court (Perm. Ed.), p. 496), it is fundamental in the law of estoppel *in pais* that the representations held to conclude a party should be of *material facts;* that the representation be made with full knowledge of the truth; and that party invoking the estoppel should have been misled to his prejudice (3 Moran, Op. Cit. 494; 21 C.J., s. 227, pp. 1223-1225.) *Testate Estate of the Late Dorotea Apostol. Benedicta Obispo, et al., petitioners and appellees, vs. Remedios Obispo, opposito r and appellant, C.A. No.* 8454-*R, October* 1, 1953, *Reyes, J. B. L., J.*

ID.; CONCLUSIONS OF LAW IN PLEADING CAN NOT GIVE RISE ESTOPPEL. — When it appears from the plain terms of a pleading that there is no allegation of fact therein, but only conclusions of law, such conclusions can not give rise to estoppel (31 C. J., 1225). *Ibid, Ibid.*

EVIDENCE; WITNESSES; TESTIMONY; PARTY MAY CALL OPPONENT AS HIS OWN WITNESS. — There is no provision of law or of the Rules of Court that would prevent a party to a litigation from calling any of the opposing parties to be his witness, so long as the one called is not disqualified under section 25 or section 26 of Rule 123. On the contrary, section 83 of said rule expressly authorizes the calling of any adverse party as such witness, even if leading questions have to be employed to overcome his natural hostility. If the previous acts or former statements of the witness contradict his present testimony, they may be shown to impeach his credibility under sections 91 and 92 of Rule 123, but they would not be grounds to bar him from testifying.

WILL; PROBATE; ESTOPPEL, WHEN NOT APPLICABLE IN PROCEEDINGS. — Probate proceedings involve public interest, and the application therein of the rule of estoppel, when it will block the ascertainment of the truth as to the circumstances surrounding the execution of a testament, would seem inimical to public policy. Over and above the interest of private parties is that of the state to see that testamentary dispositions be carried out of it, and only if, executed conformably to law. (In Re Canfield's Will, 300 NYS 502). *Ibid, Ibid.*

EVIDENCE; RECEPTION OF EVIDENCE OF DOUBTFUL ADMISSIBILITY, LESS HARMFUL. — Reception of evidence of doubtful admissibility is in the long run the less harmful course, since all material necessary for final adjudication would come before the appellate tribunals. (Prats & Co., vs. Phoenix Insurance Co., 52 Phil., 816.) *Ibid, Ibid.*

PROPERTY; STOLEN MOVABLES; OWNER'S RIGHT TO RECOVER. — That plaintiffs, as owners, are absolutely entitled to recover the stolen trucks, or any parts thereof, results from the application of article 464 of the old Civil Code. *Ethel Case, et al., plaintiffs and appellants, vs. Felipe F. Cruz, defendant and appellee, C.A. No.* 9779-*R, October* 1, 1953, *Reyes, J. B. L., J.*

MOTOR VEHICLE; OWNERSHIP; CERTIFICATE OF REGISTRATION, NOT CONCLUSIVE EVIDENCE OF OWNERSHIP.— It is a matter of law and general knowledge that certificates of registration are not conclusive on the ownership of the vehicle, and they are only issued for wholly assembled motor vehicles, not for component parts thereof. *Ibid, Ibid.*

PROPERTY; POSSESSION IN GOOD FAITH. — The good faith of a possessor consists in the absence of knowledge of a defect that invalidates his title (Art. 433, Civil Code of 1889) or, as stated in article 1950 of the same Code, "a belief that the person from whom he received the thing was the owner thereof and could transmit title thereto", which belief must be *well-founded* or reasonable (Santiago vs. Cruz, 19 Phil., 148; Leung Yee vs. Strong, ante; Emas vs. Zuzuarregui, *jam cit.*). *Ibid, Ibid.*

ID.; ID.; ID.; POSSESSION IN BAD FAITH; REIMBURSEMENT OR REMOVAL OF IMPROVEMENTS. — The spirit of articles 453 and 454 of the Spanish Civil Code of 1889 (in force in 1944 to 1946, when this case instituted) is to deny a possessor in bad faith any right to be reimbursed for or to remove the improvements (expensas utiles) made by him, even if he could remove them without injury to the principal thing (3 Sanchez Roman, Estudios de Derechos Civil, 449; 4 Manresa, Commentaries, 6th Ed., p. 318). *Ibid, Ibid.*

ID.; ID.; ID.; ID.; REPAIRS; TERM "NECESSARY EXPENDITURES", CONSTRUED. — By "necessary expenditures" have been always understood those incurred for the *preservation* of the thing, in order to prevent its becoming useless; or those without which the thing would deteriorate or be lost (Alburo vs. Villanueva, 7 Phil., 277; 4 Manresa, 6th Edition, p. 318; 8 Scaevola, Codigo Civil, p. 408); "inversiones hechas para que la cosa no perezca o desmerezca" (3 Puig Peña, Derecho Civil, Vol. 3, Part I, p. 46). *Ibid, Ibid.*

OWNERSHIP; CHATTEL MORTGAGE; MORTGAGOR, NOT DIVERTED OF ALL OWNERSHIP. — It is now recognized that a chattel mortgage is merely a real right of security (Bachrach vs. Summers, 42 Phil., 3) and does not completely divest the mortgagor of ownership. *Ibid, Ibid.*

WILLS; TESTATOR'S SIGNATURE; LOCATION IMMATERIAL. — Section 618 of Act 190 (unlike article 805 of the new Civil Code) did not require that the testator should "subscribe at the end" of the will. All it required was that the will — "be written in the language or dialect known by the testator and *signed* by him, or by the testator's name *written* by some other person in his presence and by his express direction x x x." The law did not expressly stipulate any particular place for the testator's signature; and there is respectable authority that under similar statutes, the location of the signature has been held immaterial, (Alexander, Treatise on Wills, Vol. I, pp. 558-559, 564, 565; Gardner on Wills, p. 185; Woener on Wills, Vol. I, pp. 89-90). *Testate Estate of Roman Castillo, deceased. Jose C. Platon, petitioner and appellant, vs. Antonio Castillo et al., counter-petitioner and oppositors-appellee, C. A. No.* 1042-*R October* 12, 1953, *Reyes, J. B. L., J.*

ID.; ID.; ID.; SUBSTANTIAL COMPLIANCE OF THE LAW SUFFICIENT. — The authenticity of the preceding pages of a will not being in any way endangered by the absence of the testator's signature at the foot of the fourth page, because all pages carried the marginal signature of the testator and the three witnesses, *Held:* that the law was substantially complied with. *Ibid, Ibid.*

ID.; FAILURE TO PAGE FIRST SHEET, NOT SUFFICIENT GROUND TO REFUSE PROBATE. — The failure to page the first sheet of a will composed of several sheets is not a sufficient ground to refuse its probate, where other circumstances supply identification, as already decided by the Supreme Court of the Islands in Lopez vs. Liboro, 46 Off. Gaz., No. 1 (Supp.), 211. *Ibid, Ibid.*

ID.; DATING OF WILL OR ATTESTATION CLAUSE UNNECESSARY. — The law does not require either the will or the attestation to be dated (Pasno vs. Ravina, 54 Phil., 379, 380). *Ibid, Ibid.*

OPINIONS OF THE SECRETARY OF JUSTICE

OPINION NO. 61

(Opinion as to whether Santiago C. Phua may be considered a Filipino citizen.)

1st Indorsement
March 11, 1954

Respectfully returned to the Chairman, Board of Accountancy, Bureau of Civil Service, Manila.

Opinion is requested whether Santiago C. Phua may be considered a Filipino citizen, of having elected Philippine citizenship on June 21, 1951, pursuant to Article IV, Section 1(4), of the Constitution of the Philippines and Commonwealth Act No. 625.

For Santiago C. Phua to be entitled to elect Philippine citizenship, he must establish by competent and satisfactory proof that his mother was a Filipino citizen before her marriage to an alien.

Santiago was born on August 12, 1926, in the City of Cebu, the legitimate son of Cosme Lastimosa Phua, a Chinese, and Salud Carbonell, a Filipino woman. In view of the destruction of the church records in Cebu City (See annex "A"), Santiago cannot present the baptismal certificate of his mother. To prove that his mother was a citizen of the Philippines prior to her marriage to an alien, he has adduced the sworn statements of Oscar A. Kintanar, Special Council for the province of Cebu and Don Filemon Sotto, practicing attorney in Cebu City (see Annexes "C" and "D", respectively), wherein each declared that Santiago's mother, Salud Carbonell, is the daughter of spouses Santiago Carbonell and Paula Niala, both Filipinos. This assertion is substantiated by Messrs. Juan Solidad and Teodoro Fiel, both residents of Sibonga, Cebu, who declared in their joint affidavit (Annex "E") that being neighbors of the Carbonell family they know personally that Salud Carbonell was a Filipino citizen before her marriage to her alien husband, she being the legitimate daughter of Filipino parents, Santiago Carbonell and Paula Niala, both residents of the same town, Sibonga, Cebu. These sworn statements, especially the first two, being those of well-known, distinguished and respectable citizens, deserve weight and credence and may be accepted as satisfactory proof that Salud Carbonell, applicant's mother, was a Philippine citizen before her marriage to her Chinese husband That the herein petitioner is the Santiago C. Phua who is the legitimate son of Salud Carbonell and who took the CPA examinations in June, 1953, is confirmed by Messrs. Buenaventura Veloso and Filemon Sotto, who both declared that they stood as sponsors during Santiago's baptism and confirmation respectively (see Annexes "F" and "D").

It having been established that he is the legitimate son of a Filipino woman, Santiago has the right, upon reaching the age of majority or within a reasonable time thereafter, which period has been fixed to three years, to elect Philippine citizenship in accordance with the aforecited constitutional provision and Commonwealth Act No. 625.

Petitioner was already twenty-four years, ten months and nine days old when he made his election on June 21, 1951, ten months and nine days beyond the proper period. He alleges that the delay in making his election was due to the fact that he honestly and firmly believed that he is a Filipino because he was born in the Philippines of Filipino mother; he did not register in any foreign consulate or embassy; and he had never gone to China since his birth. To bolster his claim, he cited the fact that he had taken the ROTC basic course; and that he participated in the general elections in 1953, a duty and privilege extended only to Filipinos.

In the opinion of this Department, the foregoing circumstances may be considered sufficient justification for the petitioner's delay in making his election of Filipino citzenship. His election may therefore be considered as having been made within the proper period and should be accorded legal effect. Accordingly, Santiago C. Phua has become invested with Philippine citizenship and the result of his examination for CPA in June 1953, maybe released.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 62

(Opinions of the Department of Justice not binding upon the courts of justice. It is the policy of said department not to render opinions on questions sub-judice.)

1st Indorsement
March 12, 1954

Respectfully returned to the Honorable, the Executive Secretary, Manila.

Inviting attention to the opinion of this Department dated June 1, 1946, a copy of which is herewith attached for ready reference. Herein it was held that permanent appointments made by the President under Section 16 of the Commonwealth Act No. 357, the former Election Code, need the confirmation of the Commission on Appointments. Section 21 of the Revised Election Code, Republic Act No. 180, is substantially similar to Section 16 of Commonwealth Act No. 357.

This office is informed that it is an actual case pending before the Court of First Instance of Batangas (Lipa City Branch) involving the mayorship of Rosario, Batangas, wherein one of the the principal issues raised is the necessity of confirmation by the Commission on Appointments of the appointment of the municipal mayor extended by the President under Section 21 of the Revised Election Code. In view of the established policy not to render opinion on questions *sub judice* and considering that the opinion of this Department is not binding upon the courts of justice; the undersigned deems it prudent to refrain from expressing cases of appointments made by the President under Section 21(b) of the Revised Election Code, it is suggested that, unless otherwise ruled by competent courts, action thereon may be taken in accordance with the ruling of this Department mentioned above.

Sgd. PEDRO TUASON
Secretary of Justice

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OPINION NO. 65

(Opinion on the question as to whether a decree of divorce obtained in a Saigon court by two Filipino nationals may be recognized in the Philippines).

2nd Indorsement
March 18, 1954

Respectfully returned to the Honorable, the Undersecretary of Foreign Affairs, Manila.

The undersigned concurs in the views embodied in the proposed dispatch of the Department to the Philippine Minister to Bangkok, Thailand regarding the validity of a decree of divorce granted by a Saigon Court to two Filipino nationals residing in Saigon. It is true that no law expressly provides that a decree of divorce obtained in a foreign court would be recognized in the Philippines. By the suppression of the provision relative to absolute divorce and the retention of only those pertaining to legal separation in the original draft of the present Civil Code, Republic Act No. 386, and the abrogation of Act No. 2710, otherwise known as the Divorce Law, affirms the clear intention of the legislature to abolish the existence of absolute divorce in this country as a matter of public policy.

The family is a basic institution which public policy cherises and protects (Art. 216, Civil Code). All presumptions favor the solidarity of the family and every intendment of law or fact leans toward the validity of marriage and the indissolubility of the marriage bonds (Art. 217, Ibid). Laws relating to family rights and duties, or to the status, condition and the legal capacity of persons are binding upon citizens of the Philippines, even though living abroad (Art. 15, Ibid). Prohibitive laws governing persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by

REPUBLIC ACT NO. 1186

AN ACT TO AMEND AND REPEAL CERTAIN SECTIONS OF REPUBLIC ACT NUMBERED TWO HUNDRED AND NINETY-SIX, OTHERWISE KNOWN AS "THE JUDICIARY ACT OF 1948" AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. Sections eleven, twenty-eight, forty, forty-one, forty-two, the second, third, eleventh and twelfth paragraphs of section forty-nine, fifty, fifty-one, fifty-two, the second, third, fourth, fifth, seventh, tenth, and eleventh subparagraphs of the second paragraph of section fifty-four, and section sixty of Republic Act Numbered Two hundred ninety-six, as amended, are amended to read as follows:

"SEC. 11. *Appointment and compensation of Justices of the Supreme Court.* — The Chief Justice and the Associate Justices of the Supreme Court shall be appointed by the President of the Philippines, with the consent of the Commission on Appointments. The Chief Justice of the Supreme Court shall receive a compensation of twenty-one thousand pesos *per annum*, and each Associate Justice shall receive a compensation of twenty thousand pesos *per annum*. The Chief Justice of the Supreme Court shall be so designated in his commission; and the Associate Justices shall have precedence according to the dates of their respective commissions, or, when the commissions of two or more of them bear the same date, according to the order in which their commissions may have been issued by the President of the Philippines: *Provided, however*, That any member of the Supreme Court who has been reappointed to that Court after rendering service in any other branch of the Government shall retain the precedence to which he is entitled under his original appointment and his service in the Court shall, to all intents and purposes, be considered as continuous and uninterrupted.

"SEC. 28. *Qualifications and compensation of Justices of Court of Appeals.* — The Justices of the Court of Appeals shall have the same qualifications as those provided in the Constitution for members of the Supreme Court. The Presiding Justice of the Court of Appeals shall receive an annual compensation of sixteen thousand pesos, and each Associate Justice, an annual compensation of fifteen thousand pesos.

"SEC. 40. *Judges of First Instance.* — The judicial function in Courts of First Instance shall be vested in District Judges, to be appointed and commissioned as hereinafter provided: *Provided, however*, That those who are District Judges at the time of the approval of this amendatory Act shall continue as such in their respective districts without need of new appointments by the President of the Philippines and new confirmations by the Commission on Appointments.

"SEC. 41. *Limitation upon tenure of office.* — District Judges shall be appointed to serve during good behavior, until they reach the age of seventy years, or become incapacitated to discharge the duties of their office, unless sooner removed in accordance with law.

"SEC. 42. *Qualification and salary.* — No person shall be appointed District Judge unless he has been ten years a citizen of the Philippines and has practised law in the Philippines for a period of not less than ten years or has held during a like period, within the Philippines, an office requiring admission to the practice of law in the Philippines as an indispensable requisite.

'The District Judge shall receive a compensation at the rate of twelve thousand pesos *per annum*.

"SEC. 49. *Judicial districts.* — Judicial districts for Courts of First Instance in the Philippines are constituted as follows:

"The First Judicial District shall consist of the Provinces of Cagayan, Batanes, Isabela, and Nueva Vizcaya;

"The Second Judicial District, of the Provinces of Ilocos Norte, Ilocos Sur, Abra, City of Baguio, Mountain Province and La Union;

x x x x x

"The Tenth Judicial District, of the Provinces of Camarines Sur, Albay, Catanduanes, Sorsogon and Masbate;

"The Eleventh Judicial District, of the Provinces of Capiz, Romblon and Iloilo, the City of Iloilo and the Province of Antique;

x x x x x

"SEC. 50. *Judges of First Instance for Judicial Districts.* — Five judges shall be commissioned for the First Judicial District. Two judges shall preside over the Courts of First Instance of Cagayan and Batanes, and shall be known as judges of the first and second branches thereof, respectively, the judge of the second branch to preside also over the Court of First Instance of Batanes; two judges shall preside over the Court of First Instance of Isabela, and shall be known as the judges of the first and second branches thereof; and one judge shall preside over the Court of First Instance of Nueva Vizcaya.

"Seven judges shall be commissioned for the Second Judicial District. Two judges shall preside over the Court of First Instance of Ilocos Norte; two judges shall preside over the Court of First Instance of Ilocos Sur; one judge shall preside over the Court of First Instance of Abra; one judge shall preside over the Court of First Instance of the City of Baguio and Mountain Province; and another judge shall preside over the Court of First Instance of La Union.

"Six judges shall be commissioned for the Third Judicial District. Five judges shall preside over the Court of First Instance of Pangasinan and shall be known as judges of the first, second, third, fourth and fifth branches thereof, respectively; two judges shall preside over the Court of First Instance of Lingayen to be known as the judges of the first branch and the second branch, respectively; two judges shall preside over the Court of First Instance of the City of Dagupan and shall be known as the judges of the third and fourth branches thereof, respectively, and one and shall be known as the judge of the fifth branch. One judge judge shall preside over the Court of First Instance of Urdaneta shall preside over the Court of First Instance of Zambales.

"Five judges shall be commissioned for the Fourth Judicial District. Three judges shall preside over the Courts of First Instance of Nueva Ecija and Cabanatuan City and shall be known as judges of the first, second, and third branches thereof, respectively; and two judges shall preside over the Court of First Instance of Tarlac, and shall be known as judges of the first and

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laws or judgments promulgated or by determinations or conventions agreed upon in a foreign court (Art. 17, par. 5, Ibid).

Divorce is to effect a change in the civil status of those to whom it is granted. Since the status of Filipino citizens residing abroad is governed by Philippine laws, and considering that public policy frowns upon divorce as being repugnant to good morals and distructive to public order, it is believed that a decree of divorce granted by a foreign court to Filipino nationals residing abroad will not be recognized as binding in this jurisdiction. The personal relations of the citizens of this Islands cannot be affected by decrees of foreign countries in a manner which our government believes is contrary to public order and good morals. (Barreto Gonzales vs. Gonzales, 58 Phil. 67, 72).

(Sgd.) PEDRO TUASON
Secretary of Justice

second branches thereof, respectively.

"Five judges shall be commissioned for the Fifth Judicial District. Two judges shall preside over the Court of First Instance of Pampanga and shall be known as judges of the first and second branches thereof, respectively; one judge shall preside over the Court of First Instance of Bataan; and two judges shall preside over the Court of First Instance of Bulacan and shall be known as judges of the first and second branches thereof, respectively.

"Eighteen judges shall be commissioned for the Sixth Judicial District. They shall preside over the Courts of First Instance of Manila and shall be known as judges of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth branches thereof, respectively.

"Eight judges shall be commissioned for the Seventh Judicial District. Five judges shall preside over the Courts of First Instance of the Province of Rizal, Quezon City and Pasay City and shall be known as judges of the first. second, third, fourth and fifth branches thereof, respectively; two judges shall preside over the Courts of First Instance of the Province of Cavite and the Cities of Cavite and Tagaytay, and shall be known as judges of the first and second branches thereof, respectively; and one judge shall preside over the Court of First Instance of Palawan.

"Seven judges shall be commissioned for the Eighth Judicial District. Three judges shall preside over the Courts of First Instance of Laguna and the City of San Pablo, and shall be known as judges of the first, second and third branches thereof, respectively; three judges shall preside over the Courts of First Instance of Batangas and the City of Lipa, and shall be known as judges of the first, second and third branches thereof, respectively; and one judge shall preside over the Courts of First Instance of Mindoro Oriental, Mindoro Occidental and Marinduque.

"Four judges shall be commissioned for the Ninth Judicial District. Three judges shall preside over the Court of First Instance of Quezon and shall be know as judges of first, second, and third branches thereof, respectively; and one judge shall preside over the Court of First Instance of Camarines Norte.

"Seven judges shall be commissioned for the Tenth Judicial District. Three judges shall preside over the Courts of First Instance of Camarines Sur and Naga City and shall be known as judges of the first, second and third branches thereof, respectively; two judges shall preside over the Court of First Instance of Albay and Legaspi City and of Catanduanes and shall be known as judges of the first and second branches thereof; one judge shall preside over the Court of First Instance of the Province of Sorsogon; and one judge shall preside over the Court of First Instance of Masbate.

"Seven judges shall be commissioned for the Eleventh Judicial District. Two judges shall preside over the Courts of First Instance of Capiz and Romblon and shall be known as judges of the first and second branches thereof, respectively; the judge of the first branch to preside also over the Court of First Instance of Romblon; and four judges shall preside over the Courts of First Instance of the Province of Iloilo and the City of Iloilo, and shall be known as judges of the first, second, third, and fourth branches thereof, respectively; and one judge shall preside over the Court of First Instance of the Province of Antique.

"Six judges shall be commissioned for the Twelfth Judicial District. Four judges shall preside over the Courts of First Instance of Occidental Negros and the City of Bacclod, and shall be known as judges of the first, second, third and fourth branches thereof, respectively; and two judges shall preside over the Courts of First Instance of Oriental Negros, Dumaguete City and the Sub-province of Siquijor.

"Nine judges shall be commissioned for the Thirteenth Judicial District. Three judges shall preside over the Courts of First Instance of Samar and Calbayog City and shall be known as judges of the first, second and third branches thereof, respectively; and six judges shall preside over the Courts of First Instance of Leyte and the Cities of Ormoc and Tacloban, and shall be known as judges of the first, second, third, fourth, fifth and sixth branches thereof, respectively.

"Six judges shall be commisioned for the Fourteenth Judicial District. Five judges shall preside over the Courts of First Instance of the Province of Cebu and the City of Cebu, and shall be known as judges of the first, second ,third, fourth and fifth branches thereof, respectively; and one judge shall preside over the Court of First Instance of Bohol.

"Five judges shall be commissioned for the Fifteenth Judicial District. One judge shall preside over the Court of First Instance of Surigao; one judge shall preside over the Courts of First Instance of Agusan and Butuan City; one judge shall preside over the Courts of First Instance of Oriental Misamis and Cagayan de Oro City; one judge shall preside over the Court of First Instance in the Province of Bukidnon; and one judge shall preside over the Court of First Instance of Lanao and the Cities of Dansalan and Iligan.

"Nine judges shall be commissioned for the Sixteenth Judicial District. Three judges shall preside over the Courts of First Instance of Davao and Davao City; two judges shall preside over the Court of First Instance of Cotabato; one judge shall preside over the Courts of First Instance of Occidental Misamis and Ozamis City; one judge shall preside over the Court of First Instance of Zamboanga del Norte; one judge shall preside over the Courts of First Instance of Zamboanga del Sur and Zamboanga City; and one judge shall preside over the Courts of First Instance of Sulu and Basilan City.

"SEC. 51. *Detail of judge to another district or province.* — Whenever a judge stationed in any province or branch of a court in a province shall certify to the Secretary of Justice that the condition of the docket in his court is such as to require the assistance of an additional judge, or when there is any vacancy in any court or branch of a court in a province, the Secretary of Justice may, in the interest of justice, with the approval of the Supreme Court and for a period of not more than three months for each time, assign any judge of any other court or province whose docket permits his temporary absence from said court, to hold sessions in the court needing such assistance, or where such vacancy exists. No judge so detailed shall take cognizance of any case when any of the parties thereto objects and the objection is sustained by the Supreme Court.

"SEC. 52. *Permanent stations of district judges.* — The permanent station of judges of the Sixth Judicial District shall be in the City of Manila.

"In other judicial districts, the permanent stations of the judges shall be as follows:

"For the First Judicial District, the judge of the first branch of the Court of First Instance of Cagayan shall be stationed in the Municipality of Tuguegarao, same province; the judge of the second branch, in the Municipality of Aparri, same province; one judge shall be stationed in the Municipality of Ilagan, Province of Isabela; one judge shall be stationed at Cauayan, Isabela; and another judge, in the Municipality of Bayombong, Province of Nueva Vizcaya.

"For the Second Judicial District, two judges shall be stationed in the Municipality of Laoag, Province of Ilocos Norte; two judges in the Municipality of Vigan, Province of Ilocos Sur; one judge, in the City of Baguio, Mountain Province; one judge, in the Municipality of Bangued, Province of Abra; and one judge, in the Municipality of San Fernando, Province of La Union

"For the Third Judicial District, two judges shall be stationed

in the Municipality of Lingayen, Province of Pangasinan; two judges shall be stationed in the City of Dagupan; and one judge in the Municipality of Iba, Province of Zambales; and one in the Municipality of Urdaneta.

"For the Fourth Judicial District, three judges shall be stationed in the City of Cabantuan, and two judges in the Municipality of Tarlac, Province of Tarlac.

"For the Fifth Judicial District, one judge shall be stationed in the Municipality of San Fernando, Province of Pampanga; and one judge shall be stationed in the Municipality of Guagua, Province of Pampanga; one judge in the Municipality of Balanga, Province of Bataan; and two judges, in the Municipality of Malolos, Province of Bulacan.

"For the Seventh Judicial District, the two judges of the first and second branches of the Court of First Instance of Rizal shall be stationed in the Municipality of Pasig, same province; that of the third branch, in Pasay City; and those of the fourth and fifth branches, Quezon City; one judge, in the Municipality of Puerto Princesa, Province of Palawan; and two judges, in the City of Cavite.

"For the Eighth Judicial District, two judges shall be stationed in the Municipality of Biñan and the Municipality of Santa Cruz, Province of Laguna, respectively, and one judge ,in the City of San Pablo; the judge of the first branch of the Court of First Instance of Batangas shall be stationed in the Municipality of Bantangas, Province of Batangas; and those of the second and third branches ,in the City of Lipa and the Municipality of Balayan, Province of Batangas, respectively; and one judge, in the Municipality of Calapan, Province of Mindoro Oriental.

"For the Ninth Judicial District, the two judges shall be stationed in the Municipality of Lucena, Province of Quezon; one judge shall be stationed in the Municipality of Gumaca, in the same province; and one judge, in the Municipality of Daet, Province of Camarines Norte.

"For the Tenth Judicial District, three judges shall be stationed in the City of Naga, Province of Camarines Sur; two judges in Legaspi City; one judge, in the Municipality of Sorsogon, Province of Sorsogon; and one judge. in the Municipality of Masbate. Province of Masbate.

"For the Eleventh Julicial District, one judge shall be stationed in Roxas City and Romblon; and one judge, in the Municipality of Calivo, Province of Capiz; and four judges, in the City of Iloilo; and one judge in the Municipality of San Jose de Buenavista, Province of Antique.

"For the Twelfth Judicial District, four judges shall be stationed in the City of Bacolod; two judges, in the City of Dumaguete.

"For the Thirteenth Judicial District, the judge of the first branch of the Court of First Instance of Samar shall be stationed in the Municipality of Catbalogan, Province of Samar; the judge of the second branch, in the Municipality of Borongan, same province; and the judge of the third branch, in the Municipality of Laoang, same province; the judges of the first and second branches of the Court of First Instance of Leyte shall be stationed in the City of Tacloban, the judge of the third branch, in the Municipality of Maasin, Province of Leyte; the judge of the fourth branch, in the Municipality of Baybay, same province; the judge of the fifth branch ,in the City of Ormoc; and the judge of the sixth branch, in the Municipality of Cariagra, Leyte.

"For the Fourteenth Judicial District, five judges shall be stationed in the City of Cebu and one judge, in the Municipality of Tagbilaran, Province of Bohol.

"For the Fifteenth Judicial District, one judge shall be stationed in the Municipality of Surigao, Province of Surigao; one judge, in the City of Cagayan de Oro; one judge, in the City of Dansalan; one judge, in the Municipality of Malaybalay, Province of Bukidnon; and one judge, in the City of Butuan.

"For the Sixteenth Judicial District, three judges shall be stationed in the City of Davao, Province of Davao; two judges in the Municipality of Cotabato, Province of Cotabato; one judge, in the Municipality of Oroquieta, Province of Occidental Misamis; one judge, in the Municipality of Dipolog, Province of Zamboanga del Norte; one judge, in the City of Zamboanga; and one judge in the Municipality of Jolo, Province of Sulu."

"SEC. 54. *Places and time of holding Court.* — x x

x x x x x x x x

"Second Judicial District: At Bontoc, Mountain Province, on the first Tuesday of March, June, and November of each year; and, whenever the interest of justice so require, a special term of court shall be held at Lubuagan, Subprovince of Kalinga.

"Seventh Judicial District: At Coron, Province of Palawan, on the first Monday of June and November of each year; and at Cuyo, same province, on the second Thursday of June and November of each year.

"Eight Judicial District: The judge shall hold special term at the municipalities of Lubang, Mamburao and San Jose, Mindoro Occidental; Pinamalayan and Roxas, Mindoro Oriental, once every year, as may be determined by him; at Boac, Province of Marinduque, on the first Tuesday of March, July and October of each year.

"Ninth Judicial District: At Infanta, Province of Quezon, for the municipalities of Infanta, Casiguran. Baler and Polillo, on the first Tuesday of January and June of each year.

x x x x x x x x

"Eleventh Judicial District: At Culasi, Province of Antique, on the first Tuesday of December of each year.

"Fifteenth Judicial District: At Cantilan, Province of Surigao, on the first Tuesday of August of each year; a special term of court shall also be held once a year in either the Municipality of Tandag or the Municipality of Hinatuan, Province of Surigao, in the discretion of the district judge; at Mambajao, Province of Oriental Misamis, on the first Tuesday of March of each year. A special term of court shall, likewise, be held, once a year, either in the Municipality of Talisayan or in the Municipality of Gingoog, Province of Oriental Misamis, in the discretion of the district judge; at Iligan, Province of Lanao, on the first Tuesday of March and October of each year, and at any time of the year at the Municipality of Baroy.

"Sixteenth Judicial District: At Dipolog, Province of Zamboanga del Norte, terms of court shall be held at least four times a year and in the Municipality of Sindangan of said province, on dates to be fixed by the district judge; at Pagadian, Zamboanga del Sur, at least three times a year; at Isabela, City of Basilan, at least four times a year on dates to be fixed by the district judge; at Baganga and Mati, Province of Davao: and at Glan, Province of Cotabato, terms of court shall be held at least once a year on dates to be fixed by the district judge.

x x x x x x x x

"SEC. 60. *Division of business among branches of Court of Sixth District.* — In the Court of First Instance of the Sixth District all cases relative to the registration of real estate in the City of Manila and all matters involving the exercise of the powers conferred upon the fourth branch of said court or the judge thereof in reference to the registration of land shall be within the exclusive jurisdiction of said fourth branch and shall go or be assigned thereto for disposition according to law. All other

(Continued on next page)

RAPE OF THE JUDICIARY

BY REP. DIOSDADO MACAPAGAL

Among the piling sins of the party in power can be included the enactment into law of H. Bill No. 1961 which, in the guise of judicial reorganization, will remove from office thirty-three judges at large and cadastral judges. The plea of the opposition to avoid this rape of the judiciary fell on majority ears that have become deaf to the call of justice but keen in hearkening to the siren call of political patronage to create positions for office-hungry political proteges.

The removal of these judges tramples upon the constitution. It plunges a dagger into the heart of judicial independence. It directly transgresses the constitutional provision providing that "The members of the Supreme Court and all judges of inferior courts shall hold office during good behavior, until they reach the age of seventy years, or become incapacitated to discharge the duties of their office." Dr. Jose M. Aruego, chronicler of the proceedings of the constitutional convention, attests that this provision is the sinew that gives strength to judicial independence:

> "The convention sought to secure the independence of the judiciary through the provisions to the effect (1) that the members of the Supreme Court and all judges of inferior courts shall hold office during good behavior, until they reach the age of seventy years, or become incapacitated to discharge the duties of their office."

The party in power invokes the power of Congress to create inferior courts under the constitutional provision that: "The judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law." But in the words of Justice Jose P. Laurel in the case of "Zandueta vs. de la Costa," 66 Phil. 615, "the principles embodied in these two sections of the same article of the constitution must be coordinated and harmonized." Justice Laurel said further:

> "Cases may arise where the violation of the constitution regarding security of judicial tenure is palpable and plain, and that legislative power of reorganization may be sought to cloak an unconstitutional and evil purpose. When a case of that kind arises, it will be time to make the hammer fall and heavily."

The case envisaged by Dr. Laurel has arisen in this measure. The purpose of this enactment is avowedly to prevent the transfer judges of first instance from one province to another known as "rigodon de jueces." This objective can be carried out without removing the present judges by changing their designation and prohibiting their transfer except within the same judicial district. The power to create courts must be exercised without removing the incumbent judges, particularly where their removal is not essential to the purpose of the judicial reorganization.

It follows that the removal of the incumbent judges is a political move made at the sacrifice of judicial independence which is consecrated in the fundamental law. This assault on the constitution by the ruling party is aggravated by the fact that in paragraph V of the 1953 Nacionalista platform, the party committed itself solemnly "to maintain an independent judiciary." By its consistency in reversing its election pledges, the new Nacionalista party may yet go down in our political history as the party of broken promises.

With the precedent established in this bill, every new party in power will follow this infamous example, abolish the positions of incumbent judges, and employ its own men. Security of judicial tenure thereby becomes a fiction. Judges will be induced to take sides in political fights knowing that their stay in office will depend on which party will win. Judicial independence is thereby converted into sycophancy to the political gods.

This political assault on the courts also partakes of cruelty and ingratitude if it is considered that before the election the Nacionalista party hailed the judiciary as truly the last bulwark of democracy against the alleged tyranny of the past administration for deciding case after case involving acts of the Liberal administration against the latter. Now that the Nacionalista party won partly through the moral support of the judiciary, it seeks to transform the latter from a bulwark of democracy into political booty.

The prostitution of the judicial independence by the majority party not only arouses the conscience against this conversion of the constitution into a scrap of paper to satiate a lust for political patronage, but also induces despair at the crystalizing truth that there has been a change of administration but no change in official morality.

REPUBLIC ACT NO. 1186 . . .

(*Continued from page* 315)

business appertaining to the Court of First Instance of said district shall be equitably distributed among the judges of the eighteen branches, in such manner as shall be agreed upon by the judges themselves; but in proceeding to such distribution of the ordinary cases, a smaller share shall be assigned to the fourth branch, due account being taken of the amount of land registration work which may be required of this branch: *Provided, however*, That at least four branches each year shall be assigned by rotation to try only criminal cases.

"Nothing contained in this section and in section sixty-three shall be construed to prevent the temporary designation of judges to act in this district in accordance with section fifty-one."

SEC. 2. Whenever the words "Judge-at-Large" or "Cadastral Judge" appear in Republic Act Numbered Two hundred ninety-six, the same shall read "District Judge".

SEC. 3. All the present district judges shall continue as such, but if any district judge is commissioned for the Courts of First Instance of two provinces, and a separate district judge has been provided for herein for one of such courts, the former shall have the option to select the court over which he shall continue to preside and notify the President of his selection within a reasonable time. If the number of branches in any Court of First Instance has been increased, the district judge presiding over any branch thereof in a particular place shall continue to preside over such branch notwithstanding a change in its number under the provisions of this Act.

All the existing positions of Judges-at-Large and Cadastral Judges are abolished, and section fifty-three of Republic Act Numbered Two hundred ninety-six is hereby repealed.

SEC. 4. Any judge-at-large or cadastral judge who shall not be appointed as district judge by virtue of the provisions of this Act, shall be given a gratuity in an amount of one month's salary for each year of service of such judge, the total amount not to exceed the salary for one year. The sum necessary to carry out the provisions of this Act is hereby appropriated.

SEC. 5. This Act shall take effect upon its approval.

Approved,

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