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A CRITICAL STUDY OF THE PROVISIONS OF THE CIVIL CODE OF THE PHILIPPINES ON LEGITIMACY AND ILLEGITIMACY OF CHILDREN

BY E. VOLTAIRE GARCIA *

I wish to thank the members of the Board of Directors of the Philippine Lawyers Association and all delegates representing the different bar associations throughout the length and breadth of the Country now in convention assembled for this rare privilege and opportunity accorded me to address you this afternoon on the subject "A Critical Study of the Provisions of the Civil Code of the Philippines on Legitimacy and Illegitimacy of Children", which I consider of paramount importance not only from the point of view of civil rights and obligations but also from the point of view of the social stigma from which illegitimate children unreasonably suffer.

We all know that legitimacy is mainly a matter of presumption because of the impossibility of descending into the mysteries of conception for the purpose of the identification of the paternity of the child (Ramirez Cabrera, Persons and Family Relations, 255) which appears to be beyond human knowledge to fathom (3 Scaevola, 287) so that the presumption of legitimacy of a child cannot be destroyed even by a contrary declaration by the mother (Art. 256, C.C.). It is, therefore, only in the limited cases when the legitimacy of a child is impugned or sought to be established before the Courts that legitimacy may be a matter of evidence Arts. 261, 262, 263, 268, C.C.). Even if it were scientifically possible to determine exactly the paternity of a child in every case it will, undoubtedly, be still the better policy to adhere to the principles of presumption of legitimacy, otherwise, every time a wife delivers a child medical experts will be prying into the utmost privacy of her conception resulting in scandal and embarrasment not only to her but also to the poor husband. And, moreover, "if the question of legitimacy were open to such attack, to be sustained or defeated by a mere preponderance of evidence based largely and most frequently upon circumstances, the integrity of blood, the pride of ancestry, and its just sense of honor all would depend upon the most dubious of titles" (Sergent vs. North Cumberland, etc., 112 Ky 888). There are physical earmarks connecting the wife, birth and child but none with reference to the husband. The relation between mother and child is a matter of fact, while the relation between father and child is a matter of presumption. The presumption of legitimacy is based upon the presumption of virtuous conduct of the mother (Cannon vs. Cannon, 7 Humphr. (Tenn.) 410), and founded as well upon the coincidence of probabilities (Sergent vs. North Cumberland Mfg. Co., 112 Dy. 898, 891: 66 S. W. 1036, foot note, 7 C J. 941). The presumption, however, is not one without scientific foundation. Medical experts on this matter affirm that the shortest period necessary for a foetus to acquire the conditions of viability is six (6) months and that intra-uterine life does not extend beyond ten (10) months (3 Scaevola 291). This is also the view of Hipocrates, a natural philosopher (I Oyuelos 172, 173). There is, however, no fixed rule in this regard as there is authority to the effect that sometimes the period is prolonged to three hundred thirteen (313) days (according to Ahfeld) or even to three hundred twenty (320) days according to Schroder) which are, undoubtedly, abnormal cases and are, therefore, valueless as a basis for a formation of the rules. The general average of the maximum period, according to Legrand du Saulle, is from two hundred seventy five (275) to three hundred (300) days. The German Code establishes the period from a minimum of one hundred eighty one (181) days to a maximum of three hundred two (302) days (1 Manresa 491). The Spanish Code (Art. 108) like that of the New Civil Code of the Philippines (Art. 255) fixes a minimum period of one hundred eighty (180) days and a maximum of three hundred (300). The same periods are fixed by the French Code (I Colin y Capitant,

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THE EXPANDING CONCEPT OF LIBERTY AND ITS SIGNIFICANCE FOR THE LEGAL PROFESSION

BY ATTY. ENRIQUE FERNANDO

With your indulgence, I propose to discuss the expanding concept of liberty and its significance for those of us in the legal profession.

We are all familiar with the leading Philippine case, *Rubi v. Provincial Board*, where liberty as guaranteed by the Constitution was identified with "the right to exist and the right to be free from arbitrary personal restraint or servitude." That is not all there is to it. It likewise "is deemed to embrace the right of man to enjoy the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." Thus the right to liberty if respected enables human beings, according to the opinion by Justice Malcolm, to use their faculties in all lawful ways; to live and work where they will; to earn their livelihood by any lawful calling; and to pursue any avocation.

It is not to be forgotten that the Supreme Court in the same case gives the warning that liberty as understood in democracies is not license. For what the Constitution guarantees is liberty under the law. Implied in the term is restraint by law for the good of the individual and for the greater good, the peace and order of society and the general well-being. No man can do exactly as he pleases. Every man must renounce unbridled license. In the words of Mabini, as quoted in the same case, "liberty is freedom to do right and never wrong; it is ever guided by reason and the upright and honorable conscience of the individual."

This is so as the liberty to be safeguarded is, according to former Chief Justice Hughes, "liberty in a social organization." Arbitrary restraint is thus ruled out, but not immunity from reasonable regulations and prohibitions imposed in the interest of the community. The liberty of the citizens may, in the interest of public health, public order or safety, of general welfare, in other words through the proper exercise of the police power, then be regulated. Under circumstances which to us in the profession amount to due process, there may even be deprivation of it. No constitutional question arises.

In that sense liberty does in deed pose, to quote from Justice Cardozo, "an underlying paradox. Liberty in the most literal sense is the negation of law, for law is restraint, and the absence of restraint is anarchy. On the other hand, anarchy by destroying restraint would leave liberty the exclusive possession of the strong and unscrupulous."

Liberty would be meaningless, however, if it were so. The Constitution safeguards it for all. No real contrariety or antagonism does exist between it and law. For there is recognition, according to Cardozo of that "domain of free activity that cannot be touched by government or law at all, whether the command is specially against him or generally against him and others."

In every proper case calling for the exertion of governmental power, the problem is one of harmonizing or adjusting the individual right to liberty and the community or general welfare. Necessarily then in times of stress, whether occasioned by internal disorder, fear from external aggression, or economic insecurity, the field of liberty may contract with the expansion of state power occasioned by the gravity and urgency of its needs. Diminution or restriction there may be, but never obliteration.

There are those who think of liberty as freedom from interference. That is true. There it begins, but it cannot stop there. So in the *Rubi* opinion, there is mention not only of the negative concept of liberty which is absence of restraint but likewise of its positive significance which is the enlargement of opportunity. Liberty is not only freedom from but freedom for. It is not enough that one is let alone. It is equally important that one be enabled to achieve, to realize the potentialities of his personality.

It is in that sense that the meaning has expanded. It is

540), the Code of Guatemala (3 Scaevola 291), the Swiss Code (Robert P. Shick, The Swiss Civil Code, p. 57).

Thus, Article 255 of the Civil Code of the Philippines (Republic Act 386) commonly known as the New Civil Code provides:

> Art. 255. Children born after one hundred and eighty days following the celebration of the marriage, and before three hundred days following its dissolution or the separation of the spouses shall be presumed to be legitimate.
>
> Against this presumption no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife within the first one hundred and twenty days of the three hundred which preceded the birth of the child.
>
> This physical impossibility may be caused:
> (1) By the impotence of the husband;
> (2) By the fact that the husband and wife were living separately in such a way that access was not possible;
> (3) By the serious illness of the husband.

Article 255 of the New Civil Code is a reproduction of Article 108 of the Civil Code of Spain, now usually referred to as the old Civil Code, with the addition in the New Code of what may cause the impossibility of the husband's access to the wife during the period of conception, namely: (1) By the impotence of the husband; (2) By the fact that the husband and wife were living separately, in such a way that access was not possible; (3) By the serious illness of the husband.

Before the New Civil Code took effect presumptions of legitimacy of children were governed by the Rules of Court, providing for a conclusive presumption and a rebuttable presumption, both of which were taken from the Code of Civil Procedure (Art. No 190), thus:

> The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate, if not born within one hundred and eighty days immediately succeeding the marriage, or after the expiration of three hundred days following its dissolution (Rule 123, Sec. 68, Paragraph C; taken from Section 333, paragraph, 3 Code of Civil Procedure).
>
> That a child born in lawful wedlock, there being no divorce, absolute or from bed and board, is legitimate (Rule 123, Sec. 69, par. CC; taken from Sec. 334, par. 29, Code of Civil Procedure).

There seems to be no substantial difference in practical application between Article 255 of the New Civil Code and the conclusive presumption of legitimacy provided for by Rule 123, Sec. 68, paragraph C, of the Rules of Court. Under the provisions of the Rules of Court the presence of the following requisites gives rise to the conclusive presumption: (a) marriage (b) cohabitation (c) husband not impotent (d) birth after one hundred eighty days following celebration of marriage or within three hundred days from dissolution. Whereas, Article 255 of the Civil Code requires (a) marriage and (b) birth after one hundred eighty days from celebration of marriage or within three hundred days from its dissolution or separation of spouses to give rise to the presumption of legitimacy, which may be rebutted only by physical impossibility of access by the husband to the wife during the probable period of conception, resulting from husband's impotence, or separation in such a way that access was impossible or serious illness of husband rendering access impossible. Actually, the Civil Code (Art. 255) suppressed two essential elements of the conclusive presumption of the Rules of Court and declared them evidence that may overcome the presumption of legitimacy provided for therein. In the United States the great weight of authority is to the effect that impossibility of access by the husband to the wife during the probable period of conception overcomes the presumption of legitimacy (See Max Radin, The Common Law of the Family, VI The National Law Library, 145). The Code Commission has not given any reason for a departure from the principles of the conclusive presumption of the Rules of Court and a reversion to the old provision of the Spanish Code.

something positive, opportunity or capacity or ability to do, freedom to achieve. It is in the latter sense that Laski identified liberty with the "eager maintenance of that atmosphere in which men have the opportunity to be their best selves" or "the absence of restraint upon the existence of those social conditions which in modern civilization are the necessary guarantees of individual happiness." This view considers liberty as identical with the opportunity for the growth and the unfolding of the human personality.

What is of the permanent essence of freedom, Laski continued, is that the personality of each individual should be so unhampered in its development, whether by authority or by custom, that it can make for itself a satisfactory harmonization of its impulses. There is an invasion of liberty where government-imposed prohibition acts so as to destroy that harmony of impulses which comes when a man knows that he is doing something it is worthwhile to do. Restraint frustrating the life of physical, intellectual, and spiritual enrichment is evil.

Nor is liberty reserved alone for the rich, the well-born, the economically secure. Those with lesser advantages at birth are entitled to their share of liberty. Their lives must not be stunted because of their poor or modest origins. That indeed is the goal.

That is all well and good, you might say, these fine words and noble phrases, but what does it mean for us who are practitioners in the law? To that even more important phase of the question, I now turn.

May I start by speaking of liberty in the sense of being let alone, a concept which under the Constitution is implemented by specific pledges and immunities that may be classified under two headings:

(1) Freedom of belief, whether secular or religious, freedom of expressing such beliefs, and freedom to associate with others of a like persuasion; and

(2) Personal freedom which includes the constitutional rights of the accused as an assurance that such liberty of the person may not lightly be interfered with by state action.

I believe I speak the sense of the legal fraternity, and even those who do not have the good fortune of being its members, when I say that on the whole with certain regrettable lapses, the men of the law whether on the Bench or in the Bar have been true to the sacred calling of defending freedom of belief and of expression as well as personal freedom. As a matter of fact, the complaint lately has been that sometimes in their zeal for the defense of their client's rights, there may have been a one-sided stress on the claims of liberty as against the demands of authority.

Here, I may possibly be entering a more controversial ground when I assert that those of us in the law should continue to follow that course, unrelaxing in our vigilance in the defense of the individual right to liberty. It is not for us to make meaningless the constitutional mandate that freedom of belief and of opinion should be given free play. When our services are thus solicited, it is not for us to hesitate. To our country, no less than to our clients, we owe all that is in us to oppose, and if we can frustrate, well-meaning, but sometimes mistaken, governmental action hostile and inimical to liberty.

The need seem to be greater in the Philippines as well as in the United States, for recent leading decisions indicate not expansion but diminution of at least one aspect of liberty, freedom of belief and of expression. There appears to be a retreat from the high vantage point of the clear and present danger doctrine. In 1943, the American Supreme Court in *West Virginia State Board of Education v. Barnette* asserted:

> "But freedoms of speech and of press, of assembly and of of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protest." (per Jackson, J.)

In 1949, it could reiterate:

A CRITICAL STUDY...

The first sentence of Article 258 of the Civil Code provides for a *prima facie* presumption of legitimacy of "a child born within one hundred eighty (180) days following the celebration of the marriage," which presumption may, of course, be rebutted by any evidence admissible in law that the husband is not the father of the child. This presumption is of less weight than that provided for by Article 255 of the Civil Code in favor of a child born after one hundred eighty (180) days following the celebration of the marriage or before three hundred (300) days following its dissolution or separation of the spouses which can not be overcome by any evidence except that of physical impossibility of access by the husband to the wife during the probable period of conception. There again, therefore, appears no appreciable distinction in operation between the first sentence of Article 258 of the Civil Code and the disputable presumption of legitimacy provided for in Rule 123, Sec. 69, par. CC, of the Rules of Court, in favor of a child born in lawful wedlock if the over-all effects be considered of Article 255 and the first sentence of Article 258 of the Civil Code on one hand and the joint principles of conclusive and disputable presumptions of legitimacy provided for in Sec. 68, par. C, and Sec 69, par. CC, of Rule 123 of the Rules of Court on the other.

The rule seems to be universal that a child born in lawful wedlock is presumed to be legitimate. The effects of illegitimacy under the early Common Law of England were unusually difficult for the child who was considered a *filius nullius*, without any family relations by birth, (Max Radin, The Common Law of the Family, VI The National Law Library, 141), child of nobody, or *fillius populi*, the child of the people (7 Am. Jur. 627), which doctrines did not find acceptance in the early American Colonies where the natural relationship between the illegitimate child and the mother was recognized. The effects of illegitimacy were so adverse and degrading to the child that Courts of the English Common Law invariably required the strongest evidence in order to overcome the presumption of legitimacy (Radin, Id., 1 42-144) which was carried forward to such an extent in England that sometimes amounted to absurdities. There developed in the Common Law of England a presumption of legitimacy in favor of the issue of a wife which can not be disputed, if her husband be within the four seas, that is, within the jurisdiction of the King of England, unless the husband had apparent impossibilities of procreation (2 Coke Litt. 244a, footnote, 7 C. J. 941). Thus "it was solemnly decided by a court of the highest jurisdiction, that a child born in England was legitimate although it appeared on the fullest evidence that the husband resided in Ireland during the whole time of the wife's pregnancy, and for a long while previously, because Ireland was within the King's dominion," (Wright vs. Hicks, 12 Ga. 155, 159; 56 Am. D. 451 footnote, 7 C. J. 942). "In the time of Edward II, the Countess of Glowcester bore a child one year and seven months after the death of the duke and it was pronounced legitimate. In the reign of Henry VI, Mr. Baron Rolfe expressed the opinion with apparent gravity, that a widow might give birth to a child seven years after her husband's death without injury to her reputation" (Dickinson's App., 42 Conn. 491, 501; 19 AmR 553, footnote, 7 C. J. 942. There was, obviously, too much fiction in upholding the legitimacy of a child born years after the death of the husband. While presumption is tainted with fiction it must not too apparently go against the realities of life to appear ridiculous.

The New Civil Code has carried forward this fiction in providing for certain conclusive presumptions of legitimacy of children in Article 258, which reads:

> A child born within one hundred eighty days following the celebration of the marriage is *prima facie* presumed to be legitimate. Such a child is conclusively presumed to be legitimate in any of these cases:
>
> (1) If the husband before the marriage, knew of the pregnancy of the wife;
>
> (2) If he consented, being present, to the putting of his surname on the record of birth of the child;

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> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, (Chaplinsky v. New Hampshire, supra (315 U.S. pp. 571, 572, 86 L. ed. 1034, 1935, 62 S. Ct. 766), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. x x x There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." (per Douglas, J., Terminiello v. Chicago).

With the *Dennis* decision, however, in 1951, there is an indication in the main opinion by the late Chief Justice Vinson that the clear and present danger doctrine now means only that, following Learned Hand, "in each case x x x (courts) must ask whether the gravity of the evil discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The degree of imminence and immediacy of the danger required is less than in the classic formulation of Holmes. The gravity of the evil, the overthrow of the government no less, might have led the majority to conclude that suppression of the utterance was unavoidable. It is to be hoped that such was the case.

At least the fear of the virulent nature of the Communist conspiracy could explain the modification of the clear and present danger doctrine in the United States. In our own country, in *Espuelas v. People*, a foolish and intemperate letter by a man, who simulated suicide as a protest against the administration, was cause enough for convicting the writer of inciting to sedition.

Even if the majority opinion be viewed with the utmost sympathy, its rationale is far from persuasive. It appears as if the majority in their distate for what the accused did and perhaps in their desire to warn similarly-minded critics of the administration to use less "infuriating" language dignified as seditious libel a matter, that should have occasioned at most derisive laughter.

The dissenting opinion by Justice Tuason, concurred in by Chief Justice Paras and Justice Feria, shows a better understanding of the command of the Constitution that "no law is to be passed abridging the freedom of speech and of the press."

The Supreme Court earlier in *Primicias v. Fugoso*, tacitly adopted the clear and present danger doctrine. Tested by that doctrine, the conviction here could not have been sustained. There is no question about the right of the government to punish sedition and incitement to sedition. There should be no question either about the futility of such letter and the fake suicide to lead people to take up arms. The Filipino masses cannot be deluded that easily. Those who may have read the letter and may have believed it might have sympathized with the bereaved family. The letter though could not have incited the people to take up arms against the administration. Where then is the danger? As noted by Boudin "the meaning of the rule is clear: the danger involved must be both clear and present. It is clear that the rule is all pervasive — "it applies to every case."

Fear of Communism alone whether here in the Philippines or in the United States does not seem to warrant such judicial timidity. This is not to under-estimate the peril that Communism poses.

There is an acceptance of the view that in this country and for some time now there is a band of devoted and fanatical followers of Communism. Since liberation with the aid of non-Communist groups who fought with them against the Japanese during the occupation, they have been in a stage of open rebellion in not a few places in the Philippines. As a matter of fact it was the mounting intensity of such subversive activities that called, in the presidential opinion, for the suspension of the privilege of the

(3) If he expressly or tacitly recognized the child as his own.

While these conclusive presumptions refer to children born within one hundred eighty days following the celebration of the marriage, with more reason, they also apply and with greater force to those born after such period. Under the Civil Code of Spain (Art. 110) a child born within one hundred eighty days from celebration of marriage was presumed (prima facie) legitimate if any of the three circumstances of (a) husband's knowledge of pregnancy of wife, (b) consent to use of his surname in the record of birth or (c) express or tacit recognition of paternity be present. Under Rule 123, Sec. 69, Par. CC, of the Rules of Court, "A child born in lawful wedlock, there being no divorce, absolute or from bed or board, is presumed (*disputably*) legitimate." Opinion has been expressed to the effect that the reason for the conclusive presumption in the three cases covered by Article 258 (C.C.) is estoppel by the husband (Francisco, I Civil Code of the Philippines, 684). This view of the husband's estoppel finds support in the American jurisdiction.

> "One who marries a woman known by him to be enceinte is regarded by the law as adopting into his family the child at its birth. He could not expect that the mother upon its birth would discard the child and refuse to give it nurture and maintenance. The law would forbid a thing so unnatural. The child, receiving its support from the mother, must of necessity become one of her family, which is equally the family of the husband. The child, then is received into the family of the husband, who stands as to it in loco parentis. This being the law, it enters into the marriage contract between the mother and the husband. When this relation is established, the law raises a conclusive presumption that the husband is the father of his wife's illegitimate child." (State v. Shoemaker, 62 Iowa, 343, 17 N. W. 589, 49 Am. Rep. 146; footnote, 7 Am. Jur. 638).

One thing, however, is the operation of the principles of estoppel as a rule of evidence and another thing is the grant by statute of the indisputable status of legitimacy upon a child. The rule of estoppel, as a conclusive presumption is stated in Rule 123, Sec. 68, Par. 8, of the Rules of Court in this wise, "Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot in any litigation arising out of such declaration, act or omission, be permitted to falsify it." This principle may be broken up into the following essential component parts for its operation: (a) declaration, act or omission of a party, (b) deliberate intent to lead another party to believe a particular thing to be true, (c) the other party acted upon such a belief. Justice Moran, citing Bigelow on estoppel, in his Comments on The Rules of Court, Vol. III, page 461, gives the following requisites of estoppel by conduct or in pais: (1) There must have been a representation or concealment of material facts. (2) The representation must have been made with knowledge of the facts. (3) The party to whom it was made must have been ignorant of the truth of the matter. (4) It must have been made with the intention that the other party would act upon it If these elements be present the author of the act, declaration or omission cannot alter said act, declaration or omission in a litigation arising therefrom, which are rendered conclusive as against him. If a husband, for instance, brings his step-child to an exclusive college for board, lodging and schooling and makes the college officials believe the child as his own, he cannot in an action by the college for collection of fees repudiate his act, declaration or omission and prove that he is not the father of the child. For purposes of that litigation his paternity of the child is conclusive. For all other purposes, however, the child does not become his. It has been held that the conclusive presumption of legitimacy does not apply to cases involving questions of inheritance and heirship, where the rights of others besides the husband and child arise (7 Am. Jr. 638, citing State vs. Shoemaker, 62 Iowa 343; 17 N. W. 589; Miller vs. Anderson, 43 Ohio St. 473; 3 N. E. 605). Whereas, under the New Civil Code (Art. 258)

writ of habeas corpus in 1950, happily restored a few weeks ago. Through the energetic measures taken by the then Secretary of National Defense, now President-elect, Ramon Magsaysay, an end to this armed uprising is in sight.

The view is equally accepted that the forces of Communism have not been entirely wiped out. As long as Russia remains a great power and while the struggle for world supremacy continues, Communism may be a spent but not a moribund force in the Philippines. The small but fiercely determined group of local Communists who may still be at large can be expected to continue unabated their efforts at winning converts. Their arguments may not fall on deaf ears as long as the conditions of misery under which a great portion of the tenant and laboring classes live continue unremedied. The social justice measures undertaken by the Government must be expanded in scope and accelerated in time to cut the ground from under the deceptive but plausible appeals of Communist leaders.

Granting, however, that now and in the foreseeable future there are still among our countrymen those who are victims of the delusion that is, Communism, it is my view that we, in the legal profession, must remain steadfast in our dedication to the difficult but highly rewarding task of defending freedom of belief and of opinion. This is not to deny that lawyers, more than any other group, cannot afford to close their eyes to the realities. They should not live in a social void.

The task of the judiciary then in adjusting or harmonizing individual rights with the safety of the state, ordinarily one of utmost delicacy, then becomes even more formidable. It becomes equally so for us practitioners. The fact remains however that the regime established here is one of liberty, of justice and of democracy. Belief in the theory of liberty is not merely an echo of a discredited past. It remains a fighting faith. It is a proclamation of the vitality of the democratic process. It rests on the conviction deeply and profoundly held that given the choice, a free people will prefer to remain free. We shall remain true to the noblest ideals of our profession if we act accordingly.

To us thus is entrusted the difficult and exacting task of protecting personal freedom, more specifically, as counsel for the defense.

This obligation is one of the most valued specific rights of an accused. I do not have to recall how Justice Moran characterized right to counsel in *People v. Arnault*. Then there is the terse statement by Justice Douglas that:

> "The accused 'needs the aid of counsel lest he be the victim of overzealous prosecutors x x x or of his own ignorance.' "

At this juncture, it may not be inappropriate to speak of the role of the defense counsel defending those accused of Communism. The revulsion and the repugnance that participation in the Communist led rebellion has occasioned law-abiding citizens is understandable. Nonetheless, it is equally imperative that when so accused and when so tried the members of the legal profession whether as *de oficio* or retained counsel should not shirk the duty of defending them and assuring that their conviction if it comes is in accordance with due process.

You are all familiar with a member of our profession whose opinion on this point certainly cannot command our approval. He denounced the efforts of some of the most respected members of the Bar when they defended in court those accused of Communism. He seemed to have ignored the fact in thus affording them the opportunity to meet the charge against them, they were deprived of capitalizing on the propaganda line that a democracy does not live true to its professed belief in freedom and fairness. It is heartening to note the vigorous dissent of our people, as shown in the last elections, to that unjustified accusation of our fellow lawyer, the occupant of one of the most exalted offices in the land, until noon of December 30, that is.

Our role in the defense of liberty as the freedom to be let alone is clear. It has been sanctified by centuries of legal tradition. We know what to do. What is more important, we have on the whole been doing it. When we speak though of our mission in connection with the positive aspect of liberty or freedom for the achievement of one's potentialities, we cannot be that confident. There may even be moments of doubts and misgivings as to what

the child is conclusively legitimate against the whole world if any of the three circumstances therein provided be present.

The conclusive presumption of legitimacy under the New Code (Art. 258) invites irreconcilable clashes between fiction and fact to such an extent as may shock the conscience. Suppose a Filipino woman who has never been outside the Philippines be engaged through the mails to an American male who had never been theretofore outside the United States. This is not only possible but has actually happened as a result of pen-pal letter writing encouraged by some newspapers. The suitor arrived in the Philippines to marry his Filipina sweetheart only to discover her advanced state of pregnancy. For one reason or another he, nevertheless, married her ten (10) days after his arrival (giving allowances for issuance of the marriage license). She delivered a normal baby the day following the marriage. Under the law, the child is conclusively presumed legitimate of the poor husband. The normal mind cannot be convinced of the fiction. Even if the two (2) other requisites—consent to the use of the husband's surname in the registry of birth, and express or tacit recognition of paternity be present the brains will revolt against such atrocities of the law against the facts of life. Argument may be advanced that the husband should suffer the consequences of his own stupidity to which a reply may well be made that the law should not open itself as an instrument of offense for it may very well happen that not only the husband suffers but his own legitimate compulsory heirs may fall victims to the unwisdom of the law. The absurdity of the conclusive presumption of legitimacy becomes more obvious if there be legal impediments to the marriage at the time of conception. Take the case of a widower who married, for instance, fifteen days after the death of his spouse a woman in a state of pregnancy known to him. Under the law (Art. 258, C.C.) even if the second wife delivers a normal foetus five days following the marriage, the child is conclusively legitimate of the husband. Medical authorities are agreed that six months (6) intra-uterine life is the minimum requirement for a foetus to live. At the time of conception of the child in the illustration the indisputable father was not only not married to its mother but married to another wife. The New Code (Art. 258) pronounces him conclusively legitimate, without admitting proof to the contrary.

And the situation of the child indisputably presumed legitimate becomes more complicated if we take into account the conflict of paternity between the former and the subsequent husbands of a widow who remarries earlier than authorized by law. Article 84 (C.C.) prohibits the issuance of a marriage license to a widow till after three hundred days following the death of her husband, unless in the meantime she has given birth to a child evidently for the purpose of avoiding conflicts of paternity between the first and second husbands (U.S. vs. Dulay, 10 Phil. 302; People vs. Rossi, 49 Phil. 510). The Revised Penal Code (Art. 351) penalizes a widow who shall remarry within three hundred days from the death of her husband, or before having delivered if she shall have been pregnant at the time of his death. It should be noted that a marriage license is an essential requisite of marriage, except in a marriage of exceptional character (Art. 53, C.C.) and if the widow remarries without a marriage license her second marriage will be void from the beginning (Art. 80, C.C.). However, if she succeeds in obtaining a marriage license and remarries within the prohibited period, her subsequent marriage will, undoubtedly, be valid notwithstanding the legal prohibition and the criminal liability she may have incurred. Then there arises the possibility of a conflict of presumptions of legitimacy if the remarried widow delivers a child within three hundred days following the death of her former husband (See Art. 255, C.C.) and at the same time within one hundred eighty days from the celebration of the subsequent marriage (See Art. 258, C.C.) or after such period of one hundred eighty days from such marriage (Art. 255, C.C.). The New Code (Art. 259) solves these possible conflicts of presumptions by providing:

> If the marriage is dissolved by the death of the husband, and the mother contracted another marriage within three hundred days following such death, these rules govern:

it ought to be. Now is this unusual. We are on unfamiliar ground.

Liberty as freedom to achieve has but lately received emphasis. As a matter of fact, here, again, the threat that Communism poses against Democracy is an important contributory factor in the long overdue attention now being paid to it. The realization keenly grows that Democracy may lose its appeal for the rank and file in any country when conditions of want and misery abound and are not remedied.

It is gratifying to note that one of our foremost statesmen and patriots and certainly, the outstanding contitutionalist, Senator Jose P. Laurel, has aptly entitled his recent collection of essays on government, "Bread and Freedom." Verily, if one speaks of liberty to a man emaciated in body with his basic needs unsatisfied, the response is likely to be less than enthusiastic, very much less.

Hence, the appearance in constitutions or recent vintage of such rights, termed social and economic, intended to translate into reality the promise of Democracy in the way of more decently housed, decently fed, decently clad, and therefore, happier and more contented citizenry.

Our Constitution which in the words of Justice Laurel, "was adopted in the midst of social unrest and dissatisfaction resulting from economic and social distress," then threatening the stability of governments the world over reflects that aspiration.

One of the fundamental principles therein stated is the promotion of social justice "to insure the well-being and economic security of all the people." More specifically, there is the constitutional command that the State shall afford protection to labor, especially to working women and minors and shall regulate the relations between landowner and tenant, and between labor and capital in industry and in agriculture.

The Congress of the Philippines likewise may determine by law the size of private agricultural lands which individuals, corporations, or associations may acquire and hold, may authorize, upon payment of just compensation the expropriation of lands to be subdivided into small lots and conveyed at cost to individuals. Franchises, certificates and any other form of authorization for the operation of public utilities in the Philippines may be granted only to Filipinos or to corporations or to other entities organized under the laws of the Philippines, sixty per centum of the capital of which is owned by citizens of the Philippines, cannot be exclusive in character, may not be granted for a longer period than fifty years and shall be subject to amendment, alteration or repeal by the Congress of the Philippines when the public interest so requires.

The Republic of the Philippines is enjoined to promote scientific research and invention, arts and letters being under its patronage and to create scholarships in arts, science, and letters for specially gifted citizens.

What liberty in the positive sense mean, likewise finds expression in the specific provisions of the Universal Declaration of Human Rights, including such rights of everyone to social security, to work, to free choice of employment, to just and reasonable renumeration, insuring for himself and his family an existence worthy of human dignity, to rest and leisure, to a standard of living adequate for the health and well-being of himself and of his family, to education, to participation in the cultural life of the community, to enjoyment of the arts and to a share in scientific advancement and its benefits.

No Constitution, as of now, goes that far. Even if it does, the actual may fall short of the ideal. At least the Universal Declaration of Human Rights sets a goal. Who knows but that it may yet be realized.

It is understandable, however, that for those rights to be enjoyed, the expansion of the regulatory activities of the Government may be unavoidable. This will mean the restriction of liberty of some so as to assure the enjoyment of liberty by others, many others. As Laski stated:

> "There are vital elements in the common good which can only be achieved by action under the state-power — education, housing, public health, security against unemployment."

How does liberty in its positive aspect with the corresponding expansion of governmental activity affect us as lawyers? As I

(1) A child born before one hundred eighty days after the solemnization of the subsequent marriage is disputably presumed to have been conceived during the former marriage, provided it be born within three hundred days after the death of the former husband:

(2) A child born after one hundred eighty days following the celebration of the subsequent marriage is *prima facie* presumed to have been conceived during such marriage, even though it be born within the three hundred days after the death of the former husband.

Article 259 (C.C.) attempts to solve the conflicts of presumptions of legitimacy (Code Commission Report, 86) that may arise from the operation of Article 255 (C.C.) and its possible overlapping with Article 258 (C.C.) in case a widow remarries within the prohibited period (assuming that she succeeded in obtaining a marriage license) and subsequently delivers a child within three hundred days following the death of her former husband which gives rise to a presumption almost conclusive of legitimacy of the child as that of the former husband (Art. 255, C.C.), but if the child be at the same time born after one hundred eighty days following the celebration of the subsequent marriage there is also the same presumption almost conclusive of legitimacy that the child is that of the subsequent marriage (Art. 255. C.C.); and if the child be born within one hundred eighty days following the celebration of the subsequent marriage, under the first sentence of Article 258 (C.C.) the child is presumed *prima facie* legitimate of the subsequent marriage, which *prima facie* presumption should yield to the almost conclusive presumption provided for in Article 255 (C.C.) which may be overcome only by evidence of physical impossibility of access by the husband to the wife during the first one hundred twenty days of the three hundred which preceded the birth of the child. It is believed that Article 255 (C.C.) and Article 258 (C.C., first sentence) are general rules and should yield to the provisions of Article 259 (C.C.) under the special and abnormal circumstances of a widow who remarried within the prohibited period and delivers a child within three hundred days from the death of her former husband which birth may also take place either within or after one hundred eighty days following the celebration of the subsequent marriage —in the first case the child is disputably presumed legitimate of the former marriage, and in the second case the child is *prima facie* presumed legitimate of the subsequent marriage (Art. 259, C.C.) which may be overcome by any evidence admissible in law. The problem becomes more complicated if the present husband knew of the pregnancy of the widow before the subsequent marriage, or if he consented, being present to the putting of his surname on the record of birth of the child or if he expressly or tacitly recognized the child as his own, in which case the child is indisputably presumed his legitimate child (Art. 258, C.C., second sentence) which, being conclusive, admits of no evidence to the contrary. If the conclusive presumption of legitimacy provided for in Article 258 (C.C., second sentence) were disputable the law can better cope with complicated and perplexing situations which may arise many of which, indeed, cannot now be anticipated.

The law as it is, however, before suggested reforms come to realization, has to be applied to cases as they spring up and it will be, indeed, the difficult task of the bar and the bench to arrive at just and logical solutions. Professor Emiliano R. Navarro of the College of Law, Arellano University, gives his own very enlightening view (Navarro, II Cases, Materials and Comments on Persons and Family Relations, 726-727) on the operations of these apparently conflicting presumptions in these words:

> "A child born before one hundred eighty days after the solemnization of the subsequent marriage and within three hundred days after the death of the former husband is disputably presumed, by the present article, to have been conceived during the former marriage. But for this article, the presumption would be conclusive under article 255. It may, therefore, be seen that the conclusive presumption in article 255 becomes disputable when it conflicts with the disputable

have said earlier, this is a problem that our profession has faced only recently. It offers both a challenge and an opportunity, a challenge that must be met and an opportunity that must not be missed.

To many of us in the law profession perhaps especially so in case of the younger ones, public service outside of the field of prosecuting agencies and the judiciary beckons. For in a government of laws and not of men, that now is branching out into areas hitherto left to private enterprise, the need for additional lawyers becomes apparent. Considering that even now the seductive spell that our profession casts over ambitious youths still persists, notwithstanding the many other fields of endeavor open to ambitious minds, this is a tendency not to be deplored. Certainly, if the trend is for more not less government, as all signs indicate, our liberties will be safer, I hope, in the hands of our fellow lawyers.

It is not however of the opportunities for more gainful pursuits in the government service that I wish to emphasize. I have in mind more of the effect of this wider field of governmental activity on the attitude of us lawyers as practitioners. By and large, we are retained to resist governmental intrusion into private affairs. It is not only natural but expected of us then to make use of all our faculties in zealously resisting what to us may be unwarranted extension of state authority.

That way, the freedom of the mind as well as the freedom of the person is duly safeguarded. As pointed out earlier, we would be recreant to our responsibilities if we do less.

Please note, however, that such service is required of us in connection with a conflict of interests between the government on the one hand, and private individuals, on the other. In that sense, the freedom from, as safeguarded in the Constitution, is freedom from state authority.

When we speak of freedom for, however, the situation is dissimilar for the state here is actively called upon to mediate and reconcile conflicting interests between individuals as between groups, with public welfare as the guiding consideration.

Liberty, in the positive sense as opportunity for the full and unimpeded development of one's potentialities, may for certain groups of individuals, those economically insecure, be attainable only when the government acts as its protector. Our Constitution thus has a mandate on governmental protection to labor.

Those of us called upon to advocate the cause of the higher income groups, more prone to feel the impact of state regulatory activity, are not expected to show less than our customary zeal in the defense of their rights. They are entitled to nothing less.

All that I would wish to invite your attention is more understanding on our part of why the government is thus compelled to act and less stubborn resistance to justified state effort.

We owe it to ourselves no less than to our country to which we are all devoted. Our responsibility in enlightening the rest of our fellow citizens, by precept and example, as to what liberty under law means is inescapable. It is even more imperative then that in the new era about to open, with hopes, justifiable hopes, for greater achievements, under conditions no less trying and under circumstances equally exacting as in the immediate past, we fulfill our role adequately. To us, the nation looks for leadership. It is entitled to it. It will get it.

Liberty, not in the abstract but in the concrete, is for us to enrich or frustrate. The choice is obvious. We cannot, even if we wish to, and I do not think we do, neglect or ignore that task. If we fail in giving vitality and reality to the concept of liberty, the nation fails with us. Democracy becomes a mockery. We will fall an easy prey to the forces of Communism.

We cannot afford to fail then. From us must come in our own field of action mighty blows for the sacred cause, that is Democracy, not the least attractive quality of which in the battle for men's minds and hearts is its devotion to freedom. The conviction that no other way of life is deserving of the utmost loyalty and allegiance would be immeasurably strengthened by our profession being firm, immovable, unwavering in its fidelity to the regime of liberty enshrined in our Constitution.

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presumption in article 258. But, under this last article, the disputable presumption becomes conclusive when any one of the three circumstances therein mentioned be present. When the conclusive presumptions, then, under articles 255 and 258 conflict, does the disputable presumption in paragraph (1) of the article we are commenting on still hold? Or is the case thrown open to proof as if no presumption covers it? Or, does the conclusive presumption in article 258 govern the case, thus outweighing the disputable presumption in the paragraph of the law we are commenting on? For the position that the disputable presumption in article 259 (1) still governs, it may be said that the law is in terms absolute. But we have the curious case of a child who is owned by the husband of the second marriage who is not simllarly claimed by the husband of the first marriage since he died before the child was born. The second husband may be living when the issue of paternity comes up. As a matter of policy, the second husband should be favored. This position, however, may prejudice the innocent child. But if the case be thrown open to proof, as if no presumption covers the case, the child may be prejudiced the more, since it would be a fatherless child until it can prove who its father is. The problem is perplexing and we can do no more than define it. It would seem that, under the situation we are discussing, it would be reasonable to establish at least a disputable presumption, if not a conclusive one, in favor of the second marriage, as does paragraph (2) of the article we are commenting on.

Paragraph (2) of the article we are discussing involves a conflict of conclusive presumptions under article 255. The disputable presumption in favor of the second marriage is wise from the point of view of policy. The child is born in this marriage where it is more likely to receive the care and attention that it needs."

The New Code (Art. 257) introduced a novel feature in the law of legitimacy by proving for a presumption *prima facie* of illegitimacy of a child under the following circumstances, to wit:

> Should the wife commit adultery at or about the time of the conception of the child, but there was no physical impossibility of access between her and her husband as set forth in article 255, the child is *prima facie* presumed to be illegitimate if it appears highly improbable, for ethnic reasons, that the child is that of the husband. For the purposes of this article, the wife's adultery need not be proved in a criminal case.

Dr. Jorge Bocobo, Chairman of the Code Commission, speaking before the Joint Code Commission of the Senate and House of Representatives (XVII The Lawyers Journal, No. 1, January 31, 1952, page 49) explained the background of and reasons for this presumption of illegitimacy. And we quote Dr. Bocobo:

> "This article, Mr. Chairman, is primarily intended to take care of the special situation created by the liberation as a result of which there are so many children now or babies who are evidently indubitably the children of those G-I's both black and white. The situation created in those days was anomalous, thus making the Filipino husband unfortunately deceived by the Filipino wife because in such a time we know that the G-I became somewhat like heroes and while the husband and wife were living together, the wife went with the G-I negro or white. There are now thousands of those white or negro babies. Now, it is a matter of racial dignity for us to change the presumption in this case, in this given situation. I admit that it is exceptional to presume illegitimacy but in view of the facts surrounding the case and the whole neighborhood knows that that child of a G-I, the Filipino husband plays the most ridiculous and the most sorrowful role in the community. If it were not for this Art. 257 or whether you call the presumption of legitimacy *prima facie* only the effect to the community, to the public, is the same. They point out to the poor husband "You see, that Filipino is the legal father of the negro or white baby" and to save the honor and good name of the Filipino father there should be a *prima facie* presumption of illegitimacy because we are dealing here with an exception. If you are going to follow the general rule of presumption of legitimacy what will be the result? That baby though very black with kinky hair or very white with blond hair will automatically bear the surname of the father. And that is very humiliating to the Filipino father. Now, if the presumption is going to be legitimacy although *prima facie*, don't you see, gentlemen, that burden of proof is on the part of the legitimate children to show the illegitimacy of this negro baby? We know how hard it is to prove a negative proposition. Now, I admit that there is the biological law of recission to an ancestor. It may be that a white baby, a mestizo may appear after two or three generations because the great grandfather was a Spaniard. That may happen. In the first place it is very rare. In the second place that would be a case where those who allege the contrary to the *prima facie* presumption will present witnesses to show that the great grandfather was a Spaniard. We don't close the door, if for instance the baby is the great grandson of a Spaniard. That can be shown to rebut the *prima facie* presumption of illegitimacy. As I said this is a very exceptional situation, which is the saving of the dignity and the honor of the Filipino parentage, particularly the Filipino husband."

In order that a *prima facie* presumption of illegitimacy may arise under Article 257 (C.C.) the following requisites must be present: (a) wife committed adultery at or about the time of conception of the child, (b) there was no physical impossibility of access by the husband to the wife during the first one hundred twenty days of the three hundred preceding the birth and (c) for ethnic or racial reasons it appears highly improbable that the child is that of the husband. Thus, if a Filipina wife living with her Filipino husband delivers a negro child and there be evidence of commission of adultery by the wife during the probable period of conception the child is presumed *prima facie* illegitimate. The law does not require that the man with whom the wife committed adultery for ethnic reasons could probably be the father of the child. If the Filipina wife, therefore, in the same example, commited adultery with a negro and a baby of the white race be born, the presumption of illegitimacy will arise. In the American jurisdiction, the operation of the rule is the reverse. The presumption is in favor of legitimacy of the child which may be overcome by evidence that the husband for ethnic reasons could not probably be the father of the child. It has, therefore, been held that "the presumption of legitimacy may be overthrown by evidence that a mulatto child was born of a wife of the white race married to a husband also of the white race, since it is contrary to the laws of nature for both parents of a mulatto to be persons of the white race" (7 Am. Jur. 660; Wright vs. Hicks, 12 Ga. 155 Nolting vs. Holt, 113 Kansas 494). The presumption of illegitimacy provided for in Article 257 (C.C.) seems to be an original idea of the Code Commission without having been adopted from any foreign jurisdiction. The law as it stands makes it difficult for the child to overcome the presumption of illegitimacy because of his age, whereas, if the presumption be that of legitimacy the husband will be in an adequate position to dispute it. House Bill 1019 (See Francisco, I Civil Code of the Philippines 683) proposes to amend Article 257 (C. C.) to read as follows:

> "Art. 257. Should the wife commit adultery at or about the time of the conception of the child, but there was no physical impossibility of access between her and her husband as set forth in article 255, the presumption of legitimacy may be overcome by proof that it is highly improbable, for ethnic reasons, that the child is that of the husband. For the purposes of this article, the wife's adultery need not be proved in a criminal case."

Moreover, if the idea is to protect the husband from intrusions by strangers into the family, then the law should not limit itself to adultery of the wife during the probable period of conception; it should include rape of the wife by a stranger during such period of conception, if it turns out that for ethnic reasons it is highly improbable that the husband could be the father of the child.

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TEXT OF COURT DECISION ON FOUR STATES' SEGREGATION

WASHINGTON, May 19 — (USIS) — Following is the text of the opinion delivered Monday by Chief Justice Warren on cases involving racial segragation in schools in the states of Kansas, South Carolina, Virginia and Delaware:

"These cases come to us from the states of Kansas, South Carolina, Virginia and Delaware. They are premised in different factors and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

"In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a non-segregated basis. In each instance, they had been denied admission to schools attended by White children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the fourteenth amendment. In each of the cases, other than the Delaware case, a three-judge Federal District Court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this court in Plessy V. Ferguson 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the White schools because of their superiority to Negro schools.

"The plaintiffs contend that segregated public schools are not 'equal' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the court took jurisdiction. Argument was heard in the 1952 term and reargument was heard this term on certain questions propounded by the court.

"Reargument was largely devoted to the circumstances surrounding the adoption of the fourteenth amendment in 1868. It covered exhaustively consideration of the amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of the proponents and opponents of the amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-war amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

"An additional reason for the inconclusive nature of the amendment's history, with respect to segregated schools, is the status of public education at that time. In the south, the movement toward free common schools, supported by the general taxation, had not yet taken hold. Education of White children was largely in the hands of private groups. Education of Negroes was almost nonexistent and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public education had already advanced further in the north, but the effect of the amendment on northern states was generally ignored in the Congressional debates. Even in the north, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the fourteenth amendment relating to its intended effect on public education.

"In the first cases in this court construing the fourteenth amendment, decided shortly after its adoption, the court interpreted it as prescribing all state-imposed discriminations against the Negro race. The doctrine of 'sparate but equal' did not make its appearance in this court until 1896 in the case of Plessy V. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this court, there have been six cases involving the 'separate but equal' doctrine in the field of public education. In Comming V. Country Board of Education 175 U. S. 528 and Gong Lum V. Rice 275 U. S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by White students were denied to Negro students of the same educational qualifieations. In none of these cases was it necessary to re-axamine the doctrine to grant relief to the Negro plaintiff. And in Sweatt V. Painter, supra, the court expressly reserved decision on the question of whether Plessy V. Ferguson should be held inapplicable to public education.

"In the instant cases, that question is directly presented. Here, unlike Sweatt V. Painter, there are findings below that the Negro and White schools involved have been equalized or are being equalized with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and White schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

"In approaching this problem we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when Plessy V. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

"Today, education is perhaps the most important functions of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

"We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

"In Sweatt V. Painter, supra, in finding a segregated law school for Negroes could not provide them equal educational opportunities, this court relies in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin V. Oklahoma state regents, supra, the court, in requiring that a Negro admitted to a White graduate school be treated like all other students, again resorted to intangible considerations: '...His ability to study, to engage in discussions and exchange views with other students and in general to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs

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I

Antonio Delumen et al., Petitioners-Appellees, vs. Republic of the Philippines, Oppositor-Appellant, G. R. No. L-5552, January 28, 1954.

1. RULES OF COURT; REQUISITES FOR DECLARATORY RELIEF. — A petition for declaratory relief must be predicated on the following requisites: (1) there must be a justiciable controversy; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; and (4) the issue invoked must be ripe for judicial determination.

2. IBID; ACTION FOR DECLARATORY RELIEF IMPROPER IN THE CASE AT BAR. — In essence, the appellees merely wanted to remove all doubts in their minds as to their citizenship, but an action for declaratory judgment cannot be invoked solely to determine or try issues or to determine a moot, abstract or theoretical question, or to decide claims which are uncertain or hypothetical. (1 C. J. S., p. 1024.) And the fact that appellees' desires are thwarted by their "own doubts, or by fears of others x x x does not confer a cause of action."

Solicitor General Juan R. Liwag and *Solicitor Florencio Villamor* for appellant.

Romeo M. Escareal for appellees.

D E C I S I O N

PARAS, *C. J.*:

On October 9, 1951, Antonio, Juan and Julito, surnamed Delumen, filed a petition in the Court of First Instance of Samar, alleging that they are legitimate children of Paciencia Pua, a Filipino woman, and Mariano Delumen who was declared a Filipino citizen by the same court in an order dated August 7, 1950, and praying said court to determine whether they are Filipino citizens and to declare their corresponding rights and duties. It is further alleged in the petition that the petitioners have continuously resided in the Philippines since their birth, have considered themselves as Filipinos, had exercised the right to vote in the general elections of 1946 and 1947, and were registered voters for the elections in 1951. The Solicitor General, in behalf of the Republic of the Philippines, filed an answer alleging that the petition states no cause of action, there being no adverse party against whom the petitioners have an actual or justiciable controversy. After hearing, the Court of First Instance of Samar rendered a decision declaring the appellees to be Filipinos by birth and blood. From this decision the Solicitor General had appealed.

Under the first assignment of error, the appellant cites our decision in Hilarion G. Tolentino vs. The Board of Accountancy, et. al., G. R. No. L-3062, September 28, 1951, wherein we held that: "A petition for declaratory relief must be predicated on the following requisites: (1) there must be a justiciable controversy; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; and (4) the issue invoked must be ripe for judicial determination."

While the Solicitor General contends that a justiciable controversy is one involving "an active antagonistic assertion of a legal right on one side and a denial thereof on the other concerning a real, and not a mere theoretical question or issue (C. J. S., p. 1026)," and that in the present case " no specific person was mentioned in the petition as having or claiming an adverse interest in the matter and with whom the appellees have an actual controversy," the appellees argue that, by virtue of the answer filed by the Solicitor General opposing the petition for declaratory relief, a justiciable controversy thereby arose. We are of the opinion that appellant's contention is tenable, since there is nothing in the petition which even intimates that the alleged status of the appellees as Filipino citizens had in any instance been questioned or denied by any specific person or authority. Indeed, the petition alleges that the appellees have considered themselves and were considered by their friends and neighbors as Filipino citizens, voted in the general elections of 1946 and 1947, and were registered voters for the elections of 1951, and it is not pretended that on any of said occasions their citizenship was controverted. It is not accurate to say, as appellees do, that an actual controversy arose after the filing by the Solicitor General of an opposition to the petition, for the reason that the cause of action must be made out by the allegations of the complaint or petition, without the aid of the answer. As a matter of fact, the answer herein alleges that the petition states no cause of action. In essence, the appellees merely wanted to remove all doubts in their minds as to their citizenship, but an action for declaratory judgment cannot be invoked solely to determine or try issues or to determine a moot, abstract or theoretical question, or to decide claims which are uncertain or hypothetical. (1 C.J.S., p. 1024.) And the fact that appellees' desires are thwarted by their "own doubts, or by fears of others x x x does not confer a cause of action." (Moran, Comments on the Rules of Court, 1952 ed., Vol. II, p. 148, citing Willing vs. Chicago Auditorium Assn., 277 U. S. 274, 289, 48 Sup. Ct. 507, 509.)

In view of what has been said, it becomes unnecessary to discuss either the second contention of the Solicitor General that the trial court erred in holding that the petition for declaratory relief may be utilized to obtain a judicial pronouncement as to appellees' citizenship, or his third contention that the evidence does not support the conclusion in the appealed decision that the appellees are Filipino citizens.

Wherefore, the appealed decision is reversed and the petition dismissed without pronouncement as to costs. So ordered.

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

II

Pilar Bautista, etc. et al., Plaintiffs-Appellants, vs. Hilaria Uy Isabelo, etc., Defendant-Appellant, G. R. No. L-3007, September 29, 1953.

CONSTITUTION; PROVISION THEREOF DISQUALIFYING ALIENS FROM ACQUIRING REAL PROPERTIES IN THE PHILIPPINES. — The question is whether the defendant spouses, assuming that they were Chinese citizens and that the sale was made to both and not solely to Hilaria Uy Isabelo, are disqualified to acquire and hold the property in question in view of section 1 of Article XII of the Constitution, as construed in Krivenko vs. Register of Deeds of Manila, 44 O. G. 471. In the case of Trinidad Gonzaga de Cabauatan, et al. vs. Uy Hoo, et al., G. R. No. L-2207, decided on January 23, 1951, we already held that the Constitution was not in force during the Japanese military occupation and therefore the constitutional provision disqualifying aliens from acquiring real properties in the Philippines was not applicable and the doctrine laid down in the Krivenko case cannot be invoked in a sale that took place during said occupation. This decision was followed in the latter case of Ricamara, et al. vs. Ngo Ki alias Sin Sim, G. R. No. L-5836, decided on April 29, 1953. It results that the sale in question has to be sustained.

Quintin Paredes for defendants-appellants.

Delgado and *Flores* and *Alejandro de Santos* for plaintiffs-appellants.

D E C I S I O N

PARAS, *C. J.*:

On August 18, 1943, Pilar T. Bautista was the owner of four parcels of land, with improvements, located at the corner of Azcarraga and Ylaya Streets in the City of Manila, and more parti-

cularly described in transfer certificates of title Nos. 40007 and 40008 of the Register of Deeds of Manila. On said date she executed a deed of absolute sale in favor of the defendant Hilaria Uy Isabelo, conveying the properties to the latter in consideration of ₱150,000, ₱90,000 of which was then paid. Simultaneously a mortgage was executed by Hilaria in favor of Pilar whereby it was stipulated that the balance of ₱60,000 was to be paid within two years, with interest at 6% per annum, and as a security a first mortgage was constituted in favor of Pilar on the same properties. Although the consideration mentioned in the deed of sale was ₱150,000, there is no question that the true purchase price was ₱300,000, ₱240,000 of which was paid in Japanese military notes and the balance of ₱60,000 was secured by the aforesaid mortgage. The deed of sale and the mortgage contract were presented on August 18, 1943 in the office of the Registrar of Deeds of Manila for registration, but on August 31, Pilar withdrew said documents so as to prevent registration. However, through the filing of signed carbon copies of the instruments the necessary registration was effected and new certificates of title, Nos. 67070 and 67071, were issued in the name of Hilaria.

In the early part of September, 1943, Pilar, assisted by her husband, instituted in the Court of First Instance of Manila a complaint for annulment, subsequently amended, against Hilaria and her husband Eusebio Valdez Tankeh. On September 14, 1944. Pilar deposited in court the sum of ₱240,000, intended to cover that part of the purchase price already paid by Hilaria. On the other hand, after Pilar had previously refused to accept a PNB certified check for ₱60,000 which Hilaria tendered in payment of the balance secured by the mortgage, the said amount was deposited in court. The records and the deposits were burned during the battle for the liberation of Manila, and as the parties were unable to reconstitute the same, Pilar instituted the present action for the annulment of the deed of sale and the contract of mortgage hereinabove referred to.

It appears that the improvements on the land in question were burned, and the land was occupied by the United States Army as part of the supply depot. The payment of the rentals by the Army has been withheld until final adjudication of this case. After the Army had left, Eusebio Valdez Tankeh took possession of the property and constructed thereon a building.

The theory of the plaintiff Pilar Bautista is that the defendants Hilaria Uy Isabelo and Eusebio Valdez Tankeh were Chinese citizens and accordingly disqualified to purchase real properties in this country, and that the consent of Pilar to the sale was obtained through duress and misrepresentation. On the other hand, it is contended for the defendants that Hilaria was and is a Filipino citizen; that, as appears in the deed, she was the sole purchaser; and that the deal was voluntary.

After trial the Court of First Instance of Manila rendered a decision finding that the sale was in fact to the defendant spouses who were Chinese citizens and therefore disqualified to acquire real property in the Philippines; that the sale was obtained through misrepresentation on the part of the defendants, in that Pilar was made to believe, contrary to what is actually recited in the contracts, that the balance of ₱60,000 was to be paid after two years, without interest, and she could continue occupying the portion of the improvements used by her as residence without any rental, and collecting for herself the rentals for the remainder of said improvements. The dispositive part of the decision reads as follows:

> "IN VIEW OF ALL FOREGOING CONSIDERATIONS, the Court hereby declares the deed of sale, Exhibit A, and the deed of mortgage, Exhibit B, null and void, and of no legal effect; and that the consignation in Court of the sum of ₱240,000.00 in Japanese Military notes was legally made by the plaintiff, and therefore, she has fully returned the part of the purchase price of the property received by her from the defendants. The Court also hereby orders the Register of Deeds of Manila to cancel Transfer Certificates of Titles Nos. 67070 and 67071 issued in the name of defendant Hilaria Uy Isabelo, and to issue new ones in the name of plaintiff Pilar T. Bautista. The plaintiff is hereby absolved from the defendants' counterclaim, the same not having been sufficiently proven. No damages are awarded to said plaintiff; and no special pronouncement is made as to costs."

From this decision both the plaintiff and the defendants have appealed, the plaintiffs insofar as the decision fails to declare that they are the owners of the improvements erected by Eusebio Valdez Tankeh, to order the defendants to account for the rentals collected by them, and to appoint a receiver; and the defendants insofar as the deed of sale and mortgage contract are annulled.

While the trial court overruled the contention of the plaintiffs that there was duress on the part of the defendants, consisting in the alleged fact that Pilar was forced to accede to the sale for fear that the defendants would avail themselves of their influence with the Japanese if Pilar had refused, it sustained the contention that there was misrepresentation in the sense already above indicated, namely, that the balance of ₱60,000.00 was to be paid after two years without interest, instead of within two years with interest, Pilar having the right to continue residing in the premises and collecting the rentals. We have examined the evidence thoroughly and found that its preponderance weighs on the side of the defendants. Pilar Bautista is admittedly an intelligent woman with business experience, and it is fair to assume that she would not sign the deed of sale covering her property of considerable size and value without ascertaining its terms and conditions. Indeed, there is enough evidence on record to show that Pilar not only read the document herself but called her daughter to read it aloud, and that even before the signing of the contract in the office of the Register of Deeds of Manila, she again read the document. Of course she denies having read the deed, but this assertion seems to be more unlikely than the theory of the defendants, considering, as already stated, her intelligence and business experience. At any rate, as aptly pointed out by the defendants, the alleged misrepresentation could not have been decisive in the execution of the deed of sale, the material and important factor undoubtedly being the adequacy of the price offered and paid; and there is no controversy on the latter point.

This leads us to the question whether the defendant spouses, assuming that they were Chinese citizens and that the sale was made to both and not solely to Hilaria Uy Isabelo, are disqualified to acquire and hold the property in question in view of section 1 of Article XII of the Constitution, as construed in Krivenko vs. Register of Deeds of Manila, 44 O. G. 471. In the case of Trinidad Gonzaga de Cabauatan, et al. vs. Uy Hoo, et al., G. R. No. L-2207, decided on January 23, 1951, we already held that the Constitution was not in force during the Japanese military occupation and therefore the constitutional provision disqualifying aliens from acquiring real properties in the Philippines was not applicable and the doctrine laid down in the Krivenko case cannot be invoked in a sale that took place during said occupation. This decision was followed in the latter case of Ricamar, et al. vs. Ngo Ki alias Sin Sim, G. R. No. L-5836, decided on April 29, 1953. It results that the sale in question has to be sustained.

Moreover, as also intimated in our decision in Gonzaga de Cabauatan vs. Uy Hoo, et al., even assuming that the constitutional prohibition and the doctrine in the Krivenko case may be invoked by the herein plaintiffs, as both parties were in *pari delicto*, knowing that what they did was in violation of the Constitution, the law will maintain them in their actual situation, in the absence of any statute to the contrary. Another consideration in favor of the defendant Hilaria is that, after the death of her Chinese husband on April 3, 1948, she had admittedly been repatriated and is now beyond question a Filipino citizen.

Wherefore, the appealed decision is reversed and the plaintiffs' ccmplaint dismissed, and the plaintiffs are ordered to execute, within sixty days from the finality of this decision, the necessary cancellation of the mortgage in question.

Bengzon, Tuason, Montemayor, Jugo and Bautista Angelo, J. J., concur.

Mr. Justice Labrador took no part.

Mr. Justice Pablo, dissenting.

REYES, *J.*, concurring:

I concur in the result, it appearing that Hilaria Uy Isabelo,

the buyer of the property in question, though married to a Chinese at the time of the sale, subsequently recovered her Filipino citizenship after the death of her husband.

III

Philippine International Fair, Inc., et al., Petitioners vs. Fidel Ibañez, et al., Respondents, G. R. No. L-6448, February 25, 1954.

1. CERTIORARI: INTERLOCUTORY ORDER.—Although an order denying a motion to dismiss a complaint on the ground of lack of jurisdiction is interlocutory, still if it is clear that the trial court lacks jurisdiction a higher court of competent jurisdiction would be justified in issuing a writ of certiorari and prohibition, for the proceedings in the court below would be a nullity and waste of time.

2. IBID; IBID.—In the absence of a clear showing that the respondent court lacks jurisdiction over the case which involves an actionable wrong or a tortious act, the time-honored rule that from an interlocutory order an appeal does not lie must be adhered to. If from an interlocutory order an appeal does not lie, an extraordinary legal remedy cannot be resorted to have the order reviewed by a higher court.

Victoriano Yamzon for petitioners.
Cornelio T. Villareal, Antonio L. Gregorio and *P. P. Gallardo* for respondents.

DECISION

PADILLA, *J.*:

This is a petition for a writ of certiorari and prohibition. As prayed for a writ of preliminary injunction was issued.

The facts pleaded in the petition are: The Philippines International Fair, Inc. announced and published through daily newspapers the holding of an essay contest entitled "500 Years of Philippine Progress" under the rules which read as follows:

1. The subject of this contest is: "500 Years of Philippine Progress."

2. The length of the essay should be not less than 800 words nor more than 1,000 words.

3. The essay must be a formal type and should be historically correct.

4. The contest is open to everybody, regardless of sex, age, and religion—except to members of the staff of the Philippines International Fair, Inc.

5. The contest opens July 1, 1952, and closes August 30, 1952.

6. Each of the 10 Manila daily newspapers will offer cash prize of ₱200 in the name of the Philippines International Fair, Inc. and a certificate of merit to the first prize winners.

7. Each newspaper running the contest will select and appoint a Jury to determine the winning essay.

8. All first prize winners in the different newspapers are automatically eligible to the Grand Prize of ₱500 and a diploma to be presented by the Philippines International Fair, Inc.

9. The Director General of the Philippines International Fair will select and appoint a Jury of three members, including the Chairman, to determine the winner of the Grand Prize.

10. The grand prize winning essay becomes the property of the Fair, and will be printed in the Official Program of the 1953 Philippines International Fair.

11. Newspaper editors may formulate their own rules and regulations provided these do not conflict with those of the Fair. (Exhibit A.)

Ten newspapers responded to the call and organized preliminary contests. The newspapers certified their respective winners to the Director General of the Philippines International Fair, Inc., who appointed the judges to pass upon and examine the various essays certified to by the newspapers as the winning essays in the preliminary contests. After study of the various essays submitted the board of judges adjudged Enrique Fernandez Lumba, representing *La Opinion*, as winner of the final contest and transmitted its findings to the Director General of the Philippines International Fair, Inc. Upon learning of the result of the contest and the award made by the board of judges, Ponciano B. Jacinto filed a complaint in the Court of First Instance of Manila (civil case No. 18255) where the validity of the award by the board of judges was drawn into question and the respondent court issued a writ of preliminary injunction upon the filing of a bond in the sum of ₱1,000.

The Philippines International Fair, Inc., Luis Montilla, Federico Mangahas and Juan Collas answered the complaint and set up these special defenses: (1) that the subject matter complained of is not of such a character as would allow legally the Court to intervene and that for that reason the Court of First Instance of Manila has no jurisdiction over the subject matter of the action and (2) that the complaint states no cause of action. Simeon G. del Rosario filed a petition for leave to intervene and filed his complaint in intervention. The defendants set up in their answer to the complaint in intervention the same special defenses. The plaintiff and intervenor asked that the case be set for a preliminary hearing on the legal issues raised in the first special defense to the complaints, the defendants invoking the rule laid down in the case of Ramon Felipe, Sr. vs. Hon. Jose N. Leuterio, G. R. No. L-4606, 30 May 1952. After hearing, the respondent court ruled that it had jurisdiction of the case. A motion for reconsideration was denied. The writ of preliminary injunction was dissolved upon the filing by the defendants of a counter bond in the sum of ₱5,000 to answer for any damage which plaintiff Ponciano B. Jacinto and intervenor Simeon G. del Rosario might suffer by reason of the continuance of the deefndants' actions complained of. The hearing on the merits of the case was set for 29 January 1953 at 8:30 a.m., of which the parties were duly notified.

The petitioners, defendants in the case pending in the respondent court, contend that the jurisdiction attempted to be exercised by the respondent court is contrary to law. And as there is no appeal or any other plain, speedy and adequate remedy in the ordinary course of law to prevent the respondent court from proceeding with the trial of the case, they pray for a writ of preliminary injunction and after hearing for a writ of certiorari and prohibition to enjoin the respondent court from trying or hearing civil case No. 18255.

In their answer the respondents allege and claim that in the essay contest in question there was an offer and acceptance which constitute the consent or meeting of the minds of the contracting parties; there was the essay contest, an object certain or the subject matter of the contract; and the prize of ₱500, a diploma to be presented by the Philippines International Fair, Inc. and the printing of the winning essay in the official program of the 1953 Philippines International Fair were the cause or consideration of the contract; that the provisions or rules of the essay contest were not complied with, because the winning essay was written in Spanish and it contained 1,864 words, whereas the essay chosen by the committee as winning was written in English and contained less than 1,000 words; that in the Felipe-Leuterio case the attempt to revise the award was made because one of the judges admitted he had committed a mistake in grading, whereas in this case the board of judges made the award in violation of the rules promulgated for the contest; that in the Felipe-Leuterio case it was a mere error, whereas in this case it was a commission of a clear, palpable and manifest wrong, in clear abuse of authority and in gross violation of the rights of respondent Ponciano B. Jacinto, who was the first prize winner in three newspapers, namely, *Bagong Buhay*, Evening News and Star Reporter; and that a wrongful award was made in this case.

Although an order denying a motion to dismiss a complaint on the ground of lack of jurisdiction is interlocutory, still if it is clear that the trial court lacks jurisdiction a higher court of competent jurisdiction would be justified in issuing a writ of certiorari and prohibition, for the proceedings in the court below would be a nullity and waste of time. But the facts alleged in the complaint filed in the respondent court, if proved, constitute an actionable wrong or a tortious act committed by the respondent board of judges. In the absence of a clear showing that the respondent court lacks jurisdiction over the case which involves an actionable wrong or a tortious act, the time-honored rule that from an interlocutory order

an appeal does not lie must be adhered to. If from an interlocutory order an appeal does not lie, an extraordinary legal remedy cannot be resorted to have the order reviewed by a higher court.

The petition for a writ of certiorari and prohibition is denied and the writ of preliminary injunction heretofore issued discharged, without pronouncement as to costs.

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

IV

Ruperta Camara et als., Plaintiffs-Appellants vs. Celestino Aguilar et als., Defendants-Appellees, G. R. No. L-6337, March 12, 1954.

JUDGMENT; RES ADJUDICATA. — A brought an action for ejectment against N, which involved a parcel of land allegedly possessed in good faith by RC, NC, ZC, AC, SC, & RC, who intervened in the case for ejectment against N. The Court rendered judgment declaring N owner of the land in question and ordered defendants and intervenors to pay damages. Subsequently, RC, NC, ZC, SC & RC filed another action seeking to recover damages for the money they spent in cultivating the land which was awarded to A, and for the fruits which they failed to harvest therefrom or their value. *HELD*: (1) This action is barred by the prior judgment because there is identity of parties, the same subject matter and the same cause of action, as provided for in section 45, Rule 39, the herein plaintiffs having intervened and joined the defendants in the former case, the subject matter involved in both cases being the same parcel of land and the cause of action being ejectment.

(2) The fact that damages were awarded to the then plaintiff against the then defendants and intervenors in the former case negatives the latter's right to claim damages in the present case, for such award is inconsistent with the claim that they were in possession of the parcel of land in good faith and are entitled to recover what they spent for clearing, cultivating the parcel of land and the fruits they failed to reap or harvest therein or their value.

(3) The contention that a counterclaim for expenses incurred in clearing and cultivating the parcel of land and planting coconut and other fruit-bearing trees therein could not have been set up in the former case because that would have been inconsistent with or would have weakened the claim that they were entitled to the parcel of land, is without merit, because "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one cause of action or defense or in separate causes of action or defenses." Hence, the plaintiffs herein and intervenors in the former case could have set up the claim that they were entitled to the parcel of land and alternatively that, assuming (hypothetically) that they were not entitled to the parcel of land, at least they were entitled as possessors in good faith to the coconut and other fruit-bearing trees planted by them in the parcel of land and their fruits or their value.

H. B. Arandia for appellants.
Alfredo Bonus for appellees.

DECISION

PADILLA, *J.*:

This is an action to recover the sum of ₱300 for clearing a parcel of land described in the complaint, and of ₱750 for its cultivation, caring and preservation of the coconut trees and other fruit-bearing trees planted therein. The plaintiffs further pray that the defendants jointly and severally be ordered to pay them the sum of ₱10,100 representing the value of the coconut trees and other fruit-bearing trees planted in the parcel of land or that they be declared entitled to pay to the defendants the reasonable value of the parcel of land.

The plaintiffs allege that they are all of age except Rebeca Camara for whom her sister Ruperta was appointed guardian *ad litem;* that they are the children of the late Severino Camara who since 1915 had been in continuous and uninterrupted possession of a parcel of land situated in the barrio of Balubad, municipality of Atimonan, province of Quezon, formerly Tayabas, containing an area of 5 hectares, more or less, and bounded on the North by the land of Catalino Velasco, on the East by the land of Jose Camara 1.o, on the South by the lands of Santiago Villamorel and Antonio Saniel, and on the West by the land of Antonio Marquez; that the parcel of land was inherited by Severino Camara from his parents Paulino Camara and Modesta Villamorel; that the late Severino Camara and his wife Vicenta Nera represented to their children, the plaintiffs herein, that said parcel of land belonged exclusively to him; that the plaintiffs and their husbands helped cultivate and improve the parcel of land during the time Severino Camara was in possession thereof and spent the amount sought to be recovered by them for planting 1,500 coconut and other fruit-bearing trees; that after the death of Severino Camara the plaintiffs became the true, exclusive and absolute owner of the parcel of land and improvements thereon; that Fausto Aguilar brought an action for ejectment (*reivindicacion*) against Vicenta Nera involving the parcel of land described above (civil case No. 4835) and on 26 January 1949 the Court of First Instance rendered judgment in said case, the dispositive part of which reads as follows:

> IN VIEW OF THE FOREGOING CONSIDERATIONS, the Court hereby declares the herein plaintiff to be the absolute owner of the land in question (the above described parcel of land) which is more particularly described in the complaint and Exhibits "A" and "B," and orders the herein defendant and intervenors to immediately restore possession of said land to the plaintiff, to pay said plaintiff the sum of ₱1,200 which is the value of the harvest of the products on said land obtained by them from 1941 up to the filing of this complaint, and to pay the costs of the proceeding. For lack of merits, the counterclaim and the third party claim are hereby dismissed;

that on 21 October 1950 the Court of Appeals rendered judgment in said case, the dispositive part of which is as follows:

> Upon the question of damages we agree with the trial court that the preponderance of the evidence shows that the property in question may yield, at most, ₱200 per year, but appellee's right to collect damages on that account should start only from the date of the filing of the complaint on December 24, 1947, or from the year 1948.
>
> Upon all the foregoing, we are of the opinion, and so hold that the trial court did not commit the errors assigned in appellants' brief.
>
> WHEREFORE, modified as above indicated, the appealed judgment is hereby affirmed, with costs;

that they together with their deceased father Severino Camara were possessors in good faith of the parcel of land; that for that reason they are entitled to be reimbursed and paid by the defendants for the trees they planted in the parcel of land; that the defendant Celestino Aguilar is the son of the late Fausto Aguilar, plaintiff in civil case No. 4835 referred to, and the other defendant, Purificacion Villamiel, is the widow of the late Isidro Aguilar, another son of the late Fausto Aguilar and the three minor defendants are children of the deceased Isidro Aguilar and his wife Purificacion Villamiel who represents them as their guardian *ad litem.*

A motion to dismiss the complaint was filed on the ground that the judgment rendered in civil case No. 4835, which was affirmed by the Court of Appeals with a modification only as above stated, bars the bringing of the present action, for the plaintiffs herein were intervenors in the former case (No. 4835).

The Court dismissed the complaint on the ground that the action brought in this case had been adjudged in civil case No. 4835 and that the complaint states no cause of action. Hence the appeal.

The appellants contend that the question of damages was not passed upon in the former case. The court below, however, held that this action is barred by the prior judgment because there is identity of parties, the same subject matter and the same cause of action, as provided for in section 45, Rule 39, the herein plain-

tiffs having intervened and joined the defendants in the former case, the subject matter involved in both cases being the same parcel of land and the cause of action being ejectment (*reivindicacion*).

The fact that damages were awarded to the then plaintiff against the then defendants and intervenors negatives the latter's right to claim damages in the present case, for such award is inconsistent with the claim that they were in possession of the parcel of land in good faith and are entitled to recover what they spent for clearing, cultivating and planting the parcel of land and the fruits which they failed to reap or harvest therein or their value.

The contention that a counterclaim for expenses incurred in clearing and cultivating the parcel of land and planting coconut and other fruit-bearing trees therein could not have been set up in the former case because that would have been inconsistent with or would have weakened the claim that they were entitled to the parcel of land, is without merit, because "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one cause of action or defense or in separate causes of action or defenses." (1) Hence, the plaintiffs herein and intervenors in the former case could have set up the claim that they were entitled to the parcel of land and alternatively that, assuming (hypothetically) that they were not entitled to the parcel of land, at least they were entitled as possessors in good faith to the coconut and other fruit-bearing trees planted by them in the parcel of land and their fruits or their value.

The order appealed from is affirmed, wtih costs against the appellants.

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

(1) Sec. 9, Rule 15.

V

Pabilonia et al., Petitioners, vs. Santiago et al., Respondents, G. R. No. L-5110, July 29, 1953.

RULES OF COURT; SPECIAL ADMINISTRATOR; AUTHORITY TO SELL PROPERTY TO RAISE MONEY TO PAY DEBTS.—While Sections 1 and 2 of Rule 81 and Section 8 of Rule 87 specify the cases in which a special administrator shall be appointed and the duties which they in general are to perform, Section 2 of Rule 81 expressly authoritizes him to sell "such perishable and other property as the court orders sold." Further, debts which a special administrator may not be sued for may be settled and satisfied by him if "expressly ordered by the court to do so." (Golingco vs. Calleja, et al., 69 Phil. 446.) If the court may authorize a special administrator to pay debts, it seems to follow that it may authorize him to sell property to raise the money to pay the debts.

Potenciano A. Magtibay for petitioners.
G. N. Trinidad for respondents.

DECISION

TUASON, *J.*:

This is an original petition to compel the Hon. Vicente Santiago, Judge of the Court of First Instance of Quezon, to approve and certify petitioners' record on appeal filed in special proceeding No. 2387 of that court. The proposed appeal is from an order entered in those proceedings on June 20, 1951, whereby Panfilo Nagar, as judicial administrator, was "ordered to execute another deed of sale of the property referred to and described in transfer certificate of title No. 2992 in favor of Antonia Abas under the terms and conditions which appear in the amended deed of sale of January 30, 1936 *mutatis mutandis*, subject to the approval of the Court." The respondent judge held that the sale mentioned in his order was final and execution of the deed ministerial on the part of the court.

To properly understand the status of the sale being impugned it is necessary to recite the salient circumstances under which it was made.

This sale dates as far back as the inception of the above-mentioned special proceedings in 1953. It was executed in due form by and at the behest of Pedro Pabilonia as special administrator, who was the surviving spouse of the deceased and father of the present petitioners, both of whom were then minors. Initiator of those proceedings, Pabilonia not only asked for authority to sell the questioned property but named the price of sale (P2,600) and the person to whom the sale was to be made, Antonia Abas, aunt of his deceased wife. Regarding the necessity for the sale, Pabilonia alleged that the property was mortgaged to the Philippine National Bank; that the mortgage was overdue and the mortgagee was threatening to foreclose it; that on account of the prevailing financial depression the obligation could not be met with the income derived from the land, which was the only asset of the estate; etc., etc.

Pabilonia's recommendation was granted without any modification following which a deed was executed by him in strict accordance with his recommendation and the court's order. But the court thought, for the first time, when the deed of sale was submitted for confirmation, that a regular administrator and not a special administrator like Pabilonia should sign the instrument if the same was to be valid. Consequently, on February 20, 1936, it withheld its approval of the said sale "por ahora" pending the "conversion" of the special administrator into a regular one. To this end, presumably, the court directed Pabilonia to apply for appointment as regular administrator.

In the meanwhile, Pabilonia delivered the possession of the land to the buyer, who since then has been paying the mortgage debt to the Philippine National Bank under a new arrangement reached with the creditor. For all the records would show, the mortgage may have been paid off completely by now.

For the reason, so it seems, that the buyer had already entered upon the possession of the land, novated the contract of mortgage with the Bank, and there was no other property to administer and no other obligation to settle, Pabilonia and Abas lost interest in the appointment of a regular administrator. As a result of their inaction the court, now presided by another judge, dismissed the proceedings on June 20, 1939, "por falta de gestion" by the parties.

Nevertheless, on May 28, 1947, Pabilonia and Antonia Abas made a joint motion for the reinstatement of the *expediente*. That motion was promptly granted, whereupon Pabilonia asked that he be appointed regular administrator to carry out the court's order of January 1936, and he was so appointed on June 6, 1947. But for reasons which can be guessed in the light of his subsequent actions, Pabilonia refused to qualify and proposed a brother-in-law, Leon Abrigo, in his place. Antonia Abas was not agreeable to Abrigo's appointment and nominated Panfilo Nagar.

Now entered the present petitioners, Pabilonia's children who had become of age. With their father they opposed Nagar's appointment, insisting on the appointment of their candidate, branded the sale to Abas as invalid, and sought to recover the possession of the property from the buyer. After considerable wrangling between the parties the court overruled the petitioners' objections and denied their prayers, and on June 9, 1950, issued to Nagar letters of administration "con todos los derechos y obligaciones anexos al cargo." The herein petitioners took steps to appeal from that order, but later gave up the idea.

On January 30, 1951, after the petitioners' appeal was withdrawn, Nagar filed a motion praying that the deed executed by Pabilonia as special administrator on January 30, 1936, be approved or, if this be not possible, that he be authorized to execute a new document with the same terms. It was upon this motion that the order quoted at the outset of this decision and from which petitioners now seek to appeal was made.

It will be seen from the foregoing narration of facts that the sale executed by Pabilonia on January 30, 1936, has never been disapproved, set aside, or modified. Upon the contrary, it was assumed to be valid in every respect except that it was deemed that a regular administrator should have made the sale. All these long years the appointment of such administrator was distinctly understood by the parties and the court to be the only unfinished matter to be attended to, and Panfilo Nagar's appointment and the court's order for him to execute a new deed exactly like that signed by the former administrator were nothing more than in furtherance of that

understanding. Except, therefore, for that appointment and the court's final approval, and as far as the estate was concerned, the right of the buyer was complete, absolute and incontestable. Not only was the sale made in pursuance of the special administrator's motion, but the parties have fully complied with its terms. Under the circumstances, only want of any of the essential elements of a contract can give the petitioners the right to stop the court's confirmation of the transaction. The petitioners have not submitted a copy of the record on appeal, nor other supporting papers except excerpts thereof or of some of them, and we are not informed of the exact basis of their objection to the sale.

As a matter of fact, we incline to the opinion that the conveyance made by the special administrator was valid and effective and that there was no necessity of appointing a regular administrator to ratify it or execute a new deed. While Sections 1 and 2 of Rule 81 and Section 8 of Rule 87 specify the cases in which a special administrator shall be appointed and the duties which they in general are to perform, Section 2 of Rule 81 expressly authorizes him to sell "such perishable and other property as the court orders sold." Further, debts which a special administrator may not be sued for may be settled and satisfied by him if "expressly ordered by the court to do so." (Golingco vs. Calleja, et al., 69 Phil. 446.) If the court may authorize a special administrator to pay debts, it seems to follow that it may authorize him to sell property to raise the money to pay the debts. Here there was a debt to pay and there was an order to sell the only property of the intestate for the purpose of paying that debt.

The court finds no merit in the application and, accordingly, denies it, with costs against the petitioners.

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

VI

Manila Trading and Supply Co., Petitioner-Appellant, vs. Register of Deeds of Manila, Respondent-Appellee, G. R. No. L-5623, Jan. 28, 1954.

LAND REGISTRATION; CERTIFICATE OF TITLE; ANNOTATION THEREON OF OWNERSHIP OF IMPROVEMENTS; CASE AT BAR. — The Manila Trading and Supply Co., a corporation, is the lessee of three parcels of land in the Port Area, Manila, belonging to the Philippine Government, such lease having been recorded on the Government's Certificate of Title No. 4939. The structures built by said company upon the lots were destroyed during the last war; but after liberation, it erected new buildings that cost over a million pesos. Thereafter, on April 12, 1951 it requested the Manila Court of First Instance to require the Register of Deeds to enter and annotate, on Certificate of Title No. 4948, its Declaration of Property Ownership of such valuable improvements. The court granted the request. Then the Register of Deeds demanded payment of ₱1308.00 for the assurance fund pursuant to section 99 of Act No. 496. The company refused to pay, and applied to the court for relief thru a petition-consultation. The attorney for appellant insists here that section 99 is inapplicable, because the matter is not original registration of "land," nor entry of a certificate showing title as registered owners in heirs or devisees. The Legislature knew, he argues, that "buildings" and "improvements" are not "land." *Held*: Upon examination of the whole Land Registration Act we are satisfied that "land" as used in section 99 includes buildings. For one thing the same section uses "real estate" as synonymous with land. And buildings are "real estate" (Sec. 334, Civil Code; Art. 415, New Civil Code; Republica de Filipinas v. Ceniza, L-4169, Dec. 17, 1951). For another, although entitled "*Land* Registration," the Act (496) permits the registration of interests therein, improvements, and buildings. Of course the building may not be registered separately and independently from the parcel on which it is constructed, as aptly observed by Chief Justice Arellano in 1909. But "buildings" are registerable just the same under the *Land* Registration System. It seems clear that having expressly permitted in its initial sections (sec. 2) the registration of title "to land or buildings or an interest therein" and declared that the proceedings shall be *in rem* against the land and the buildings and improvements thereon, the statute (Act 496) used in subsequent provisions the word "land" as a short term equivalent "to land or buildings or improvements" to avoid frequent repetition of "buildings and improvements." Unless, of course, a different interpretation is required by the intent or the terms of the provision itself, which is not the case of section 99. On the contrary, to consider buildings as within its range would be entirely in line with its purpose because as rightly pointed out by His Honor, it would be unfair for petitioner to enjoy the protection of the assurance fund even if it refuses to contribute to its maintenance.

Ross, Selph, Carrascoso and *Janda* for petitioner-appellant. *Solicitor General Juan R. Liwag* and *Solicitor Jose G. Bautista* for appellee.

DECISION

BENGZON, *J.*:

The issue for adjudication is whether the owner of building erected on premises leased from another person is required to contribute to the assurance fund when he petitions for annotation of his ownership on the corresponding certificate of Torrens title.

The facts are simple: The Manila Trading and Supply Co., a corporation, is the lessee of three parcels of land in the Port Area, Manila, belonging to the Philippine Government, such lease having been recorded on the Government's Certificate of Title No. 4939. The structures built by said company upon the lots were destroyed during the last war; but after liberation, it erected new buildings that cost over a million pesos. Thereafter, on April 12, 1951 it requested the Manila Court of First Instance to require the Register of Deeds to enter and annotate, on Certificate of Title No. 4948, its Declaration of Property Ownership of such valuable improvements. The court granted the request [1]. Then the Register of Deeds demanded payment of ₱1308.00 for the assurance fund pursuant to section 99 of Act No. 496. The company refused to pay, and applied to the court for relief thru a petition-consultation. The Register of Deeds was upheld. Hence this appeal.

Section 99 provides in part:

"Upon the original registration of land under this Act, and also upon the entry of a certificate showing title as registered owners in heirs or devises, there shall be paid to the register of deeds one-tenth of one percentum of the assessed value of the real estate on the basis of the last assessment for municipal taxation, as an assurance fund. x x x"

The Honorable Ramon R. San Jose, Judge, approving the Register's action explained:

"x x x considerando que la anotacion de la citada orden, juntamente con el expresado affidavit, en el Certificado de Titulo No. 4938 de Gobierno de Filipinas, crea un interes en el terreno descrito en el referido titulo sobre todo en el presente caso en que consta inscrito un contrato de arrendamiento del terreno entre el Gobierno y la dueña de los edificios, este Juzgado es de opinion que la cuestion discutida cae de lleno bajo las disposiciones legales que hablan no solamente de terreno, sino tambien de 'real estate' y de 'interes' en el terreno y dan proteccion a los que, sin negligencia suya, pierdan irreivindicablemente su derecho, interes o participacion, en el terreno y/o las mejoras existentes en el mismo. Es injusto que la recurrente tenga la proteccion de sus edificios bajo el fondo de aseguro y no haga su contribuccion al mismo. x x x."

The attorney for appellant insists here that section 99 is inapplicable, because the matter is not original registration of "land," nor entry of a certificate showing title as registered owners in heirs or devisees. The Legislature knew, he argues, that "buildings" and

(1) The petition is permissible under sec. 112 Act 496 and protects the rights of lessee (Atkins Kroll & Co. v. Domingo, 46 Phil. 362)

"improvements" are not "land."

Upon examination of the whole Land Registration Act we are satisfied that "land" as used in section 99 includes buildings. For one thing the same section uses "real estate" as synonymous with land. And buildings are "real estate" (See. 334, Civil Code, Art. 415, New Civil Code, Republica de Filipinas v. Ceniza, L-4169, Dec. 17, 1951).[2] For another, although entitled "*Land* Registration," the Act (496) permits the registration of interests therein, improvements, and buildings. Of course the building may not be registered separately and independently from the parcel on which it is constructed, as aptly observed by Chief Justice Arellano in 1909.[3] But "buildings" are registerable just the same under the *Land* Registration System. It seems clear that having expressly permitted in its initial sections (sec. 2) the registration of title "to land or buildings or an interest therein" and declared that the proceedings shall be *in rem* against the land and the buidings and improvements thereon, the statute (Act 496) used in subsequent provisions the word "land" as a short term equivalent "to land or buildings or improvements"[4]. Unless, of course, a different interpretation is required by the intent or the terms of the provision itself, which is not the case of section 99. On the contrary, to consider buildings as within its range would be entirely in line with its purpose because as rightly pointed out by His Honor, it would be unfair for petitioner to enjoy the protection of the assurance fund[5] even as it refuses to contribute to its maintenance.

Wherefore, the appealed order will be affirmed, with costs.

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

....I reserve my vote — *Marcelino R. Montemayor.*

(2) In American Law the term "land" is sufficiently broad to include buildings of a permanent character (Chicago, I. & K.R. Co. v. Knuffke, 13 P. 582, 583, 36 Kan. 367 Lightfood v. Grove, 52 Tenn. (5 Heisk) 473, 477; People v. Barker, 47 N. E. 46, 47, 153 N. Y. 93; Crawford v. Hathaway, Neb. 93 N. W. 781, c783, citing McGee Irrigating Ditch Co. v. Hudson, Tex. 22 S. W. 967; In re City of New York, 76 N. E. 18, 19, 183 N. Y. 245; Cincinnati College v. Yeatman, 8 Ohio St. 276, 282).

(3) Manila Building & Loan Association, 13 Phil. 575.

(4) See for instance Secs. 37, 38, 39, 46 etc.

(5) And the land registration system. Atkins Kroll v. Domingo, supra.

VII

People of the Philippines, Plaintiff-Appellee vs. Maximo Pacheco, alias Emong, alias Guemo, Defendant-Appellant, G. R. No. L-4570, July 31, 1953.

1. CRIMINAL LAW; TREASON; VENUE. — It is common knowledge that when the Government found it was no longer necessary to maintain one People's Court for the whole Philippines to try treason indictments, the Congress abolished that Court and directed that treason cases pending before it shall be heard by the respective courts of first instance. There is nothing to indicate congressional intention to disturb the usual rules on jurisdiction or venue of courts of first instance obtaining before the creation of the People's Court.

2. IBID; IBID; IBID; TREASON A CONTINUOUS OFFENSE. — The information alleged in substance that Pacheco, being a Filipino citizen, willfully aided the Japanese in two instances, to wit: (1) the arrest, maltreatment and shooting of Ceferino Rivera on January 2, 1945 in the Municipality of Polo, Bulacan, and (2) the arrest and torture in Manila, in February 1945, of Judge Eugenio Angeles, whom the accused had pointed to the Japanese as a guerrilla major of Polo, Bulacan.

At the opening of the trial, counsel for the defense questioned the jurisdiction of the Bulacan court to take cognizance of the second count, inasmuch as it referred to acts which occurred in Manila. *Held*: The crime of treason may be committed "by executing, either a single or several intentional overt acts, different or similar but distinct and for that reason" it may be considered one single continuous offense. (Guinto v. Veluz 44 O. G. 909). It may therefore be prosecuted in any province wherein some of the essential ingredients thereof occurred. (Sec. 9 Rule 106. (U. S. vs. Santiago 27 Phil. 408; U. S. vs. Cardell 23 Phil. 207).

To uphold appellant's contention would be to permit another prosecution against him in the Court of First Instance of Manila (See Guinto vs. Veluz supra.)

Cardenas and *Casal* for appellant.

Solicitor General Pompeyo Diaz and *Solicitor Pacifico P. de Castro* for appellee.

DECISION

BENGZON, *J.*:

In the year 1950, Maximo Pacheco was tried for treason in the court of first instance of Bulacan, the amended information alleging, in the first count, acts performed in Polo, Bulacan and in the second, acts in the City of Manila.

The Honorable Manuel P. Barcelona, Judge, in a decision dated January 10, 1951, found him guilty as charged, and sentenced him to be imprisoned for life, to pay a fine of ₱10,000 and to indemnify the heirs of Ceferino Rivera in the amount of ₱6,000.60.

The accused appealed in due time. His printed brief assigns four errors that raise two principal issues: (1) jurisdiction of the court to try the second count and (2) credibility of the witnesses.

The information alleged in substance that Pacheco, being a Filipino citizen, willfully aided the Japanese in two instances, to wit: (1) the arrest, maltreatment and shooting of Ceferino Rivera on January 2, 1945 in the Municipality of Polo, Bulacan, and (2) the arrest and torture in Manila, in February 1945, of Judge Eugenio Angeles, whom the accused had pointed to the Japanese as a guerrilla major of Polo, Bulacan.

At the opening of the trial, counsel for the defense questioned the jurisdiction of the Bulacan court to take cognizance of the second count, inasmuch as it referred to acts which occurred in Manila. The Judge overruled the contention, adverting to its orders in previous cases on the same issue. We do not find in this record the reasons of the trial judge. Very probably, however, they refer to the same theory advanced by the People in this appeal relative to one continuous offense consisting of several acts occurring in different provinces, offense which may under the principles governing venue be prosecuted in any province wherein any material ingredient of the offense is shown to have been committed.

The appellant however cites Republic Act No. 311 that in dissolving the People's Court ordered all cases then pending therein to be "transferred to, and tried by, the respective Courts of First Instance of the provinces or cities where the offenses are alleged to have been committed."

It is common knowledge that when the Government found it was no longer necessary to maintain one People's Court for the whole Philippines to try treason indictments, the Congress abolished that Court and directed that treason cases pending before it shall be heard by the respective courts of first instance. There is nothing to indicate congressional intention to disturb the usual rules on jurisdiction or venue of courts of first instance obtaining before the creation of the People's Court. Under the rules, the trial court's jurisdiction may be and should be upheld in this case.

The crime of treason may be committed "by executing, either a single or several intentional overt acts, different or similar but distinct and for that reason" it may be considered one single continuous offense. (Guinto v. Veluz 44 O. G. 909). It may therefore be prosecuted in any province wherein some of the essential ingredients thereof occurred. (Sec. 9 Rule 106). (U. S. v. Santiago 27 Phil. 408; U. S. v. Cardell 23 Phil. 207).

To uphold appellant's contention would be to permit another prosecution against him in the Court of First Instance of Manila (See Guinto v. Veluz supra).

Having disposed of the preliminary question, we may now examine the record.

As to the first count, Isidro Rivera, Dominga Camatos, Antonio de Guzman, Federico San Juan and Regino Galicia took the witness stand, and their combined testimony shows: In the morning of January 2, 1945 four Filipino makapilis (two of them were Maximo Pacheco, 25, and Teofilo Encarnacion) entered the house of Filomena de la Cruz in Pasong Balite, Polo, Bulacan, and arrested her son-in-law Ceferino Rivera, 24, as a guerrilla suspect, in the pre-

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

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

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

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

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

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

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

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

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

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

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

Mr. Justice Feria took no part.

VIII

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

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

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

DECISION

JUGO, *J.*:

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

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

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

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

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

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

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

x x x x

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

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

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

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

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

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

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

IX

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

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

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

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

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

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

DECISION

MONTEMAYOR, *J.*:

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

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

with gross earnings ranging from ₱20.00 to ₱25.00, receiving therefrom the corresponding 20% share ranging from ₱4.00 to ₱5.00, and that in some cases, especially during Saturdays, Sundays and Holidays when a driver worked 24 hours a day, he grossed from ₱40.00 to ₱50.00, thereby receiving a share of from ₱8.00 to ₱10.00 for the period of twenty-four hours.

The reasons given by the trial court in dismissing the complaint is that the defendant being engaged in the taxi or transportation business which is a public utility, came under the exception provided by the Eight Hour Labor Law (Commonwealth Act No. 444); and because plaintiffs did not work on a salary basis, that is to say, they had no fixed or regular salary or remuneration other than the 20% of their gross earnings, "their situation was therefore practically similar to piece workers and hence, outside the ambit of article 302 of the Code of Commerce."

For purposes of reference we are reproducing the pertinent provisions of the Eight Hour Labor Law, namely, sections 1 to 4.

> "SECTION 1. The legal working day for any person employed by another shall be of not more than eight hours daily. When the work is not continuous, the time during which the laborer is not working and can leave his working place and can rest completely shall not be counted.
>
> "SEC. 2. This Act shall apply to all persons employed in any industry or occupation, whether public or private, with the exception of farm laborers, laborers who prefer to be paid on piece work basis, domestic servants and persons in the personal service of another and members of the family of the employer working for him.
>
> "SEC. 3. Work may be performed beyond eight hours a day in case of actual or impending emergencies caused by serious accidents, fire, flood, typhoon, earthquake, epidemic, or other disaster or calamity in order to prevent loss of life and property or imminent danger to public safety; or in case of urgent work to be performed on the machines, equipment, or installations in order to avoid a serious loss which the employer would otherwise suffer, or some other just cause of a similar nature; but in all such cases the laborers and employees shall be entitled to receive compensation for the overtime work performed at the same rate as their regular wages or salary, plus at least twenty-five per centum additional.
>
> "In case of national emergency the Government is empowered to establish rules and regulations for the operation of the plants and factories and to determine the wages to be paid the laborers.
>
> "SEC. 4. No person, firm, or corporation, business establishment or place or center of labor shall compel an employee or laborer to work during Sundays and legal holidays, unless he is paid an additional sum of at least twenty-five per centum of his regular remuneration: Provided however, That this prohibition shall not apply to public utilities performing some public service such as supplying gas, electricity, power, water, or providing means of transportation or communication."

Under section 4, as a public utility, the defendant could have his chauffeurs work on Sundays and legal holidays without paying them an additional sum of at least 25% of their regular remuneration; but that, with reference only to work performed on Sundays and holidays. If the work done on such days exceeds 8 hours a day, then the Eight Hour Labor Law would operate, provided of course that plaintiffs came under section 2 of the said law. So that the question to be decided here is whether or not plaintiffs are entitled to extra compensation for work performed in excess of 8 hours a day, Sundays and holidays included.

It will be noticed that the last part of Section 3 of Commonwealth Act 444 provides for extra compensation for overtime work "at the same rate as their *regular wages or salary*, plus at least twenty-five per centum additional," and that section 2 of the same act excludes from the application thereof laborers who preferred to be on *piece work basis*. This connotes that a laborer or employee with no fixed salary, wages or remuneration but receiving as compensation from his employer an uncertain and variable amount depending upon the work done or the result of said work (piece work) irrespective of the amount of time employed, is not covered by the Eight Hour Labor Law and is not entitled to extra compensation should he work in excess of 8 hours a day. And this seems to be the condition of employment of the plaintiffs. A driver in the taxi business of the defendant, like the plaintiffs, in one day could operate his taxi cab eight hours, or less than eight hours or in excess of 8 hours, or even for 24 hours on Saturdays, Sundays and holidays, with no limit or restriction other than his desire, inclination and state of health and physical endurance. He could drive continuously or intermittently, systematically or haphazardly, fast or slow, etc. depending upon his exclusive wish or inclination. One day when he feels strong, active and enthusiastic he works long, continuously, with diligence and industry and makes considerable gross returns and receives much as his 20% commission. Another day when he feels despondent, run down, weak or lazy and wants to rest between trips and works for a less number of hours, his gross returns are less and so is his commission. In other words, his compensation for the day depends upon the result of his work, which in turn depends on the amount of industry, intelligence and experience applied to it, rather than the period of time employed. In short, he has no fixed salary or wages. In this we agree with the learned trial court presided by Judge Felicisimo Ocampo which makes the following findings and observations on this point.

> " x x x. As already stated, their earnings were in the form of commission based on the gross receipts of the day. Their participation in most cases depended upon their own industry. So much so that the more hours they stay on the road, the greater the gross returns and the higher their commissions. They have no fixed hours of labor. They can retire at pleasure, they not being paid a fixed salary on the hourly, daily, weekly or monthly basis.
>
> "It results that the working hours of the plaintiffs as taxi drivers were entirely characterized by its irregularity, as distinguished from the specific and regular remuneration predicated on specific and regular hours of work of factors and commercial employees.
>
> "In the case of the plaintiffs, it is the result of their labor, not the labor itself, which determines their commissions. They worked under no compulsion of turning a fixed income for each given day. x x x x."

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

The Wage Administration Service of the Department of Labor in its INTERPRETATIVE BULLETIN No. 2 dated May 28, 1952, under "Overtime Compensation," in Section 3 thereof entitled COVERAGE, says:

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

From all this, to us it is clear that the claim of plaintiffs-appellants for overtime compensation under the Eight Hour Labor Law has no valid support.

As to the month pay (mesada) under Art. 302 of the Code of Commerce, Article 2270 of the new Civil Code (Republic Act 386) appears to have repealed said Article 302 when it repealed the provisions of the Code of Commerce governing Agency. This repeal

took place on August 30, 1950, when the new Civil Code went into effect, that is, one year after its publication in the Official Gazette. The alleged termination of services of the plaintiffs by the defendant took place according to the complaint on September 4, 1950, that is to say, after the repeal of Article 302 which they invoke. Moreover, said Article 302 of the Code of Commerce, assuming that it were still in force, speaks of "salary corresponding to said month," commonly known as "mesada." If the plaintiffs herein had no fixed salary whether by the day, week or the month, then computation of the month's salary payable would be impossible. Article 302 refers to employees receiving a fixed salary. Dr. Arturo M. Tolentino in his book entitled "Commentaries and Jurisprudence on the Commercial Laws of the Philippines," Vol. I. 4th edition, p. 160, says that Article 302 is not applicable to employees without fixed salary. We quote —

> *"Employees not entitled to indemnity.*—This article refers only to those who are engaged under salary basis, and not to those who only receive compensation equivalent to whatever service they may render. (1 Malagarriga 314, citing decision of Argentina Court of Appeals on Commercial Matters.)"

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

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

In the result.—*Paras*

X

Pedro Calano, Petitioner-Appellant vs. Pedro Cruz, Respondent-Appellee, G. R. No. L-6404, January 12, 1954.

1. ELECTION; PETITION FOR QUO WARRANTO; DISMISSAL THEREOF FOR FAILURE TO STATE SUFFICIENT CAUSE OF ACTION; APPEAL.—In the past we had occasion to rule upon a similar point of law. In the case of Marquez v. Prodigalidad, 46 O. G. Supp. No. 11, p. 264, we held that Section 178 of the Revised Election Code limiting appeals from decisions of Courts of First Instance in election contests over the offices of Provincial Governor, Members of the Provincial Board, City Councilors and City Mayors, did not intend to prohibit or prevent the appeal to the Supreme Court in protests involving purely questions of law, that is to say, that protests involving other offices such as municipal councilor may be appealed provided that only legal questions are involved in the appeal. Consequently, the appeal in the present case involving as it does purely questions of law is proper.

2. ID.; ID.; CONTESTANT CANNOT BE PROCLAIMED ELECTED; OFFICE SHOULD BE DECLARED VACANT.—In the case of Llamoso vs. Ferrer, 47 O. G. No. 2p, p. 727, wherein petitioner Llamoso who claimed to have received the next highest number of votes for the post of Mayor, contested the right of respondent Ferrer to the office for which he was proclaimed elected, on the ground of ineligibility, we held that Section 173 of the Revised Election Code while providing that any registered candidate may contest the right of one elected to any provincial or municipal office on the ground of ineligibility, it does not provide that if the contestee is later declared ineligible, the contestant will be proclaimed elected.

J. R. Nuguid for petitioner-appellant.

Emilio A. Gangcayco for respondent-appellee.

DECISION

MONTEMAYOR, *J.*:

For purposes of the present appeal the following facts, not disputed, may be briefly stated. As a result of the 1951 elections respondent PEDRO CRUZ was proclaimed a councilor-elect in the municipality of Orion, Bataan, by the Municipal Board of Canvassers. Petitioner Pedro Calano filed a complaint or petition for quo warranto under Section 173 of the Revised Election Code (Republic Act No. 180) contesting the right of Cruz to the office on the ground that Cruz was not eligible for the office of municipal councilor. In his prayer petitioner besides asking for other remedies which in law and equity he is entitled to, asked that after declaring null and void the proclamation made by the Municipal Board of Canvasser in November, 1951, to the effect that Cruz was councilor-elect, he (Calano) be declared the councilor elected in respondent's place.

Acting upon a motion to dismiss the petition, the Court of First Instance of Bataan issued an order of December 27, 1951, dismissing the petition for quo warranto on the ground that it was filed out of time, and also because petitioner had no legal capacity to sue as contended by respondent. On appeal to this Court by petitioner from the order of dismissal, in a decision promulgated on May 7, 1952, we held that the petition was filed within the period prescribed by law; and that although the petition might be regarded as somewhat defective for failure to state a sufficient cause of action, said question was not raised in the motion to dismiss because the ground relied upon, namely, that petitioner had no legal capacity to sue, did not refer to the failure to state a sufficient cause of action but rather to minority, insanity, coverture, lack of juridical personality, or any other disqualification of a party. As a result, the order of dismissal was reversed and the case was remanded to the court of origin for further proceedings.

Upon the return of the case to the trial court, respondent again moved for dismissal on the ground that the petition failed to state a sufficient cause of action, presumably relying upon the observation made by us in our decision. Further elaborating on our observation that the petition did not state a sufficient cause of action, we said that paragraph 3 and 8 of the petition which read thus —

> "8. Que el recurrente tenia y tiene derecho a acupar el cargo de concejal de Orion, Bataan, si no habia sido proclamado electo concejal de Orion, Bataan, al aqui recurrido.
>
> "3. Que el recurrente era candidato a concejal del municipio de Orion, Bataan con el Certificado de candidatura debidamente presentado, y registrado asi como tambien fue votado *y elegido* para dicho cargo, en la eleccion del 13 de Noviembre de 1951." (Underscoring ours)

were conclusions of law and not statement of facts.

The trial court sustained the second motion to dismiss in its order of September 30, 1952, on the ground that the petition failed to state a sufficient cause of action. Again petitioner has appealed from that order to this Court.

Appellant urges that the trial court erred not only in not holding that the motion to dismiss was filed out of time but also in declaring that the complaint failed to state a sufficient cause of action. In answer respondent-appellee contends that the appeal should not have been given due course by the trial court because under the law there is no appeal from a decision of a Court of First Instance in protests against the eligibility or election of a municipal councilor, the appeal being limited to election contests involving the offices of Provincial Governor, Members of the Provincial Board, City Councilors and City Mayors, this under Section 178 of the Revised Election Code.

In the past we had occasion to rule upon a similar point of law. In the case of Marquez v. Prodigalidad, 46 O. G. Supp. No. 11, p. 264, we held that Section 178 of the Revised Election Code limiting appeals from decisions of Courts of First Instance in electoin contests over the offices of Provincial Governor, Members of the Provincial Board, City Councilors and City Mayors, did not intend to prohibit or prevent the appeal to the Supreme Court in protests involving purely questions of law, that is to say, that protests involving other offices such as municipal councilor may be appealed provided that only legal questions are involved in the appeal. Consequently, the appeal in the present case involving as it does purely questions of law is proper.

Going to the question of sufficiency of cause of action, it should be stated that our observation when the case came up for the first time on appeal was neither meant nor intended as a rule or doc-

trine. We were merely considering the main prayer contained in appellant's petition, namely, that he be declared councilor-elect in the place of the respondent-appellee. In other words, we only observed that petitioner could not properly ask for his proclamation as councilor elect without alleging and stating not mere conclusions of law but facts showing that he had the right and was entitled to the granting of his main prayer.

Considering the subject of cause of action in its entirety, it will be noticed that Section 173 of the Revised Election Code provides that when a person who is not eligible is elected, any registered candidate for the same office like the petitioner-appellant in this case, may contest his right to the office by filing a petition for quo warranto. To legalize the contest this section just mentioned does not require that the contestant prove that he is entitled to the office. In the case of Llamson v. Ferrer, 47 O. G. No. 2, p. 727, wherein petitioner Llamoso who claimed to have received the next highest number of votes for the post of Mayor, contested the right of respondent Ferrer to the office for which he was proclaimed elected, on the ground of ineligibility, we held that Section 173 of the Revised Election Code while providing that any registered candidate may contest the right of one elected to any provincial or municipal office on the ground of ineligibility, it does not provide that if the contestee is later declared ineligible, the contestant will be proclaimed elected. In other words, in that case, we practically declared that under Section 173, any registered candidtae may file a petition for quo warranto on the ground of ineligibility, and that would constitute a sufficient cause of action. It is not necessary for the contestant to claim that if the contestee is declared ineligible, he (contestant) be declared entitled to the office. As a matter of fact, in the case of Llamoso v. Ferrer, we declared the office vacant.

In view of the foregoing, the failure of Calano to allege that he is entitled to the office of councilor now occupied by the respondent Cruz does not affect the sufficiency of his cause of action. Reversing the order of dismissal, the case is hereby remnaded to the trial court for further proceedings. No costs.

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

XI

People of the Philippines, Plaintiff-Appellee, vs. Motin Cocoy, et al., Defendants, Motin Cocoy and Apolonio Cocoy, Defendants-Appellatns, G. R. No. L-6019, Dec. 15, 1953.

CRIMINAL LAW; COMPLEX CRIME OF ROBBERY WITH HOMICIDE. — A, B and C went to the house of D, and there boloed to death D's wife, daughter and son. Afterwards, they ransacked the house and left it clean of its contents. *Held*: The crime committed is the complex crime of robbery with homicide, not robbery with triple murder.

Herminio P. Villanayor for appellants.

Solicitor General Juan R. Liwag and *Solicitor Jose G. Bautista* for appellee.

DECISION

MONTEMAYOR, *J.*:

MOTIN COCOY, his younger brother APOLONIO COCOY, their father BARHIN COCOY, one named MAGDALENO VILLORENTE and another called ABI, were originally charged with robbery with triple murder in the Justice of the Peace Court of Libacao, Capiz. With the exception of Abi, all were arrested and submitted to the preliminary investigation conducted by the Justice of the Peace who later sent the case up to the Court of First Instance. Upon representations of the Provincial Fiscal that the evidence for the prosecution was not enough to convict Barhin Cocoy and Magdaleno Villorente, the information was dismissed as against the two. Upon arraignment the remaining two accused Motin and Apolonio pleaded guilty. Because of the seriousness of the offense charged and because the two brothers were illiterate non-Christians, instead of thenceforth sentencing them, the trial court presided over by Judge Luis N. de Leon had Motin Cocoy take the witness stand. With his testimony the trial judge had the impression that the two accused might not have understood the meaning and effect of their plea of guilty and so ordered a plea of not guilty. After trial the lower court found them guilty beyond reasonable doubt of robbery with triple murder and sentenced them to suffer the death penalty and to indemnify the heirs of the victims in the sum of ₱3,000.00 plus ₱273.60 for the value of the things taken away, and to pay one-half of the costs. The case is now here for review under the provisions of Rule 118, Section 9, of the Rules of Court providing for the transmission to this Court of all criminal cases where the death penalty is imposed by the trial court.

There is no dispute as to the following facts. In the month of March, 1952, Jose Leyson, his wife Maria Felix, their daughter Gardenia aged three and their son Golpihan 1-1/2 years old were living in the barrio of Manica, municipality of Libacao, province of Capiz, in a sort of temporary building commonly known as an evacuation hut, consisting of one single room, including the kitchen, situated near the forest and standing only about two feet from the ground. Their nearest neighbor was about two kilometers away. The hut was a good many miles from the poblacion, requiring many hours hiking over trails and fording streams to negotiate the distance. In the morning of March 12, 1952 (Wednesday) Leyson left his family in the house to go to the poblacion to make purchases the following day (Thursday) which was a market day. That same afternoon Wednesday, several marauders entered his house and after killing Maria and the two children by means of bolo blows, ransacked the house and left it clean of its contents such as plates, kitchen utensils, money amounting to ₱210.00, jewelry valued at ₱50.00, clothes costing ₱40.00 and one cavan of rice worth ₱10.00. According to investigation by the police, the body of Maria bore seven wounds, Gardenia — 6 wounds and the little boy — 3 wounds. The two eyes of the boy were found to have been gouged and extracted from their sockets.

Due to the distance of the poblacion from his house and because upon his return home he could not cross swollen streams, Leyson did not reach his home until Saturday afternoon March 15. We can only imagine the shock that must have stunned him and his reactions to the scene of death and desolation that greeted his eyes, — his dear ones whom only three days before he had left alive and hale, now but corpses scattered on the floor, and the house itself despoiled of all its contents. He notified his relatives and then hurried back to his home where they arrived two or three days later.

We agreed with the trial court and the Solicitor General that the evidence adduced during the trial is conclusive that Martin Cocoy and his brother Apolonio Cocoy and according to them one named Abi were responsible for the robbery and the killing of the three victims. According to the testimony of Motin and Apolonio, together with Abi and upon suggestion of the latter they all went to the house of Leyson late in the afternoon of Wednesday. Upon arrival there Abi asked for food telling Maria that they were hungry and the housewife said she would prepare for them. After a long wait Abi impatient asked her about the food promised them and she answered that there was no food in the house, whereupon Abi began boloing and otherwise attacking Maria and the two children Golpihan and Gardenia until they were all dead. Motin said that he did not see the killing because at the time he was at the window looking toward the forest. His brother Apolonio equally disclaimed having witnessed the actual killing, because according to him he was at the door looking out and when the two brothers turned around, Maria and her children were already lying dead on the floor. We do not blame the trial court for calling and considering this story of the two brothers "too fantastic, a downright lie." The infliction of the seven wounds on Maria, six wounds on Gardenia and three wounds on the little boy could not have been accomplished in an instant like the explosion of bomb but must have taken some time, and undoubtedly accompanied by resistance even if ineffective, shouts or even noise and commotion produced by the assault, and yet Motin and Apolonio would have the court believe that all these happened without their knowledge because they were engrossed in contemplating the scenery. There is every reason to believe and to find that there was a previous agreement on the

part of the two brothers and Abi to rob the house and to kill the inmates in order to better hide the crime, an agreement which they actually carried out. This is supported not only by the very testimony of the two brothers Motin and Apolonio, admitting that after the killing they took part in ransacking the house and taking away money and articles, but by the testimony of Roque Idala who according to him responded to Maria's shouts for help and witnessed part of the killing by the two brothers from his place of hiding and observation, a distance of several meters from the house. He also saw the killers, including the two brothers leave the house carrying in bundles what they had taken from Leyson's dwelling. According to Idala after the marauders had left he entered the house and saw the dead bodies on the floor. The participation of Motin and Apolonio in the killing and the robbery is further supported by their own affidavits, Exhibits A-1 and B-1, wherein they admit that once in the house of Leyson and after Maria had told them that there was no food in the house, the two brothers took part in killing the inmates after they saw Abi initiate the murderous assault. This, to say nothing of their spontaneous plea of guilty to the charge of robbery with homicide, not robbery with triple murder (1) was striken from the record. As to the voluntariness of the affidavits, Exhibits A-1 and B-1, Eufronio A. Escalona, Justice of the Peace of Libacao, before whom they were sworn assured the court that he read to the affiants the contents in the local dialect and told them that they could either affirm or deny the truth thereof, but that they told him that they contained the truth. Even during the trial Motin and Apolonio told the court that they were neither intimidated nor maltreated by the Constabulary or the police.

The crime committed by appellants which is the complex crime of robbery with homicide, not robbery with triple murder (1) was truly hideous and shocking, not only because of the massacre of three innocent persons but because the killing of two of the victims was clearly unnecessary. Even if the two had been spared, they were too young (aged 3 and 1-1/2 years) to remember and to relate the occurence and identity of the culprits; and the gouging of the eyes of the little boy as confessed by Apolonio is a manifestation of wanton cruelty and brutality. Ordinarily, this horrifying crime deserves the death penalty imposed by the trial court because of the presence of several aggravating circumstances, such as dwelling, uninhabited place, abuse of superior strength, etc., but some members of this Tribunal are inclined to reduce the penalty to life imprisonment not only because of ignorance and lack of instruction of the defendants but because of their being non-Christians and their lack of association with a civilized community. They lived more or less in isolation in the mountains. Apolonio told the court that he had never been to the poblacion of Libacao within whose territorial jurisdiction he had been living since birth.

Lacking the necessary number of votes to impose the extreme penalty, the death penalty imposed by the trial court is hereby reduced to life imprisonment; and following the suggestion of the Solicitor General, the indemnity to the heirs imposed by trial court for the killing should be raised to ₱6,000.00, and the value of the articles taken away raised from P273.60 to ₱303.60.

We notice that Abi, the person who according to the two brothers, was the leader, up to now has not yet been arrested despite the issuance of the corresponding warrant against him and although according to the appellant he was still living in the sitio of Taroytoy not far from their home. The authorities should continue or renew their efforts to bring him to justice. We quote with approval a paragraph of the decision from on this point.

> "The court notes that Abi was a co-accused in the Justice of the Peace of origin. A warrant was issued for his arrest. The record does not show what happened with the case with respect to Abi after the warrant of arrest was issued. This, in spite of the fact that Abi, according to the herein accused, is not hiding. He is in Taroytoy. This shows reluctance on the part of the peace and prosecuting officers to bring Abi to the bar of justice. Such an attitude cannot fail to create in the minds of many a belief that, at times, the law is not applied equally to all. It cannot fail to create a resentment in the hearts of the herein accused because, whereas they are to suffer the extreme penalty of the law for the crime, Abi, who is as guilty, if not more, as they are, is free. Cases as this is one of the causes of the people's losing respect for the law and faith in the government. But the non-prosecution of Abi cannot be an impediment to the conviction of the accused if they are really guilty."

With the modification above enumerated, the decision appealed from is hereby affirmed, with costs. Let a copy of this decision be furnished the Department of Justice and the Chief, Philippine Constabulary.

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

(1) U.S. v. Landesan, 35 Phil. 359.
People v. Manuel, 44 Phil. 583.

XII

Juan D. Crisologo, Petitioner, vs. People of the Philippines and Hon. Pablo Villalobos, Respondents, G. R. No. L-6277, February 26, 1954.

1. CRIMINAL LAW; TREASON; CASE AT BAR. — C was on March 12, 1946, accused of treason under Article 114 of the Penal Code in an information filed in the people's court but before C could be brought under the jurisdiction of the court, he was on January 13, 1947 indicted for violation of Commonwealth Act No. 408, otherwise known as the articles of war before a military court. The indictment contained three charges two of which were those of treason, while the other was that of having certain civilians killed in time of war. He was found guilty of the second and was sentenced to life imprisonment.

   With the approval of Republic Act No. 311 abolishing the people's court, the criminal case in the court against C was, pursuant to the provisions of said act, transferred to the Court of First Instance of Zamboanga and there the charges of treason were amplified. Arraigned in that court upon the amended information petitioner presented a motion to quash, challenging the jurisdiction of the court and pleading double jeopardy because of his sentence in the military court. The court denied the motion.

2. IBID; TREASON A CONTINUOUS OFFENSE. — Treason being a continuous offense, one who commits it is not criminally liable for as many crimes as there are overt acts, because all overt acts specified in the information for treason even if those constitute but a single offense." (Guinto vs. Veluz, 44 Off. Gaz., 909; People vs. Pacheco, L-4750, promulgated July 31. 1953) and it has been repeatedly held that a person cannot be found guilty of treason and at the same time also guilty of overt acts specified in the information for treason even if those overt acts, considered separately, are punishable by law, for the simple reason that those overt acts are not separate offenses distinct from that of treason but constitutes ingredients thereof.

3. COURT; CONCURRENT JURISDICTION. — Mere priority in the filing of the complaint in one court does not give that court priority to take cognizance of the offense, it being necessary in addition that the court where the information is filed has custody or jurisdiction of the person of the defendant.

4. CRIMINAL PROCEDURE; DOUBLE JEOPARDY; CONVICTION OR ACQUITTAL IN A CIVIL COURT NOT A BAR TO A PROSECUTION IN THE MILITARY COURT; EXCEPTION. — There is, for sure, a rule that where an act transgresses both civil and military law and subjects the offender to punishment by both civil and military authority, a conviction or an acquittal in a civil court cannot be pleaded as a bar to a prosecution in the military court, and *vice versa*. But the rule "is strictly limited to the case of a single act which infringes both the civil and the military law in such a manner as to constitute two distinct offenses, one of which is within the cog-

nizance of the military courts and the other is subject of civil jurisdiction" (15 Am. Jur. 72), and it does not apply where both courts derive their powers from the same sovereignty (22 C. J. S. p. 449.) It, therefore, has no application to the present case where the military court that convicted the petitioner and the civil court which proposes to try him again derive their powers from one sovereignty and it is not disputed that the charges of treason tried in the court martial were punishable under the Articles of War, it being as a matter of fact impliedly admitted by the Solicitor General that the two courts have concurrent jurisdiction over the offenses charged.

Antonio V. Raquiza, Floro Crisologo and *Carlos Horrilleno* for petitioner.

Pablo Villalobos for respondent.

D E C I S I O N

REYES, *J.*:

The petitioner Juan D. Crisologo, a captain in the USAFFE during the last world war and at the time of the filing of the present petition a lieutenant colonel in the Armed Forces of the Philippines, was on March 12, 1946, accused of treason under Art. 114 of the Revised Penal Code in an information filed in the People's Court. But before the accused could be brought under the jurisdiction of the court, he was on January 13, 1947, indicted for violations of Commonwealth Act No. 408, otherwise known as the Articles of War, before a military court created by authority of the Army Chief of Staff, the indictment containing three charges, two of which, the first and third, were those of treason consisting in giving information and aid to the enemy leading to the capture of USAFFE officers and men and other persons with anti-Japanese reputation and in urging members of the USAFFE to surrender and cooperate with the enemy, while the second was that of having certain civilians killed in time of war. Found innocent of the first and third charges but guilty of the second, he was on May 8, 1947, sentenced by the military court to life imprisonment.

With the approval on June 17, 1948, of Republic Act No. 311 abolishing the People's Court, the criminal case in that court against the petitioner was, pursuant to the provisions of said Act, transferred to the Court of First Instance of Zamboanga and there the charges of treason were amplified. Arraigned in that court upon the amended information, petitioner presented a motion to quash, challenging the jurisdiction of the court and pleading double jeopardy because of his previous sentence in the military court. But the court denied the motion and, after petitioner had pleaded not guilty, proceeded to trial, whereupon, the present petition for certiorari and prohibition was filed in this Court to have the trial judge desist from proceeding with the trial and dismiss the case.

The petition is opposed by the Solicitor General who, in upholding the jurisdiction of the trial judge, denies that petitioner is being subjected to double jeopardy.

As we see it, the case hinges on whether the decision of the military court constitutes a bar to further prosecution for the same offense in the civil courts.

The question is not of first impression in this jurisdiction. In the case of U. S. vs. Tubig, 3 Phil. 244, a soldier of the United States Army in the Philippines was charged in the Court of First Instance of Pampanga with having assasinated one Antonio Alivia. Upon arraignment, he pleaded double jeopardy in that he had already been previously convicted and sentenced by a court-martial for the same offense and had already served his sentence. The trial court overruled the plea on the grounds that as the province where the offense was committed was under civil jurisdiction, the military court had no jurisdiction to try the offense. But on appeal, this Court held that "one who has been tried and convicted by a court martial under circumstances giving that tribunal jurisdiction of the defendant and of the offense, has been once in jeopardy and cannot for the same offense be again prosecuted in another court of the same sovereignty." In a later case, Grafton vs. U. S. 11 Phil. 776, a private in the United States Army in the Philippines was tried by a general court martial for homicide under the Articles of War. Having been acquitted in that court, he was prosecuted in the Court of First Instance of Iloilo for murder under the general laws of the Philippines. Invoking his previous acquittal in the military court, he pleaded it in bar of proceedings against him in the civil court, but the latter court overruled the plea and after trial found him guilty of homicide and sentenced him to prison. The sentence was affirmed by this Supreme Court, but on appeal to the Supreme Court of the United States, the sentence was reversed and defendant acquitted, that court holding that "defendant, having been acquitted of the crime of homicide alleged to have been committed by him by a court martial of competent jurisdiction proceeding under the authority of the United States, cannot be subsequently tried for the same offense in a civil court exercising authority in the Philippines."

There is, for sure, a rule that where an act transgresses both civil and military law and subjects the offender to punishment by both civil and military authority, a conviction or an acquittal in a civil court cannot be pleaded as a bar to a prosecution in the military court, and *vice versa*. But the rule "is strictly limited to the case of a single act which infringes both the civil and the military law in such a manner as to constitute two distinct offenses, one of which is within the cognizance of the military courts and the other a subject of civil jurisdiction" (15 A. Jur. 72), and it does not apply where both courts derive their powers from the same sovereignty. (22 C. J. S. p. 449.) It, therefore, has no application to the present case where the military court that convicted the petitioner and the civil court which proposes to try him again derive their powers from one sovereignty and it is not disputed that the charges of treason tried in the court martial were punishable under the Articles of War, it being as a matter of fact impliedly admitted by the Solicitor General that the two courts have concurrent jurisdiction over the offense charged.

It is, however, claimed that the offense charged in the military court is different from that charged in the civil court and that even granting that the offense was identical the military court had no jurisdiction to take cognizance of the same because the People's Court had previously acquired jurisdiction over the case with the result that the conviction in the court martial was void. In support of the first point, it is urged that the amended information filed in the Court of First Instance of Zamboanga contains overt acts distinct from those charged in the military court. But we note that while certain overt acts specified in the amended information in the Zamboanga court were not specified in the indictment in the court martial, they all are embraced in the general charge of which is within the cognizance of the military courts and the other is not criminally liable for as many crimes as there are overt acts, because all overt acts "he has done or might have done for that purpose constitute but a single offense." (Guinto vs. Veluz, 44 Off. Gaz., 909; People vs. Pacheco, L-4750, promulgated July 31, 1953.) In other words, since the offense charged in the amended information in the Court of First Instance of Zamboanga is treason, the fact that the said information contains an enumeration of additional overt acts not specifically mentioned in the indictment before the military court is immaterial since the new alleged overt acts do not in themselves constitute a new and distinct offense from that of treason, and this Court has repeatedly held that a person cannot be found guilty of treason and at the same time also guilty of overt acts specified in the information for treason even if those overt acts considered separately, are punishable by law, for the simple reason that those overt acts are not separate offenses distinct from that of treason but constitutes ingredients thereof. Respondents cite the cases of Melo vs. People, 47 Off. Gaz., 4631, and People vs. Manolong, 47 Off. Gaz., 5104, where this Court held:

> "Where after the first prosecution a new fact supervenes for which the defendant is responsible, which changes the character of the offense and, together with the facts existing at the time, constitutes a new and distinct offense, the accused cannot be said to be in second jeopardy if indicted for the new offense."

But respondent overlook that in the present case no new facts have

supervened that would change the nature of the offense for which petitioner was tried in the military court, the alleged additional overt acts specified in the amended information in the civil court having already taken place when petitioner was indicted in the former court. Of more pertinent application is the following from 15 American Jurisprudence, 56-57:

> "Subject to statutory provisions and the interpretation thereof for the purpose of arriving at the intent of the legislature in enacting them, it may be said that as a rule only one prosecution may be had for a continuing crime, and that where an offense charged consists of a series of acts extending over a period of time, a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period. In such case the offense is single and indivisible; and whether the time alleged is longer or shorter, the commission of the acts which constitute it, within any portion of the time alleged, is a bar to the conviction for other acts committed within the same time. x x x."

As to the claim that the military court had no jurisdiction over the case, well known is the rule that when several courts have concurrent jurisdiction of the same offense, the court first acquiring jurisdiction of the prosecution retains it to the exclusion of the others. This rule, however, requires that jurisdiction over the person of the defendant shall have first been obtained by the court in which the first charge was filed. (22 C. J. S. pp. 186-187.) The record in the present case shows that the information for treason in the People's Court was filed on March 12, 1946, but petitioner had not yet been arrested or brought into the custody of the court — the warrant of arrest had not even been issued — when the indictment for the same offense was filed in the military court on January 13, 1947. Under the rule cited, mere priority in the filing of the complaint in one court does not give that court priority to take cognizance of the offense, it being necessary in addition that the court where the information is filed has custody or jurisdiction of the person of defendant.

It appearing that the offense charged in the military court and in the civil court is the same, that the military court had jurisdiction to try the case and that both courts derive their powers from one sovereignty, the sentence meted out by the military court to the petitioner should, in accordance with the precedents above-cited, be a bar to petitioner's further prosecution for the same offense in the Court of First Instance of Zamboanga.

Wherefore, the petition for certiorari and prohibition is granted and the criminal case for treason against the petitioner pending in that court ordered dismissed. Without costs.

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

XIII

Vicente J. Francisco and Francisco Marasigan, Petitioners, vs. Eduardo Enriquez, Judge of the Court of First Instance of Negros Occidental, Respondent, G. R. No. L-7058, *March* 20, 1954.

1. CONTEMPT OF COURT; FAILURE OF AN ATTORNEY TO APPEAR AT THE TRIAL OF THE CASE; EXPLANATION FOR SUCH FAILURE; CASE AT BAR. — Attorney F and his assistant M with law office in Manila were the lawyers of L in a criminal case instituted in Negros Occidental. On the day when the trial of the case was to be resumed in Bacolod both lawyers did not appear. Judge Eduardo Enriquez ordered their arrest. Attorney F requested that the order be suspended and sent Attorney M to Negros to explain that their failure to attend at the trial was fully justified. Judge Enriquez refused to listen to Attorney M's explanation because he wanted Attorney F to appear personally and to be the one to explain why he did not appear on the said date. *Held:* The order is without reason and the judge acted in excess of jurisdiction.

2. IBID; IBID; IBID. — After the required explanation had been presented under oath, and after Atty. M had appeared in person to give the explanation and had submitted the required evidence, for him and in behalf of Atty. F, there was no reason to require the further personal appearance of the petitioner for the same purpose in Bacolod on some other date. The sworn explanation is according to our rules, prima facie evidence (Sec. 100, Rule 123).

3. IBID; IBID; IBID. — Atty. M who had sworn that the facts stated in the explanation are of his personal knowledge, and who was the one called upon to attend the Criminal Case of the 15th day of Sept., 1953, was a competent person to give a pertinent explanation of the absence of the petitioner on the date of trial on Sept. 15, and he actually offered to give such explanation. It does not appear that there was any question asked of him about the non-appearance of the petitioner which he could not answer by his own knowledge and about which only Atty. F could give legally admissable answer.

4. IBID; IBID; IBID. — The denial to hear Atty. M's explanation only because it includes Atty. F's explanation, is against the law. It is indisputable that he has the right to be heard in its own representations, then and there. There was no reason to compel him to come back. It was also indisputable that Atty. F had also the right to be heard "by himself or counsel" (Rule 64, Sec. 3). There was at the moment no reason at all to require his personal appearance, even laying aside his delicate state of health at the time which was an impediment for him to travel.

JUSTICE ANGELO BAUTISTA, concurring.

1. CONTEMPT OF COURT; POWER TO PUNISH FOR CONTEMPT. — The power to punish for contempt is inherent in all courts and is essential to their right of self-preservation. "The reason for this is that respect for the courts guarantees the stability of their institution. Without such guaranty said institution would be resting on a very shaky foundation." This power is recognized by our Rules of Court (Rule 64.).

2. IBID; KINDS OF CONTEMPT. — Under this rule, contempt is divided into two kinds: (1) direct contempt, that is, one committed in the presence of, or so near, the Judge as to obstruct him in the administration of justice; and (2) constructive contempt, or that which is committed out of the presence of the court, as in refusing to obey its order or lawful process.

3. IBID; HOW IT SHOULD BE INITIATED. — As a rule, contempt proceeding is initiated by filing a charge in writing with the court. (Section 3, Rule 64.) It has been held however that the court may *motu propio* require a person to answer why he should not be punished for contemptuous behaviour. Such power is necessary for its own protection against an improper interference with the due administration of justice.

4. IBID; CASE AT BAR. — The contempt under consideration is a constructive one it having arisen in view of the failure of Attys. F and M to obey an order of the court, and for such failure respondent Judge ordered them to appear and show cause why they should not be punished for contempt. There was therefore no formal charge filed against them but the action was taken directly by the court upon its own initiative.

5. IBID; WAIVER OF APPEARANCE. — The rule on the matter is not clear (Section 3, Rule 64). While on one hand it allows a person charged with contempt to appear by *himself* or by *counsel*, on the other, the rule contains the following provision: "But nothing in this section shall be so construed as to prevent the court from issuing process to bring the accused party into court or from holding him in custody pending such proceedings." Apparently, this is the provision on which respondent Judge is now relying in insisting on the personal appearance of Atty. F.

6. IBID; POWER OF THE COURT TO ORDER ARREST OF THE ACCUSED PARTY. — This power (to order the arrest of the accused party) can only be exercised when there are good reasons justifying its exercise. The record discloses none. The

reason for the appearance is already well known. The contemptuous charge was clear. The only thing required was for Atty. F to explain his conduct. This he did in his telegram to the court intimating that his failure to appear was due to failing health and doctor's advice, while, on the other hand, he caused Atty. M to appear for him and elaborate on his explanation. This attitude, in my opinion, is a substantial compliance with the rule and justifies the action taken by Atty. F.

Vicente J. Francisco and *F. V. Marasigan* for petitioners.
Eduardo P. Arboleda for respondent.

DECISION

DIOKNO, *M.*:

La cuestion en este recurso ha quedado reducida a la de si el Honorable Juez recurrido incurrió en exceso de jurisdiccion al insistir en su orden de que los recurrentes comparezcan personalmente ante él, en la ciudad de Bacolod para que expongan las razones por qué no se les debe imponer accion disciplinaria por no haber comparecido el dia 15 de septiembre de 1953 para la continuacion de la vista de la causa criminal No. 3220 del Juzgado de Primera Instancia de Negros Occidental, intitulado Pueblo *contra* Lacson y otros, por asesinato.

Los hechos pertinentes, brevemente expuestos, son los siguientes:

1.o Los recurrentes, Francisco y Marasigan, eran los abogados del acusado Rafael Lacson. El primero era el abogado principal y el segundo el auxiliar, que en ausencia del primero actuaría y actuó, en efecto, en su lugar. Marasigan era, ademas, abogado de otro acusado en la causa. El 15 de septiembre de 1953 estaba señalada la continuacion de la vista de la causa criminal, y ninguno de los recurrentes comparecieron, ni enviaron oportuna explicación de su ausencia. El acusado Lacson estaba presente, pero se limito á informar que el recurrente Francisco le habia dicho que él personalmente no asistiría en la vista sino el recurrente Marasigan. Con motivo de la ausencia de ambos abogados, la vista hubo de transferirse para otro dia.

2.o Con vista de esta ausencia inexplicada, el Hon. Juez recurrido ordenó el arresto de los recurrentes. En el mismo dia, el recurrente Francisco dirigio al Juez recurrido el siguiente telegrama, desde Manila:

"Septiembre 15, 1953
Honorable Eduardo Enriquez
Bacolod City
Please suspend order until we have opportunity to explain stop Attorney Marasigan flying to Negros tomorrow
Vicente Francisco"

A lo que el Hon. Juez recurrido contestó como sigue:

"Bacolod Sep 16-53
Atty. Vicente Francisco
Manila
Re tel order suspended as requested but you are required personally to appear twenty fourth instant to explain why you should not be held in contempt.
Judge Enriquez"

El anterior telegrama fue recibido por el recurrente Francisco cuando el recurrente Marasigan ya habia salido por avión para Bacolod, por lo que aquél envió el mismo dia el siguiente telegrama al Hon. Juez recurrido:

"Judge Enriquez
Bacolod City
Received your telegram when Atty. Marasigan had gone already to Negros by plane to submit explanation why he and myself did not attend last hearing Lacson case stop I submit said explanation and motion of withdrawal for your action without hearing stop Request my presence be dispensed with on the 24th cannot make trip to Negros during this stormy season due to failing health and doctors advice
Vicente Francisco"

3.o El recurrente Marasigan llegó a Bacolod el mismo dia 16 de septiembre de 1953, llevando consigo la explicación de la ausencia de ambos recurrentes en la vista del 15, en forma de un escrito intitulado "Ex-parte Urgent Motion for Reconsideration of Order of Arrest," fechado 15 de septiembre, 1953, firmado por ambos recurrentes, y jurado por Marasigan (Exh. D).

El 17 de septiembre de 1953, el recurrente Marasigan presentó el escrito y compareció ante el Hon. Juez recurrido. Lo que sigue es parte de la transcripción de las notas taquigraficas de lo que ocurrió en esa ocasión:

"Marasigan: I would like to state that I am here to explain for Atty. Francisco and for myself.

—— x —— —— x —— —— x ——

"Court: Practically that order has been suspended or practically set aside because of the telegram of Mr. Francisco sent on the fifteenth. There is a telegram sent by Atty. Francisco asking that the order be suspended because you are coming here by plane, but in my reply-telegram I advised him that the order was suspended but he must appear here on the twenty fourth to explain and to show cause why no disciplinary actions should be taken against him. Besides that telegram, I dictated an order requiring Mr. Francisco and you — Mr. Marasigan — to appear on the twenty fourth. Inasmuch as you are here the court is ready to listen to your explanation but that is insofar as you are concerned only. The court still requires Mr. Francisco to appear before this court, before or on September 24th because I will not accept your explanation for Mr. Francisco. So you choose, do you want to have your explanation on the twenty fourth with Mr. Francisco or do you want to advance your explanation by disregarding your explanation for Mr. Francisco? Because the court wants Mr. Francisco to be present here to explain for himself and no explanation from somebody else will be accepted by this court because I would like to propound some questions to Atty. Francisco.

—— x —— —— x —— —— x ——

"Court: I have told you already that I will not accept any explanation from somebody else but from Mr. Francisco himself. He must appear here personally.

—— x —— —— x —— —— x ——

'Court: Let us cut short this discussion. I made it clear to you that the court will not accept any explanation for Mr. Francisco by somebody except by Mr. Francisco only, and there is a standing order requiring him to be here and not thru somebody else.

"Atty. Marasigan: That is it. The court admits that the only purpose in requiring him to come here is to give him an opportunity to explain. Now I am here to explain for him in the meantime.

—— x —— —— x —— —— x ——

"Court: I will let it appear on the record that the court is not ready to receive any explanation for Mr. Francisco by somebody else.

"Atty. Marasigan: Not even if it will be an explanation that would justify the failure of Atty. Francisco to appear here?

"Court: I am not concerned with the explanation for Mr. Francisco by somebody else.

—— x —— —— x —— —— x ——

"Court: Well, if you believe that it is his right let us wait for Atty. Francisco. If he wants to be here it is okay and if he does not want to come here it is also okay but I know what steps I will take.

"Court: The telegram of Mr. Francisco is as follows:

"Please suspend order until we have opportunity to explain stop Atty. Marasigan flying to Negros tomorrow." This was received at 5:45 p.m., September 15, Tuesday. On the following day, yesterday, I answered that telegram. "Re tel order suspended as requested but you are required personally to appear twenty fourth instant to explain why you should not be held in contempt." This is very clear. "Personally." The court wants him to appear personally and not thru another person. Besides that telegram, here is the order of the court signed by me yesterday, which I am quoting: "A peticion del abogado Sr. Vicente J. Francisco

contenida en su telegrama de ayer, por el presente se suspendo aquella parte de la orden de 15 de Septiembre de 1953 en cuanto se ordena el arresto de los abogados Sres. Vicente J. Francisco y Francisco Marasigan, y en su lugar se ordena a ambos abogados para que personalmente comparezcan ante esta Sala el 24 de Septiembre de 1953, a las 9:00 de la mañana y expongan las razones por qué no se les debe imponer acción disciplinaria por no haber comparcido el dia 15 de Septiembre de 1953 para la continuación de la vista de esta causa. Envíense por correo aereo y por certificado copias de esta orden a los referidos abogados. Asi se ordena." The court in open court will offer you a copy of this order and please sign on the original of this order. (To a court personnel who was present there.) Where is a copy of that. You furnish Mr. Marasigan. (To Atty. Marasigan.) Now, if you want to advance your appearance here by virtue of that order you can do so but I will repeat: I won't hear any explanation to be made by you in behalf of Mr. Francisco because the court will stick to its order and will require Mr. Francisco to be here on the 24th." (pp. 3756, 3557, 3758 and 3759, t.s.n.)

"Atty. Marasigan: At any rate I will explain and I ask the court to consider that whatever I explain; I explain it not only in connection with my case but in connection with the case of Atty. Francisco, I explain in the meantime.

"Court: If that is the condition, I will not listen to you — if you will abide by that condition.

—— x —— —— x —— —— x ——

"Atty. Marasigan: But I insist . . .

"Court (Interruption) I don't want to hear, if you insist that you will be heard in behalf of Mr. Francisco. If you want to explain for yourself, all right, but if you want to explain for Mr. Francisco, nothing doing." (pp. 3767-3768, t.s.n.)

"Atty. Marasigan: I have nothing more to say but I will make of record that I am presenting my evidence. This is a question of law." (p. 3768, t.s.n.)

"Court: All right, this is the order of the court. Let the motion for reconsideration filed by Messrs. Francisco and Marasigan be heard on the 24th of this month September 1953, at 9:00 A.M." (pp. 3768-3769, t.s.n.)

"Court: That is the order of the court. All right hearing closed.

"Atty. Marasigan: All right, Your Honor, I will present evidence in support of the ex-parte urgent motion for reconsideration.

"Court: The order is already issued. (To Court Interpreter) Next case, that election case." (pp. 3768-3769, t.s.n.)

4.o En cuanto a la condicion física por entonces del recurrente Francisco, consta que el 1.o de septiembre de 1953, o quince dias antes. el Juzgado estaba enterado que aquel "temia" viajar en avion.

"Court: There are people who are afraid to take the plane as a means of transportation and I am one of them. Mr. Francisco is as old as I am and I want to live longer.

—— x —— —— x —— —— x ——

"Court: This is one instance where the non-appearance of Atty. Francisco is justified. Nobody can go against the will of God. This typhoon is the act of God. If anybody says: If he did not take the boat, why did he not take the plane? But I would have done the same like him." (p. 3716,t.n.t.)

Tambien consta el hecho de que el abogado no podía hacer viaje alguno debido a su mala salud en el telegrama arriba transcrito de fecha 16 de septiembre de 1953. Y ello no parece ficticio, porque el Dr. Agorico B. M. Sison, Director del Philippine General Hospital, certificó bajo juramento —

"x x x that Atty. Vicente J. Francisco is under the medical care of the undersigned and has been advised to avoid sea and air travel because he is extremely susceptible to 'Motion Sickness' which lowers his vitality to such an extent that it provokes Neurocirculatory Asthenia, and may seriously endanger his health."

5.o Habiendo el Hon. Juez recurrido insistido en la comparecencia personal de los recurrentes para el 24 de septiembre, el recurrente Francisco, dirigió el siguiente telegrama al Hon. Juez recurrido:

"Raised question to Supreme Court whether Atty. Marasigan and myself may be compelled to appear personally in hearing September twenty four stop Requesting incident be held in abeyance until after Supreme Court resolves certiorari. Vicente Francisco."

y dicho Juez, el 24 del citado mes, sin haber sido aun notificado del recurso aqui presentado dictó una orden (anexo F) que dice en parte:

"El Juzgado cree que, a menos que haya una orden de la Corte Suprema ordenando a este tribunal para que se abstenga de seguir ejerciendo sus facultades en este incidente, podria hacer caso omiso o ignorar el contenido de este telegrama; sin embargo, para dar todas las oportunidades al Sr. Francisco para poner a prueba la legalidad de la orden de fecha 16 de Septiembre de 1953, el Juzgado resuelve conceder la peticion del Sr. Francisco y dispone transferir la comparencia de los Sres. Francisco y Marasigan ante este Juzgado a fin de exponer las razones que tuvieren por que no deben ser declarados incursos en desacato, hasta que la Corte Suprema resuelva el remedio de cortiorari que segun el Sr. Francisco ha presentado ante dicha Superioridad."

En la misma orden el Hon. Juez recurrido dijo que se abstenía de tomar acción alguna en cuanto a la moción de reconsideración de la orden de arresto de los recurrentes "toda vez que dicha orden ya ha sido suspendida"; y en cuanto a la separacion de los recurrentes como abogados en la causa criminal conforme a sus mociones de fecha 7 y 18 de septiembre de 1953, autorizó la retirada de los mismos como abogados del acusado Rafael Lacson, y el ultimo además como abogado del acusado Jose Valencia. Tambien por dicha orden pospuso la comparecencia personal de los recurrentes hasta que fuese resuelta por esta Corte el presente recurso.

El art. 3 de la regla 64 de los Reglamentos dice que "after charge in writing has been filed, and an opportunity given to the accused to be heard by himself or counsel, a person guilty x x x may be punished by contempt." Dice tambien que "nothing in this section shall be so construed as to prevent the court from issuing process to bring the accused party into court, or from holding him in custody pending such proceedings."

Estando ya presentada la explicación requerida, y bajo juramento, y habiendo ya el recurrente Marasigan comparecido en persona para dar las aclaraciones y presentar las pruebas que se necesiten, para sí y para el recurrente Francisco, no habia razón alguna para requerir todavia la comparecencia personal de los recurrentes para el mismo tramite en Bacolod en otra fecha. La explicación jurada es, con arreglo a nuestros reglamentos, prueba prima facie. (Art. 100, Regla 123.) Caso de falsedad de dicha explicación escrita en algun detalle material, cabe la acusacion de perjurio. Ademas, ambos son miembros del foro y son responsables de toda conducta anti-profesional. El recurrente Marasigan, que lo juró de propio conocimiento, y que era el llamado a asistir en la vista del dia 15 de septiembre de 1953 de la causa criminal, era competente para dar personalmente cualquiera explicacion pertinente de la *ausencia* de los recurrentes en la vista del dia 15 de septiembre, y se había ofracido a darla. No consta que se le haya dirigido pregunta alguna sobre la incomparecencia de los recurrentes que él no podia contestar de su propio conocimiento, o que solo el recurrente Francisco podia dar contestación legalmente admisible. La negativa de oir la explicacion de Marasigan solo porque incluia la de Francisco va contra los preceptos de la ley. Es indisputable que él tenia derecho a ser sido en su propia representacion, entonces y allí mismo. No habia razon alguna para hacerle volver. Es tambien indisputable que el recurrente Francisco tenia derecho a ser oido "by himself or counsel." (Regla 64, art. 3) No habia por el momento razón para requerir su presencia personal, dejando a un lado su por entonces delicada salud para hacer viajes. Y está repetidamente declarado que se obra con exceso de jurisdiccion cuando se dicta orden sin razón.

Se arguye que al exigir la comparecencia personal de los re-

currentes el Hon. Juez recurrido estaba autorizado por el ultimo parrafo del art. 3 de la Regla 64 que provée que el mismo no se interpretará de modo que impida al Juzgado ordenar que el acusado sea traido al Juzgado o de tenerle detenido durante la pendencia del incidente. Se pueden tambien invocar al mismo efecto los arts. 5 y 6 de la misma regla. Sin embargo, el arresto de los recurrentes está abandonado y el argumento es por tanto inmaterial. Entonces todo lo que quedaba del incidente era resolverlo.

EN VIRTUD DE LO EXPUESTO, se concede el recurso. La orden del 24 de septiembre de 1953, en cuanto requiere a los recurrentes que comparezcan ante el Hon. Juez recurrido para un tramite ya hecho, cual es, el de explicar la incomparecencia de los mismos en la vista del día 15 de septiembre de 1953 de la causa criminal No. 3220 del Juzgado de Primero Instancia de Negros Occidental queda anulada. Sin costas.

Asi se ordena.

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

BAUTISTA ANGELO, *J., concurring*:

On September 15, 1953, date set for the continuation of the hearing of the case, Attys. Francisco and Marasigan, who were appearing for the accused, failed to show up, whereupon respondent Judge issued an order for their arrest. Informed of this order, Atty. Francisco sent a wire asking for an opportunity to explain. The order was suspended but Attys. Francisco and Marasigan were required to appear *personally* on September 24. Atty. Francisco replied by telegram informing the court that he could not appear on the date set due to failing health and doctor's advice, but was submitting his explanation through Atty. Marasigan. Atty. Marasigan in effect appeared on the date set but respondent Judge refused to hear his explanation if it would include that of Atty. Francisco. A portion of the transcript showing what has taken place during the hearing is as follows:

"Court: I have told you already that I will not accept any explanation from somebody else but from Mr. Francisco himself. *He must appear here personally.*

—— x —— —— x —— —— x ——

"Atty. Marasigan: x x x If in a criminal action the accused can waive his presence, why cannot Atty. Francisco waive his presence and allow me, instead in the meantime to explain for him, Your Honor?

"Court: I can tell you that a defendant in a criminal case can waive his presence in certain stage in the proceedings but he cannot waive his presence to be arraigned of this information or charge. *He must be present here.* He cannot be represented by somebody else.

"Atty. Marasigan: But in this case there is no arraignment, Your Honor.

"Court: Precisely he is required to be here, to be appraised of the charge.

"Atty. Marasigan: In a criminal charge there is an arraignment but in a contempt proceedings, there is none.

"Court: Why not? That is the reason why the court wants him to be present here to be apprised of the charges.

"Atty. Marasigan: *But he is apprised already.* As a matter of fact there is no arraignment."

The power to punish for contempt is inherent in all courts and is essential to their right of self-preservation. "The reason for this is that respect for the courts guarantees, the stability of their institution. Without such guaranty said institution would be resting on a very shaky foundation." (Salcedo v. Hernandez, 61 Phil. 724.) This power is recognized by our Rules of Court (Rule 64). Under this rule, contempt is divided into two kinds: (1) direct contempt, that is, one committed in the presence of, or so near, the Judge as to obstruct him in the administration of justice; and (2) constructive contempt, or that which is committed out of the presence of the court, as in refusing to obey its order or lawful process. (Narcida v. Bowen, 22 Phil. 365, 371; Iso Yick Mon v. Collector of Customs, 41 Phil. 548; Caluag v. Pecson, 46 O. C. (a), 514.)

As a rule, contempt proceeding is initiated by filing a charge in writing with the court. (Section 3, Rule 64.) It has been held however that the court may *motu proprio* require a person to answer why he should not be punished for contemptuous behavior. Such power is necessary for its own protection against an improper interference with the due administration of justice (In re Quirino, 76 Phil. 630).

The contempt under consideration is a constructive one it having arisen in view of the failure of Attys. Francisco and Marasigan to obey an order of the court, and for such failure respondent Judge ordered them to appear and show cause why they should not be punished for contempt. There was therefore no formal charge filed against them but the action was taken directly by the court upon its own initiative. The question that now arsies is: Can the attorneys waive their *personal appearance* as ordered by the court?

The rule on the matter is not clear (Section 3, Rule 64). While on one hand it allows a person charged with contempt to appear by *himself* or by *counsel*, on the other, the rule contains the following proviso: "But nothing in this section shall be so construed as to prevent the court from issuing process to bring the accused party into court, or from holding him in custody pending such proceedings." Apparently, this is the provision on which respondent Judge is now relying in insisting on the personal appearance of Atty. Francisco.

I believe, however, that this power can only be exercised when there are good reasons justifying its exercise. The record discloses none. The reason for the appearance is already well known. The contemptuous charge was clear. The only thing required was for Atty. Francisco to explain his conduct. This he did in his telegram to the court intimating that his failure to appear was due to failing health and doctor's advice, while, on the other hand, he caused Atty. Marasigan to appear for him and elaborate on his explanation. This attitude, in my opinion, is a substantial compliance with the rule and justifies the action taken by Atty. Francisco.

XIV

Felix Fabella and Ernesto Figueroa, Plaintiffs-Appellees, vs. The Provincial Sheriff of Rizal, Vicente D. Alobog, and Alto Surety and Insurance Co. Inc., Defendants-Appellants, G. R. No L-6090, November 27, 1953.

1. PLEADING AND PRACTICE; JUDGMENT ON THE PLEADINGS; ITS NATURE. — The nature of a judgment on the pleadings maybe found in Section 10, Rule 35 of the Rules of Court, which provides "where an answer fails to tender an issue, or otherwise admits the material allegations of the adverse party's pleading, the court may, on motion of that party, direct judgment on such pleading, except in actions for annulment of marriage or divorce wherein the material facts alleged in the complaint shall always be proved." The rules contain no other provision on the matter.

2 IBID; WHO MAY ASK JUDGMENT ON THE PLEADINGS.— Apparently, in this jurisdiction the rule regarding judgment on the pleadings only applies where an answer fails to tender an issue and plaintiff invokes the rule. The rule is silent as to whether a similar relief may be asked by the defendant, although under American jurisprudence, the rule applies to either party.

3. IBID; CASE ILLUSTRATING THE NATURE AND APPLICATION OF THE RULE. — We have in this jurisdiction quite a good number of cases illustrating the nature and application of the rule. As an illustration and guidance, we may cite the following restatement of the rulings found in different cases decided by this Court: When the defendant neither denies nor admits the material allegation of the complaint, judgment on the pleadings is proper (Alemany, et al. v. Sweeney, 3 Phil. 114). But where the defendant's answer tenders an issue, judgment on the pleadings should not be rendered (Ongain v. Riarte, 46 O. G. No. 1, p. 67). And when the defendant admits all allegations of the complaint, the admission is a sufficient ground for judgment. One who prays for judgment on the pleadings without offering proof as to the truth of his own

allegations, and without giving the opposing party an opportunity to introduce evidence, must be understood to admit the truth of all the material and relevant allegations of the opposing party, and to rest his motion for judgement on those allegations taken together with such of his own as are admitted in the pleadings. (Bauermann v. Casas, 10 Phil. 386; Evangelista v. De la Rosa, 76 Phil., 115; Tanchico v. Ramos, 48 O. G. [1] 654,)

4. IBID; WHEN JUDGMENT ON THE PLEADINGS MAY BE RENDERED. — Judgment on the pleadings can only be rendered when the pleading of the party against whom the motion is directed, be he plaintiff or defendant, does not tender any issue or admits all the material allegations of the pleading of the movant. Otherwise, judgment on the pleadings cannot be rendered.

I. C. Monsod for appellant Vicente D. Alobog.
Pedro C. Gloria for appellees.

DECISION

BAUTISTA ANGELO, *J.*:

This is an action for damages instituted in the Court of First Instance of Rizal arising from the attachment of a movie house together with all equipments, machineries, and furniture found therein, the ownership of which is disputed.

Defendant Vicente Alobog filed a motion to dismiss and when the same was denied for lack of merit, he filed an answer wherein he denied specifically all the material allegations of the complaint and set up some affirmative and special defenses and a counterclaim.

Plaintiffs answered the counterclaim stating merely that they deny "generally and specifically each and every allegation contained in each and every paragraph" of said counterclaim. Thereafter, defendant Vicente Alobog, considering that plaintiff's answer to his counterclaim failed to tender an issue, filed a motion praying that judgment be rendered in his favor and against plaintiffs, asking at the same time that he be allowed to present evidence as to the amount of damages he is claiming in his answer.

This motion was set for hearing, but as defendant or his counsel failed to appear, counsel for plaintiffs informed the court that he was agreeable that a judgment on the pleadings be rendered as prayed for in the motion of defendant. Accordingly, the court rendered judgment granting practically the relief prayed for in the complaint. From this decision defendant has appealed.

The case was originally taken to the Court of Appeals, but when the case was called for hearing appellant's counsel admitted that he was merely raising questions of law, to which appellees' counsel agreed, as in fact the latter alleged in his brief that said court has no jurisdiction over the case and that it should be forwarded to the Supreme Court. Thereupon, the case was certified to this Court.

The motion which the lower court considered as one for judgment on the pleadings and which served as basis of its decision reads as follows:

"Comes now defendant Vicente Alobog, by and through his undersigned counsel and to this Honorable Court most respectfully shows:

1. That the defendant Vicente D. Alobog in answer to the plaintiffs' complaint on file denying the allegations contained therein, except paragraph 1 and in a way paragraphs 3, 5, 6, and 13, for the truth of the matter are as stated in the Affirmative and Special defenses, and by way of Counterclaim reproduces all the allegations of his 'Answer', 'Affirmative Defense' and 'Special Defense' and incorporated therein as part of said Counterclaim in the amount of Twelve Thousand (P12,000.00) Pesos for damages suffered by said defendant.

said counterclaim of said defendant Vicente D. Alobog, said answer dated September 6, 1950, failed to tender an issue, and instead in law admit the material allegations of the said 'Answer', 'Affirmative Defense', 'Special Defense', and 'Counterclaim' of defendant Vicente D. Alobog, for the said answer of plaintiffs state: 'THAT PLAINTIFFS DENY GENERALLY AND SPECIFICALLY EACH AND EVERY ALLEGATION CONTAINED IN EACH AND EVERY PARAGRAPH OF THE DEFENDANTS' COUNTERCLAIM.'

That the herein moving party is thus entitled to a judgment as a matter of law.

That the defendant Vicente D. Alobog is ready to present evidence as to the amount of Damage suffered by him therein alleged.

WHEREFORE, premises considered, the undersigned pray for an order giving judgment in favor of the defendant Vicente D. Alobog and against the plaintiffs based on the pleadings on file; that the defendant Vicente D. Alobog be allowed to present evidence as to the amount of damage suffered by him as therein alleged; and further pray for such other and further relief as the court may deem just with costs, against the plaintiffs."

What is the nature of a judgment on the pleadings? This point is well defined in our Rules of Court. Thus, in Section 10, Rule 35, it is provided that "where an answer fails to tender an issue, or otherwise admits the material allegations of the adverse party's pleading, the court may, on motion of that party, direct judgment on such pleading, except in actions for annulment of marriage or pleading, except in actions for annulment of marriage or divorce wherein the material facts alleged in the complaint shall always be proved." The rules contain no other provision on the matter. Apparently, in this jurisdiction the rule regarding judgment on the pleadings only applies where an answer fails to tender an issue and plaintiff invokes the rule. The rule is silent as to whether a similar relief may be asked by the defendant, although under American jurisprudence, the rudle applies to either party. (Roxoline Petroleum Co. v. Craig, et al., 300 P. 620; 71 C. J. S. p. 863.)

Quite apart from the rule we have quoted above, and regardless of whoever may invoke the benefit of its provisions, we have in this jurisdiction quite a good number of cases illustrating the nature and application of the rule. As an illustration and guidance, we may cite the rule. As an illustration and guidance, we may cite the following restatement of the rulings found in different cases decided by this Court: When the defendant neither denies nor admits the material allegations of the complaint, judgment on the pleadings is proper (Alemany, et al. v. Sweeney, 3 Phil. 114). But where the defendant's answer tenders an issue, judgment on the pleadings should not be rendered (Ongsin v. Riarte, 46 O. G. No. 1, p. 67). And when the defendant admits all allegations of the complaint, the admission is a sufficient ground for judgment. One who prays for judgment on the pleadings without offering proof as to the truth of his own allegations, and without giving the opposing party an opportunity to introduce evidence, must be understood to admit the truth of all the material and relevant allegations of the opposing party, and to rest his motion for judgment on those allegations taken together with such of his own as are admitted in the pleadings. (Bauermann v. Casas, 10 Phil., 386; Evangelista v. De la Rosa, 76 Phil., 115; Tanchico v. Ramos, 48 O. G. [1] 654.) It is apparent from these rulings that judgment on the pleadings can only be rendered when the pleading of the party against whom the motion is directed, be he plaintiff or defendant, does not tender any issue, or admits all the material allegations of the pleading of the movant. Otherwise, judgment on the pleadings cannot be rendered.

If we consider the motion filed by the defendant wherein he prayed that judgment be rendered on the pleading in the light of the foregoing rules, one cannot but reach the conclusion that what was intended was merely to ask for judgment in so far as the counterclaim contained in his answer is concerned in view of the failure of the plaintiffs to traverse it as required by the rules. This is reflected in the second paragraph of the motion wherein defendant makes patent the fact that plaintiffs' answer to his counterclaim failed to tender an issue because it merely pleaded a general denial. This is also reflected in the prayer wherein he asked that judgment be rendered in his favor and against the plaintiffs and that he be allowed to present evidence as to the amount of damages claimed by him in his counterclaim. The motion could

not have referred to the material allegations of the complaint for the simple reason that they were specifically denied in the answer and therefore the latter has tendered an issue which could not be the subject of a judgment on the pleadings. This is the only conclusion that can be drawn from a careful analysis of the contents of the motion of defendant. A contrary interpretation would be incongruous and contrary to its very purpose. It is for these reasons that we believe that the lower court committed an error in considering the aforesaid motion as an implied admission of all the material allegations of the complaint and in rendering judgment accordingly.

Wherefore, the decision appealed from is hereby revoked, without pronouncements as to costs. The case is remanded to the lower court for further proceedings.

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

XV

Mamerto Mission, et al., Petitioners, vs. Vicente S. del Rosario, as Acting Mayor of Cebu City, et al., Respondents, G. R. No. L-6754, February 26, 1954.

1. PUBLIC OFFICERS; "DETECTIVE" DEFINED.—"The word 'detective', as commonly understood in the United States, is defined as one of a body of police officers, usually dressed in plain clothes, to whom is intrusted the detection of crimes and the apprehension of the offenders, or a policeman whose business is to detect wrongs by adroitly investigating their haunts and habits." [Grand Rapids & I. Ry. Co. v. King, 83 N.E. 778, 780, 41 Ind. App. 707, citing Am. Dict, and Webst. Dict. (Vol. 12, Words and Phrases, p. 312.)]

2. IBID; "POLICEMAN" DEFINED. — The term "policemen" may include detectives (62 C.J.S. p. 1091).

3. IBID; "POLICE" DEFINED.—"The term 'police' has been defined as an organized civil force for maintaining order, preventing and detecting crimes, and enforcing the laws, the body of men by which the municipal law, and regulations of a city, town, or district are enforced."

4. IBID; COMMON FUNCTION OF POLICEMEN AND DETECTIVES.—With few exceptions, both policemen and detectives perform common functions and duties and both belong to the police department. In contemplation of law therefore both shall be considered as members of the police force.

5. IBID; REMOVAL OF CITY POLICE UNDER REPUBLIC ACT NO. 557.—Section 1 of Republic Act No. 557 provides, in so far as may be pertinent to their case, that the members of the *city police* shall not be removed "except for misconduct or incompetency, dishonesty, disloyalty to the Philippine government, serious irregularities in the performance of their duties, and violation of law or duty," and in such cases, charges shall be preferred by the city mayor and investigated by the city council in a public hearing, and the accused shall be given opportunity to make their defense. A copy of the charges shall be furnished the accused and the investigating body shall try the case within ten days from notice. The trial shall be finished within a reasonable time, and the investigating body shall decide the case within fifteen days from the time the case is submitted for decision. The decision of the city council shall be appealable to the Commission of Civil Service.

6. REMOVAL OF CITY POLICE UNDER EXECUTIVE ORDER NO. 264.—Executive Order No. 264, on the other hand, prescribes a more summary procedure. It applies to secret service agents or detectives and provides in a general way that the appointing officer may terminate the services of the persons appointed if he deems it necessary because of lack of trust or confidence and if the person to be separated is a civil service eligible, the advice of his separation shall state the reasons therefor. Under this procedure no investigation is necessary, it being sufficient that the appointee be notified of his separation based on lack of confidence on the part of the appointing officer.

7. IBID; ILLEGAL REMOVAL OF DETECTIVES; CASE AT BAR.—Some detectives in the Police Department of Cebu City were removed by the Mayor because he had lost his confidence in them. The detectives maintain that their removal is illegal because it was made in violation of the law and the Constitution which protect those who are in the civil service. On the other hand, the mayor contends that their positions being primarily confidential, their removal can be effected under Executive Order No. 264 of the President, on the ground of lack of trust or confidence. HELD: (1) Sec. 1 of Republic Act No. 557 provides, in so far as may be pertinent to their case, that the members of the *city police* shall not be removed "except for misconduct or incompetency, dishonesty, disloyalty to the Philippine government, serious irregularities in the performance of their duties, and violation of law or duty," and in such cases, charges shall be preferred by the city mayor and investigated by the city council in a public hearing, and the accused shall be given opportunity to make their defense, etc. Executive Order No. 264, on the other hand, prescribes a more summary procedure. It applies to secret service agents or detectives and provides in a general way that the appointing officer may terminate the services of the persons appointed if he deems it necessary because of lack of trust or confidence and if the persons to be separated is a civil service eligible, the advice of his separation shall state the reasons therefor. Under this procedure no investigation is necessary, it being sufficient that the appointee be notified of his separation based on lack of confidence on the part of the appointing officer. An analysis of the pertinent provisions of the Charter of the City of Cebu (Com. Act No. 58) will reveal that the position of a detective comes under the police department of the city. This is clearly deducible from the provisions of sections 32, 34, and 35. Therefore, the detectives were illgeally removed from their positions.

Fernando S. Ruiz for petitioners.
Jose L. Abad for respondents.

DECISION

BAUTISTA ANGELO, *J.*:

Petitioners were detectives in the Police Department of the City of Cebu duly appointed by the Mayor of the city. Some of the appointees were civil service eligibles. Their rank, length of service, and efficiency rating appear in the certification attached to the petition.

On May 11, 12, and 19, 1953, petitioners were notified by the Mayor that they had been removed because he has lost his confidence in them. Following their removal, the City Treasurer and City Auditor stopped the payment of their salaries, and after their positions had been declared vacant because of their removal, the City Mayor immediately filled them with new appointees who are presently discharging the functions and duties appertaining thereto.

Considering that their removal was made in violation of the law and of the Constitution which protect those who are in the civil service, petitioners filed the present petition for mandamus in this Court praying that their removal be declared illegal and without effect and that their reinstatement be ordered and their salaries paid from the date of their removal up to the time of their reinstatement.

Respondents in their answer tried to justify the removal of petitioners contending that, their positions being primarily confidential, their removal can be effected under Executive Order No. 264 of the President of the Philippines, on the ground of lack of trust or confidence. They claim that the Mayor of Cebu City has lost confidence in them, and so he separated them from the service upon due notice.

The only issue involved in this petition hinges on the determina-

tion of the nature of the positions held by petitioners at the time of their removal. Petitioners contend that, having been appointed as detectives, they should be regarded as members of the Police Department of Cebu City and, therefore, they are members of the *city police*. As such they can only be removed in line with the procedure laid down in Republic Act No. 557. On the other hand, respondents contend that petitioners are not members of the police force, but of the detective force, of the City of Cebu, and, therefore, their removal is governed by Executive Order No. 264.

Let us first make a brief outline of the procedure concerning removal laid down in the legislation invoked by the parties before passing on to determine the nature of the positions held by petitioners.

Section 1 of Republic Act No. 557 provides, in so far as may be pertinent to their case, that the members of the *city police* shall not be removed "except for misconduct or incompetency, dishonesty, disloyalty to the Philippine government, serious irregularities in the performance of their duties, and violation of law or duty," and in such cases, charges shall be preferred by the city mayor and investigated by the city council in a public heraing, and the accused shall be given opportunity to make their defense. A copy of the charges shall be furnished the accused and the investigating body shall try the case within ten days from notice. The trial shall be finished within a reasonable time, and the investigating body shall decide the case within fifteen days from the time the case is submitted for decision. The decision of the city council shall be appealable to the Commission of Civil Service.

é. Executive Order No. 264, on the other hand, prescribes a more summary procedure. It applies to secret service agents or detectives and provides in a general way that the appointing officer may terminate the services of the persons appointed if he deems it necessary because of lack of trust or confidence and if the person to be separated is a civil service eligible, the advice of his separation shall state the reasons therefor. Under this procedure no investigation is necessary, it being sufficient that the appointee be notified of his separation based on lack of confidence on the part of the appointing officer.

An analysis of the pertinent provisions of the Charter of the City of Cebu (Commonwealth Act No. 58) will reveal that the position of a detective comes under the police department of the city. This is clearly deducible from the provisions of sections 32, 34 and 35. Section 32 creates the position of Chief of Police "who shall have charge of the police department and everything pertaining thereto, including the organization, government, discipline, and disposition of the city police and *detective force*." Section 34 creates the position of Chief of the Secret Service who shall, under the Chief of Police, "have charge of the detective work of the department and of the detective force of the city, and shall perform such other duties as may be assigned to him by the Chief of Police." And section 35 classifies the Chief of Police and Assistant Chief of Police, the Chief of the Secret Service and all officers and members of the city police and detective force as *peace officers*. Under this set-up it is clear that, with few exceptions, both policemen and detectives perform common functions and duties and both belong to the police department. In contemplation of law therefor both shall be considered as members of the police force of the City of Cebu.

The authorities in the United States are of the same import. Thus, "The word 'detective', as commonly understood in the U. S., is defined as one of a body of police officers, usually dressed in plain clothes, to whom is intrusted the detection of crimes and the apprehension of the offenders, or a policeman whose business is to detect wrongs by adroitly investigating their haunts and habits." [Grand Rapids & I. Ry. Co. v. King, 83 N.E. 778, 780, 41 Ind. App. 707, citing Am. Dict. and Webst. Dict. (Vol. 12, Words and Phrases, p. 312.)]. The term "policemen" may include detectives (62 C.J.S. p. 1091). And "the term 'police' has been defined as an organized civil force for maintaining order, preventing and detecting crimes, and enforcing the laws, the body of men by which the municipal law, and regulations of a city, town, or district are enforced." (Vol. 62, C.J.S. p. 1050.)

It appearing that petitioners, as detectives, or members of the police force of Cebu City, were separated from the service not for any of the grounds enumerated in Republic Act No. 557, and without the benefit of investigation or trial therein prescribed, the conclusion is inescapable that their removal is illegal and of no valid effect. In this sense, the provisions of Executive Order No. 264 of the President of the Philippines should be deemed as having been impliedly repealed in so far as they may be inconsistent with the provisions of said Act. (*See* sec. 6, Republic Act No. 557.) This interpretation is the more justified considering the rank and length of service of many of the petitioners involved. The great majority of them had been in the service for 6 years, one for 9 years, one for 11 years, one for 14 years and one even for 31 years with an efficiency rating which is both commendable and satisfactory. These data give an inkling that their separation is due to causes other than those recognized by law.

Wherefore, the petition is granted, without pronouncement as to costs.

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

XVI

Co Te Huc, Petitioner vs. Hon. Demetrio B. Encarnacion, Judge, Court of First Instance of Manila, Respondent, G. R. No. L-6415, January 26, 1954.

CRIMINAL PROCEDURE; DOUBLE JEOPARDY; DISMISSAL CONSENTED AND URGED BY COUNSEL OF THE ACCUSED.—Where an accused is dismissed provisionally not only with the express consent of the accused but even upon the urging of his counsel, there is no double jeopardy under Sec. 9, Rule 113, if the case against him is revived by the fiscal.

Amado A. Yatco for petitioner.

Demetrio B. Encarnacion, Assistant Solicitor General Guillermo E. Torres and *Solicitor Jaime de los Angeles* for respondents

DECISION

BAUTISTA ANGELO, *J.*:

This is a petition for certiorari seeking to set aside an order of the Court of First Instance of Manila which directs that petitioner be included as one of the accused in a criminal case for estafa from which he was previously excluded by an order of the court.

On July 15, 1950, several persons including petitioner, were charged with the crime of estafa in the Court of First Instance of Manila (Criminal Case No. 13229). Petitioner was arraigned and pleaded not guilty. On August 29, 1951, upon motion filed by the offended party, with the conformity of his counsel, and without objection on the part of the fiscal, the case was provisionally dismissed as to petitioner. On May 31, 1952, the fiscal filed a motion to revive the case on the ground that its dismissal with respect to petitioner "was impractical, discriminating since the ground of dismissal was not based on the merits of the case." Petitioner objected to this motion but the court granted it stating that after a reinvestigation it was found that he was just as guilty as the other accused. On November 12, 1952, petitioner moved to quash the information as to him alleging that his reinclusion in the same after it has been provisionally dismissed places him in double jeopardy. This motion was denied, and respondent Judge having refused to reconsider his order, petitioner filed the present petition for certiorari alleging that said Judge has acted in excess of his jurisdiction.

It is the theory of petitioner that the charge for estafa filed against him having been dismissed albeit provisionally without him express consent, its revival constitutes double jeopardy which bars a subsequent prosecution for the same offense under section 9, Rule 113, of the Rules of Court. This claim is disputed by the Solicitor General who contends that, considering what has transpired in relation to the incident, the provisional dismissal is no bar to his subsequent prosecution for the reason that the dismissal was made with his express consent.

We are inclined to uphold the view of the Solicitor General. From the transcript of the notes taken at the hearing in connection with the motion for dismissal, it appears that a conference was had between petitioner and the offended party in the office of the fiscal concerning the case and that as a result of that conference the offended party filed the motion to dismiss. It also appears that as no action has been taken on said motion, counsel for petitioner invited the attention of the court to the matter who acted thereon only after certain explanation was given by said counsel. And when the order came the court made it plain that the dismissal was merely provisional in character. It can be plainly seen that the dismissal was effected *not only with the express consent of petitioner but even upon the urging of his counsel.* This attitude of petitioner, or of his counsel, takes this case out of the operation of the rule.

A case in point is People v. Romero, G. R. No. L-4517-20, promulgated on July 31, 1951, wherein the order of dismissal was issued after the defense counsel has invited the attention of the court to its former order to the effect that the case would be dismissed if the fiscal was not ready to proceed with the trial on June 14, 1950. When the case reached this Court on appeal, counsel claimed that "it is indubitable that your defendant did not himself personally move for the dismissal of the cases against him nor expressly consent to it; and that the dismissal was, in effect, an acquittal on the merits for failure to prosecute, because no reservation was made in favor of the prosecution to renew the charges against your defendant in the ulterior proceedings." In overruling this plea, this Court said:

> "Whatever explanation that may be given by the attorneys for the defendant, it is a fact which cannot be controverted that the dismissal of the cases against the defendant was ordered upon the petition of defendant's counsel. In opening the postponement of the trial of the cases and insisting on the compliance with the order of the court dated May 25, 1950 that the cases be dismissed if the Provincial Fiscal was not ready for trial on the continuation of the hearing on June 14, 1950, he obviously insisted that the cases be dismissed. The fact that the counsel for the defendant and not the defendant himself, *personally* moved for the dismissal of the cases against him, had the same effect as if the defendant had personally moved for such dismissal, inasmuch as the act of the counsel in the prosecution of the defendant's cases was the act of the defendant himself, for the only case in which the defendant cannot be represented by his counsel is in pleading guilty according to section 3, Rule 114, of the Rules of Court."

There is more weighty reason to uphold the theory of reinstatement in the present case than in that of Romero considering the particularity that the dismissal was provisional in character. In our opinion this is not the dismissal contemplated by the rule that has the effect of barring a subsequent prosecution.

Petition is dismissed with costs.

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

Justice Bengzon, concurs in the result.

Chief Justice Paras took no part.

XVII

Philippine National Bank, Plaintiff-Appellee vs. Laureano Atendido, Defendant-Appellant G. R. No. L-6342, January 26, 1954.

WAREHOUSE RECEIPT; PLEDGE THEREOF TO GUARANTEE THE PAYMENT OF AN OBLIGATION; CASE AT BAR.—On June 26. 1940. A obtained from the Philippine National Bank a loan of ₱3,000 payable in 120 days with interest at 6% per annum from the date of maturity. To guarantee the payment of the obligation the borrower pledge to the bank 2,000 cavanes of palay which were then deposited in the warehouse of Cheng Siong Lam & Co. in San Miguel Bulacan, and to that effect the borrower endorsed in favor of the bank the corresponding warehouse receipt. Before the maturity of the loan, the 2,000 cavanes of palay disappeared for unknown reason in the warehouse. When the loan matured the borrower failed to pay either the principal or the interest and so action was instituted. *Held*: The delivery of said palay being merely by way of security, it follows that by the very nature of the transaction its ownership remains with the pledgor subject only to foreclosure in case of non-fulfillment of the obligation. By this we mean that if the obligation is not paid upon maturity the most that the pledgee can do is to sell the property and apply the proceeds to the payment of the obligation and to return the balance, if any, to the pledgor (Article 1872, Old Civil Code). This is the essense of this contract, for, according to law, a pledgee cannot become the owner of, nor appropriate to himself, the thing given in pledge (Article 1859, Old Civil Code). If by the contract of pledge the pledgor continues to be the owner of the thing peldge during the pendency of the obligation, it stands to reason that in case of loss of the property, the loss should be borne by the pledgor. The fact that the warehouse receipt covering the palay was delivered, endorsed in blank, to the bank does not alter the situation, the purpose of such endorsement being merely to transfer the juridical possession of the property to the pledgee and to forestall any possible disposition thereof on the party of the pledgor. This is true notwithstanding the provisions to the contrary of the Warehouse Receipt Law.

Gaudencio L Atendido for appellant.

Ramon B. de los Reyes and *Nemesio P. Libunao* for appellee.

DECISION

BAUTISTA ANGELO, *J.*:

This is an appeal from a decision of the Court of First Instance of Nueva Ecija which orders the defendant to pay to the plaintiff the sum of ₱3,000, with interest thereon at the rate of 6% per annum from June 26, 1940, and the costs of action.

On June 26, 1940, Laureano Atendido obtained from the Philippine National Bank a loan of ₱3,000 payable in 120 days with interest at 6% per annum from the date of maturity. To guarantee the payment of the obligation the borrower pledge to the bank 2,000 cavanes of palay which were then deposited in the warehouse of Cheng Siong Lam & Co. in San Miguel, Bulacan, and to that effect the borrower endorsed in favor of the bank the corresponding warehouse receipt. Before the maturity of the loan, the 2,000 cavanes of palay disappeared for unknown reasons in the warehouse. When the loan matured the borrower failed to pay either the principal or the interest and so the present action was instituted.

Defendant set up a special defense and a counterclaim. As regards the former, defendant claimed that the warehouse receipt covering the palay which was given as security having been endorsed in blank in favor of the bank, and the palay having been lost or disappeared, he thereby became relieved of liability. And, by way of counterclaim, defendant claimed that, as a corollary to his theory, he is entitled to an indemnity which represents the difference between the value of the palay lost and the amount of his obligation.

The case was submitted on an agreed statement of facts and thereupon the court rendered judgment as stated in the early part of this decision.

Defendant took the case on appeal to the Court of Appeals but later it was certified to this Court on the ground that the question involved is purely one of law.

The only issue involved in this appeal is whether the surrender of the warehouse receipt covering the 2,000 cavanes of palay given as a security, endorsed in blank, to appellee, has the effect of transferring their title or ownership to said appellee, or it should be considered merely as a guarantee to secure the payment of the obligation of appellant.

In upholding the view of appellee the lower court said: "The surrendering of warehouse receipt No. S-1719 covering the 2,000 cavanes of palay by the defendant in favor of the plaintiff was not that of a final transfer of that warehouse receipt but merely

as a guaranty to the fulfillment of the original obligation of ₱3,000.00. In other word, plaintiff corporation had no right to dispose (of) the warehouse receipt until after the maturity of the promissory note Exhibit A. Moreover, the 2,000 cavanes of palay were not on the first place in the actual possession of plaintiff corporation, although symbolically speaking the delivery of the warehouse receipt was actually done to the bank."

We hold this finding to be correct not only because it is in line with the nature of a contract of pledge as defined by law (Articles 1857, 1858 and 1863, Old Civil Code), but is supported by the stipulations embodied in the contract signed by appellant when he secured the loan from appellee. There is no question that the 2,000 cavanes of palay covered by the warehouse receipt were given to appellee only as guarantee to secure the fulfillment by appellant of his obligation. This clearly appears in the contract Exhibit A wherein it is expressly stated that said 2,000 cavanes of palay were given as a collateral security. The delivery of said palay being merely by way of security, it follows that by the very nature of the transaction its ownership remains with the pledgor subject only to foreclosure in case of non-fulfillment of the obligation. By this we mean that if the obligation is not paid upon maturity the most that the pledgee can do is to sell the property and apply the proceeds to the payment of the obligation and to return the balance, if any, to the pledgor (Article 1872, Old Cicil Code). This is the essence of this contract, for, according to law, a pledgee cannot become the owner of, nor appropriate to himself, the thing given in pledge (Article 1859, Old Civil Code). If by the contract of pledge the pledgor continues to be the owner of the thing pledge during the pendency of the obligation, it stands to reason that in case of loss of the property, the loss should be borne by the pledgor. The fact that the warehouse receipt covering the palay was delivered, endorsed in blank, to the bank does not alter the situation, the purpose of such endorsement being merely to transfer the juridical possession of the property to the pledgee and to forestall any possible disposition thereof on the part of the pledgor. This is true notwithstanding the provisions to the contrary of the Warehouse Receipt Law.

In a case recently decided by this Court (Martinez v. Philippine National Bank, G. R. No. L-4080, September 21, 1953) which, involves a similar transaction, this Court held:

> "In conclusion, we hold that where a warehouse receipt or quedan is transferred or endorsed to a creditor only to secure the payment of a loan or debt, the transferree or endorsee does not automatically become the owner of the good covered by the warehouse receipt or quedan but he merely retains the right to keep and with the consent of the owner to sell them so as to satisfy the obligation from the proceeds of the sale, this for the simple reason that the transaction involved is not a sale but only a mortgage or pledge, and that if the property covered by the quedans or warehouse receipts is lost without the fault or negligence of the mortgagee or pledgee or the transferree or endorsee of the warehouse receipt or quedan, then said goods are to be regarded as lost on account of the real owner, mortgagor or pledgor."

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

Bengzon, Padilla, Montemayor, Jugo, Reyes and *Labrador, J. J.*; concur.

Chief Justice Paras dissents for the same reasons stated in Martinez vs. P.N.B., L-4080.

XVIII

Cebu Portland Cement Company, Petitioner vs. The Court of Industrial Relations (CIR) and Philippine Land-Air-Sea Labor Union (PLASLU), Respondents, G. R. No. L- 6158, *March* 11, 1954.

1. COURT OF INDUSTRIAL RELATIONS; JURISDICTION OVER A CLAIM FILED BY A LABOR UNION WHOSE PERMIT HAD ALREADY EXPIRED AND NOT RENEWED BY THE SECRETARY OF LABOR. — The registration required by Commonwealth Act No. 103 is not a prerequisite to the right of a labor organization to appear and litigate a case before the Court of Industrial Relations. (Kapisanan Timbulan ng mga Manggagawa, 44 O. G. (1), pp. 182, 184-185.) In the second place, once the Court of Industrial Relations has acquired jurisdiction over a case under the law of its creation, it retains that jurisdiction until the case is completely decided, including all the incidents related thereto.

2. EMPLOYER AND EMPLOYEE; THE POSITION OF SUPERINTENDENT IS THAT OF AN EMPLOYEE. — In a general sense an "'employee' is one who renders service for another for wages or salary, and that in this sense a person employed to superintend, with power to employ and discharge men and generally to represent the principal is an 'employee,'" (Shields v. W. R. Grace and Co., 179 P. 265, 271, quoted in 14 Words and Phrases 360.)

3. IBID; IBID. — It has been said that while a superintendent who has the power to appoint and discharge may be considered as part of the management, in the dispute that arises between it and the laborers, said superintendent is an employee in his own relation to the capitalist or owner of the business, in this case, the Cebu Portland Cement Company.

4. IBID; IBID. — Valencia was, in the case of his dismissal by the Cebu Portland Cement Company an employee, not a part of the management, and his case properly falls under the category of an industrial dispute falling under the jurisdiction of the Court of Industrial Relations. And the fact that his position was among the highest in a government enterprise did not change the nature of his relation to his employer.

5. IBID; DISMISSAL WITHOUT CAUSE. — There is no question that the position of general superintendent was not abolished; its salary of ₱6,000 and which was held by one Ocampo, was suppressed. Instead of retiring Ocampo, whose petition was abolished, Valencia was retired, even as his position was retained, and Ocampo promoted to take his (Valencia's) position. As Valencia's position was not abolished or suppressed, Valencia should not have been separated by retirement; it should have been Ocampo who should have been retired because of the abolition of his own position. Petitioner's argument in effect is as follows: that there is economy if Valencia is separated and Ocampo retained, and Valencia dismissed. The absurdity of the contention is evident; it is its own refutation. Reasons of economy may have justified the reduction, of Valencia's salary, but certainly not his separation. Evidently the reduction was merely the opportune occasion for a dismissal without cause.

Legal Counsel of Cebu Portland Cement Company, *Fortunato V. Borromeo* and Asst. Gov't Corporate Counsel, *Leovigildo Monasterial* for petitioners.

Emilio Lumontad for respondents, PLASLU.

DECISION

LABRADOR, *J.*:

This is an appeal by certiorari from a decision of the Court of Industrial Relations ordering the petitioner Cebu Portland Cement Company to reinstate Felix V. Valencia to his former position as general superintendent, with full back pay at ₱1,000 a month from November 15, 1950, up to his reinstatement and the differential salary collectible from May 1, 1949 up to November 16, 1950, with all the privileges and emoluments attached to said position.

The record discloses that on December 31, 1948 respondent Philippine Land-Air-Sea Labor Union (PLASLU) filed a petition with the Court of Industrial Relations, docketed as CIR Case No. 241-V and entitled Philippine Land-Air-Sea Labor Union vs. Cebu Portland Cement Company, submitting a set of grievances and demands against the therein respondent, herein petitioner, for decision and settlement by said court. While the said case was pending and on

November 20, 1950, said PLASLU filed an incidental motion in the said case, alleging that respondent herein Felix V. Valencia was dismissed without just cause on November 16, 1950 and praying that he be reinstated with back salaries. The Cebu Portland Cement Company filed an answer denying that Valencia was dismissed without cause and alleging that he was retired from the service together with 100 other employees and/or laborers to promote economy and efficiency in the service in accordance with the order of the Secretary of Economic Coordination. In that same answer the cement company questioned the PLASLU's juridical personality as a labor union, as well as the jurisdiction of the CIR to take cognizance of the incidental case. After hearing the merits of the incidental case the Court of Industrial Relations rendered the decision appealed from. After a motion for reconsideration filed by the cement company was denied *in banc*, it filed the present action for certiorari alleging that (a) the CIR has no power to take cognizance of the incidental case of Valencia, firstly, because the PLASLU's license as a registered labor union was revoked by the Secretary of Labor on August 25, 1950, and secondly, because the subject-matter involved in the said incidental case is not an industrial or agricultural dispute related to the main case, Valencia belonging to the management group of the petitioner company; (b) that the court had no power and acted with grave abuse of discretion, firstly, because it did not state correctly the facts appearing on record secondly, because it disregarded the essential requirements of due process; thirdly, because it did not weigh the evidence submitted by the petitioner herein before promulgating its decision; fourthly, because it had no jurisdiction to consider the claim of a Filipino citizen in the service of a government controlled corporation, etc.

The facts giving rise to the incidental case filed by Valencia against the Cebu Portland Cement Company may be briefly stated as follows: On or before November 10, 1950, Felix V. Valencia was a general superintendent of the company with a salary of ₱12,000 per annum. He first served with the Cebu Portland Cement Company as assistant general superintendent from July, 1939 with a salary of ₱7,200 per annum. In November, 1947, on recommendation of the general manager, he was promoted to the position of general superintendent with compensation at the rate of ₱9,600 per annum. On May 1, 1949, he got a promotional appointment with a compensation of ₱12,000 per annum. On October 7, October 21, and October 23, the Secretary of Economic Coordination ordered the general manager of the Cebu Portland Cement to take steps to secure a reduction in the expenses of the company, in order to enable it to produce cement at a lower cost and thus reduce its price for the benefit of the public. Pursuant to this order the manager proposed that the annual salary of the general superintendent of the plant to be reduced to ₱10,800 and recommended that Valencia be retired for the good of the service and the assistant general superintendent take his place as general superintendent. The Secretary of Economic Coordination approved the proposal and recommendation and ordered the retirement of Mr. Valencia effective November 16, 1950. Valencia refused to retire as ordered and so filed the incidental case.

One of the most important questions raised in this appeal is the supposed lack of jurisdiction on the part of the Court of Industrial Relations to consider the incidental case of respondent Valencia, for the reason that when his claim was presented before the court on November 16, 1950 the Philippine Land-Air-Sea Labor Union, to which he belonged, had no longer any personality before the said court, because its permit to continue as a labor organization had already expired and the same was not renewed by the Secretary of Labor. In the first place, it must be remembered that the registration required by Commonwealth Act No. 103 is not a prerequisite to the right of a labor organization to appear and litigate a case before the Court of Industrial Relations. (Kapisanan Timbulan ng mga Manggagawa, 44 O. G. (1), pp. 182, 184-185.) In the second place, once the Court of Industrial Relations has acquired jurisdiction over a case under the law of its creation, it retains that jurisdiction until the case is completely decided, including all the incidents related thereto. (Manila Hotel Employees Association vs. Manila Hotel Company and the Court of Industrial Relations, 73 Phil. 374; Mortera, et al. vs. Court of Industrial Relations, 45 Q. G. (4), p. 1714; and Luzon Brokerage Company vs. Luzon Labor Union, 48 O. G. (9), p. 3883.)

It is also claimed that the Court of Industrial Relations has no jurisdiction over the case of the dismissal or separation of Valencia, because the dispute involved between him and the Cebu Portland Cement Company is not an industrial dispute which is causing or likely to cause a strike or a lockout, and the number of employees or laborers involved does not exceed 30. In answer to this contention it must be noted that the original case was instituted by the Philippine Land-Air-Sea Labor Union (PLASLU) and the circumstances required by law for the case to be submitted to the Court of Industrial Relations, as required by Section 4 of Commonwealth Act No. 103, were then present. While this original action was pending, the incidental case of Valencia, a member of the PLASLU, arose and the power of the court to take cognizance thereof is recognized in Section 1 of said Commonwealth Act No. 103 as a dismissal of an employee during the pendency of the proceedings in the original case.

It is also contended that the position of general superintendent held by Valencia, which is next in importance to that of general manager with respect to the operation of the company's plant, is not that of an employee, as Valencia represented the management of the company and his dismissal was a case involving a member of the management and not an employee, and, therefore, not an industrial dispute. In a general sense an " 'employee' is one who renders service for another for wages or salary and that in this sense a person employed to superintend, with power to employ and discharge men and generally to represent the principal is an 'employee,' " (Shields v. W. R. Grace and Co., 179 P. 265, 271; quoted in 14 Words and Phrases 360.) It is true that in the case between the PLASLU and the Cebu Portland Cement Company, Valencia actually represented the management in the dispute arising between the Cebu Portland Cement Company, employer, and the union of the laborers, employees. But in the incidental case at bar, we are not concerned with said relation between the PLASLU and the Cebu Portland Cement Company, but we are with that of Valencia, employee, on one side, as against the Cebu Portland Cement Company, employer, on the other. It has been said that while a superintendent who has the power to appoint and discharge may be considered as part of the management, in the dispute that arises between it and the laborers, said superintendent is an employee in his own relation to the capitalist or owner of the business, in this case, the Cebu Portland Cement Company.

> "A foreman in his relation to his employer, is an employee, while in his relation to the laborers under him he is the representative of the employer and within the definition of Section 2(2) of the Act. Nothing in the Act excepts foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master. (NLRB vs. Skinner and Kennedy Stationary Co., 113 Fed. 2d., 667.)
>
> "His interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in those respects because he serves his master in others. x x x." (330 U. S. 485.)

Valencia was, in the case of his dismissal by the Cebu Portland Cement Company an employee, not a part of the management, and his case properly falls under the category of an industrial dispute falling under the jurisdiction of the Court of Industrial Relations. And the fact that his position was among the highest in a government enterprise did not change the nature of his case or his relation to his employer.

Let us now consider the merits of the arguments submitted by petitioner in justification of Valencia's separation. It is claimed that this was made in the interest of economy and efficiency. There is no question that the position of general superintendent was not abolished; its salary was reduced only, from ₱12,000 to ₱10,800 per annum. That of assistant general superintendent, which carried a salary of ₱6,000 and which was held by one Ocampo, was suppressed. Instead of retiring Ocampo, whose position was abolished,

Valencia was retired, even as his position was retained, and Ocampo promoted to take his (Valencia's) position. As Valencia's position was not abolished or suppressed, Valencia should not have been separated by retirement; it should have been Ocampo who should have been retired because of the abolition of his own position. Petitioner's argument in effect is as follows: that there is economy if Valencia is separated and Ocampo retained, but none if Ocampo, whose position is abolished, is retained and Valencia dismissed. The absurdity of the contention is evident; it is its own refutation. Reasons of economy may have justified the reduction of Valencia's salary, but certainly not his separation. Evidently, the reduction was merely the opportune occasion for a dismissal without cause.

Was the dismissal in the interest of efficiency? The CIR found that Valencia's efficiency is shown by the greater amount of production obtained during his incumbency. Even the petitioner admits that there is no charge of inefficiency. (See Brief for the Petitioner, p. 89.) But the separation was recommended "for the good of the service," implying that there were valid reasons therefor. None appear in the record. On the other hand, the evidence submitted prove Valencia's efficiency. Even if there were reasons therefor, which were not disclosed, the separation would still be illegal because no charges of any kind whatsoever appear to have been filed against him and neither does any opportunity appear to have been given him to answer them or to defend himself against them.

The above considerations cover the most important points raised in this appeal; it would be unprofitable to answer all the other arguments, most of which are high-sounding claims without foundation in fact and in law. Suffice it for us to state that we have carefully examined the record and we find no reason or ground to disturb the findings of fact and conclusions of law contained in the judgment. The findings of fact are based on the testimonial and documentary evidence submitted. The claim that the facts appearing in the record are not stated, or that the requirements of due process of law have been ignored, find no support in the record, it appearing that every opportunity was afforded petitioner to present its side.

The judgment is, therefore, hereby affirmed, with costs.
So ordered.

Paras, Pablo, Bengzon, Padilla, Montemayor; Reyes; Jugo and *Bautista Angelo, J. J.*, concur.
Mr. Justice Concepcion and *Mr. Justice Diokno* did not take part.

XIX

The People of the Philippines, Plaintiff, Antonio Espada, Offended-Party-Appellee, vs Pelagio Montasesa et al., Accussed-Appellants, G. R. No. L-5684, January 22, 1954.

1. CRIMINAL LAW; CIVIL LIABILITY OF THE ACCUSED; CASE AT BAR. — The defendants were found guilty of the crime of coercion and were sentenced either to return the articles in question (two bales of tobacco) to the complainant or to indemnify him of the same of P632.00 with subsidiary imprisonment in case of insolvency. In compliance therewith, the accused delivered to the provincial sheriff two bales of tobacco but in spite of this the provincial sheriff levied upon certain real properties of the accused. The accused claimed that tobacco is a fungible thing and that in accordance with article 1593 of the Civil Code, the obligation of one who receives money or fungible things is to return to the creditor the same amount or thing owned of the same kind or specie and quality. *Held*: The civil liability of the accused-appellants, in the case at bar, is not governed by the Civil Code, as contended, but by Articles 100-111 of the Revised Penal Code. In accordance therewith, the sentence is for the return of the very thing taken, *restitution*, and if this can not be done, for the payment of P600 in lieu thereof, *reparation*. This amount represents the value of the two bales of tobacco taken, at the time of the taking, and this value was fixed by the court presumably in accordance with the evidence adduced during the trial.

2. IBID; IBID; RESTITUTION OR REPARATION AS THE CIVIL LIABILITY OF THE ACCUSED IN CRIMES AGAINST PROPERTY. — The purpose of the law is to place the offended party as much as possible in the same condition as he was before the offense was committed against him. So if the crime consists in the taking away of his property, the first remedy granted is that of restitution of the thing taken away. If restitution can not be made, the law allows the offended party the next best thing, reparation .

3. IBID; IBID; REPARATION MAY NOT BE MADE BY THE DELIVERY OF A SIMILAR THING. — Reparation may not be made by the delivery of a similar thing (same amount, kind or species and quality), because the value of the thing taken may have decreased since the offended party was deprived thereof. Reparation, therefore, should consist of the price of the thing taken, as fixed by the court (Art. 106, Revised Penal Code).

4. IBID; IBID; AMOUNT TO BE PAID TO THE OFFENDED PARTY AS REPARATION; MONEY AS STANDARD OF VALUE. — In the case at bar, the court considered the payment of P600 as the next best thing, if the property taken could not be returned. No valid objection can be raised against this decision; money is the standard of value, and, except in financial crises, it does not fluctuate in value as much as merchandise or things, especially those bought and sold in the ordinary course of commerce.

Julio Siayoco for appellants.
No appearance for appellees in the Supreme Court.

DECISION

LABRADOR, *J.*:

In the above entitled criminal case, the accused-appellants were found guilty of the crime of coercion and were sentenced by the Court of Appeals, as follows:

> "x x x the penalty is increased to four (4) months and one (1) day of arresto mayor, and that appellant should also be sentenced either to return the articles in question to the complainant or to indemify him in the sum of P632.00, with subsidiary imprisonment in case of insolvency, x x x."

When the case was returned to the Court of First Instance for the execution of the above sentence, said court issued an order of execution for P600, the value of two bales of tobacco obtained by the accused from the offended party. The provincial sheriff levied upon certain real properties of the accused Paulino Dumagat to secure the payment thereof, notwithstanding the fact in compliance with the judgment, the accused had delivered to him (the sheriff) two bales of tobacco. So the accused presented a motion in court praying that the order of execution be set aside. The offended party opposed the petition, and the court sustained this opposition, denying the petition to set aside the order. Against this order of denial, the accused have prosecuted this appeal.

In their brief, the accused claim that tobacco is a fungible thing and that, in accordance with Article 1593 of the Civil Code, the obligation of one who receives money or fungible things is to return to the creditor the same amount of the thing owed of the same kind or species and quality.

The civil liability of the accused-appellants, in the case at bar, is not governed by the Civil Code, as contended, but by Articles 100-111 of the Revised Penal Code. In accordance therewith, the sentence is for the return of the very thing taken, *restitution*, and if this can not be done, for the payment of P600 in lieu thereof, *reparation*. This amount represents the value of the two bales of tobacco taken, at the time of the taking, and this value was fixed by the court presumably in accordance with the evidence adduced during the trial.

The purpose of the law is to place the offended party as much as possible in the same condition as he was before the offense was committed against him. So if the crime consists in the taking away

of his property, the first remedy granted is that of restitution of the thing taken away. If restitution can not be made, the law allows the offended party the next best thing, reparation. The Spanish jurist Viada, commenting on this provision of the law says:

> "En las causas por robo, jurto, etc., en que no hayan sido recuperados durante el proceso los objetos de dichos delitos, be condenarse a los reos a su restitucion, o, en su defecto, a la indemnizacion correspondiente en la cantidad en que hayan sido valorados o tasados por los peritos; x x." (3 Viada 6).

Reparation may not be made by the delivery of a similar thing (same amount, kind or species and quality), because the value of the thing taken may have decreased since the offended party was deprived thereof. Reparation, therefore, should consist of the price of the thing taken, as fixed by the court (Art. 106, Revised Penal Code).

In the case at bar, the court considered the payment of ₱600 as the next best thing, if the property taken could not be returned. No valid objection can be raised against this decision; money is the standard of value, and, except in financial crises, it does not fluctuate in value as much as merchandise or things, especially those bought and sold in the ordinary course of commerce. In any case, the judgment of the Court of Appeals ordering restitution, or the payment of the value of the property taken, is now final and executory and can no longer be subject to modification.

The appeal is hereby dismissed, with costs against accused-appellants.

So ordered.

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

XX

Re: Transfer Certificate of Title No. 14123, *Tirso T. Reyes, as guardian of the minors, Azucena, Flor-De-Lis and Tirso, Jr., all surnamed Reyes y Barretto, Petitioners-Appellees versus Milagros Barretto-Datu, Oppositor-Appellant, G. R. No. L-5549, February* 26, 1954.

1. FINAL JUDGMENTS; DIFFERENT WAYS OF ATTACKING THEIR VALIDITY. — Under our rules of procedure, the validity of a judgment or order of the court, which has become final and executory, may be attacked only by a direct action or proceeding to annul the same, or by motion in another case if, in the latter case, the court had no jurisdiction to enter the order or pronounce the judgment (Sec. 44, Rule 39 of the Rules of Court). The first proceeding is a direct attack against the order or judgment, because it is not incidental to, but is the main object of, the proceeding. The other one is the collateral attack, in which the purpose of the proceedings is to obtain some relief, other than the vacation or setting aside of the judgment, and the attack is only an incident. (I Freeman on Judgments, Sec. 306, pp. 607-608.) A third manner is by a petition for relief from the judgment or order as authorized by the statutes or by the rules, such as those expressly provided in Rule 38 of the Rules of Court, but in this case it is to be noted that the relief is granted by express statutory authority in the same action or proceeding in which the judgment or order was entered. In the case at bar, we are not concerned with a relief falling under this third class, because the project of partition was approved in the testate proceedings in the year 1949, whereas the petition in this case is in a registration proceeding and was filed in the year 1951.

2. ID.; ID.; CASE AT BAR. — In the case at bar, the respondent Lucia Milagros Barretto is objecting to the petition by the second method, the collateral attack. When a judgment is sought to be assailed in this manner, the rule is that the attack must be based not on mere errors or defects in the order or judgments. There and there alone can it meet with any meaand void, because the court had no power or authority to grant the relief, or no jurisdiction over the subject matter or over the parties or both. (Ibid. Sec. 326, p. 650).

3. ID.; ID.; PRINCIPLES GOVERNING COLLATERAL ATTACK. — In cases of collateral attack, the principles that apply have been stated as follows:

> "The legitimate province of collateral impeachment is void judgments. There and there alone can it meet with any measure of success. Decision after decision bears this import: In every case the field of collateral inquiry is narrowed down to the single issue concerning the void character of the judgment and the assailant is called upon to satisfy the court that such is the fact. To compass his purpose of overthrowing the judgment, it is not enough that he show a mistaken or erroneous decision or a record disclosing non-jurisdictional irregularities in the proceedings leading up to the judgment. He must go beyond this and show to the court, generally from the fact of the record itself, that the judgment complained of is utterly void. If he can do that his attack will succeed for the cases leave no doubt respecting the right of a litigant to collaterally impeach a judgment that he can prove to be void." (I Freeman on Judgments, Sec. 322, p. 642.)

4. ID.; ID.; WHEN LACK OF JURISDICTION OF THE COURT MAY BE A GROUND FOR COLLATERAL ATTACK. — The doctrine that the question of jurisdiction is to be determined by the record alone, thereby excluding extraneous proof seems to be the natural unavoidable result of that stamp of authenticity which, from the earliest times, was placed upon the record, and which gave it such uncontrollable credit and verity that no plea, proof, or averment could be heard to the contrary. x x x. Any other rule, x x x, would be disastrous in its results, since to permit the court's records to be contradicted or varied by evidence dehors would render such records of no avail and definite sentence would afford but slight protection to the rights of parties once solemnly adjudicated. x x x. (I Freeman on Judgments, Sec. 376, p. 789.)

Deogracias T. Reyes and *Virgilio Anz. Cruz* for appellant.
Calanog and *Alafriz* for appellee.

DECISION

LABRADOR, *J.*:

This is an appeal prosecuted in this Court against two orders of the Court of First Instance of Bulacan, issued in Case No. 116, G. L. R. O. Rec. No. 12908, requiring the oppositor-appellant Lucia Milagros Barretto to surrender Transfer Certificate of Title No. 14123, issued in the name of Bibiano Barretto, so that the same may be cancelled and a new one issued in lieu thereof in the name of Azucena, Flor-de-lis and Tirso, Jr., all surnamed Reyes, co-owners of an undivided one-half share, and Lucia Milagros Barretto as the owner of the other half. The circumstances leading to the issuance of the said orders may be briefly stated as follows:

Bibiano Barretto died on February 18, 1936, and in the testate proceedings for the settlement of his estate, Salud Barretto and Lucia Milagros Barretto were declared as his children and heirs. Lucia Milagros Barretto was at that time a minor, 15 years of age, and proceedings were instituted in the same court (Case No. 49881) for the appointment of her guardian. In the testate proceedings a project of partition was submitted, which was signed by Salud Barretto, Lucia Milagros Barretto (minor) and Maria Gerardo (surviving spouse), the latter signing "on her behalf and as guardian for the Minor, Milagros Barretto." This project of partition was approved by the court. It was filed in the Office of the Register of Deeds of Bulacan on May 22, 1940 but the transfer certificate of title over the property in question was never cancelled. His widow, Maria Gerardo, died on March 5, 1948, and in the testate proceedings for the settlement of her estate, Lucia Milagros Barretto submitted a will purporting to be of said deceased for probate, in accordance with which Maria Gerardo had only one child with the deceased Bibiano Barretto, namely. Lucia Milagros Barretto. This will submitted by Lucia Milagros Barretto was declared to be the last will and testament of the deceased Maria Gerardo.

(*Continued on page* 253)

DECISION OF THE PHILIPPINE PATENT OFFICE

Menzi and Co., Inc., Opposer, vs. Andres Co, Respondent-Applicant, T. M. Dec. No. 10, s. 1952.

TRADEMARK ACT; SOURCE OF OWNERSHIP OF A TRADEMARK.—The ownership of a trademark springs from its adoption and use. Ownership does not arise from its registration. He who first adopts and uses a trademark is considered the owner thereof (Act No. 666, secs. 2, 3; Rep. Act No. 638, sec. 1; Recamier v. Ayer, 59 F (2d) 802, 806; Keystone v. Arena, 27 F. Supp. 290, 293; McLean v. Fleming, 24 L. ed. 828).

IBID; EFFECT OF REGISTRATION OF A TRADEMARK.—Registration produces for the owner of a trademark only procedural advantages in court — advantages which spring from the statutory declaration that a certificate of registration is *prima facie* evidence of the registrant's ownership of the trademark, of his exclusive right to use it on certain products, and of certain other matters (Rep. Act No. 166, sec. 20; Act No. 666, sec. 16).

IBID; FAILURE TO REGISTER ONE'S TRADEMARK.—A person's failure to register his trademark under the Trademark Act does not affect his rights of ownership over it. (Ansehl v. Williams, 267 F. 9, 14, and cases cited). Such failure to register does not of itself result in the abandonment and in the relinquishment of his proprietary rights thereover.

IBID; ABANDONMENT OF A TRADEMARK.—Abandonment is a matter not only of the non-user of a trademark but of the actual intent to abandon it, as well, both of which factors need be established by evidence by him who asserts it (Ansehl v. Williams, *supra;* p. 13; Sexlehner v. Eisner, 45 L. ed. 60; Wallace v. Repetti, 266, F. 307).

IBID; CLAIM TO THE EXCLUSIVE USE OF TRADEMARK.—The claim to the exclusive use, or ownership, of a trademark is a continuing right in the owner (Heger v. Polk, 47 F (2d) 966, 969 and cases cited).

IBID; MEANING OF THE TERM "MARK" AS USED IN SECTION 8.—The broad term "mark" used in Sec. 8 of the Trademark Act (Rep. Act No. 166, as amended) means a "trademark" or a "service mark."

IBID; PERSONS WHO MAY OPPOSE REGISTRATION OF TRADEMARK.—There is nothing in the language of Sec. 8 of our statute that would justify the interpretation that no person may oppose a registration, unless he owns a trademark and that trademark is registered; and, if the same is not registered, that he must ,at least, have *exclusive* rights to it. The fact that the statute directs that copies of foreign certificates of registration should be attached to the opposition, does not necessarily mean that the ownership of a registered trademark or of an *unregistered* exclusive trademark, is required as a basis for opposition. All that appears necessary is that the opposer allege in the opposition that he is using something or other on his goods *by way of a mark;* that the trademark sought to be registered by the applicant so closely resembles this mark, that he believes that he would be damaged by the registration of the applicant's trademark.

IBID; UNFAIR COMPETITION; JURISDICTION OF THE PATENT OFFICE.—The Principal Register of the trademark statute, on which the Respondent-Applicant seeks registration of his trademark *Señorita,* is not concerned with labels or their appearances; it is concerned exclusively with trademarks. The appearance of labels falls under the law of unfair competition, not under the trademark law proper. Over matters of unfair competition, the Patent Office has no jurisdiction (Sec. T. M. Dec. No. 2, s. 1951).

ORDER

The Respondent-Applicant moves that the Opposition filed by the Opposer be dismissed on the ground that, upon the facts set forth in said Opposition, the Opposer is not entitled to oppose the registration in favor of the Respondent-Applicant of the trademark under dispute.

The Respondent-Applicant has applied, under the current Trademark Act (Rep. Act. No. 166, as amended), for the registration of a trademark, *Señorita,* which he claims to have used on bobby pins since the year 1948. Under Sec. 8 of the Act, the Opposer has opposed the registration upon the ground that it would be damaged by the said registration, having used the same trademark, *Señorita,* on identical articles, since the year 1932.

The Opposer alleges that its trademark *Señorita* was registered in 1934 under the old trademark Act No. 666, which was repealed on June 20, 1947, by the current Trademark Act, Rep. Act No. 166, approved on the same date. It admits that the said trademark has not been re-registered under the current Act either under its Sec. 41(a) or as a new, original registration.

It is because of this fact that the Opposer's trademark *Señorita* has not been re-registered under the current Act, and because nobody, according to him, can have exclusive rights to the designation *Señorita,* as used on bobby pins, that the Respondent-Applicant moves that the Opposition be dismissed. The Respondent-Applicant understands that by its failure to re-register its trademark *Señorita* under the current Act, the Opposer should be deemed to have abandoned and relinquished all its rights to said trademark; and, being deemed to have abandoned and relinquished said rights, it is now not entitled to oppose the registration of the same trademark *Señorita,* for the same goods, to the Respondent-Applicant. The Respondent-Applicant also understands that a person who has no exclusive rights to a mark he is using on certain goods may not be allowed to oppose the registration, in favor of another, of the same mark used on similar articles.

Whether or not the positions taken by the Respondent-Applicant are correct, is the issue for decision in this Order.

The Opposer alleges that it is the owner of the trademark *Señorita.* The ownership of a trademark springs from its adoption and use. Ownership does not arise from its registration. He who first adopts and uses a trademark is considered the owner thereof (Act No. 666, secs. 2, 3; Rep. Act No. 638, sec. 1; Recamier v. Ayer 59 F(2d) 802, 806; Keystone v. Arena, 27 F. Supp. 290, 293; McLean v. Fleming, 24 L. ed. 828). Registration produces for the owner of a trademark only procedural advantages in court — advantages which spring from the statutory declaration that a certificate of registration is *prima facie* evidence of the registrant's ownership of the trademark, of his exclusive right to use it on certain products, and of certain other matters (Rep. Act No. 166, sec. 20; Act No. 666, sec. 16). A person's failure to register his trademark under the Trademark Act does not affect his rights of ownership over it. (Ansehl v. Williams, 267 F 9, 14, and cases cited). Such failure to register does not of itself result in the abandonment and in the relinquishment of his proprietary rights thereover. Abandonment is a matter not only of the non-user of a trademark but of the actual intent to abandon it, as well, both of which factors need be established by evidence by him who asserts it (Ansehl v. Williams, *supra,* p. 13; Saxlehner v. Eisner, 45 L. ed. 60; Wallace v. Repetti, 266 F 307). The claim to the exclusive use, or ownership, of a trademark is a continuing right in the owner (Heger v. Polk, 47 F(2d) 966, 969 and cases cited).

The claim, therefore, of the Respondent-Applicant that the Opposer has no right to make opposition in this case, because it has lost its proprietary rights to the trademark *Señorita,* through its failure to register it under the current Trademark Act, cannot be sustained.

The section of the current Trademark Act relating to opposition provides as follows:

> "Sec. 8. *Opposition* — Any person who believes that he would be damaged by the registration of a mark or tradename may, upon payment of the required fee and within thirty days after the publication under the first paragraph of section

seven hereof, file with the Director an opposition to the application. Such opposition shall be in writing and verified by the oppositor, or by any person on his behalf who knows the facts, and shall specify the grounds on which it is based and include a statement of the facts relied upon. Copies of certificates of registration of marks or trade-names registered in other countries or other supporting documents mentioned in the opposition shall be filed therewith, together with the translation thereof into English, if not in the English language. For good cause shown and upon payment of the required surcharge, the time for filing an opposition may be extended for an additional thirty days by the Director, who shall notify the applicant of such extension."

The broad term "mark" used in this Section means a "trademark" or a "service mark."

Sec. 6 of the U.S. Trademark Act of Feb. 20, 1905, declares:

"Sec. 6. * * * Any person who believes he would be damaged by the registration of a mark may oppose the same by filing notice of opposition, stating the grounds therefor, in the Patent Office within thirty days after publication of the mark sought to be registered, which said notice of opposition shall be verified by the person filing the same before one of the officers mentioned in section two of this Act. An opposition may be filed by a duly authorized attorney, but such opposition shall be null and void unless verified by the opposer within a reasonable time after such filing. If no notice of opposition is filed within said time, the commissioner shall issue a certificate of registration therefor, as hereinafter provided for.***"

Sec. 13 of the current U.S. Trademark of 1946, reads:

"Any person who believes that he would be damaged by the registration of a mark upon the principal register may, upon payment of the required fee, file a verified notice of opposition in the Patent Office, stating the grounds therefor, within thirty days after the publication under subsection (a) of section 12 of this Act of the mark sought to be registered. For good cause shown, the time for filing notice of opposition may be extended by the Commissioner, who shall notify the applicant. An unverified opposition may be filed by a duly authorized attorney, but such opposition shall be null and void unless verified by the opposer within a reasonable time after such filing to be fixed by the Commissioner."

There is nothing in the language of the above Sec. 8 of our statute that would justify the interpretation that no person may oppose a registration, unless he owns a trademark and that trademark is registered; and, if the same is not registered, that he must, at least, have *exclusive* rights to it. The fact that the statute directs that copies of foreign certificates of registration should be attached to the opposition, does not necessarily mean that the ownership of a registered trademark or of an *unregistered* exclusive trademark, is required as a basis for opposition. All that appears necessary is that the opposer allege in the opposition that he is using something or other on his goods *by way of a mark;* that the trademark sought to be registered by the applicant so closely resembles this mark, that he believes that he would be damaged by the registration of the applicant's trademark.

Construing the above cited Sec. 6 of the U.S. Trademark Act of Feb. 20, 1905, the Court of Appeals of the Dist. of Columbia said in *Broderic v. Mitchell,* 289 F 618, 619 (1923):

"Section 6 of the Trade-Mark Act (Comp. St. § 9491), as construed by this court in Arkell Safety Bag Co. v. Safepack Mills, — App. D. C. —, 289 Fed. 616, decided at this sitting, gives the right to any one who believes that the mark of an applicant would damage him the right to oppose its registration. In order that he may maintain his opposition it is not necessary that he should have a registered mark, or *one that is registerable.* Atlas Underwear Co. v. B. V. D. Co., 48 App. D. C. 425 McIlhenny Co. v. Trappey, 51 App. D. C. 216, 277 Fed. 615. If the mark of the applicant is so nearly like his as to be likely to lead intending purchasers to believe that the goods of the applicant were put out by the opposer, and to buy them on that assumption, thereby damaging the latter, the statute affords him a right to object to the applicant's mark being registered. It may be that the opposer *is not entitled to the exclusive use of his mark.* None the less he has the right to resist the applicant's attempt to appropriate to himself its exclusive use where, as here, the use of the two marks would probably deceive" (underscoring supplied)

In another case, *Touraine v. Washburn,* 286 F 1020, 1022 (1923), the same court said:

"The trademark statute (section 6, 33 Stat. 726) is our chart. There is nothing in it which says that a person must own a trademark, registered or not, before he can oppose the registration of the mark of another person. All that the statute requires of him, according to our interpertation, is to prove facts, which, if true, would tend to show that he would probably be damaged by the registration."

To the same effect are the decisions in the following cases: California Cyanide v. American Cyanamid, 40 F(2d) 1003, 1005 (1930); Trustees v. McCreery, 49 F(2d) 1068, 1071 (1931); Helsberg v. Katz, 73 F(2d) 626, 628 (1934); Pep Boys v. Fisher, 94 F(2d) 204, 209, (1938); Vi-Jon v. Lentheric, 133 F(2d) 947, 948 (1943); Weinberg v. Riverside, 76 USPQ 218, 219 (1948; Juillard v. American Woolen 77 USPQ 21, 22 (1948); Raymond v. Duart, 77 USPQ 662, 663 (1948); First Industrial v. Pierece 78 USPQ 152 (1948); Goldring v. Adler, 78 USPQ 290 (1948); Denny v. Elizabeth Arden, 79 USPQ 214, 215 (1948); Seeck v. Moran, 84 USPQ 249, 250 (1950); Packwood v. Cofax 86 USPQ 410, 413 (1950); Noma Electric v. On-A-Lite Corp., 92 USPQ 283 (1952).

In the cited *Packwood v. Cofax* case (1950) the U.S. Court of Customs and Patent Appeals said:

"Appellant, as the opposer, to the registration of a trademark is entitled in such proceedings to rely not only upon its previously registered trademark, but also upon *tradenames and designs previously used on labels and in advertising literature in a manner analogous to a trademark use.* (Wood v. Servel,) 77 F(2d) 946, 25 USPQ 488; Virginia Dare v. Dare, 70 F(2d) 118, 21 USPQ 334)" (underscoring supplied)

The objection, therefore, that the Opposer has no right to make opposition because it has no exclusive rights to the designation *Señorita,* as used on bobby pins, cannot be sustained.

Another ground advanced by the Respondent-Applicant for the dismissal of the Opposition is that the label bearing his *Señorita* and the label displaying the Opposer's *Señorita* are so distinctly dissimilar in appearance that the use of both trademarks cannot possibly produce any confusion in the public mind, and cannot, therefore, damage the Opposer.

The Principal Register of the trademark statute, on which the Respondent-Applicant seeks registration of his trademark *Señorita,* is not concerned with labels on their appearances; it is concerned exclusively with trademarks. The appearance of labels falls under the law of unfair competition, not under the trademark law proper. Over matters of unfair competition, the Patent Office has no jurisdiction (See T. M. Dec. No. 2 s. 1951). Because the Patent Office has no jurisdiction over the appearance of labels, it does not take the same into account when considering whether or not a given trademark is registerable. Besides, what assurance is there that the appearance of the label bearing the trademark sought to be registered would not be changed, in the future, by the applicant?

In *Tungsten, etc. v. Sureline, etc.,* 79 USPQ 272, 273 (1948), the U. S. Commissioner of Patents said:

"Applicant emphasizes the fact that in actual use the marks of the parties are applied to packages, and that the packages of the respective parties are entirely different in color, type of printing and general appearance. The record clearly discloses that there is no similarity between these packages. The question involved in this proceeding is, however, limited to applicant's right to register the mark shown in its application. While applicant has used this mark for a considerable period

(*Continued on page* 259)

OPINIONS OF THE SECRETARY OF JUSTICE

I

OPINION NO. 26

(Opinion on the question as to whether or not the office of the National Bureau of Investigation is required to obtain a permit from the Director of Health for an exhumation of a dead body in the course of legal investigation conducted by it.)

Respectfully returned to the Director, National Bureau of Investigation, Manila.

Opinion is requested on whether or not that Office is required to obtain a permit from the Director of Health for an exhumation of dead bodies in the course of a legal investigation conducted by it.

Section 1082 of the Revised Administrative Code declares that it shall be unlawful to "disinter a human body or human remains, until a permit therefor, approved by the Director of Health, shall have been obtained." And Section 1095 of the same Code reads:

> "Sec. 1095. Permit to disinter after three years — Treatment of remains. — Permission to disinter the bodies or remains of persons who have died of other than dangerous communicable disease, may be granted after such bodies had been buried for a period of three years; and, in special cases, the Director of Health may grant permission to disinter after a shorter period when in his opinion the public health will not be endangered thereby.
>
> "x x x."

It has been averred that said sections are not applicable to cases where exhumation has to be done for an autopsy by any of the persons authorized to do so in the course of a legal investigation. But the language of the above-quoted sections are clear and absolute in terms and admits of no exception. Nor may any exception to said requirement be found in any of the provisions dealing with legal investigations. Therefore, such an exception cannot be read into the law. This is so because the purpose of the requirement of said permit is the protection of the public health which may not be sacrificed even where a legal investigation is being conducted.

It has also been contended that Section 1089 of the Revised Administrative Code which describes the proceedings to determine the cause of death in case of suspected violence or crime and which prohibits the burial or interment of the deceased unless permission is obtained from the provincial fiscal or from the municipal mayor is an exception to the requirement of a permit in Sections 1082 and 1095, above-mentioned. But the former cannot furnish an exception to the latter because they cover different subject matters —while section 1089 deals with the proceedings before the burial of a person, sections 1082 and 1095 deal with exhumation or disinterment after burial.

Reference has furthermore been made to sections 983 and 1687, as amended, of the same Code. The first authorizes the district health officer, upon request of the provincial fiscal or Judge of First Instance or justice of the peace, to conduct, an investigation into the cause of suspicious death; the second authorizes the provincial fiscal to investigate the cause of sudden death not satisfactorily explained and to cause an autopsy to be made for purposes of such investigation. It has been stated that to require a permit from the Director of Health for every exhumation in the course of legal investigations authorized by these sections would be to render abortive the powers granted to the officials mentioned therein. But the undersigned sees no inconsistency between the grant of powers in said sections and the requirement of the permit in sections 1082 and 1095. Whatever little delay may be caused by the compliance with such requirement is more than compensated for by the consequent protection to the public health.

The undersigned is therefore of the opinion that the query should be answered in the affirmative.

(Sgd.) PEDRO TUASON
Secretary of Justice

II

OPINION NO. 28

(On the question as to whether X-ray films imported by the Oceanic Medical Inc. for the Armed Forces of the Philippines should be exempted from customs duties.)

1st Indorsement
February 10, 1954

Respectfully returned to the Honorable, the Secretary of Finance, Manila.

In a bidding conducted by the Office of the Surgeon General, AFP, the Oceanic Medical Inc. was awarded the contract to furnish said office with X-ray films to be imported from Belgium, the delivery of which was to be made 150 days from the approval of the ICC license. The winning bidder was given Purchase Orders Nos. 287-FY-53 and 288-FY-53, both dated March 3, 1953, and the goods were imported under Letter of Credit No. 55858 dated August 10, 1953.

It is now claimed that this importation of X-ray films should be exempted from the 25% ad valorem duty in view of the provision in the General Appropriation Act that "all purchases made by the Armed Forces of the Philippines exclusively for military purposes shall be tax free." (Par. 11, P. 632, Rep. Act No. 816; K-VI-(9), Rep. Act No. 906) The opinion of this Office is accordingly requested on whether or not such exemption may be granted.

In a previous opinion dated August 13, 1953 (Op., Sec. of Jus., No. 160, s. 1953), this Office held that the word "taxes" as used in Republic Act No. 901 includes customs duties. By parity of reasoning, it would follow that exemption from taxes of purchases made by the Armed Forces exclusively for military purposes should also be deemed to include exemption from customs duties on purchases made by it from abroad.

In the purchase under consideration, it appears that in his bid tender, the bidder agrees that "all pertinent parts of the General Conditions contained in the GENERAL CONDITIONS OF THE INVITATION TO BID dated March 5, 1952, are made part and apply to this agreement." One of such conditions reads as follows:

> "3. QUOTATIONS—
>
> "a. All quotations shall include all taxes, levies, fees, charges, arrastre, etc., incident to delivery to the AFP depot.
>
> "b. x x x x x x
>
> "c. In case the item under procurement will still have to be imported abroad, the AFP may facilitate the Import Control License. The dealer in this case shall specify in his tender that the AFP shall apply for the ICC License and that the corresponding quotations shall exclude all taxes and fees to which the AFP shall be exempted."

It is to be noted from the above conditions that the quotation of a bidder includes all taxes, except that in the case of articles to be procured abroad, the dealer shall specify in his bid tender that his quotation excludes all taxes and fees to which the Armed Forces shall be exempted. The bid tender of the Oceanic Medical Inc. is not entitled to a refund of the import duties it has paid on the importation of X-ray films in question.

However, it has been represented to this Office that there was a verbal agreement between the Oceanic Medical Inc. and the Office of the Surgeon General, AFP, that the prices quoted by the former were exclusive of customs duties, i.e., that the importation would be duty-free. While such unwritten understanding may not modify the express conditions of the agreement, it is felt that if it really existed, it is still in the sound discretion of the Customs authorities or the Secretary of Finance to waive the failure to embody the exemption on the bid, and extend the relief asked for by the importer in fairness to the latter. If the Secretary of Finance wishes to consider the case in this light, then the problem resolves itself into the truth of the alleged verbal agreement, the reason why

such vital stipulation was not made a part of the written one, the effect of the omission on the other bidders, and related matters.

(Sgd.) PEDRO TUASON
Secretary of Justice

III

OPINION NO. 30

(Opinion on the question as to what should be the salary of the judge of the municipal court of Dagupan City.)

4th Indorsement
February 4, 1954

Respectfully returned to the Honorable, the Auditor General, Manila.

The within papers refer to a query of the City Auditor, Dagupan City, as to what should be the salary of the Judge of the Municipal Court of that City.

The Judiciary Act of 1948 fixes the salary of the Municipal Judge of Dagupan City at ₱3600.00 per annum. This was increased to ₱5100.00 by Republic Act No. 840 which took effect on July 1, 1952. On June 24, 1953, Ordinance No. 34 of the Municipal Board of Dagupan City was passed appropriating a certain sum of money to pay the salary differential due officials of the City, including the Municipal Judge, corresponding to the period from July 1, 1952 to June 30, 1953. On May 5, 1953, however, Republic Act No. 843 was enacted and took effect on the same day expressly reducing the salary of the Municipal Judge of Dagupan City to ₱4200.00 per annum. Finally, on June 20, 1953, Republic Act No. 924 standardizing the salaries of all judges of Municipal Courts took effect. Section 1 of which expressly provides as follows:

> "Section 1. The annual salary of each of the Judges of the Municipal Courts of the chartered cities shall be the following:
>
> (a) Of the City of Manila, nine thousand pesos;
>
> (b) Of all other cities, the salary fixed for each of the Judges of Municipal Courts by Republic Act numbered Eight hundred and forty or by Republic Act numbered Eight hundred and forty-three. *which ever is the higher.*"

The Municipal Board of Dagupan City, when it enacted Ordinance No. 34, did not fix the salary of the Municipal Judge thereof at ₱5100.0. per annum, because that amount was fixed by Republic Act No. 840. Said Ordinance merely appropriated money to cover the salary differential due the different officials of the City by reason of the increases provided by said Republic Act No. 840. The provision of Republic Act No. 843 which, in effect, reduces the salary of certain specified Municipal Judges from ₱5100.00 as fixed by Republic Act No. 840 to ₱4200.00 per annum cannot apply to the Municipal Judge of Dagupan City because of the express prohibition in Section 9, Art. VIII of the Constitution against the diminution of the compensation of Judges during their continuance in office. So that notwithstanding the approval of Republic Act No. 843, the salary of the incumbent Municipal Judge of Dagupan City remains ₱5100.00 per annum. Therefore, Republic Act No. 924, insofar as the Municipal Judge of Dagupan City is concerned, merely confirms the rate of his salary as fixed by Republic Act No. 840.

(Sgd.) JESUS G. BARRERA
Undersecretary of Justice

IV

OPINION NO. 39

(Opinion on the question as to whether or not the extention of the expiration date of ICC no-dollar remittance license is legal.)

2nd Indorsement
February 25, 1954

Respectfully returned to the Honorable, the Secretary of Foreign Affairs, Manila, inviting attention to Section 2 of Republic Act No. 650, otherwise known as the Import Control Law, which reads as follows:

> "Sec. 2. The import license provided for in section one of this Act shall be issued by the President of the Philippines through such existing board or instrumentality of the Government as he may choose or create to assist him in the execution of this Act. No other government instrumentality or agency shall be authorized to qualify or question the validity of any license so issued. Questions of legality and interpretation of any license shall be decided exclusively by said board or instrumentality subject to appeal to the President."

Inasmuch as the question raised herein involves the legality of the extension of the expiration date of ICC no-dollar remittance license No. 14880, it is believed that the matter should be decided by the Office of the President in accordance with the above-quoted provision of law.

It may be pointed out, however, that there is no provision in Republic Act No. 650 fixing the period for the validity of an import license. It is only provided that "unless extended in accordance with the rules and regulations, import licenses issued under the Act and which are not used within thirty days after their issue by the opening of a letter of credit or a similar transaction shall be null and void" (Sec. 8). In Resolution No. 70 dated March 27, 1952, the Import Control Commission "decided that all licenses issued by the ICC since January 1, 1952, are granted a six-month validity period from the date of validation indicated in the lower left hand corner of the license application, provided that the corresponding letters of credit were opened within thirty days of release thereof."

The license in question having been issued and validated on May 18, 1953, its expiration date should have been November 18, 1953. However, there appears to be certain regulations of the defunct ICC which authorized the extension of the validity of an import license. This Office has been unable to procure a copy of the rules regarding such extension but the within papers sufficiently indicate the existence of rules allowing extension of import licenses. This is shown by ICC Form No. 102, which was the form used for requesting license amendment, or extension, a copy of which is attached herewith and on which appears the approval of the extension of the import license in question "for another six months so that it will expire on May 18, 1954." It is also to be observed that Section 8 of Republic Act No. 650 authorizes the extension of import licenses "in accordance with the rules and regulations."

(Sgd.) PEDRO TUASON
Secretary of Justice

V

OPINION NO. 40

(Opinion on the question as to whether or not a certain Chinese may seek cancellation of his alien certificate of registration on the ground that he is a Filipino citizen.)

2nd Indorsement
January 25, 1954

Respectfully returned to the Commissioner of Immigration, Manila.

Jose Ching Muy alias Ching Muy seeks the cancellation of his alien certificate of registration on the ground that he is a Filipino citizen.

Petitioner avers that he was born in Amoy, China, on July 15, 1926, the son of Tan Sue, a Chinese woman, and Calixto Lugmoc, a Filipino; that he arrived with his mother in the Philippines on January 18, 1938, and he was admitted by the Board of Special Inquiry as the son of Calixto Lugmoc as "P.I. citizen" (see Identification Certificate No. 167-40, issued on February 6, 1940); and that he went to China in 1946, returning to this country in the same year, by means of a reentry permit. He is married to Yap

Sio Ang, with whom he has a child named Ching Uy, both now in Amoy, China. It is further averred that petitioner and his father were registered as Chinese nationals in 1941; and that Calixto Lugmoc and Tan Sui both died during the Japanese occupation in San Pablo City.

To prove that his father is a Filipino, petitioner adduced the following documents: (1) Landing Certificate of Residence issued to Calixto Lugmoc on September 12, 1918, which describes him as the son of Teodora Lugmoc, a Filipino; (2) his residence certificates issued in 1941 and 1943; (3) see Exhibit "C" and "D' showing that he is a Filipino; and (4) his baptismal certificate (Exhibit "A") which recites that he was born in Kawit, Cavite, on October 14, 1888, baptized on October 18, in the same year, as the illegitimate son of Teodora Lugmoc by an unknown father. This document having been issued prior to the change of sovereignty, is a public document, and may be used for the purpose of establishing the facts to which it relates (U.S. v. Orosa, 2 Phil. 247 and U.S. v. Evangelista, 29 Phil. 215). That Calixto is the son of a Filipino citizen finds corroboration in the testimony of Doroteo Ocampo, 80 years old, and resident of Barrio Anibang, Bacoor, Cavite, to the effect that Teodora Lugmoc, a Filipina, lived under the same roof with a Chinaman named Sy Wa, with whom he had a son named Calixto.

The foregoing evidence, in the opinion of this Department, sufficiently proves that Calixto Lugmoc is a Filipino citizen.

As regards, however, the relationship of petitioner Ching Muy to Calixto Lugmoc, this Department finds no competent evidence to prove his filiation. He has not presented his birth or baptismal certificate which would ordinarily constitute the best proof of his parentage and filiation. True, he has presented an identification certificate issued by then Secretary of Labor in 1940 in which he is mentioned as the son of Calixto Lugmoc, but evidently, this cannot be deemed as sufficient evidence of his true filiation. Doroteo Ocampo, the only witness presented during the investigation, testified that he does not know the petitioner herein to be the grandson of Teodora Lugmoc. Under these circumstances, and considering the far-reaching consequences of a declaration of Philippine citizenship, this Department is not convinced that petitioner Ching Muy is the son of Calixto Lugmoc.

Premises considered, this Department holds that Jose Ching Muy alias Ching Muy is *prima facie* a Chinese citizen, it being admitted that he was born of a Chinese mother in China. His alien certificate of registration should not be cancelled.

(Sgd.) JESUS G. BARRERA
Undersecretary of Justice

VI

OPINION NO. 46

(Opinion on the question as to whether or not a City Health Officer is entitled to an additional compensation under Section 4 of Republic Act No. 840 in his capacity as ex-officio Local Civil Registrar.)

2nd Indorsement
March 5, 1954

Respectfully returned to the Civil Registrar-General, Bureau of Census and Statistics, Manila.

Opinion is requested on whether the City Health Officer of Cabanatuan City is entitled to additional compensation under section 4 of Republic Act No. 840 in his capacity as *ex-officio* Local Civil Registrar.

The above-cited provision reads in part as follows:

"Sec. 4. Unless the corresponding city charter provides for a higher rate of additional compensation in cases where the charter of a city provides for *ex-officio* officials, such officials, except the ex-officio city councilors, shall receive additional compensation which shall not exceed the following:

"In first and second class cities; for city engineers and city fiscals, one thousand six hundred pesos; and for city auditors, city health officers, city assessors and superintendents of city schools, eight hundred pesos per annum."

A careful reading of the above-quoted legal provision will readily show that the officials entitled to additional compensation at the rates therein fixed are those holding the positions of city engineer, city fiscal, city auditor, city health officer, city assessor and superintendent of city schools in an *ex-officio* capacity, i.e., in addition to their regular duties as incumbent of a separate office. This conclusion is manifest from the fact that city treasurers are not included in the enumeration, the reason being that in no chartered city is the position of city treasurer held in an *ex-officio* capacity.

Assuming, therefore, that the city Health Officer of Cabanatuan — is also *ex-officio* Local Civil Registrar for the city — a point which need not be decided in this opinion — his claim must fail for the reason that the office of Local Civil Registrar is not among those specified positions which, if held in an *ex-officio* capacity, would entitle the incumbents to additional compensation under the statute. *Expressio unius est exclusio alterius.* (50 *Am. Jur.*, 238)

Wherefore, the query is answered in the negative.

(Sgd.) PEDRO TUASON
Secretary of Justice

VII

OPINION NO. 47

(Opinion on the question as to whether or not action for deportation against three Indonesians under section 37 (a-1) of the Immigration Act, as amended, had, pursuant to section 37(b) of said Act, prescribed at the time of their apprehension by the Philippine Navy sometime in August, 1953.)

2nd Indorsement
March 3, 1954

Respectfully returned to the Commissioner of Immigration, Manila.

It appears that Ali Amir, Juhuri Abdul Rahim, and Maldia Hadji Jassan, Indonesians, entered the Philippines illegally sometime in 1940, 1942, and 1945, respectively, thru Sitangkai, Sulu.

Opinion is requested on (1) whether the action for deportation against them under section 37(a)(1) of the Immigration Act (C.A. No. 613), as amended by (Rep. Act No. 503), had, pursuant to section 37(b) of the same Act, prescribed at the time of their apprehension by the Philippine Navy sometime in August, 1953, and, (2) in the affirmative case, whether the said aliens may apply for the legalization of their residence in the Philippines under section 41 of the same Act.

The aforementioned section 37(a)(1) authorizes the arrest and deportation of "any alien who enters the Philippines after the effective date of this Act without inspection and admission by the immigration authorities at a designated port of entry or at a place other than at a designated port of entry." And section 37(b) ordains that deportation under section 37(a)(1) shall not be effected unless the arrest in the deportation proceedings is made within five years after the cause for deportation arises, i.e., within five years after the illegal entry.

Ali Amir entered the Philippines in 1940 — before the date of effectivity of Commonwealth Act No. 613 on January 1, 1941. Therefore, the above-cited provisions do not apply to him. He, however, comes within the purview of section 45(d) of the same Act which penalizes as an offense the act of an alien in entering the Philippines without inspection and admission by the immigration officials. Upon conviction of such offense, the alien may be fined not more than one thousand pesos, and imprisoned for not more than two years *and deported* (C. A. 613 as amended by R. A. No. 144). No prescriptive period for the action having been fixed by this provision, the general law fixing the prescriptive periods for violations of special acts applies. (Act No. 3326). Under said Act, offenses punished by imprisonment of not more than two years prescribed after four years (sec. 1), to be counted from the day of the commission of the offense and "if the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment" (sec. 2). The unlawful entry of the Indonesians having been discovered only in

August, 1953 when they were apprehended by the Philippine Navy, Ali Amir may still be prosecuted under the above-mentioned section 45(d) and, if found guilty, deported, as part of the penalty therefor.

As to the other two Indonesians, since they arrived in 1942 and 1945, (after the date of effectivity of C. A. No. 613) respectively, and since more than five years have elapsed between said dates of entry and their apprehension by the Philippine Navy, deportation proceedings may no longer be brought against them under section 37(a)(1) and 37(b). Nevertheless, being persons not properly documented for admission, they are among the aliens excluded from entry into the Philippines under section 29(a)(17) of the same act. As such, they come within section 37(a)(2) of the same Act which authorizes the arrest and deportation of any "alien who enters the Philippines after the effective date of this Act who was not lawfully admissable at the time of his entry." And under section 37(b), deportation may be effected on this ground at any time after entry. Thus, pursuant to these provisions, deportation proceedings may still be brought against Juhuri Abdul Rahim and Maldia Hadji Hassan, in addition to criminal proceedings under the aforementioned section 45(d) of the same Act.

This renders unnecessary a consideration of the second query.

(Sgd.) PEDRO TUASON
Secretary of Justice

VIII

OPINION NO. 48

(Opinion as to whether or not a policeman of temporary appointment is entitled to the proceeds of the government service insurance policy.)

March 5, 1954

The General Manager
Government Service Insurance System
M a n i l a

S i r :

This is with reference to your request for opinion as to whether or not Mr. Valentin G. Santos is entitled to the proceeds of his insurance policies which matured last February 28, 1952, considering that his service record shows that his appointment was of a temporary nature.

Mr. Santos is presently a policeman of Hagonoy, Bulacan, having been appointed as such in January 1937. On February 28, 1941, the Municipality of Hagonoy became a member of the Government Service Insurance System and upon the certification made by the Municipal Treasurer that his employment was of a permanent nature, Mr. Santos was insured with the System, and Original Policy No. 87942 and later its supplements A, B, and C were issued to him. He paid his premiums religiously until February 28, 1952 when said policy matured. While the claim for the proceeds thereof was being processed, it was found from his service record, which was certified correct by the Commissioner of Civil Service, that his appointment was of a temporary nature, for which reason, the Auditor of the System refused to pass audit payment of said proceeds, contending that, as Mr. Santos was not eligible for membership in the System, the policies issued to him were null and void.

Section 4 of Commonwealth Act No. 186, as amended by Republic Act No. 660, relied upon by the Auditor of the System in disallowing payment of the Insurance proceeds in question, provides in part as follows:

> "(a) Membership in the System shall be compulsory upon all regularly and permanently appointed employees, including those whose tenure of office is fixed or limited by law; upon all teachers except only those who are substitutes; and upon all regular officers and enlisted men of the Armed Forces of the Philippines: Provided, That it shall be compulsory upon regularly and permanently appointed employees of a municipal government below first class only if and when said government employee has joined the System under such terms and conditions as the latter may prescribe."

Without deciding whether under the above-quoted provision — which speaks of compulsory insurance — temporary employees may be admitted as members into the Government Service Insurance System, the principle of estoppel precludes the insurer from contesting the validity of a policy after an employee had actually been insured without any fault on his part and paid all the premiums stipulated in the contact. It is a universal and statutory rule that a party may not deny a state of things which by his culpable silence he has led another to believe existed; if the latter in good faith acted on that belief. So it has likewise been uniformly held that it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesces or of which he accepted benefits (15 Words and Phrases, 271).

As a matter of fact, the original policy contains, in recognition of the above principle, the following standard provisions: "This policy shall be incontestable from the date it takes effect except for non-payment of premiums, x x x." This clause alone is conclusive and answers the question propounded without necessity of discussion.

I have the honor, therefore, to answer the query in the affirmative.

(Sgd.) PEDRO TUASON
Secretary of Justice

IX

OPINION NO. 49

(Opinion on the question as to whether or not the officials of municipalities created by executive order under Section 68 of the Revised Administrative Code and appointed by the President pending the holding of the next regular election may be removed from office at pleasure or only for cause in accordance with the procedure prescribed in Section 2188 et seq., of the Revised Administrative Code.)

March 5, 1954

The Honorable
The Executive Secretary
M a n i l a

S i r :

This is in reply to your request for opinion on whether the officials of municipalities created by executive order under Section 68 of the Revised Administrative Code appointed by the President pending the holding of the next regular election may be removed from office at pleasure, or only for cause in accordance with the procedure prescribed in Sections 2188 et seq., of the Revised Administrative Code.

You made mention of the particular case of the municipality of Balingoan, Oriental Misamis, which was created by Executive Order No. 490 dated February 2, 1952, out of a part of the municipality of Talisayan, same province. The first mayor, vice-mayor and councilors of the new municipality were appointed by the former President pursuant to Section 10 of the Revised Election Code which reads in part as follows:

> *"Filling of elective offices in a new division.* — When a new political division is created the inhabitants of which are entitled to participate in the elections, the elective officers thereof shall, unless otherwise provided, be chosen at the next regular election. *In the interim* such offices shall, in the discretion of the President, be filled by appointment by him or by a special election which he may order."

Upon the change of administration, that office removed the mayor of Balingoan and appointed another person in his place. It is further alleged that the incumbent mayor is not willing to surrender his office "without due process of law."

In the opinion of this Department dated January 16, 1954 (Op., Sec. of Jus., No. 6, s. 1950), it was ruled that the provision contained in Republic Act No. 629 which created the Municipality of Palanes, Masbate, that "the first mayor, vice-mayor and councilors of the Municipality of Palanes shall be appointed by the President of the Philippines and shall hold office until their successors shall have been elected and have qualified" fixes a definite term of office for the officials named and they may not therefore be removed except for any of the causes provided by Section 2188

SUPREME COURT . . .

(*Continued from page 246*)

Reyes presented the petition for the cancellation of the transfer certificate of title in the name of Bibiano Barretto on March 19, 1951 in Case No. 116, G. L. R. O. Record No. 12908. Lucia Milagros Barretto filed an opposition, claiming (a) that the project of partition approved by the court in the proceedings for the settlement of the estate of Bibiano Barretto is null and void, because it appears therefrom that Lucia Milagros Barretto was a minor at the time she signed the said project of partition, and Maria Gerardo was not authorized to sign said project on her (Milagros Barretto's) behalf; and (b) that in accordance with the will of the deceased Maria Gerardo, Salud Barretto was not a daughter of Bibiano Barretto and Maria Gerardo, because only Lucia Milagros Barretto was the daughter of the said spouse. The lower court overruled the above objections and issued the orders mentioned above; so Lucia Milagros Barretto prosecuted this appeal.

Under our rules of procedures, the validity of a judgment or order of the court, which has become final and executory, may be attacked only by a direct action or proceeding to annul the same, or by motion in another case if, in the latter case, the court had no jurisdiction to enter the order or pronounce the judgment (Sec. 44, Rule 39 of the Rules of Court). The first proceeding is a direct attack against the order or judgment, because it is not incidental to, but is the main object of, the proceeding. The other one is the collateral attack, in which the purpose of the proceeding is to obtain some relief, other than the vacation or setting aside of the judgment, and the attack is only an incident. (I Freeman on Judgments, Sec. 306, pp. 607-608.)

A third manner is by a petition for relief from the judgment or order as authorized by the statutes or by the rules, such as those expressly provided in Rule 38 of the Rules of Court, but in this case it is to be noted that the relief is granted by express statutory authority in the same action or proceeding in which the judgment or order was entered. In the case at bar, we are not concerned with a relief falling under this third class, because the project of partition was approved in the testate proceedings in the year 1939, whereas the petition in this case is in a registration proceeding and was filed in the year 1951.

In the case at bar, the respondent Lucia Milagros Barretto is objecting to the petition by the second method, the collateral attack. When a judgment is sought to be assailed in this manner, the rule is that the attack must be based not on mere errors or defects in the order or judgment, but on the ground that the judgment or order is null and void, because the court had no power or authority to grant the relief, or no jurisdiction over the subject matter or over the parties or both. (Ibid, Sec. 326, p. 650.) In cases of collateral attack, the principles that apply have been stated as follows:

> "The legitimate province of collateral impeachment is void judgment. There and there alone can it meet with any measure of success. Decision after decision bears this import: In every case the field of collateral inquiry is narrowed down to the single issue concerning the void character of the judgment and the assailant is called upon to satisfy the court that such is the fact. To compass his purpose of overthrowing the judgment, it is not enough that he show a mistaken or erroneous decision or a record disclosing non-jurisdictional irregularities in the proceedings leading up to the judgment. He must go beyond this and show to the court, generally from the fact of the record itself, that the judgment complained of its utterly void. If he can do that his attack will succeed for the cases leave on doubt respecting the right of a litigant to collaterally impeach a judgment that he can prove to be void." (I Freeman on Judgments, Sec. 322, p. 642.)

Is the order approving the project of partition absolutely null and void, and if so, does the invalidating cause appear on the face of said project or of the record? It is argued that Lucia Milagros Barretto was a minor when she signed the partition, and that Maria Gerardo was not her judicially appointed guardian. The claim is not true. Maria Gerardo signed as guardian of the minor, and her authority to sign can not be questioned (Secs. 3 and 5, Rule 97, Rules of Court). The mere statement in the project of partition that the guardianship proceedings of the minor Lucia Milagros Barretto are *pending* in the court, does not mean that the guardian had not yet been appointed; it meant that the guardianship proceedings had not yet been terminated, and as a guardianship proceedings begin with the appointment of a guardian, Maria Gerardo must have been already appointed when she signed the project of partition. There is, therefore, no irregularity or defect or error in the project of partition, apparent on the record of the testate proceedings, which shows that Maria Gerardo had no power or authority to sign the project of partition as guardian of the minor Lucia Milagros Barretto, and, consequently, no ground for the contention that the order approving the project of partition is absolutely null and void and may be attacked collaterally in these proceedings.

That Salud Barretto is not a daughter of the deceased Bibiano Barretto, because Maria Gerardo in her will stated that her only daughter with the said deceased husband of hers is Lucia Milagros Barretto, does not appear from the project of partition or from the record of the case wherein the partition was issued. It appears in a will submitted in another case. This new fact alleged in the opposition may not be considered in this registration case, as it tends to support a collateral attack which, as indicated above, is not permitted. The reasons for this rule of exclusion have been expressed in the following words:

> "The doctrine that the question of jurisdiction is to be determined by the record alone, thereby excluding extraneous proof seems to be the natural unavoidable result of that stamp of authenticity which, from the earliest times, was placed upon the 'record,' and which gave it such 'uncontrollable credit and verity that no plea, proof, or averment could be heard to the contrary.' x x x. Any other rule, x x x, would be disastrous in its results, since to permit the court's records to be contradicted or varied by evidence dehors would render such records of no avail and definite sentences would afford but slight protection to the rights of parties once solemnly adjudicated. Finding no error in the orders appealed from, we hereby affirm them, with costs against the oppositor-appellant.
> x x x." (I Freeman on Judgments, Sec. 376, p. 789.)

So ordered.

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

Mr. Justice Concepcion and *Mr. Justice Diokno* did not take part.

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of the Revised Administrative Code. I believe that this ruling applies to the instant case.

It is true that Executive Order No. 490 did not expressly provide that the first mayor, vice-mayor and councilors of the Municipality of Balingoan, Oriental Misamis, who were appointed by the President were to hold office until their successors would have been elected and qualified in the next regular election. But the determining factor is not the terms of the executive order or the appointments, but the provision of Section 10, *ante*. This section makes no distinction between municipal officers chosen by election and those chosen by appointment, and now appears to have been intended. In the absence of any express or implied provision to the contrary, it must be concluded that the tenure of all offices created by said Section 10 is the same in all cases. There is no plausible support for the theory that the Congress did not intend to place appointive officers of new municipalities on the same level as elective ones.

It is accordingly my opinion that the incumbent municipal mayor of Balingoan, Oriental Misamis, may not be removed from office except for any of the causes prescribed in Section 2188 of the Revised Administrative Code.

Respectfully,
(Sgd.) PEDRO TUASON
Secretary of Justice

REPUBLIC ACTS

Republic Act No. 722

AN ACT TO EXEMPT THE HOLDING OF OPERAS, CONCERTS, RECITALS, DRAMAS, PAINTING AND ART EXHIBITIONS, FLOWER SHOWS, AND LITERARY, ORATORICAL OR MUSICAL PROGRAMS FROM THE PAYMENT OF ANY NATIONAL OR MUNICIPAL AMUSEMENT TAX.

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

Section 1. The holding of operas, concerts, recitals, dramas, painting and art exhibitions, flower shows, and literary, oratorical or musical programs, except film exhibitions and radio or phonographic records thereof, shall be exempt from the payment of any national or municipal amusement tax on the receipts derived therefrom.

Sec. 2. All laws or parts of laws which are inconsistent with the provisions of this Act are hereby repealed.

Sec. 3. This Act shall take effect upon its approval.

Approved, June 6, 1952.

Republic Act No. 826

AN ACT CREATING THE COMMISSION ON PARKS AND WILDLIFE, DEFINING ITS POWERS, FUNCTIONS, AND DUTIES.

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

Section 1. *Creation of Commission on Parks and Wildlife.*—In order to promote effectual planning, development, maintenance, and conservation of national parks, monuments and wildlife in said parks, of game and fish, and of provincial, city and municipal public parks, to provide for the enjoyment of the same, and to carry out the provisions of this Act, there is hereby created a commission to be known as the Commission on Parks and Wildlife, hereinafter referred to as the Commission. The Commission shall be composed of the Secretary of Agriculture and Natural Resources, who shall be the Chairman of the Commission, the Secretary of Public Works and Communications, the Secretary of Education, the Secretary of Health and the Social Welfare Commissioner, as members. The Chairman and the members of the Commission shall serve as such without additional compensation. A majority of the members of the Commission shall constitute a *quorum*.

The Commission shall be under the executive control and supervision of the President of the Philippines.

Sec. 2. *Duties of the Commission.*—It shall be the duty of the Commission to administer the provisions of this Act and to promote, conserve, maintain, and regulate the use of national parks, national monuments and wildlife in said parks, of game and fish, game refuges, bird sanctuaries, and game farms, and to provide assistance to, and cooperate with, the provinces, chartered cities, municipalities and municipal districts in the establishment and conservation of provincial, city, municipal and municipal district parks and monuments by such means and measures as conform to the fundamental purpose of the said parks, monuments, and game and fish, game refuges, bird sanctuaries, and game farms, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein, including birds, fishes, mammals, and other animals and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the benefit and enjoyment of future generations. The Commission is also charged with the administration of Acts Numbered Twenty-five hundred and ninety, entitled "An Act for the protection of game and fish," and Numbered Thirty-nine hundred and fifteen, entitled "An Act providing for the establishment of National Parks, declaring such parks as game refuges, and for other purposes," both as amended.

Sec. 3 *Powers of the Commission.*—The Commission shall have power to:

(*a*) Adopt rules and regulations for the administration of this Act, and the transaction of the business of the Commission.

(*b*) Make expenditures for the care, supervision, improvement, development, extension and maintenance of all parks, parkways, and monuments under the control of the Commission and for the protection and conservation of wildlife and game fish, game refuges, bird sanctuaries and game farms.

(*c*) Make rules and regulations governing the proper use and protection of park areas, game refuges, bird sanctuaries and game farms and to protect property and preserve the peace therein.

(*d*) Cooperate with the local governments for the purpose of securing improvement, development, or maintenance of lands which are designated as parks or pleasure grounds and to secure agreements between the local governments for the accomplishment of the purposes of this Act.

(*e*) Delegate to the Director of Parks and Wildlife or other employees of the Commission, to foresters, rangers and forest guards of the Bureau of Forestry; to land inspectors of the Bureau of Lands; to agricultural agents, plant inspectors or other suitable employees of the Bureau of Agricultural Extension Service or of the Bureau of Plant Industry; and to members of the Philippine Constabulary and of the local police force and other suitable persons any duty or authority relative to the administration, or protection of national parks, wildlife, game and fish, game refuges, bird sanctuaries and game farms.

Said Director of Parks and Wildlife and employees and persons shall comply with the duty and exercise the authority delegated to them pursuant to this subsection. They shall, in addition, be peace officers and as such they may arrest any person within the premises of national parks found under suspicious circumstances and reasonably tending to show that such person has committeed or is about to commit an offense against the laws or regulations concerning national parks, wildlife, game and fish, game refuges, bird sanctuaries and game farms.

Sec. 4. *Director of Parks and Wildlife—other employees.*—The Commission shall have a Director of Parks and Wildlife who shall be appointed by the President of the Philippines with the consent of the Commission on Appointments and who shall have active charge and administration of all national parks and national monuments and of the laws relating to the protection of game and fish, game refuges, bird sanctuaries and game farms. He shall, under the direction of the Commission, cooperate with local boards of park commissioners and local officials in the establishment and conservation of provincial, city, municipal and municipal district public parks. He shall perform such other duties as may from time to time be required by the Commission. Said director shall be selected solely upon the basis of executive ability and special training in park matters. He shall receive an annual compensation of seven thousand two hundred pesos.

The Director of Parks and Wildlife shall appoint, in accordance with Civil Service Rules and Regulations and subject to the approval of the Commission, such employees as shall be necessary for the maintenance and conservation of national parks and monuments, and protection and conservation of wildlife and game and for carrying out the functions of the Commission.

Sec. 5. *Acquisition of property by gifts or otherwise.*—The Commission, on behalf of the National Government, and the provincial, city, and municipal or municipal district government, on behalf of the province, city, municipality or municipal district concerned, may acquire lands suitable for park purposes, by gift, donation, contribution or otherwise, and may receive and accept devises, bequests, and other gifts or beneficial transfers of property, money, and other objects for the purpose of the improvement or ornamentation of any national, provincial, city, municipal or municipal district park, pleasure ground, parkway, avenue or road, or for the establishment in said park or pleasure ground of zoological or other gardens, collections of natural history, monuments or works of arts, or for conservation of wildlife, game birds or animals.

Sec. 6. *Restrictions on members and employees of Commission and Boards of Park Commissioners.*—No member or employee

of the Commission or of the local boards of park commissioners shall be interested, directly or indirectly, any contract relating to the establishment or maintenance of any national, provincial, city or municipal public park, pleasure ground or parkway, or in any contract providing for the expenditure of any money in relation thereto.

Sec. 7. *Provincial, city and municipal parks.*—Any province, city, municipality or municipal district may acquire, establish and maintain public parks, pleasure grounds and parkways within the boundaries of said province, city, municipality or municipal district. Lands which may be required for any of such purposes may be set aside by such province, city, municipality, or municipal district and devoted to such purposes, out of any lands or parcels of land owned or possessed by any such province, city, municipality or municipal district; or said lands may be acquired by gift or purchase, in the manner provided by law: *Provided*, That no lands, the purchase price of which exceeds one thousand pesos, shall be acquired by purchase by a province, city, municipality, or municipal district for any of such purposes without the previous approval of the President of the Philippines.

Any province, city, municipality or municipal district establishing public parks, pleasure grounds or parkways under the provisions of this Act shall, by its duly constituted authority, have full power to cultivate, plant and otherwise improve the same; and shall enact resolutions or ordinances for the proper administration, maintenance and use thereof.

Sec. 8 *Cities and towns may unite in establishing parks.*—Any two or more cities, municipalities or municipal districts which are contiguous or adjacent may unite in acquiring, establishing and maintaining public parks, pleasure grounds or parkways for their common benefit upon such terms and conditions as may be mutually agreed upon by ordinance.

Sec. 9. *Board of Park Commissioners.*—Whenever a province, city, municipality or municipal district has established a public park, the provincial governor, city, municipal, or municipal district mayor thereof shall, with the consent of the provincial board, city, municipal or municipal district council, appoint a board of park commissioners, hereinafter called the Board, which shall be composed of three most travelled and civic minded members who shall be residents of the province, city, municipality or municipal district where such park is located, and who shall serve for a term of two years without compensation.

The Board shall elect from among themselves a chairman. A majority of the Board shall constitute a *quorum* for the transaction of business, and no action of the Board shall be binding unless authorized by a majority of the members of the Board at a regular meeting or duly called special meeting thereof. The Board shall be provided by the province, city, municipality, or municipal district with a convenient office and with such facilities and stationery as may be necessary for the performance of their duties. The provincial governor, city, municipal, or municipal district mayor concerned may, upon recommendation of the Board, appoint a secretary of the Board, who shall keep a record of all proceedings of the Board, have custody of and preserve all its records and perform such other duties as may be prescribed by the Board.

Sec. 10. *Management of local parks—Rules.*—The Board of Park Commissioners shall have the management and control of public parks, pleasure grounds and parkways of the province, city, municipality, or municipal district wherein it is appointed. It shall establish necessary rules and regulations not in conflict with law or the ordinances of the city, municipality or municipal district for the proper supervision and use of such parks, pleasure grounds and parkways and shall have such additional powers relating thereto as may be prescribed by resolution of the provincial board or ordinance by the city, municipal, or municipal district council. The provincial board, city, municipal, or municipal district council concerned shall, by resolution or ordinance, provide for the enforcement of the rules and regulations promulgated by the Board of Park Commissioners. The Board may appoint a park caretaker, who shall be a practical landscape gardener, and who shall, under the direction of the Board, have active charge, control and direction of all the parks, pleasure grounds or parkways under the control of said Board, and perform such other duties as may be required by the Board.

The provincial board, city, municipal, or municipal district council, as the case may be, shall provide for the salary of the park caretaker and the secretary to the Board of Park Commissioners.

Sec. 11. *Park Commissioners and employees not to be interested in contract.*—No park Commissioner or employee of the Board of Park Commissioners shall be interested, directly or indirectly in any contract relating to the establishment or maintenance of any public park or pleasure grounds under its jurisdiction or in any contract providing for the expenditures of any money in relation thereto.

Sec. 12. *Expenditures for park purposes.*—The Board shall, with the approval of the provincial governor, city, municipal or municipal district mayor concerned, have full, complete and exclusive power and authority to expend, for and on behalf of the province, city, municipality or municipal district wherein it is appointed, all sums of money that may be appropriated for the establishment, maintenance and improvement of public parks, parkways and pleasure grounds therein.

Sec. 13. *Transfer of functions and activities relative to parks, wildlife and game and fish to Commission.*—All the powers, functions and duties vested in, and exercised by, the Secretary of Agriculture and Natural Resources and the Director of Forestry under Acts Numbered Twenty-five hundred and ninety and Thirty-nine hundred and fifteen, both as amended, relative to the protection of game and fish and the establishment of national parks, are transferred to the Commission on Parks and Wildlife and the Director of Parks and Wildlife, respectively.

The Game and Wildlife Section of the Bureau of Forestry and the positions therein in charge of the work relative to the maintenance, operation and improvement of national parks, together with their corresponding personnel, appropriations, equipment, facilities, records and other property, are hereby likewise transferred to the Commission on Parks and Wildlife.

Sec. 14. *Appropriations.*—Aside from the sums set aside in the General Appropriations Acts for the Game and Wildlife Section of the Bureau of Forestry and for the positions in charge of the work relative to the maintenance, operation and improvement of national parks, which are by virtue of this Act transferred to the Commission on Parks and Wildlife, there is hereby appropriated, out of any funds in the National Treasury not otherwise appropriated, the sum of five thousand pesos which shall be expended by the Commission on Parks and Wildlife for the establishment, maintenance, conservation and improvement of national parks, monuments, and parkways; for the construction, maintenance and repair of roads, trails, and necessary buildings within the said parks; for the protection and propagation of game birds, mammals, and other useful wild animals protected by law; for the establishment, improvement and maintenance of game refuges, bird sanctuaries and game farms; for the salaries and wages of the necessary personnel; and for sundry and other necessary expenses which the said Commission may incur in carrying out the provisions of this Act for the remainder of the fiscal year nineteen hundred and fifty-two and for the fiscal year nineteen hundred and fifty-three. Thereafter, the necessary funds for the operation of the Commission on Parks and Wildlife and for carrying out its activities shall be included in the Annual General Appropriation Acts.

Sec. 15. *Repeals.*—All Acts and parts of Acts in conflict with the provisions of this Act are repealed.

Sec. 16. *Date of taking effect.*—This Act shall take effect upon its approval.

Approved, August 14, 1952.

Republic Act No. 879

AN ACT REORGANIZING THE MUNICIPAL BOARD OF THE CITY OF SAN PABLO, BY AMENDING SECTION ELEVEN OF COMMONWEALTH ACT NUMBERED FIVE HUNDRED AND TWENTY, AS AMENDED.

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

Section 1. Section eleven of Commonwealth Act Numbered

Five hundred and twenty, as amended by Republic Act Numbered One hundred and sixty-three, is hereby further amended to read as follows:

"Sec. 11. *Constitution and organization of the Municipal Board —Compensation of members thereof.*—The Municipal Board shall be the legislative body of the city and shall be composed of the Mayor, who shall be its presiding officer, the city treasurer, the city engineer, the city health officer, and five councilor who shall be elected at large by popular vote during every election for provincial and municipal officials in conformity with the provisions of the Revised Election Code. In case of sickness, absence, suspension or other temporary disability of any member of the Board, or if necessary to maintain a *quorum*, the President of the Philippines may appoint a temporary substitute who shall possess all the rights and perform all the duties of a member of the Board until the return to duty of the regular incumbent.

"If any member of the Municipal Board should be candidate for office in any election, he shall be incompetent to act with the Board in the discharge of the duties conferred upon it relative to election matters, and in such case the other members of the Board shall discharge said duties without his assistance, or they may choose some disinterested elector of the city to act with the Board in such matters in his stead.

"The Members of the Municipal Board of the City of San Pablo, who are not officers or employees of the Government receiving a fixed compensation or salary from public funds, shall each receive a compensation of two thousand pesos *per annum*."

Sec. 2. Pending the next election for provincial and municipal officers, the present two appointive Members of the Municipal Board of the City of San Pablo shall continue to occupy the two new elective positions in the said Board.

Sec. 3. This Act shall take effect upon its approval

Approved, June 19, 1953.

Republic Act No. 838

AN ACT TO CHANGE THE NAME OF KAWIT HIGH SCHOOL TO EMILIANO T. TIRONA MEMORIAL HIGH SCHOOL.

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

Section 1. In recognition of the distinguished services rendered by Emiliano T. Tirona, Filipino statesman and leader and an illustrious son of the Province of Cavite, the name of Kawit High School is changed to Emiliano T. Tirona Memorial High School.

Sec. 2. This Act shall take effect upon its approval.

Approved, March 26, 1953.

Republic Act No. 895

AN ACT TO AMEND SECTION SEVEN, PART C, TITLE III, OF REPUBLIC ACT NUMBERED SEVEN HUNDRED EIGHT, REGARDING CONVERSION OF CERTAIN POSITIONS IN THE DEPARTMENT OF FOREIGN AFFAIRS TO POSITIONS OF FOREIGN AFFAIRS OFFICERS.

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

Section 1. Section seven, Part C, Title III, of Republic Act Numbered Seven hundred eight, is amended to read as follows:

"Sec. 7. *Conversion of positions.*—To permit rotation of career personnel between the Home Office and the Foreign Service, as contemplated in this Act, the positions of Counselors and the positions of chiefs of division and those of equal rank and responsibility now occupied by graduates of the Foreign Affairs Training Program in the United States Department of State are hereby converted into positions of Foreign Affairs Officers, Class I and Class II, respectively, occupying the rate in each class which the Secretary deems appropriate. The Secretary shall, by regulation, determine the manner and frequency in which Counselors, chiefs of division and occupants of positions of equal rank and responsibility shall be exchanged with Foreign Affairs Officers in the field, subject to the limitations of this Act."

Sec. 2. This Act shall take effect upon its approval.

Approved, June 20, 1953.

Republic Act No. 850

AN ACT TO AMEND REPUBLIC ACT NUMBERED FIVE HUNDRED SEVENTY-THREE IN ORDER TO PROVIDE FOR THE EXTENSION OF THE ACTIVE DUTY OR ENLISTMENT OF RESERVE OFFICERS AND ENLISTED MEN OF THE PHILIPPINE EXPEDITIONARY FORCE PROVIDED FOR IN SAID ACT.

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

SECTION 1. Republic Act Numbered Five hundred seventy-three, otherwise known as the "Philippine Military Aid to the United Nations Act," is hereby amended by inserting a new section between sections ten and eleven thereof, to be designated as section ten-A, which shall read as follows:

"SEC. 10-A. The provisions of any law to the contrary notwithstanding, Reserve Officers in the Philippine Expeditionary Force shall remain on active duty as long as the Philippines continues to maintain said force overseas, unless sooner relieved from such active duty or discharged by the President, or dismissed from the service pursuant to the approved sentence of a general court-martial. All enlistments of enlisted men serving with the Philippine Expeditionary Force shall continue in force for a like period, unless sooner terminated by the President or pursuant to the approved sentence of a court-martial."

SEC. 4. This Act shall take effect upon its approval.

Approved, May 28, 1953.

Republic Act No. 915

AN ACT TO MAKE THE CLERK OF THE COURT OF FIRST INSTANCE OF A PROVINCE *EX OFFICIO* SHERIFF NOT ONLY OF SUCH PROVINCE BUT ALSO OF ANY CITY WHICH, BEFORE CONVERSION TO A CITY, FORMED PART OF SUCH PROVINCE.

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

SECTION 1. The clerk of the Court of First Instance of a province shall be *ex officio* sheriff not only of such province but also of any city, which before conversion to a city, formed part of such province. As *ex officio* sherif of a city, such clerk shall receive an additional compensation of not exceeding one thousand two hundred pesos, which shall be fixed by the city council or municipal board and payable from city funds.

SEC. 2. Commonwealth Act Numbered Six hundred twenty-nine is repealed.

SEC. 3. This Act shall take effect upon its approval.

Approved, June 20, 1953.

Republic Act No. 841

AN ACT TO DESIGNATE THE DISTRICT OR CITY ENGINEERS TO TAKE CHARGE OF RECONSTRUCTING, MAINTAINING, PROTECTING AND CLEANING MONUMENTS AND HISTORICAL MARKERS SITUATED WITHIN THEIR RESPECTIVE JURISDICTIONS AND REGULATING THE CONSTRUCTION OR MANUFACTURE OF SUCH STRUCTURE OR PLAQUE TO PERPETUATE THE MEMORY OF A PERSON OR EVENT.

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

Section 1. The district or city engineers are hereby designated to take charge of reconstructing, maintaining, protecting and cleaning monuments and historical markers located within their respective jurisdictions. The district or city engineers shall include a yearly estimate of expenditure for this purpose for appropriate action by the respective provincial or municipal board, or city council. Unexpended appropriation should be reverted to the General Fund.

Sec. 2. In the construction of monuments or manufacture of plaques to perpetuate the memory of a person or event, the party or parties concerned should submit the necessary plans, sketches or inscriptions to the Philippine Historical Committee through the Department of Public Works and Communications for comment and approval.

Sec. 3 This Act shall take effect upon its approval.

Approved, April 7, 1953.

MEMORANDUM OF THE CODE COMMISSION

(Continued from April Issue)

ARTICLE 902

Mr. Justice Reyes contends that the provisions of Articles 902, 989 and 998 confer the right of representation upon *the illegitimate issue of an illegitimate child;* while the *illegitimate issue of a legitimate child* is denied the right of representation by Article 992, and therefore unfair and unjustified.

In answer to this claim of unfairness and injustice, we would like to cite the provisions of Article 982:

"Art. 982. The grandchildren and other descendants shall inherit by right of representation, and if any one of them should have died, leaving several heirs, the portion pertaining to him shall be divided among the latter in equal portions."

If the provisions of the above article are correctly interpreted and understood, do they exclude the illegitimate issue of a legitimate child? The terms "grandchildren and other descendants" are not confined to legitimate offspring.

We submit that not only legitimate but also illegitimate descendants should be included in the interpretation of Articles 902, 939 and 998. In cases of this kind, where the Code does not expressly provide for specific rights, and for that matter, all codes have gaps, equity and justice should prevail, taking into consideration the fundamental purpose of the whole law on succession which, among other things, gives more rights to illegitimate children, thereby relaxing the rigidity of the old law, and liberating these unfortunate persons from the humiliating status and condition to which they have been dumped.

It may be mentioned in this connection, that the old Civil Code fails to provide for several concurrences of heirs, but as the same have correctly said, justice and equity should prevail in such cases.

With respect to the provisions of Articles 903 and 993 allowing illegitimate children and descendants to inherit from an ascendant, but the illegitimate grandparent may not inherit from a grandson, the Code Commission has in mind that the succession of illegitimate ascendants shall be confined only to the parents and should not go beyond that degree of relationship so that his or her spouse and/or brothers and sisters shall be entitled to the same (Art. 994).

ARTICLE 904, *par.* 2

This proposed amendment is already discussed in connection with Article 864.

ARTICLE 908, *par.* 2

The Code Commission accepts the proposition of Mr. Justice Reyes by eliminating the words "that are subject to collation" found in lines 2 and 3 of the second paragraph of this article.

ARTICLE 909

The Code Commission has no objection to the substitution of the words "compulsory heirs" to the word "children" found in line 1 of this first paragraph of this article.

The further suggestion of inserting "without prejudice to the provisions of Article 1064" is not necessary because the phrase may be out of place in this section on legitime, and because the idea in Article 1064 should not be repeated here.

The additional rule also proposed may not be necessary because anything that will be in excess of the legitime shall be considered a part of the free portion, and may be given to strangers.

ARTICLE 911 (2)

The rule established in this article is different from that mentioned in Article 950. The rule established in No. (2) of Article 911 speaks of the reduction to be made of *legacies if the legitime is impaired.* The rule provided, however, in Article 950 deals with cases where the total free portion is not sufficient to pay all the legacies and devices mentioned by the testator in his will.

ARTICLE 912

The proposed amendment wholly depends upon the policy to be adopted, whether the compulsory heirs should be favored or not. As it is, the article provides that if the reduction absorbs exactly one-half (1/2) of the value of the legacy or devise, the property should go to the compulsory heirs, and this should be the case, because as between the compulsory heirs and third persons, the former shall be preferred, as the testator owes more obligations legal and moral, to his own parents, descendants and spouse.

ARTICLE 918

The proposed amendment to this article is to clarify the effects of a defective disinheritance, and the Code Commission has no objection in eliminating the phrase "annul the institution of heirs insofar as it may prejudice the person disinherited" in lines 4 and 5 of the said article, and in replacing the same with "not prevent the disinherited heir from receiving his share in the legitime."

ARTICLE 919 (7)

One of the grounds for disinheritance of children and descendants under the old Civil Code is prostitution of daughters or granddaughters (Art. 853, No. 3, Spanish Code). Under this law, sons and other male descendants are not included because prostitution can only apply to women. It seems unfair and unjust because a son or a grandson may live a life more immoral than that of a daughter, and yet they cannot be disinherited. To avoid this double standard, the new Civil Code in Article 919, No. 7, provides:

"(7) When a child or descendant leads a dishonorable or disgraceful life".

With this provision of the law, both sons and daughters are placed on the same level. Mr. Justice Reyes claims that what the testator deems "dishonorable" or "disgraceful" may not appear so to the judge. May we ask, have the Filipino people so lost their sense of moral values that they can no longer discern what is dishonorable and disgraceful life? Has the moral standard of our people come to the level that they can no longer distinguish the moral from the immoral? Is the judiciary so ignorant or morally warped that those interpreting the law and administering justice can understand only "prostitution of daughters" but can not understand what constitutes a dishonorable or disgraceful life on the part of a son?

On this point, the German Civil Code provides in Article 2333, No. (5):

"If the descendant leads a dishonorable or immoral life contrary to the testator's wishes."

Let the court establish its doctrine and propound its jurisprudence.

ARTICLE 923

The Code Commission accepts the proposed amendment to Article 923, which should constitute its first paragraph:

"A valid disinheritance not only deprives the disinherited heir of any share in the legitime, but automatically revokes any disposition in his favor chargeable to the free portion."

The above amendment shall make the effects of valid disinheritance very clear. It will also clarify the effects of restoration of the rights of a compulsory heir in case of preterition as well as those of compulsory heirs restored to their rights in case of a defective disinheritance.

ARTICLES 929 *AND* 931

There seems to be no inconsistency between these two articles. Article 929 refers to a case where the testator *owns only a part of, or interest in, the thing bequeathed,* in which case, the legacy or bequest shall be limited to such part or interest, unless the testator expressly declares that he gives the thing in its entirety.

Article 931 speaks of a *thing exclusively belonging to another,* in which case he may order that it be acquired in order to be given to the legatee or devisee.

In case the testator bequeathes an undivided share that does not belong to him as provided in Article 929, do not the provisions of Article 931 apply, which requires that it be acquired in order to be given to the legatee or devisee?

Mr. Justice Reyes asks why the new Civil Code suppressed the sublegacy permitted by Article 863 of the old Civil Code. There is nothing wrong with it, but the Code Commission believes that it is not necessary to be included inasmuch as the same is covered by Articles 925 and 952.

Article 863 of the old Civil Code provides:

"Art. 863. A legacy made to a third person of a thing belonging to the heir or to a legatee, shall be valid, and such

heir or legatee, on accepting the succession, must deliver the thing bequeated or its value, subject to the limitations established by the following article.

"The provisions of the foregoing paragraph are understood to be without prejudice to the legitime of the forced heirs."

Articles 925 and 952, par. 1, of the new Civil Code provide:

"Art. 925. A testator may charge with legacies and devises not only his compulsory heirs but also the legatees and devisees.

"The latter shall be liable for the charge only to the extent of the value of the legacy or the devise received by them. The compulsory heirs shall not be liable for the charge beyond the amount of the free portion given them."

"Art. 952. The heir, charged with a legacy or devise, or the executor or administrator of the estate, must deliver the very thing bequeathed if he is able to do so and cannot discharge this obligation by paying its value."

The legacy mentioned in Article 863 of the old Civil Code is a variety of what is called "legado de cosa ajena". In other words, the thing bequeathed does not belong to the testator but the same may belong to a third person, or to the heir, or to the legatee or devisee. From the provisions, therefore, of Article 925 and Article 952, par. 1, we maintain that they include what is intended by Article 863 of the old Civil Code.

ARTICLE 932, par. 1 and ARTICLE 933, par. 1

The two paragraphs of these two articles are said to express the same rule, and hence, it is claimed that the latter is a mere repetition of the former.

The first parts of the two paragraphs may provide for the same rule, but the *latter parts of the same paragraphs* provide for different effects. Moreover, the second paragraph of Article 923 is very different from the provisions of paragraph 2 of Article 933. By placing these two articles close to each other, the reader can readily compare their respective provisions as well as their respective effects

ARTICLE 934

The proposed amendment to this article is not necessary inasmuch as the meaning of both forms is the same.

ARTICLE 943

It is suggested that the last part of this article which provides that "but a choice once made shall be irrevocable" should be eliminated because it is a repetition of paragraph 3 of Article 940. However, Article 940 deals with the "heir, legatee or devisee, who may have been given the choice", but *"dies before making it"*, while Article 943 deals with cases where the "heir, legatee or devisee *cannot make the choice*," not only because of death but because of other causes, like disinheritance or unworthiness.

ARTICLE 950

With respect to the order of payment of legacies, please see our Comment on Article 911.

Mr. Justice Reyes contends that Article 950 which gives the order of payment of legacies and devises, does not include donations given in a marriage settlement by a future spouse to the other which is mentioned in Article 130 of the new Civil Code, and which shall be chargeable to the free portion. Article 950 gives the order of payment of various kinds of legacies and devises, taking into consideration their particular purposes and objectives. Inasmuch as the donation of future property mentioned in Article 130 may not have a particular purpose or objective, it may be classified either under No. (2) or under No. (6) of the article depending how it was given. We do not believe that such a donation be given a special preference as contended, inasmuch as it was given in consideration of marriage, and it is for this reason that the same should be treated as an ordinary donation and should fall under No. (6) of the article, unless declared by the testator to be preferential, in which case, it should fall under No. (2).

ARTICLE 957

Another paragraph is proposed to be added to this article, to read, thus:

"(4) A legacy in favor of the spouse who subsequently gives cause for a decree of legal separation, as provided in Article 106, (4) of this Code."

We beg to disagree with the proposed amendment because it is a mere repetition of Article 106, No. (4). This Article 106 provides for the effects of legal separation, and No. (4) expressly deals with the subject in both intestate and testate successions.

ARTICLE 960 (3)

The new Civil Code does not include as a cause of intestacy the case of a conditional heir who survives the testator but dies before the fulfillment of the suspensive condition. This is not necessary because if an heir subject to the fulfillment of a suspensive condition should die before the fulfillment of said condition, he shall of course acquire no rights nor transmit any to his own heirs. Hence, intestacy shall take place. Please see our comments on Article 878, *ante*.

Besides, in the case mentioned by Justice Reyes, "the suspensive condition x x x x x does not happen or is not fulfilled" within the meaning of No. 3 of Art. 960.

ARTICLES 963-967

These Articles 963 to 967 deal with the degree of relationship of persons, and the manner of computing the proximity of relationship. Mr. Justice Reyes proposes that these articles should be in Book I dealing with Family Relations.

We beg to differ. The question is whether the provisions of these articles have more relation with intestate succession or with the law on persons and family relations. We maintain that if these provisions should be embodied in Book I, they would really be out of place there. As a matter of fact, the only instance where the degree of relationship is mentioned in Book I is in connection with incestuous marriage (Article 81, No. (3)). A person will be at a loss to be reading the rules on the degree of relationship in a Book where they will have no bearing with the other provisions found therein.

The arrangement of the new Civil Code is adopted not only by the Spanish Civil Code but also by the Civil Codes of France and Switzerland.

ARTICLE 968

It is proposed that the term "accrue" used in line 3 of this article be replaced by the word "benefit" or "pass", so as to avoid confusion that may arise with the provisions of the Code on accretion, mentioned in Articles 1015 to 1023.

The term "accrue" is better than the word "benefit" or "pass" because it is more comprehensive, and it carries the meaning that the Code wants to impart. In law, "accrue" means "to come into existence as an enforceable claim; to vest as a right; as a cause of action has accrued when the right to sue has become vested". In general, it means "to come by way of increase; to be added as increase, or profit". Moreover, "accretion" is nearer to the Spanish original, "acrecer". Lastly, Article 968 deals with accretion. See also Articles 1080 and 1020.

ARTICLE 972, par. 2

The proposed amendment to this article is unnecessary, nor will the rule be incorrect without the amendment to paragraph 2 of this article. Article 972 provides for the persons in whose favor the right of representation is established, the first paragraph being in favor of the direct descending line, while the second paragraph in favor of the collateral line. Article 975 deals with a concurrence of heirs, that is, if uncles or aunts survive with nephews or nieces.

Besides, Article 975 is so near that a reference to it is unnecessary. Any one who wants to study representation would read the whole subsection 2.

ARTICLE 978

It is proposed that Article 978 be suppressed on the ground that under the new Civil Code when the spouse concurs with legitimate descendants, the said spouse "has in the succession the same share as that of each of the children", and hence, "the surviving spouse is an intestate heir together with the descendants."

Article 978 ordains:

"Art. 978. Succession pertains, in the first place, to the descending direct line."

This article assumes that there are no other heirs who may concur with the children or descendants. So that if they concur with the surviving spouse, the rule is provided for in Articles 996, 998, and 999.

Besides, Justice Reyes fails to grasp the method of the new Civil Code in Sec. 2 — "Order of Intestate Succession". By Articles 978, 985, 988, 995, 1001, and 1103, the Code names the relatives who, in the order stated, inherit the *whole estate*. Article 978 assumes that there is no surviving spouse.

(To be Continued)

A CRITICAL STUDY...

(Continued from page 219)

CONCLUSIONS AND RECOMMENDATIONS

Much of the possible difficult situations we have endeavored to present which cannot be adequately solved by the present provisions of the Code without absurd results may be remedied by eliminating the conclusive presumption of legitimacy provided for in Article 258 of the present Civil Code in any of the three cases therein mentioned. This will make the present rigors of the law more flexible to permit its rigidity yield to the realities of life.

The *prima facie* presumption of illegitimacy provided for in Article 257 (C. C.) should be reversed. The presumption of legitimacy should be the rule, but its rebuttal should be allowed under the conditions and circumstances mentioned in Article 257 (C. C.) and adding thereto the case of rape of the wife during the same period of time. Articles 255 and 259 may remain as they are subject to a modification of Article 259 (C. C.) for clarity only by incorporating to the opening paragraph thereof the following phrase, "notwithstanding the provisions of Article 255".

It is, therefore, recommended that Articles 257, 258 and 259 of the Civil Code be redrafted to read as follows:

"Art. 257. In case of the commission of adultery by the wife or rape of the wife at or about the time of conception of the child, but there was no physical impossibility of access by the husband to the wife as set forth in Article 255, the presumption of legitimacy therein provided, may be overcome by proof that it is highly improbable for ethnic reasons that the child is that of the husband. For purposes of this Article the adultery or the rape as the case may be need not be proved in a criminal case." (Patternod after House Bill No. 1019; Francisco, I Civil Code of the Philippines 683).

"Art. 258. A child born within one hundred eighty days following the celebration of the marriage is *prima facie* presumed to be legitimate."

"Art. 259. If the marriage is dissolved by the death of the husband, and the mother contracted another marriage within three hundred days following such death, these rules shall govern, notwithstanding the provisions of article 255:

(1) A child born before one hundred eighty days after the solemnization of the subsequent marriage is disputably presumed to have been conceived during the former marriage, provided it be born within three hundred days after the death of the former husband;

(2) A child born after one hundred eighty days following the celebration of the subsequent marriage is *prima facie* presumed to have been conceived during such marriage, even though it be born within the three hundred days after the death of the former husband."

* * *

DECISION OF THE...

(Continued from page 248)

of time on a particular style of packages any registration which might issue upon its application would not be limited to use upon such packages, and the packages used could be changed by either party at any time. Ambrosia Chocolate Co. v. Myron Foster, 603 O. G. 545, 74 USPQ 307. *Under well settled authority* (General Food Corporation v. Casein Company of America, Inc., 27 C.C.P.A. 797, 108 F.2d 261 (44 USPQ 33); Barton Mfg. Co. v. Hercules Powder Co., 24 C.C.P.A. 982, 88 F.2d 708 (33 USPQ 105); Sharp & Dohme, Incorporated v. Abbott Laboratories, 571 O.G. 519, 64 USPQ 247), *the differences in packaging can not affect the right to registration.*" (underscoring supplied)

In view of the well-settled principle that an opposer need not own a trademark; a registered trademark; or have exclusive rights to a trademark, registered or unregistered; all he needs being something which is analogous to a trademark, and a showing that he would probably be damaged by the registration sought; and in view of the equally well-settled principle that the appearance of the labels bearing the rival trademarks cannot affect the right to registration of one of them, the motion to dismiss the Opposition is rejected, and the Respondent-Applicant is directed to answer the same within fifteen (15) days of his receipt of a copy hereof.

SO ORDERED.

Manila, Philippines, October 31, 1952.

(SGD.) CELEDONIO AGRAVA
Director of Patents

FOR THE SAKE OF TRUTH

BY PORFIRIO C. DAVID

I wish to make a vigorous exception to Mr. Federico B. Moreno's article ROLL OF HONOR (of judges of First Instance) as published in the Sunday Times Magazine of May 9, 1954.

I do not question Mr. Moreno's right to praise a particular judge or group of judges. For the consumption of the public, he can even raise them to the level of an Arellano, a Cardozo or Holmes. But, he has no right to do so at the expense of other judges whom he had degraded and ridiculed by publishing his conclusions about their efficiency on the basis of half-truths and mis-truths.

The proficiency of a judge cannot be correctly measured by the precise action of the Supreme Court on his appealed decisions and orders for only one year (last year) and on the applications for writs of certiorari, prohibition and mandamus decided in the preceding three years and on the basis of important cases settled by the Court of Appeals in 1952 and 1953 as published in the Official Gazette. One who is familiar with the machinary of justice, like Mr. Moreno, who is a lawyer, should know that *not* all decisions are published in the Official Gazette. Hence, to rate a judge on what might have been published of his appealed decisions in the Official Gazette alone would be the height of irresponsibility.

Take, for instance, the particular cases of Judges Barot, Moscoso and Ocampo, who are represented to have had no affirmed decisions of any sort during the period given. This is unbelievable. I regret that I do not have offhand the records of Judge Moscoso, who is in the Visayas, and of Judge Barot, who is in Pampanga. But from the records alone of Judge Ocampo as available in the Office of the Clerk of Court of the Court of First Instance of Manila, where said judge has been presiding since 1951, I can say that the conclusions of Mr. Moreno about these judges are at once preposterous and gratuitous, if not libelous.

In this connection, I am supporting my stand with the facts and figures appearing on the correct copies of Reports of Cases decided by Judge Ocampo and brought to the Appellate Courts, duly certified by the clerks in charge, which are self-explanatory.

Summarizing, I find:

Criminal cases appealed	34
Affirmed	8
Modified	3
Appeal abandoned	8
Reversed	2
Pending	13
Civil cases appealed to Supreme Court	4
Pending	2
Affirmed	2
Reversed	None
Civil cases appealed to the Court of Appeals	19
Pending	13
Appeal dismissed or abandoned	4
Affirmed	2
Reversed	None

If only to set the record straight and to correct any wrong impression which Mr. Moreno's article may have produced on the readers' minds, I have taken pains to dig up the above facts and figures.

PUBLIC CORPORATIONS

(Continued from April Issue)

[§297] AA. *Report concerning persons sojourning; statutory provisions as to municipalities in regular provinces.* "When the province or municipality is infested with outlaws, the municipal council, with the approval of the provincial governor, may further require each householder of any municipal center or of any barrio of the municipality to make prompt report to the mayor or municipal councilor of the barrio, as the case may be, of the name, residence, and description of any person not a resident of such municipal center or barrio who may enter the house of such householder or receive shelter or accomodations therein. The report made to the municipal councilor of the barrio shall be transmitted by such councilor within twenty-four hours after its receipt to the mayor."[185]

[§298] BB. *Rewards.* "It is generally held that municipal corporations, unless authorized by statute, are not empowered to offer rewards for the arrest or conviction of offenders against the criminal law of the state, and that the power to provide for the general welfare does not confer such power. By virtue of express grant or or by necessary implication from power expressly granted such corporations may have the power to offer such rewards. When authorized to offer rewards the power may, and must, be exercised within its scope. It has been held that a municipal corporation may offer a reward for the arrest and conviction of a person for arson as a means of protection against fire, and such power has been held authorized under the welfare clause. The offer of a reward, when made by a municipal corporation empowered to make such an offer must be made by the proper municipal authorities."[186]

[§299] CC. *Schools; statutory provisions as to Philippine municipal corporations.* — 1. *Municipalities in regular provinces.* "It shall be the duty of the municipal council to establish and maintain primary schools in the municipality, to be conducted as a part of the public school system in conformity with the provisions of the School Law."[187]

"Special and professional schools. — After adequate provision has been made for the primary schools of a municipality, the council may establish and maintain intermediate, secondary, or professional schools; and with the approval of the Director of Public Schools, reasonable tuition fees may be charged for instruction in such institutions."[188]

"Cooperation of municipalities in maintenance of school, giving intermediate instruction. — Where the number of pupils eligible for intermediate instruction in any municipality is not sufficient to justify the maintenance by it of a school giving intermediate instruction or where the municipal funds are insufficient to make adequate provision therefor, the municipal council may, with the approval of the Director of Public Schools, cooperate with the authorities of any other municipality or municipalities in the same province in the maintenance of such a school."[189]

[§300] 2. *Municipalities in specially organized provinces.* "The municipal council have power by ordinance or resolution:

"* * * * *

"(g) *Schools.* — To establish and maintain primary schools, subject to the limitations of law.

"* * * * *"[190]

[§301] 3. *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * * *

(d) To provide for the establishment and maintenance of free public schools for intermediate instruction and to acquire sites for school houses for primary and intermediate classes through purchases or conditional or absolute donation.

"(e) To establish secondary, and professional schools; and, with the approval of the Director of Public Schools, to fix reasonable tuition fees for instruction therein.

"* * * * *"[191]

[§302] DD. *Signs, billboards, and other structures or devices for advertising.* — 1. *In general.* "With the limitations to be discussed hereinafter, as a general rule municipal corporations may control and regulate the construction and maintenance of billboards, signs, and other structures or devices for advertising purposes. Such power may be expressly conferred or it may be implied; and it is usually derived from the police power of municipal corporations. For the preservation of the public health, safety, morals, or general welfare, municipal corporations may have the right to prescribe the manner of construction of such structures; to compel the use of safe material in their construction, as that the material be incombustible; to prohibit the erection of insecure billboards or similar structures; to restrict reasonably or limit their size, length, height, and location; to require that they be maintained in a secure and sanitary condition; to provide for their removal, if they become dangerous or unsanitary, and that at the expense of the owners; and to prohibit advertisements thereon of indecent or immoral tendencies. But such regulations must have some reasonable tendency to protect the public safety, health, morals, or general welfare; they must be reasonable, and not arbitrary or discriminatory; they must not unnecessarily invade private property rights. Following the general rule the power cannot be exercised merely for the benefit of adjoining owners or other particular individuals. Aesthetic considerations alone do not justify the exercise of the power. Some regulations may be reasonable in a particular locality or district of the corporation and unreasonable in other localities or districts; in such case a regulation, without qualification or limitation, applicable to signs or billboards alike in all portions of the corporation, is unreasonable.

"Permits and absolute prohibition. While a municipal corporation may require permits for the construction and maintenance of such structures, the grant or refusal must not be left to absolute or despotic power or without reference to prescribed and duly enacted rules and regulations. While, under its power to regulate streets, it has been held that a municipal corporation may prohibit the erection of signs, sheds, or other obstructions on or over any part of the sidewalk, roadway, or neutral ground of certain streets, as in residential districts, and may compel the removal of such existing structures, the prohibition of the erection of structures designed for advertising purposes, however safe, sanitary, and morally unobjectionable, they may be, is warranted and invalid.

"Retroactive effect of regulations. Some of such regulations have been held to apply to structures erected prior to their passage or enactment; and they have been regarded as not offensive to the provisions of the organic law protecting vested interests or inhibiting retrospective legislation. Other regulations have been held not to apply to existing billboards and signs; and it has been held that any attempt to interfere with existing billboards, signs, etc., except to make them safe and secure, will be invalid provided they complied with the ordinances or regulations at the time of their erection. Even though the regulation may have no retroactive effect, it may apply to billboards or signs previously erected when there is a desire or necessity to remove them to some other place.

"Advertising truck. A regulation prohibiting the use of advertising trucks, vans, or wagons in the city streets has been valid, as an exercise of the police power.

"Official billposter. In the absence of express legislative authority, a municipal corporation cannot create the office of billposter and give him exclusively the right to post advertisements."[192]

[§303] 2. *Statutory provisions as to Philippine municipal corporations.* — a. *Municipalities in regular provinces.* "The municipal council shall have authority to exercise the following discretionary powers:

"* * * * * *

"(r) To regulate . . . signs, signboards, and billboards displayed or maintained in any place exposed to public view except those displayed at the place or at places where the profession or business advertised thereby is in whole or part conducted.

"* * * * * *"[193]

[§304] b. *Municipalities in specially organized provinces.* "The municipal council shall have the power by ordinance or resolution:

"* * * * * *

"(d) . . . To regulate . . . signs, signboards, and billboards, displayed or maintained in any place exposed to public view, except those displayed at the place or places where the profession or busi-

185 Sec. 2276, Rev. Adm. Code.
186 43 C. J. 431.
187 Sec. 2249, Rev. Adm. Code.
188 Sec. 2250, Id.
189 Sec. 2251, Id.
190 Sec. 2625, Rev. Adm. Code.
191 Sec. 18, Rep. Act No. 409.
192 43 C. J. 822-825.
193 Sec. 2243, Rev. Adm. Code.

ness advertised thereby is in whole or in part conducted . . .

"* * * * * * *"[194]

[§306] c. *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * * * * *

"(ee) . . . to regulate or prohibit . . . the use of property on or near public ways, grounds, or place, or elsewhere within the city, for a display of electric signs or the erection or maintenance of billboards or structures of whatever material, erected, maintained, or used for the display of posters, signs, or other pictorial or reading matter except signs displayed at the place or places where the profession of business advertised thereby is in whole or part conducted.[195]

"* * * * * * *

[§306] d. *Power of mayors.* "If after due investigation, and having given the owner an opportunity to be heard, the mayor shall decide that any sign, signboard, or billboard displayed or exposed to public view is offensive to the sight or is otherwise a nuisance, he may order the removal of such sign, signboard, or billboard, and if same is not removed within ten days after he has issued such order he may himself cause its removal, and the sign, signboard, or billboard shall thereupon be forfeited to the municipality, and the expenses incident to the removal of the same shall become a lawful charge against any person or property liable for the erection or display thereof."[196]

[§307] EE. *Searches and seizures.* "A municipal corporation in the absence of express authority may not authorize the search for, and seizure of, property kept for unlawful use."[197]

[§308] FF. *Slaughtering animals and slaughterhouses.* — 1. *In general.* "The slaughtering of animals for food within municipal boundaries is a proper subject for regulation by municipal corporations, under the police power to protect the health of their inhabitants, unless especially governed by the superior power of a state statute. Following the general rules, slaughtering regulations must be reasonable and not arbitrary or discriminatory. In the exercise of its power a municipal corporation may prescribe the character of buildings and equipment for slaughterhouses; may provide for their inspection, the inspection of those employed therein, the inspection of the animals to be slaughtered and of their meats; and may prohibit the sale as food of animals not inspected and slaughtered at such slaughterhouses. It has been held that a municipal regulation providing that licensed slaughterhouses shall slaughter for the public without discrimination is valid. In some jurisdictions municipal corporations maintain abattoirs for the purpose of providing a place where cattle may be killed and prepared for food by those skilled in the work of that kind and under the control of regulations of the municipal corporation; such abattoirs are not intended to provide a place of business for slaughterers.[198]

"As nuisance per se. Although the maintenance of a slaughterhouse is a legitimate business and not a nuisance per se, a slaughterhouse may be a nuisance when located near an inhabited locality. So under the rules as to the authority of municipal corporations over nuisances such corporations may declare slaughterhouses to be nuisances when the facts and circumstances warrant it; may provide the limits within which they may be erected and maintained; may demand their removal from particular districts, though they may have been established pursuant to ordinances authorizing them; and may even entirely exclude them from the corporate boundaries. But of course the facts and circumstances must show them to be nuisances in fact."[199]

[§309] 2. *Statutory statement as to Philippine municipal corporations.* — a. *Municipalities in regular provinces.* "It shall be the duty of the municipal council, conformably with law:

"* * * * * * *

"(q) To establish or authorize the establishment of slaughterhouses . . . and inspect and regulate the use of the same.

"* * * * * * *"[200]

[§310] b. *Municipalities in regular provinces.* "The municipal council shall have power by ordinance or resolution:

"* * * * * * *

"(y) *Slaughterhouses and markets.* To establish or authorize the establishment of slaughterhouses . . . and inspect and regulate the use of the same . . ."

"* * * * * * *"[201]

[§311] *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * * * * *

"(cc) Subject to the provisions of ordinances issued by the Department of Health in accordance with law, to . . . prohibit or permit the establishment or operation within the city limits of public . . . slaughterhouses by any person, entity, association, or corporation other than the city.

"* * * * * * *"[202]

[§312] GG. *Sunday observance.* "The securing of the proper observance of Sunday may be the subject of reasonable police regulation by municipal corporations, either under the general police power, or under an express or implied grant of power for the purpose. The general statutes of the state on this subject fix the limit and measure of municipal police power, unless the charter expressly confers more. But the municipality need not cover the entire field of the statute; and an ordinance forbidding only a portion of the acts denounced by statute may yet be valid. In the exercise of the power under consideration municipal corporations may regulate the conduct of business on Sunday; may within reasonable limits prohibit work or labor on such day; may prohibit the sale of particular merchandise on that day; and may regulate Sunday amusements. While such regulations should not be discriminatory and must be reasonable, the fact that the municipal authorities to whom the power is delegated single out certain occupations does not operate as an unreasonable or illegal discrimination against those engaged in those occupations."[203]

[§313] HH. *Vehicles and means of transportation.* — 1. *In general.* "Subject to the limitations discussed hereinafter, ordinarily municipal corporations have power to regulate the traffic of vehicles of all kinds, commonly used within the corporate limits, as an exercise of their police powers, not inherent, but granted to the corporation expressly or impliedly. But such regulations must be reasonable, and not arbitrary or discriminatory. And the power to regulate such vehicles does not authorize prohibition. But under a grant of express power a municipal corporation may prohibit particular kinds of vehicles from operating on its streets or other public places. Vehicles merely passing through the municipality may not be included; but those may which belong to nonresidents if publicly used in the municipality, or if the route terminus is within it. The municipal corporation may prescribe what style of vehicles shall be used for public passenger service, but not for private use; what streets they must travel, if regular lines; and where hacks must stand; whether the driver may leave them; and what mark of distinction he shall wear. It may prohibit anyone from riding on the seat with the driver. It may also prohibit fast driving, but not slow driving; and may assess a penalty against a public conveyance for refusal to carry a passenger. It may confine vehicles to the righthand sides of the centers of streets, with reference to the directions in which they are severally moving, and may forbid the leaving of any vehicle standing on a street elsewhere than on the righthand side thereof with reference to the direction in which it faces. A municipal regulation which interferes with its lawful use of sidewalks by pedestrians and endangers the safety of pedestrians by permitting vehicles on the sidewalks is unreasonable and invalid.

"Charges and prices. Generally speaking, a municipal corporation, under its properly delegated police power, may prescribe rates for carriage by cab, hack, coach, omnibus, car, or other vehicle, used in transportation within the municipal boundaries.

"Delegation of power. While a municipality may vest upon designated officials or officers certain power of discretion to carry into effect the regulation under consideration, and in doing so may authorize police officers to require drivers to obey their directions in regard to the places which vehicles may occupy, it cannot confer upon

194 Sec. 2625, Rev. Adm. Code.
195 Sec. 18, Rep. Act No. 409.
196 Sec. 2243, Rev. Adm. Code, with reference to municipalities in regular provinces, Sec. 2625(a), Id., with reference to municipalities specially organized provinces, and Sec. 19, Rep. Act No. 409, with reference to City of Manila.
197 43 C. J. 451.
198 43 C. J. 319-320.
199 Id. 320.
200 Sec. 2242, Rev. Adm. Code.
201 Sec. 2625, Rev. Adm. Code.
202 Sec. 18, Rep. Act No. 409.
203 43 C. J. 436.

such officials unlimited discretion in prescribing the rules for the regulation of vehicles on the streets or other public places."[204]

[§314] 2. *Statutory provisions as to city of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * * * *

"(v) . . . to regulate the speed of horses and other animals, motor and other vehicles, cars, and locomotives, within the limits of the city; to regulate the lights used on all such vehicles, cars, and locomotives; to regulate the locating, constructing, and laying of the track of horse, electric, and other forms of railroad in the streets or other public places of the city authorized by law; to provide for and change the location, grade, and crossings of railroads, and compel any such railroad to raise or lower its tracks to conform to such provisions for changes; and to require railroad companies to fence their property, or any part thereof, to provide suitable protection against injury to persons or property, and to construct and repair ditches, drains, sewers, and culverts along and under their tracks, so that the natural drainage of the streets and adjacent property shall not be obstructed.

"* * * * *"[205]

[§315] II. *Zoning.* — 1. *Definition, nature, and history.* "The verb 'zone' has acquired a comparatively new meaning, that is, to separate the commercial or industrial districts from the resident districts, and to prohibit the establishment of places of business in any designated residence district, or vice versa. In its original and primary sense, zoning is simply the division of a municipal corporation into districts and the prescription and application of different regulations in each district. Roughly stated, these regulations, which may be called 'zoning regulations,' are divided into two classes: Those which regulate the height or bulk of buildings within certain designated districts, in other words, those regulations which have to do with structural and architectural designs of the building; and those which prescribe the use to which buildings within certain designated districts may be put. Zoning ordinances are of comparatively recent origin. The subject of zoning has certainly become a very important branch of the law affecting municipal corporations."[206]

[§316] 2. *Source and delegation of power to municipal corporatoins.* "The power of municipal corporations to enact zoning regulations may be derived from constitutional or statutory provisions. Within its constitutional limitations the legislature may authorize such enactment. The power may also be derived directly from the constitution of the state; and state constitutional provisions conferring the power have been upheld as against the objection that they violated the federal constitution as a denial of the equal protection of the law, or discrimination. Also, the statutes conferring the power have been upheld as against the objection that they were violative of the federal constitution.

"Construction of statute. It has been held that statutes conferring upon the municipal corporations the power to enact zoning regulations should be liberally construed.

"Police power as sufficient source. It has been suggested that the police power residing in the state legislature is sufficient to authorize the enactment of zoning statutes, if done wisely; that zoning under the power of eminent domain is unwise; and that there is no necessity for constitutional amendment to provide for zoning."[207]

[§317] 3. *Existence and limits of power.* — a. *In general.* "As a general rule, subject to the limitations to be noted hereinafter, municipal corporations may enjoy the right or power to enact reasonable zoning regulations. Regulations to that effect have been upheld as against the objection that they were unconstitutional, as denial of due process or equal protection of the law, and that they were discriminatory. The power is not an inherent one; it can be exercised only when it is expressly conferred on the municipal corporation or rises by necessary implication. While it has been held that the power to enact certain zoning regulations cannot be exercised as an incident of the municipal police power, the weight of authority is to the effect that reasonable zoning regulations may be proper exercise of the municipal police power. But the question whether municipal corporations have power to enact zoning regulations often depends on the particular regulation in question. It depends on conditions. Under certain conditions and circumstances zoning regulations may be the constitutional and proper exercise of the municipal police power, but under other conditions and circumstances they may be considered unconstitutional as being an attempt to deprive owners of real property of their rights of dominion over it without due compensation or in an unreasonable manner. In this connection it should be noted that the police power of a municipal corporation must be responsive, in the interest of common welfare to the changing conditions and developing needs of growing communities. And, as it is the case with police powers generally, zoning regulations which may at one time be regarded as not within the power of a municipal corporation may, at another time, by reason of changed conditions be recognized as a legitimate subject of municipal power. Also, zoning regulations which may be regarded as within the power of one municipal corporation may not be so regarded as to another."[208]

[§318] b. *Limits on exercise.* — *In general.* "The power to enact zoning regulations by municipal corporations, if it exists, must be exercised subject to the limitations and restrictions which the legislature may have imposed upon the municipal corporation. It must be exercised reasonably, not arbitrarily, without discrimination. The regulation must have some tendency to promote the public health, public safety, and public welfare. The power of the municipality to zone is not limited to the protection of established districts, but extends to aid in the development of new districts."[209]

[§319] (2) *Matters considered.* "In determining whether a zoning regulation is valid two questions present themselves: (1) Whether the scheme of zoning is as a whole sound, that is to say, whether the method of classification and the districting is reasonably necessary to the public health, saftey, morals, or general welfare. (2) Whether the scheme of classification and districting has been applied fairly and impartially in each instance. It is difficult to isolate the several factors which may be considered in the enactment of zoning regulations. Such regulations may involve complicated and conflicting elements and interests. Zoning regulations must take into consideration the character of the district, the future development of the municipality, and the direction of municipal improvements. All questions affecting the public and private interests must be considered. The peculiar suitability for particular uses, the conservation of property values, the permanency of the structure and its use, are all matters to be considered. Zoning regulations must be in accordance with some well considered plan and must adopt a definite policy. They should describe with certainty the district or districts within which they are applicable. The authority to zone contemplates fixed areas with defined boundaries. To what extent it is necessary to zone the entire municipal boundaries often depends on circumstances, and also the rule may differ as to different municipal corporations. An absolute identity of treatment of particular parcels of land is not required. Under particular circumstances zoning may be limited to one street only. When the statute so requires it, zoning regulations should be in accordance with well-considered plans applying within the entire municipal boundaries."[210]

"Aesthetic Considerations. Aesthetic considerations alone do not justify the enactment of zoning regulations. But when once it is determined that regulation tends to promote the public health, public safety, or public welfare, aesthetic considerations may be considered in the enactment of the particular regulation."[211]

[§320] c. *Particular powers.* — (1) *Architectural design and structural designs.* Municipal zoning regulations may consist in regulating the architectural and structural designs of buildings within specified districts in regard to bulk, building lines, heights, open spaces, yards, etc. In the exercise of the power apartments, tenements, and like structures may be zoned and their height, bulk, open spaces, etc., regulated; as for instance, the particular

204 43 C. J. 440-442.
205 Sec. 18, Rep. Act No. 409.
206 43 C. J. 333.
207 43 C. J. 333-334.
208 43 C. J. 334-336.
209 43 C. J. 336.
210 43 C. J. 336-338.
211 State v. Harper, 182 Wis. 143, 158, 33 A.L.R. 269.

number of families for which such structures may be built may be regulated.[212]

"It is needless to . . . analyze and enumerate all of the factors which make a single family home more desirable for the promotion and perpetuation of family life than an apartment, hotel, or flat. It will suffice to say that there is a sentiment practically universal, that this is so. But few persons, if given their choice, would, we think, deliberately prefer to establish their homes and rear their children in an apartment house neighborhood rather than in a single home neighborhood. The general welfare of a community is but the aggregate welfare of its constituent members and that which tends to promote the welfare of the individual members of society cannot fail to benefit society as a whole. The entrance of one apartment house or flat into a district usually means the entrance of others, and while it may mean an enhancement of value of the adjacent property for the building of similar structures, it detracts from the value of neighboring property for home building. The man who is seeking to establish a permanent home would not deliberately choose to build next to an apartment house, and it is common experience that the man who has already built is dissatisfied with his home location and desires a change. In other words, the apartment house, tenement, flat, and like structures tend to the exclusion of homes. The home owner may move to another district but this may not be a sufficient solution . . . (of) his problem, for if no protection can be given to strictly home districts — such as is contemplated by a comprehensive and properly constructed zoning plan — he may be forced by the ever-increasing encroachment of apartments and flats to relinquish, if not altogether abandon, the benefits emanating from a permanent home site."[213]

"With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play enjoyed by those in more favored localities — until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable come very near to being nuisances."[214]

"Discussion of, and reason for, rule. — Restriction of the use of land to buildings each to be occupied as a residence for a single family may be viewed at least in two aspects. It may be regarded as preventive of fire. It seems to us manifest that, other circumstances being the same, there is less danger of a building becoming ignited if occupied by one family than if occupied by two or more families. Any increase in the number of persons or of stoves or lights under a single roof increases the risk of fire. A regulation designed to decrease the number of families in one house may reasonably be thought to diminish that risk. The space between buildings likely to arise from the separation of people into a single family under one roof may rationally be thought also to diminish the hazard of conflagration in a neighborhood . . . It may be a reasonable view that the health and general physical and mental welfare of society would be promoted by each family dwelling in a house by itself. Increase in fresh air, freedom for the play of children and of movement of adults, the opportunity to cultivate a bit of land, and the reduction in the spread of contagious diseases may be thought to be advanced by a general custom that each family live in a house standing by itself with its own curtilage. These features of family life are equally essential or equally advantageous for all inhabitants, whatever may be their social standing or material prosperity. There is nothing on the face of this by-law to indicate that it will not operate indifferently for the general benefit. It is a matter of common knowledge that there are in numerous districts plans for real estate development involving modest single-family dwellings within the reach as to price of the thrifty and economical of moderate wage earning capacity."[215]

"The power is not an inherent one, it must be expressly granted or rise by necessary implication, and in many instances the existence of the power has been denied, as for instance, prohibiting the erection of four-story apartment houses, prohibiting the erection of frame office buildings, prohibiting the erection of one-story buildings within a particular district, prohibiting the erection, within a specified district, of buildings to be used by more than one family, prohibiting the erection of a four-family flat within a residential district, prohibiting the erection of two-family houses within a district. In any event the power must be exercised within its scope. Thus, a regulation providing that no buildings shall be erected, altered, or used as a residence for more than one family, but not regulating the size of the lot or specifying how far buildings shall be separated, is not authorized by statute authorizing municipalities to regulate the location of industries and buildings with a view to promote the public health, safety, and general welfare. Also, authority to regulate the 'manner and method of building' does not authorize the restriction of the location of one-story buildings. The regulations must have the tendency to promote the health, safety, or general welfare. The power must be exercised reasonably, not arbitrarily, and without discrimination, although reasonable classification may be permitted."[216]

212 43 C. J. 338-368.
213 Miller v. Los Angeles Bd. of Public Works, 195 Cal. 477, 493, 234 P 881.
214 Euclid v. Ambler Realty Co., (U.S.) 47 Sup. Ct. 114.
215 Brett v. Brookline Bldg., Comr., 250 Mass. 73, 78, 145 N.E. 269.
216 43 C. J. 339-340.

(To be continued)

TEXT OF COURT . . . *(Continued from page 220)*

"Segregation of White and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

Whatever may have been the extent of psychological knowledge at the time of Plessy V. Ferguson, this finding is amply supported by modern authority, any language in Plessy V. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the fourteenth amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question — the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on questions 4 and 5 previously propounded by the court for the reargument this term. The Attorney-General of the United States is again invited to participate. The public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.

DR. CECILIO PUTONG JOINS FRANCISCO COLLEGE AS VICE-PRESIDENT

DR CECILIO PUTONG

The Board of Trustees of the Francisco College has appointed Dr. Cecilio Putong, former Secretary of Education, as Vice-President and Dean of Graduate Studies (M.A.) of the Francisco College.

Dr. Putong's appointment to the second highest administrative position in the Francisco College is in line with the school's policy of giving the youth of the land the best in educational guidance and instruction. The name of Dr. Putong is inextricably linked with the field of education in the Philippines.

Graduating as valedictorian from the Philippine Normal School in 1912, Dr. Putong was immediately appointed principal of the Dimiao Intermediate School in Bohol, his home province, at the youthful age of 21. From thence on his rise in the rung of public education was meteoric. He successively became high school principal in Abra and La Union, 1922-1924; division superintendent of schools for Romblon, Abra, Agusan, Leyte, 1924-1931; chief, curriculum department of the Bureau of Education, 1931-1938, during which period he also served as division superintendent of schools for Bulacan, Tarlac, and Pangasinan for brief terms; and superintendent of city schools, Manila, 1938-1944. After liberation he rejoined the Department of Education as Chief of the Elementary School Division. Subsequently, and in quick succession, he became Assistant Director of Public Schools, Director of Public Schools, Undersecretary of Education, and finally, Secretary of Education. He retired from the government service last December.

He obtained his B.S.E. degree from Western Illinois State College in 1920, his M.A. degree from Columbia University in 1921 and his Ph.D. degree from the University of Chicago.

His studies in educational institutions were supplemented by travel for purposes of observing educational practices and trends under a Unesco fellowship grant in 1950, during which he attended the Fifth Unesco Conference at Florence, Italy as one of the delegates from the Philippines. He also visited school systems in the United States, Mexico, England, Italy, Spain, France, Denmark, and Sweden. He had visited schools in Japan when he attended the Pan-Pacific New Educational Conference at the Imperial University of Tokyo in 1935. Last July he attended the Sixteenth International Conference on Public Government and after the conference he made studies in higher education, visiting the University of Louvaine and the University of Brussels in Belgium, the University of Leyden in Holland, the University of London and Oxford University in England, The Ministry of Education and Ecclesiastics in Norway, Columbia University, the University of Chicago, and Harvard University of the United States, and the Central University of Madrid and the University of Salamanca in Spain. He attended the Seventh Centennial of the University of Salamanca as a representative of the University of the Philippines.

He is listed in *Who's Who in American Education, Leaders in American Education,* and *World Biography.*

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