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In this issue

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EVERY MEMBER OF THE BAR AND BENCH MUST RECOGNIZE THEIR RESPECTIVE RESPONSIBILITY *

By CHIEF JUSTICE RICARDO PARAS

I have been wondering whether your invitation for me to address this National Convention of Lawyers is, witting'y or unwittingly, a mere ruse of getting even with us, the members of the Supreme Court, for subjecting lawyers to the ordeal of interpellations during oral arguments which, though often giving credit to many, embarrass some to the point of showing their lack of preparation. The lawyers may want to make it appear that, by a poor speech he delivers, a Justice is not after all as good a scholar and jurist as he seems to be when confronting lawyers. With this apprehension I will avoid rhetorical flights, dogmatic references and pontifical assertiveness, and thus refuse to take the test, so to speak. The expert consultants and members of this Convention have already dwelt upon many subjects requiring academic and highly technical deliberation and treatment, in addition to the brilliant guest speakers that you have previously heard, and I am therefore left in a situation where I have merely to limit myself to some observations gained from personal experiences or otherwise warranted by factual considerations. At any rate, a modern version of Chancellor Lyndhurst's definition of a good Judge — and a Justice for that matter — is not, that he must be a great scholar and jurist, but is merely the following: "First, he must be honest. Second, he must possess a reasonable amount of industry. Third, he must have courage. Fourth, he must be a gentleman. And then, if he has some knowledge of law, it will help." I can perhaps invoke this definition to cover up any shortcomings.

But one good quality of a Judge is industry, and in an attempt at exemplification, I have chosen to gather and present facts regarding our bar and judiciary with a view at least to provoking some thought.

To begin with I may inform you that, as of the year 1952, there are in our country 12,823 lawyers, including the unknown dead. In this connection ours is always a feeling of pride and satisfaction whenever groups of new lawyers are sworn in before the Supreme Court, in great contrast to our disappointment whenever attorneys plead before us in defense of themselves against disbarment proceedings. Incidentally, since the liberation alone we have received 160 complaints for malpractice and at least five lawyers have been reprimanded, suspended or disbarred.

The increasing number of lawyers should not cause any alarm. Those who have already an established lucrative practice need not worry about competition, and those who are new and merely forging ahead in the field still have plenty of room because, with our population of twenty millions, there are about 1,559 for every lawyer, even assuming that all the lawyers listed in the Roll of Attorneys are practicing, which is very far from the truth. On the other hand, as of 1940 alone, there were in the United States (with a population of 131,822,000) 180,000 lawyers, or 732 for every lawyer. As a matter of fact, many of our recorded attorneys have died or are not engaged in the active practice of law, being employed in one capacity or another in or out the Government Service. According to statistics released by the Bureau of the Census, there are more physicians than law practitioners and that there are only about 1,500 lawyers actually engaged in the legal profession. Moreover, a great majority of law students are aiming merely to utilize the law course or membership in the bar as a means for cultural upliftment and general practical utility.

The bench is not entirely free from blemish because also since liberation 371 administrative cases have been filled against justices of the peace. The grounds are many and varied, ranging from the minor and petty act of arrogance to the serious crimes of bribery and extortion. During the same period there have been filed in the Supreme Court 30 administrative cases against judges of first instance.

Now, to give you an idea of the dockets of our courts of first instance throughout the Philippines, without mentioning the number of finished cases, I may state that at the end of the year 1948, there

* Speech delivered by Chief Justice Ricardo Paras of the Supreme Court at the National Convention of Lawyers, December 30, 1953.

SPEECH DELIVERED BY MR. JUSTICE SABINO PADILLA AT THE OATH TAKING CEREMONIES OF THE 1953 SUCCESSFUL BAR CANDIDATES ON 18 JANUARY 1954

Members of the Bar:

To the Chairman and Members of the Board of Examiners goes the Court's appreciation for the splendid work done. To the new Members of the Bar go the congratulations of the Court.

The taking of oath on this solemn occasion has made you officers of the Court. It is a milestone in your life. It is portentous. It may mean success or failure. It lies in your hands to make it a success. Your success would depend upon your efforts to make yourself worthy of the profession you have embraced. The successful completion of your studies, your passing the examinations and admission to the bar mark only the beginning of your struggle for success. What really and actually means is that you have to work harder, honestly, conscientiously and continuously, if you expect to succeed in our chosen profession. Your admission to the bar is a sort of a degree that enables you to pursue advanced studies. A lawyer's preparation is like that of a scholar in the college of liberal arts who, after finishing the college courses, may pursue professional studies. But the lawyer's degree is, of course, on a higher plane, because he may branch out in the university of practical life into different fields of human endeavor, for law permeates, influences and controls every human activity. So that those who view with apprehension the ever increasing number of lawyers should not be alarmed, because not all those who have been admitted to the bar are to practice law. They may venture into diverse fields of human endeavor and their legal background is a good foundation which enables them to perform more efficiently and successfully their duties and functions. In fact, a lawyer is better prepared to assume greater and more complicated responsibilities.

Learned men have considered noble the profession of a lawyer. It is so when in the practice of his profession he is inspired by loftly and noble ideals.

On occasions like this it seems customary and proper to give an advice to the neophytes. There is no better advice than to follow what in the oath you have solemnly declared, undertaken and promised to do. Your oath is a solemn profession of faith to God by which you have irrevocably undertaken and promised to owe and maintain allegiance to your Republic; to support its Constitution and obey the laws and the legal orders of the duly constituted authorities That is your duty to the Government. You have vowed to do no falsehood nor consent to the doing of any in court; not to promote wittingly or willingly any groundless, false or unlawful suit nor give aid nor consent to the same. That is your duty to the courts. You have promised to delay no man for money or malice, to conduct yourself as a lawyer according to the best of your knowledge and judgment with all good fidelity to the courts and to your clients. You have made these commitments freely and voluntarily without any mental reservation or purpose of evasion. And as a fitting climax to all these undertakings and promises you have asked, prayed and invoked the help of God so that you may fulfill them. I cannot think of a more sublime act than the oath you have just taken. You have made it to the Supreme Court of the Republic as the lawful and legitimate representative of God. Fulfillment by you of the promises made in the oath would spell success. A violation of any of them would bring about and result in failure. May the Almighty God guide you in your efforts to fulfill them.

A good suggestion would be to have this oath you have just taken framed and have it before you in your bedroom or study room. After reciting your daily prayers and before you start the day's grind, you should read your oath and ponder on its significance. If you realize what that oath means and try to live up to it, then no one of you would fail.

The Court wishes you all Godspeed.

Manila, 18 January 1954.

were pending 38,738 cases. This was increased to 40,973 at the end of the year 1949. By the end of the year 1950, the number reached 43,289, and this was enlarged at the end of the year 1951 when the total was 45,848. This upward trend continued until the end of the year 1952 when the number of pending cases in said courts became 52,171. Of this last figure, 13,245 are criminal cases; and 23,632 are special proceedings and cases of miscellaneous nature. Many of these cases are perhaps not ready for decision.

In the Court of Appeals the number of cases docketed from 1946 to 1953 is 12,104, as against 9,516 cases disposed of up to 1953. As of December 28, 1953, the number of cases pending decision is 974.

Lest I may be charged with hiding the status of the docket of the Supreme Court, allow me to tell you that from 1945 up to December 7, 1953, 7,304 cases have been filed and docketed. From 1945 up to yesterday, the Court has disposed of either by decision or by resolution a total of 6,587 cases. I wish to inform you that, as of today, the number of cases submitted to a pending decision by the Supreme Court is 510. Of this number, 3 cases are of the 1950 calendar; 4 cases pertain to the 1951 calendar; 53 cases are of the 1952 calendar; and 465 cases are of the 1953 calendar. You will note that there are no cases older than 1950, and the cases before 1953 are only 45 which, together with the 465 cases of the 1953 calendar, the Court will take up and dispose of beginning January, 1954. Many of these pending cases have been voted, awaiting the preparation of the necessary opinions. After the summer of 1954, I estimate that we shall have disposed of by penned decisions around 250 cases, and our docket will then be almost up-to-date. In this connection I am pleased to announce that in the year 1953 alone we have written "finis" to 957 cases, or an average of about three cases a day, which represent perhaps, modesty aside, a good working record.

One reason for the improvement of the docket of our Supreme Court, apart from the fact that every member has been working as hard as he can, is undoubtedly the circumstance that, notwithstanding its right to vacation periods, the Court continuously is in session throughout the year, — something that perhaps makes it unique. Allowed by statute to hold summer sessions in Baguio, with corresponding appropriations from year to year, the Court, animated by the temperate climate, is usually able to promulgate in two months about one third of the total number of its decisions and resolutions in one year. Of course, by foregoing the yearly vacation period, every member of the Court is able to accumulate as much as one-year vacation leave; but as a matter of expedient policy and in the interest of the service, the Court sees to it that not more than two members go on leave at a time.

From the facts and figures I have just pointed out, I have drawn a few observations which I want to present for what they maybe worth. Let us begin with the increasing number of disbarment proceedings which, as I have already mentioned, occasionally make it our painful duty to impose certain disciplinary measures on erring attorneys. If only to lessen the work of the Supreme Court, would not this Convention feel constrained to do something calculated to minimize, if not eliminate altogether, the cause for suspension or disbarment? Of course, I cannot be mistaken when I state that one sure way of preventing complaints against lawyers is for the latter to faithfully adhere to the oath of office which they are required to take before their admission to the bar, and for them to comply strictly with the duties of attorneys enumerated in section 19 of Rule 127 of the Rules of Court. I need not refresh your minds as to the contents of the lawyer's oath and as to his reglementary duties, and I merely hope that you have not forgotten them or, if you already do, you would occasionally read them over. There may be some humor in this, but I have often heard the remark that, as a new lawyer is sworn in and reads his oath before the Supreme Court, he feels nervous and faltering when he reaches that part which says that "I shall delay no man for money or malice," because this is too much of an obligation to impose upon him who intends to practice law. Stated more bluntly, the idea of depriving himself of the prospects of earning money in any way is too hard for a lawyer to swallow. Certainly an attorney has to earn and live like any other professional, but don't we think that, if we cannot earn by justifiable methods, it would be better to give up the law practice?

SPEECH OF PRESENTATION

By FRANCISCO ORTIGAS, Jr.
(Member of the Bar)

January 18, 1954

MAY IT PLEASE THE COURT:

The honor of presenting to this Honorable Court, for admission to the Bar, the candidates who successfully passed the examinations given last year has been bestowed upon me. Allow me to acknowledge my appreciation of the privilege with the observation that there are other members of the Committee of Bar Examiners, far more brilliant and experienced in the law than I, who could have lent greater prestige to this task.

Your Honors, before making my formal presentation, and as is usual in occasions of this nature, let me express some thoughts and hopes for these successful candidates. I shall be brief in my remarks for, recalling my own reaction as one of the successful Bar Candidates in 1931, I feel that the candidates I am now in turn sponsoring are likewise aware only of the solemn formality of these rites where they have to, first: listen to a speech of presentation by a member of the Committee of Bar Examiners; second: take their oaths; and third and last: attend to words of advice from the member of this Honorable Court designated to address them on their admission to the Bar. Whatever substantial meaning there might be to this gathering will be lost to these candidates either spontaneously or within the passage of a very meagre measure of time. Most of them are perhaps even now wishing that these ceremonies were over so that they can the sooner join their intimates and loved ones. Indeed, it is not strange for young people to live in improvident hopes for the future without realization that the pattern of that which is to come is in the main worked out by activities and preparations of the present.

Now-a-days, major undertakings are seldom pursued without a plan. It is now generally conceded that a project should not be left to improvisation as it takes its course to a conclusion. A commanding officer must even have a plan of retreat should the fortunes of war turn against him; otherwise, his forces may be totally annihilated.

I know that the course of an individual's life cannot be deliberately and exactly planned. Paraphrasing Shakespeare, we are all like swimmers in the sea, and the ocean waves and currents may cast us ashore or take us farther out; only the event will tell in its coming. Be that as it may, planning for our lives is not at all without value. The candidates I am sponsoring, for example, have planned to be lawyers, and they will be admitted to the Bar in a few moments. My late and revered father was an almost indigent student in his day who could not finance his own schooling. He wanted to be a Pharmacist, but the worthy fathers who gave him his high school training recognized his aptitude for the study of law. They offered him free tuition in the college of law, and he had to take it in preference to the payment of fees in the School of Pharmacy. It turned out to be good planning for him.

Planning for a lawyer, after his admission to the Bar, is difficult. I must confess I did not have the benefit of one. But I had, instead, a human ideal in the person of my father by whose standards I sought to guide my own behavior. My father once remarked to Senator Laurel as follows: "If you have lost your money, you have lost nothing; if you have lost your health, you may have lost something; but if you lose your honor and integrity, you will have lost everything". That simple principle, *inter alia*, has steered me to where I am; — not a very successful lawyer perhaps, but one happy and at peace with his own self.

The establishment of an ideal to emulate is within the reach of all these candidates. The lives of Arellano, Araullo, Mapa and many other luminaries in Bench and Bar are open books, and the principles they followed belong to the realm of public property which anyone, with the desire, can appropriate to himself. Once an ideal has been fixed as a goal, it will serve as a guiding beacon light and it should be relatively easy, once in a while, to stop and ponder on whether or not the young lawyer is still going in the direction of that goal, and how much progress he has made in the meantime. With hard work and perseverance, and an objective in mind, the chances for success would be much more than where one is just drifting aimlessly in the struggle for existence.

EVERY MEMBER OF THE . . .

With respect to the alarming number of administrative cases against justices of the peace and judges of first instance, I may say that, in the majority of cases, the grounds are unfounded or more or less motivated by dissatisfaction resulting from unfavorable decisions. However, we cannot dismiss lightly the unwholesome effect of such administrative proceedings, and the bar should impose upon itself the duty of being alert about the conduct of all members of the bench and, always consistent with fairness and truth, reporting to the proper authorities anyone who is derelict in the performance of his duties. Upon the other hand, if the members of the bench will only perform rightly and firmly his judicial functions, he need not worry about any administrative actions.

On matter of the increasing number of pending cases every year, without touching on the point whether there are sufficient courts and judges to cope with the judicial work, I think much can be derived if every member of the bench, from the lowest justice of the peace to the highest Justice of the Supreme Court, should assume and feel that it is his responsibility to accomplish as much work as is humanly possible. He need not kill himself by overwork, but he can, if he wants, set a standard that is consistent with his capacity and health, the amount of work to be done, and the saying that "justice delayed is justice denied." At this point I may return to the modern version of the definition of a good judge by Chancellor Lyndhurst requiring "that a good judge must possess a reasonable amount of industry." In other words, every member of the bench is expected to display at least a reasonable amount of industry, and when he can no longer meet this, for the good of the service and of himself, he should retire. I am happy to admit that the Government has shown its liberality and earnestness to provide for an adequate system.

Hand in hand with the efforts exerted by the members of the bench towards disposing of as many cases as possible, the members of the bar are called upon to give the court all the aid necessary to achieve the purpose. The lawyer should realize that, as the one in effect controlling the progress of a trial or of a proceeding on appeal, he is responsible — perhaps more than the court — for clogging the judicial docket. The court can decide, under ordinary circumstances, only as fast as the lawyers can submit a case for decision. And while courts are established to administer justice, not infrequently, justice can be achieved and secured outside of a judicial tribunal. Sometimes a just and amicable, extra-judicial settlement or compromise, satisfactory not only to your client but also to the adverse party, can be arrived at, with the use of a little tact and patience. If that is achieved, you will be saving the courts of time and unnecessary labor, and also expense, time and worry to your client, at the same time promoting peace and good will in the community. This is specially true in cases involving partition, inheritance, probate of wills, etc., where the parties are close relatives, even brothers and sisters. Of course in those cases you cannot expect as much remuneration as in prolonged court litigation, including appeals, but, for your inner satisfaction, you may dwell in the consoling thought that you are not engaged in a business, to make money, but you are practicing a profession, a noble one.

There is one other point, somewhat detached from the subject already mentioned, which in passing I would like to bring to your attention. The complexities of modern life have necessitated the creation of administrative, quasi-judicial agencies to operate in a field lying between the known legislative and judicial functions on one side and the common executive powers on the other. Commissions and boards, like the Securities and Exchange Commission, Public Service Commission, Workmen's Compensation Commission, Board of Tax Appeals, Patent Office, Court of Industrial Relations, — parenthetically I may state that jurisdiction over appeals from these commissions and boards has greatly increased the work of the Supreme Court, — have from time to time been established to handle certain relationships resulting from the tides of expanding agricultural, commercial and industrial development, which regular judicial and legislative procedures could not adequately and expeditiously meet. Misgivings were at first aired about the possible courts of law, their expansion and multiplication having been oftentimes debated, specially in the United States. So far, however, in our country they have generally inured to the benefit of the people at large, partly perhaps, because their actuations have usually been subject to judicial review, which besides scrutinizing the law applicable to the matter, has laid special emphasis on the query whether the adjudication had been made under conditions meeting the due process clause, and the tenets of fair and impartial investigation. To proceedings before these agencies the Rules of Court are not, of course, applicable *ex propio vigore*. Wherefore the time is ripe may be for the bar to take interest in the advisability or possibility of devising and recommending some kind of uniform procedure for the regulation of the practice before these administrative agencies, as has been done in the United States.

In closing, permit me to lay special stress on the need for every member of the bar and the bench to recognize their respective responsibility, and for them to assume without any reservation such responsibility, in relation to our judicial system. We cannot relax without jeopardizing the administration of justice. To the extent that the lawyer is true to his oath of office and to the cause of his client, and to the extent that every member of the bench conscientiously discharges his judicial functions and fast enough to avoid unnecessary delay, the people's confidence will remain firm and unshakable in the so-called last bulwark of democracy, the Judiciary

(*Continued on page* 149)

SPEECH OF . . .

Admission to the Bar is technically the culmination of preparation; it is also technically the start of operation. But the field of law is so vast that we can never say that the activity of preparation or study is really ended. A lawyer continues to study and still learn as he works. I am reminded of the following incident in my father's life. After his own admission to the Bar, he applied for a law clerkship in the law office of the deceased De Icaza. Mr. De Icaza took my father to his library and asked him if he had read all the books there. My father, of course, replied in the negative. Mr. De Icaza then told my father that in order to be a successful lawyer, he must read all these books. The incident is an extreme example, but it portrays the necessity on the part of the lawyer to work hard and to be constantly wide-read in the literature of his profession.

A lawyer should not cultivate only the factors that make for success. He must also strive to have traits that will make him a happy man and a good citizen. He must be fair to his adversaries; he must be true and loyal to his friends. He must possess a civic consciousness. And with significant emphasis, I wish to stress the fact that he must also fully appreciate the quality of gratitude. The man who knows how to be grateful to those who have helped him is the man who will reap success and happiness together. Gratitude is a tender memory of the heart. I trust, above all, that these candidates will never for an instant forget the debt they owe their parents or any other people who have made it possible for them to be present at this oath-taking.

As a rule, the average man is more emotional than rational. The requirement for lawyers is quite different. He must always be rational, never emotional. Justice is founded on reason, never on emotion. There is no known way by which human justice can be dispensed by agencies without the aid of the human judgment, and for this reason the administration of justice can never be perfect. Human judgment cannot be infallible. This circumstance should all the more inspire these candidates to seek truth and justice without emotion. They might do well to ever repeat this prayer to St. Thomas More, patron saint of lawyers:

> "O Almighty and Eternal God, Judge and Lawgiver, send your Holy Spirit upon me that I may have light to know what is right, wisdom to analyze and interpret the tangled strands of human perplexities, and strength to act upon my honest convictions. Never let me use any situation or information to my own unfair advantage. Let me be fearless in defense of justice. O good St. Thomas More, give me of your fortitude and wisdom. Pray that our country may have just laws and wise men to decide and strong to execute. Amen."

With that prayer to St. Thomas More, let me now respectfully move before this Honorable Court, on behalf of the Chairman and the Committee of Bar Examiners for 1953, that the candidates who successfully passed the examinations given in August of last year be admitted to the Philippine Bar.

MR. BROWNELL'S OPINION ON U.S. BASES

Following is the full text of the legal opinion of U.S. Attorney General Herbert Brownell Jr., claiming the United States has title to naval and military bases in the Philippines. It was submitted to the Secretary of State on August 28, 1953.

MR. BROWNELL JR.

The Honorable
The Secretary of State
My dear Mr. Secretary:

This is in response to the request of your legal adviser, dated April 17, 1953, for an opinion respecting title to United States military bases, including naval reservations and fueling stations, in the Philippines. The request is apparently joined in by the secretaries of the navy and air force and the director of the budget bureau, who are represented with you in an interdepartmental committee considering the Manila joint staff committee report (August 15, 1952) for the settlement of United States property rights and related problems in the Philippines. Accompanying the request for an opinion is a memorandum of the legal adviser, which the navy and air force consider to be a fair and full statement of the legal issues, together with a considerable number of supporting classified documents.

The principal question is whether the United States retains title—the proprietary interest as distinguished from sovereignty—in the lands or areas in the Philippines comprising the military and naval bases, reservations, and stations which it held as such immediately prior to Philippine independence, achieved July 4, 1946. (There is, of course, no issue as to the parts of such lands or areas which have since been conveyed by express, formal grant of the United States to the Philippine government.) If the answer is that the United States continues to own the base lands or areas, the further questions are whether the United States is under obligation to transfer them to the Philippine government presently without compensation, or if there is no such obligation, whether the President is authorized to make such a transfer.

I.

The problem begins with the Philippine Independence act—also known as the Tydings-McDuffie act—of March 24, 1934. In preparation of Philippine independence, provision was made for a commonwealth government as a bridge to complete independence, and for complete independence on the fourth day of July following a ten-year period of commonwealth government. The commonwealth government came into existence on November 15, 1935, so the contemplated and actual date of independence became July 4, 1946.

The Philippine Independence act, in section 5, transferred to the commonwealth government all the property and rights acquired in the Philippine Islands by the United States under the treaties of 1898 and 1900 with Spain, "except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the government of the United States," and except such land or property as may have been sold. Previous acts of congress had placed under the control of the then governments of the islands all property acquired by the United States under the treaties with Spain, except such land or property as might be designated by the President for military or other reservations. Section 12 of the Act of July 1, 1902, (32 Stat. 691, 695) substantially reenacted by section 9 of the Act of August 29, 1916, (39 Stat. 545, 547) and, from time to time by executive orders of the President, certain

MR. RECTO STATES THE PHILIPPINE CASE

Memorandum of Senator Claro M. Recto to the Secretary of Foreign Affairs in reply to the United States claim of ownership over its naval and military bases in the Philippines. It was dated March 3, 1954, and incorporated points mentioned in an earlier memorandum by Mr. Recto.

Dear Secretary Garcia:

MR. RECTO

My attention has been called to the opinion dated August 28, 1953 of Mr. Brownell, the incumbent attorney general of the United States, on the question of whether the United States has retained the "proprietary interest or title as distinguished from sovereignty," in the "lands or areas in the Philippines comprising the military and naval bases, reservations, and stations" notwithstanding the grant of independence.

His opinion is that the United States retained, after the grant of independence, the title or proprietary interest to the base lands, that is to say, that the Republic of the Philippines is not the owner of the lands where the United States military bases, reservations and fueling stations are presently located.

The argument supporting Mr. Brownell's opinion may be summarized thus:

That under section 5 of the Tydings-McDuffie Law the Commonwealth government acquired all the property and rights which the United States acquired from Spain, except military and other reservations; that under section 2(a)(12) and section 5, title to said reservations was retained during the Commonwealth period; that under section 10(a) of the same law, it was originally intended to transfer to the Philippines the title to military reservations upon the proclamation of independence; that under section 10(b) all questions relating to naval reservations and fueling stations would be adjusted and settled within two years after the proclamation of independence, in negotiations between the President of the United States and the Philippine government; that under section 10(c), added to the law in 1939, the United States would retain title to its properties used for diplomatic and consular establishments in the Philippines after the grant of independence; that Joint Resolution 93 of the United States Congress dated June 29, 1944 changed the policy of the United States with respect to military reservations by providing in effect that, instead of transferring title to said reservations upon the grant of independence, as originally intended, the title to such reservations would be retained even after the grant of independence; that such change of policy is also evidenced by the Philippine Property Act of 1946, passed by the United States Congress on July 3, 1946, one day before the proclamation of independence, which provided that title to all United States properties in the Philippines would remain vested in the United States even after independence and such properties included military and other reservations; that there has been no adjustment of the property rights of the United States in the Philippines as contemplated in section 2(b) (1) of the Tydings-McDuffie Law, as shown by article VI of the Treaty of General Relations; that the proclamation of Philippine independence was subject to the reservations contained in the Tydings-McDuffie Law and other laws of the United States Congress; that the Bases Agreement concerns the use of the bases and did not settle directly the title to military and naval bases; that, therefore, the titles to all

areas were designated as military or naval reservations. Exercise of the authority granted to the President to designate land for military and other reservations vested title to the designated land in the United States until otherwise disposed of by the President (28 Op. A.G. 262, 1910).

Section 10 (a) of the Philippine Independence act provided for the recognition of Philippine independence and the withdrawal of American sovereignty. On the specified fourth day of July, (1946) the President of the United States by proclamation was to withdraw and surrender "all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands, including all military and other reservations of the government of the United States in the Philippines (except such naval reservation and fueling stations as are reserved under Section 5)," and was to recognize the independence of the Philippine Islands as a separate and self-governing nation. Under section 10 (b), the President was authorized to enter into negotiations with the government of the Philippine Islands not later than two years after his proclamation recognizing independence, for the "adjustment and settlement of all questions relating to naval reservations and fueling stations of the United States in the Philippine Islands, and pending such adjustment and settlement the matter of naval reservations and fueling stations shall remain in its present status." Under section 2 (b) (1) and (5) it was required that the Philippine Constitution provide, effective upon independence, that the property rights of the United States and the Philippine Islands shall be promptly adjusted and settled: and that by way of further assurance the Philippine government would embody the foregoing provision. and certain others, in a treaty with the United States.

The words of section 10 (a) on their face appear to be a relinquishment to the Philippine Republic of sovereignty over the Philippine territory, including military and other reservations of the United States but excluding United States naval reservations and fueling stations, and not a relinquishment or conveyance of title or proprietary right, such as was made in the language of section 5 to the commonwealth government. Except for the military and other reservations, this phraseology of section 10 (a) was entirely consistent with section 5. There was no ambiguity since the commonwealth government was vested with title to public property to which the independent republic would succeed, and it needed only the session of sovereignty to complete its absolute control. But the military and other reservations designated by the President of the United States had not been conveyed to the commonwealth government by section 5. Hence, without a further explanation, it would seem that the force of section 10 (a), insofar as United States military reservations were concerned, was a grant of sovereingty to the Philippine Republic but leaving title to the fee in the United States.

However, it appears that more was intended. The 1934 Tydings-McDuffie Philippine Independence act, which required and had received the acceptance of the Philippine Legislature, was the reenactment with some few changes of the Hare-Hawes-Cutting Act of January 17, 1933. Like the Tydings-McDuffie Act the 1933 act called for acceptance by the Philippine Legislature but had been rejected by the Philippine Legislature on several grounds, one of which was the issue of military reservations. Under the Hare-Hawes-Cutting Act, the section 5 grant to the commonwealth government of ownership of property except military and other reservations of the United States was the same as appeared in the later act. But while the section 10 grant of sovereignty included military and other reservations of the United States, it permitted the President to redesignate and thereby retain for the United States any or all of the land reserved under section for the United States within two years after the proclamation of independence (47 Stat. 768). As stated by the managers of the bill for the house of representatives:

"The effect of the conference agreement is to reserve to the United States upon final withdrawal of the sovereignty of the United States from the Philippine Islands, such land or other property which has heretofore been designated for military and

the bases still remain in the United States, there having been no transfer thereof to the Philippines; and that, finally, the President of the United States has complete discretion to decide whether the titles to such bases would be transferred to the Philippines and whether the transfer should be with or without compensation.

I have carefully read Mr. Brownell's 21-page opinion, and I have found no justification for changing my stand that the so-called "base lands or areas" (as distinguished from the improvements thereon in the form of buildings and other types of real property) are now owned by the Republic of the Philippines and not by the United States.

My stand is supported by the provisions of the Tydings-McDuffie Act, and the stipulations of Treaty of General Relations entered into between the Philippines and the United States on July 4, 1946 and the bases agreement between the two countries executed on March 14, 1947. The implications of the two treaties on the question of title to the base lands were not fully considered in Mr. Brownell's opinion.

The Tydyings-McDuffie Law of March 24, 1934 provides that "the Philippine Islands recognizes *the right of the United States . . . to maintain* military and other reservations"; that "all the property and rights which may have been acquired in the Philippine Islands by the United States . . ., except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the government of the United States" are granted to the Commonwealth government; *that upon the proclamation of Philippine Independence on July 4, 1946 "the President of the United States shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands, including all military and other reservations of the Government of the United States in the Philippines (except such naval reservations* and fueling stations as are reserved under section 5)": and that "the President of the United States is hereby authorized and empowered to enter into negotiations with the Government of the Philippine Islands, not later than two years after his proclamation recognizing the independence of the Philippine Islands, for the adjustment and settlement of all questions relating to naval reservations and fueling stations of the United States in the Philippine Islands, and pending such adjustment and settlement of the matter of naval reservations and feuling stations shall remain in its present status."

Because only naval reservations and fueling stations were provided for in the Tydings-McDuffie Law, the right of the United States to negotiate for additional bases was implemented in the Joint Resolution of the United States Congress of June 29, 1944. In concurrence with this action of the U.S. Congress, the Congress of the Philippines approved Joint Resolution No. 4 on July 28, 1945 authorizing the President of the Philippines to negotiate with the President of the United States the establishment of the aforesaid bases, so as to insure the territorial integrity of the Philippines, the mutual protection of the Philippines and the United States, and the maintenance of peace in the Pacific.

On July 4, 1946, President Truman proclaimed the independence of the Philippines. Pursuant to the provision of section 10(a) of the Tydings-McDuffie Law, he withdrew and surrendered "all rights of possession, supervision, jurisdiction, control or sovereignty of the United States of America in and over the territory and people of the Philippines except certain reservations therein and thereafter authorized to be made."

Under article I of the Treaty of General Relations the United States withdrew and surrendered to the Republic of the Philippines "all right of possession, supervision, jurisdiction, control of sovereignty existing and exercised by the United States in and over the territory and people" of the Philippines, "except the use of such bases, necessary appurtenances to such bases, and the rights incident thereto, as the United States of America by agreement with the Republic of the Philippines, may deem necessary to retain for the mutual protection" of the two coun-

other purposes as may be redesignated by the President of the United States within two years after the date of independence."

This retention of military reservations was unacceptable to the Philippine Legislature which, in declining to accept the act, included among its reasons a statement that "the military, naval, and other reservations provided for in the said act are inconsistent with true independence, violate national dignity, and are subject to misunderstanding."

There were other reasons for rejection. But it appeared that the best compromise that the President was able to offer at the time was a request to congress to remove the more objectionable features from the military base provisions and to correct at some later date, after hearings, whatever imperfections or inequalities existed in the sections of the Hare-Hawes-Cutting Act. Accordingly, on March 2, 1934, the President proposed the following changes in the Hare-Hawes-Cutting Act:

"As to the military bases, I recommend that this provision be eliminated from the law and that these bases be relinquished simultaneously with the accomplishment of final Philippine independence.

"As to the naval bases, I recommend that the law be so amended as to provide for the ultimate settlement of this matter on terms satisfactory to our own government and that of the Philippine Islands."

In the support of these recommendations the Tydings-McDuffie act was enacted. It removed from the first paragraph of section 10 of the old act the option of the United States to redesignate and retain any or all of the land or property reserved for military or other reservations, and retained for the United States only "such naval reservations and fueling stations as are reserved under section 5." Also there was transferred from section 10 to section 2 the provisions to be included in the Philippine Constitution, including the provision to be effective upon independence that property rights of the United States in the Philippine Islands shall be promptly adjusted and settled. In their place there was inserted a second and final paragraph:

"(b) The President of United States is hereby authorized and empowered to enter into negotiations with the government of the Philippine Islands, not later than two years after his proclamation recognizing the independence of the Philippine Islands, for the adjustment and settlement of all questions relating to naval reservations and fueling stations of the United States in the Philippine Islands, and pending such adjustment and settlement the matter of naval reservations and fueling stations shall remain in its present status."

In describing the effect of these changes, the house committee on insular affairs and the senate committee on territories and insular affairs gave identical explanations as follows:

"5. The United States agrees to relinquish all reservations now designated for the use of the United States Army after the institution of the independent government, but reserves the right, at its discretion, to retain and maintain naval bases and fueling stations in the Philippine Islands.

"6. The feasibility of further retaining and maintaining naval bases and fueling stations in the Philippine Islands after the independent government is constituted, will be the subject of conferences between the two governments."

In addition, both reports included the following statement regarding the purpose and intent of the new measure:

"The pending bill (M.R. 8573) is a proposal to reenact the Hare-Hawes-Cutting bill, with the exception that the United States agrees, after the establishment of the independent government, to withdraw its sovereignty and relinquish all lands now constituting reservations for the United States Army in the islands and all other reservations, excepting those which have heretofore been designated for the use of the United States Navy and for fueling stations," (Underscoring supplied.)

It would thus appear that it was intended, after the commonwealth period, that the United States would give up its property and rights in military reservations including the right to maintain them as bases; but that the United States would retain its

tries. I have underscored the word "use" because it discloses the nature of the interest retained by the United States in the bases and it implies that the title to the bases is in the Republic of the Philippines as the sovereign grantor of their use to the United States.

It is inferable from article I of the treaty that there had already been a grant or surrender to the Philippines of the title held by the United States to all the base lands at the time of the proclamation of Philippine independence.

The subsequent agreement referred to in the said treaty of General Relations is the Bases Agreement concluded between the two countries on March 14, 1947.

The treaty uses the word "bases" without qualification, thus indicating that it refers indiscriminately to military, naval and other kinds of bases.

The Bases Agreement, as an implementation of the Treaty of General Relations and as the culmination of negotiations for bases in the Philippines after the withdrawal of American sovereignty, unreservedly confirms the view that the Philippines owns the lands or areas where the bases are situated. The subject of the Bases Agreement according to its preamble is the *"grant to the United States of America by the Republic of the Philippines, in the exercise of its title and sovereignty, of the use, free of rent, in furtherance of the mutual interest of both countries, of certain lands of the public domain."* It may be noted that the preamble recognizes that the "title" to the bases is held by the Philippines and that the United States acquires only the "use" of certain lands of the public domain. The juxtaposition of the words "title" and "sovereignty" signifies that these two concepts are inseparably linked.

Article I, paragraphs 1 and 2, of the Bases Agreement provides that the "Government of the Philippines grants to the Government of the United States of America the right to *retain the use* of the bases in the Philippines listed in Annex A attached hereto"; and *to use* the bases listed in Annex B. Under Article XXI the United States retains the right to *occupy* temporary quarters and installations existing outside the bases. The duration of the use and occupancy is 99 years.

Article XVIII specifically assumes that the bases will be relinquished and turned over by the United States to the Philippines upon the termination of the agreement, or at any earlier date chosen by the United States.

Other provisions of the Bases Agreement indicate that the United States has merely the use, possession, and occupancy, but not the ownership of the base lands. Indeed, the Bases Agreement contains several stipulations, which are premised on the assumption that upon the proclamation of independence there had been a transfer to the Republic of the Philippines of all the title and proprietary interest previously held by the United States in the base areas. The same assumption is made by the Philippine secretary of foreign affairs in his notes to the American Ambassador, relative to the transfer to the Philippine government of Fort Mills, Mariveles quarantine reservation, Nichols Field and the Zamboanga Pettit barracks. The secretary of foreign affairs in his notes clarified that the transfers were a *"formalization"* of the withdrawal of United States sovereignty over said bases as effected in the Treaty of General Relations. The stand of the secretary of foreign affairs is consistent with his note of March 14, 1947 (upon the signing of the bases agreement) wherein he did not concede the existence of any rights or titles of the United States to the real property in the bases.

There is one feature of the Bases Agreement which deserves special mention. Although the title of the agreement mentions "military bases" only, in reality it also includes such naval reservations as the Leyte-Samar Naval Base, Subic Bay, Northwest Shore Naval Base, Olongapo Naval Reservation, Baguio Naval Reservation, Tawi-Tawi Naval Anchorage and Naval Base, Cañacao-Sangley Point Naval Base and certain naval air bases. The Bases Agreement is therefore consistent with the Treaty of General Relations whose article I, as already noted, speaks of the use of "bases," without qualification.

Furthermore, the agreement in a way represents and consti-

property rights in naval reservations and fueling stations and the right to maintain them, subject to further discussions and the changes effected, if any, by a final adjustment and settlement of all questions pertaining to naval bases. The discussions were to be begun within two years after the proclamation of independence, but there would be no change in status of the naval reservations and stations until and unless the final settlement produced a change. The Philippine Independence Act on May 1, 1934, and following the adoption of the Constitution and its approval in a plebicite in 1935, the Commonwealth regime was inaugurated.

The contemporary opinion of authoritative sources supported the view that section 10 intended a transfer to the new republic of property rights in United States military reservations, as well as the grant of sovereignty, when independence was to be achieved. For example, the joint preparatory committee on Philippine affairs, created April 14, 1937, pursuant to an arrangement between the President of the United States and the President of the Philippines, included in its report a statement on United States government property in the Philippines. After referring to sections 5, 10, and 2 of the Philippine Independence act, the committee made the following statement:

"After the independent government is established on July 4, 1946, the government of the United States will require, for its official establishments in the Philippines, properties such as a government normally maintains in the territory of a foreign country. For instance, the government of the United States now contemplates the erection of certain buildings on a portion of the Camp John Hay military reservation, near the city of Baguio, for the use of its official representatives in the Philippines during and following the Commonwealth period. Unless some arrangement is made before the independent government comes into existence, this property, as a part of a military reservation, must be surrendered to the independent government. In view of the extensive properties which will be turned over to the independent government under existing law, the committee also recommends, as a matter of equity, that, prior to the establishment of the government, some arrangement be made under which title to such properties as the United States may require for the aforementioned purpose would either be retroceded to the United States without compensation, or be acquired by the United States through an exchange of properties."

This report became the basis for the 1939 amendments of the Philippine Independence Act. Significantly, in regard to the property amendments effected by the 1939 act, it was section 10 of the basic act which was amended. (Act of August 7, 1939, 53 Stat. 1226, 1230-1231.) A new subsection (c) was added to section 10, which authorized the President, among other things, to designate properties of the United States in the Philippines suitable for diplomatic and consular establishments. It was provided that the property so designated "shall continue to be vested in fee-simple in the United States notwithstanding the provisions contained in subsection (a) of this section." Likewise, title to the lands and buildings constituting the official residences of the United States High Commissioner was to continue to be vested in the United States after July 4, 1946, notwithstanding the provisions contained in section 10(a). The senate and house reports indicated that it was necessary to make these provisions, else all properties held or owned by the United States in the Philippines would be transferred to the independent government of the Philippines.

Thus, prior to the war with Japan, contemporary interpretation and expectation was that upon achievement of Philippine independence the United States would relinquish operation and ownership of military and other reservations in the Philippines, retaining only 1) operation and ownership of naval reservations and fueling stations, subject to subsequent negotiations with the Philippine Republic, and 2) ownership of consular and diplomatic properties, including the residences of the former high commissioner. It was also contemplated, pursuant to section 2(b) of the Philippine Independence act and article 16 of the Philippine Constitutes the very "adjustment and settlement" of questions regarding naval reservations, which, under Section 10(b) of the Tydings-McDuffie Law, the President of the United States was supposed to negotiate within two years from July 4, 1946. Mr. Brownell's opinion erroneously presupposes that there has been no such adjustment yet.

It appears to me that to resolve the question regarding the title to the base lands there is no need to consult other documents, laws or agreements, nor to consider other antecedent and collateral circumstances, which would only tend to mislead or obscure the issue. The two treaties I have mentioned, viz., the Treaty of General Relations and the Bases Agreement, are covenants which are in full force and effect and have not been modified or altered. They are law-making treaties conclusive on the high contracting parties and are the sole repository and the best evidence of the intention of the two countries with reference to the status of the bases. Their language as to the nature of the United States' interest in the base lands is clear and unmistakable.

In a recent decision the Philippine supreme court categorically ruled that the Republic of the Philippines retains its sovereignty or ownership of the bases held by the United States. Said the supreme court:

"By the agreement, the Philippine government merely consents that the United States exercises jurisdiction in certain cases. This consent was given purely as a matter of comity courtesy, or expediency. The Philippine government has not abdicated its sovereignty over the bases as part of the Philippine territory or divested itself completely of jurisdiction over offenses committed therein." (People v. Acierto, January 30, 1953.)

The court also noted in the Acierto case the significance of the provision of the Bases Agreement in Article XIII, paragraph 3, that in case the United States renounces the jurisdiction reserved to it in paragraphs 1 and 6 of said article, the American officer holding the offender in custody should notify the corresponding prosecuting officer of that fact. According to the court, said provision "is an emphatic recognition and reaffirmation of Philippine sovereignty over the bases."

I notice that Mr. Brownell's opinion fails to mention the proviso in article I of the Treaty of General Relations that the United States would be allowed only the "use" of the bases. On the other hand, he characterizes as a "difficult-to-explain ambiguity" the statement in the preamble of the Bases Agreement that the Republic of the Philippines, "in the exercise of its title and sovereignty," was granting to the United States merely the "use" of the bases. While he admits that "the purpose of the agreement was to cover the use of the properties (meaning the bases) for military purposes," his opinion misses the significance of the term "use" as employed in the agreement and bypasses those provisions which imply that the title to the base lands remains in the Philippines. Contrary to the Attorney General's insinuation, the title to the base lands is assumed by the two treaties to be held by the Republic of the Philippines and was not left to future determination.

The term "use" in its ordinary and legal acceptation (whether in the common law or civil law) is not synonymous with title or dominion. It connotes a right included in, and therefore inferior to, title or ownership.

I have already stated in a previous communication that the right of the United States in the base lands is only a "jus utendi" and that the transaction covered by the Bases Agreement is a "lease." I said it is a lease because the 99-year term of the use reminded me of the 99-year lease of Atlantic bases obtained during the last war by the United States from Great Britain in consideration for some old destroyers. From the standpoint of our municipal law, however, the right of the United States to use the bases free of rent resembles the contract of *commodatum* or the servitude of use. The comparison might help in understanding the view that Philippine ownership of the bases is not incompatible with the United States right to maintain and operate them.

In the exchanges of notes between the American Ambassador to the Philippines and the Philippine secretary of foreign affairs,

stitution, that the property rights of the United States in the Philippine Islands would be promptly adjusted and settled following the recognition of independence of the Philippine Islands; and by way of further assurance, the government of the Philippines would embody this provision in a treaty with the United States.

The advent of war with Japan brought a complete change in the mutual relationship between the United States and the Philippines. The occupation of the Islands by Japan made it necessary for United States forces to drive out the invaders. It was obvious to the people and governments of both the United States and the Philippines that, even after Philippine independence was achieved, there would be need for more adequate military installations in the Philippines than was contemplated by the Independence Act for the protection of the Island. Discussions regarding future American bases in the Philippines arose in 1943 and culminated in the adoption of senate joint resolution 93 of the 78th congress. which became P. L. 380, approved June 29, 1944 (58 Stat. 625. Section 2 provided.)

"After negotiation with the President of the Commonwealth of the Philippines, or the President of the Filipino Republic, the President of the United States is hereby authorized by such means as he finds appropriate to withhold or to acquire and to retain such bases, necessary appurtenances to such bases, and the rights incident thereto, in addition to any provided for by the act of March 24, 1934, as he may deem necessary for the mutual protection of the Philippine Islands and of the United States."

The President also was authorized in section 3 to advance the date for granting independence prior to July 4, 1946, but this was never done.

As noted by the senate and house committees which recommended the adoption of S. J. Res. 93:

"This joint resolution deals with the subject of Filipino independence and the future security of the United States and the coming Philippine Republic. The whole subject of the Philippine matter, both present and future has been considered by President Roosevelt; President Manuel Quezon, of the Philippine Commonwealth, now living in Washington; various departments of our government interested in the Philippines; and by members and committees of congres.* * *

"First, the President of the United States is authorized, after negotiation with the President of the Commonwealth of the Philippines or the President of the Filipino Republic, to withhold or to acquire and retain such bases, necessary appurtenances to such bases, and the rights incident thereto, in addition to any provided by the Tydings-McDuffie law, as he may deem necessary for the full and mutual protetion of the Philippine Islands and the United States."

The concept of the Tydings-McDuffie Act that the United States would withdraw almost entirely from the giving of military protection to the Philippines was thereby erased, and by mutual understanding. On their part, the Philippine leadership and legislature accepted the spirit and the letter of Joint Resolution 93. Culminating negotiations between President Truman and Philippine President Osmeña, both signed an agreement on May 14, 1945 setting forth a preliminary statement of general principles pertaining to the United States military and naval base system in the Philippines to be used as a basis for detailed discussions and staff studies. Among the provisions of this preliminary statement were the following:

"6. Pending development of the detailed plan, the U.S. will retain all sites which were held by U.S. army as military reservations on 7 December 1941 and by the U.S. navy except at Cavite, and will be accorded rights to sites in the localities shown on the attached appendix.

"7. The U.S. will have the right to retain, or to exchange for sites listed in paragraph 6 above, those sites wherein are located bases, installations, or facilities which have been or may be developed in the course of the present war, to acquire additional sites and to acquire such sites in the future as may be required by changes in the means and methods of warfare, including the development of new weapons. The U.S. will have the right to concerning the transfer of Fort Mills (Corregidor) and islands in the vicinity thereof, Pettit barracks in Zamboanga, the Mariveles Quarantine station, a portion of Nichols Field, and the U.S. armed forces cemetery No. 2 in San Francisco del Monte, the American Ambassador generally declares that the "the government of the United States of America transfers to the Republic of the Philippines all *right, or title to or interest in*" the aforesiad properties. The implication is that prior to said transfer, the "title to," or ownership of said bases or reservations belonged to the Government of the United States.

However, it will be noted that the above installations are not included in Annexes A and B of the Bases Agreement, as among the military bases whose use is reserved or granted to the United States. Hence, as correctly qualified by the Philippine Secretary of Foreign Affairs in his replies to the aforesaid notes of the American Ambassador. such transfers of "the right, title to or interest" of the United States government in the bases and reservations known as Fort Mills and islands surrounding it, Pettit barracks in Zamboanga, the Mariveles quarantine station, etc., were merely *"a formalization of the transfer and surrender of possession, supervision, control or sovereignty* over these areas already made by the United States in favor of the Philippines in the Treaty of General Relations" and in the Proclamation of Independence.

The component elements of ownership are the *jus fruendi, jus utendi, jus disponendi, jus vindicandi,* and *jus acutendi.* It is evident from the terms of the Bases Agreement that the United States acquired only the *jus utendi,* which right, in law and jurisprudence anywhere is separable from ownership.

On the other hand, the Act of August 7, 1939, amending section 10 of the Tydings-McDuffie Law, provides that the properties which may be acquired by the United States under this act, as contradistinguished from military bases and other reservations, shall belong *in absolute ownership* ("shall be vested in fee simple") to the United States.

If it had ever been intended to vest in the United States the ownership of military bases and other reservations in the Philippines, that intention could have been clearly and unequivocally expresed by the United States Congress in the same Tydings-McDuffie Law; in the Joint Resolution of the U.S. Congress of June 29, 1944, authorizing the President of the United States to acquire bases for the mutual protection of the United States and of the Philippines; in the Treaty of General Relations between the United States and the Philippines signed on July 4, 1946, and in the Bases Agreement itself, in the same manner as its intention with respect to the properties contemplated in the Act of Congress of August 7, 1939. Since the Treaty of General Relations and the Bases Agreement merely speak of the grant of the *use* of the bases to the United States, said grant can by no means be construed as a relinquishment of ownership. In short, the bases were in effect *leased* to the United States, for 99 years and only their possession was transferred thereby, inasmuch as there is no transfer of ownership in lease.

As I have said, both the Treaty of General Relations and the Bases Agreement are adequate to the resolution of the question of title to the base lands. Nevertheless, I would like to set forth hereunder some additional observations on the points discussed in Mr. Brownell's opinion.

1. It is argued that a distinction should be made between "proprietary interest" and "sovereignty" in the bases, the premise being that while the Philippines has sovereignty over the base lands, the United States has the title. The distinction has no basis because, as has been said, the acquisition of territory by a state "can mean nothing else than the acquisition of sovereignty." (Oppenheim's Int. Law, Lauterpacht, Vol. I, 6th ed., p. 496; I. Hachworth's Digest of Int. Law, p. 395). To concede that the United States retained title to the base lands after the proclamation of independence, is to concede her right to exercise sovereignty over the same to the exclusion of the Philippine government. The result would be a species of obnoxious extraterritoriality, impairing the status of the Republic of the Philippines as a sovereign

acquire sites and install, maintain and operate thereon, the required communication and navigation facilities and radar installations."

In addition, the Philippine legislature acted on the matter when it passed Joint Resolution 4, approved July 28, 1945. Noting that the United States government had enacted joint resolution 93, and that such action had been "concurred in by the government of the Commonwealth of the Philippines then establish in Washington, it resolved "that the congress of the Philippines adhere to the policy and intent" of joint resolution 93. Further:

"That in order to speedily effectuate the policy declared by the congress of the United States and approved by the government of the Commonwealth of the Philippines, the President of the Philippines is authorized to negotiate with the President of the United States the establishment of the aforesaid bases, so as to insure the territorial integrity of the Philippines, the mutual protection of the Philippines and the United States, and the maintenance of peace in the Pacific."

Thus it appears that the intentions of the Philippine Independence act respecting military reservations were mutually altered in favor of a policy looking toward the expansion of military, naval, and air bases in the Philippine—a policy wholly inconsistent with the idea of an automatic transfer of the property constituting the bases upon the achieving of independence. Not only was the President of the United States authorized to withhold and retain or acquire and retain bases in addition to any provided by the Tydings-McDuffie law, but he was authorized to do these things in negotiation with the President of the future Republic of the Philippines as well as the then President of the Commonwealth of the Philippines; making it quite clear that ownership and operation were to continue well after independence was achieved. And this broad pattern for the continuance and expansion of bases was accepted, though no acceptance was technically required at the time, by the President and legislature of the Philippines.

In my view, the change wrought by the joint resolution of June 29, 1944, is decisive of the intention to retain title, and of the fact that title was retained, in the United States, to the property owned and used or reserved by the United States prior to Philippine independence as military and naval reservations, bases, or stations. However, if further evidence of this purpose and fact is needed, it is supplied by the second section of the Philippine Property Act of 1946 (Act of July 3 ,1946, 60 Stat. 418).

In addition to the post-war military defense problems there were a host of post-war rehabilitation and restoration problems in which United States help was essential even after independence of the Philippines was achieved. Congress had enacted a Philippine Rehabilitation act providing for the conduct of many federal services in the islands. It was necessary for these agencies to occupy real property and use personal property owned by the United States. Otherwise, the agencies' appropriations would be diverted to the purchase or rental of the needed space and equipment. Our government had brought into the Philippine large stores of supplies and equipment for purposes of the war and rehabilitation. In addition, the alien property custodian held large amounts of property seized from enemy aliens.

In view of all the changes in circumstances and in the nature and extent of United States property holdings, it was deemed "manifestly improper to permit title to pass automatically to the Philippine Republic on July 4 of this year (1946)."

As a consequence, there was enacted the Philippine Property Act of 1946, dealing "only with the proprietary interests of the United States in real or personal property within the boundaries of the Philippines." Section 2 of the act provided:

"There shall remain vested in the government of the United States or its agencies or instrumentalities all the right, title, and interest of the said government or its agencies or instrumentalities to all real and personal property within the Philippine Islands as may now be vested in, or later be acquired by the government of the United States or any of its agencies or instrumentalities."

state and contrary to the letter and spirit of the independence law and the professed altruistic policy of the United States to the Islands.

2. Mr. Brownell admits that under the Tydings-McDuffie Law, the original intention was to transfer the title to the military bases upon the proclamation of Philippine independence.

But it is contended that Joint Resolution 93, adopted by the United States Congress on June 29, 1944, wrought a change in the policy of the United States with respect to the bases. Said resolution authorized the President of the United States to negotiate with the President of the Philippines for additional bases. The Philippine congress in its Joint Resolution No. 4, dated July 28, 1945, assented to the Joint Resolution 93. The attorney general claims that said Joint Resolution 93 is "decisive of the intention to retain title, and of the fact that title was retained," in the bases after the grant of independence.

The contention is not well-taken. Section 5 of the Tydings-McDuffie Law, in providing for the grant or transfer to the Commonwealth government of all the property and rights acquired by the United States from Spain, may be construed as a complete conveyance of whatever title or proprietary interest was held by the United States in Philippine territory. The proviso, excepting military bases and naval reservations from the grant, may be construed as allowing the retention by the United States of the *use, possession* or *occupancy* of said military and other reservations, but *not* of the *ownership* or *title.*

This interpretation is in harmony with section 10(a) which speaks of the relinquishment of "possession" (not title) of military bases upon the proclamation of Philippine independence, the implication being that during the commonwealth period, the United States retained only the *possession* or *occupancy* of the bases and that their ownership had become vested in the Commonwealth government, as contemplated in Section 5.

There is one practical consideration justifying the above interpretation. It is that, in order to maintain and operate military bases and other reservations during the commonwealth period and after independence, it was not, and it would not be necessary for the United States to retain the title or ownership of the base lands. Possession or control thereof is sufficient for the purpose. so it is improper to assume that more than this right was conveyed. The principle of *in dubio mitius* is applicable to the problem at hand, if there is at all a problem of construction involved in this case. This rule of interpretation holds that if the meaning of a stipulation is in doubt, that meaning is to be preferred which would be less onerous for the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party.

There is nothing in Joint Resolution 93 which directly supports the theory that the United States retained ownership of the lands. On the contrary, the resolution should likewise be construed as entitling the United States to retain merely the *use and possession* of additional base lands, in view of the fact that the Bases Agreement itself which defines and limits the nature of United States interest in the base lands, makes specific reference to Joint Resolution 93.

In a comparatively recent book on American foreign policy, the authors, in citing Joint Resolution 93, describes it as reserving to the United States *"the right to 'use' sites for military, naval, and air bases in the Philippine Islands after July 4, 1946,* when they would have gained their freedom and would be able to negotiate as an independent nation."

Had it been the intention of the United States to retain the ownership of the base lands after the recognition of independence, that intention could and should have been clearly stated in section 10 of the Tydings-McDuffie Law, in Joint Resolution 93, and in the two treaties already cited. The United States would not have left the matter to inference or interpretation. In its Act of August 7, 1939, amending section 10 of the Tydings-McDuffie Law, there is a specific and categorical provision that the properties in the Philippines acquired by the United States for *diplomatic or consular establishments "shall continue to be vested*

Sections 3 and 5 dealt with disposition of properties acquired by the alien property custodian, and provided for immediate transfer of agricultural lands and immediate or ultimate transfer of the others of such properties to the Philippine government.

Section 4 authorized the President in his discretion, and on such terms as he deemed appropriate, to transfer title to the Philippine Republic of other properties of the United States in the Philippines not within the scope of Section 3. Section 6 provided:

"Nothing contained in this act shall be construed as amending the provisions of the Act of March 24, 1934 (48 Stat. 456), as amended, respecting naval reservations and fueling stations, and diplomatic or consular property, and the property of the high commissioner to the Philippine Islands, nor as amending the provisions of the joint resolution of June 29, 1944 (Public Law 380, Seventy-eight Congress), respecting bases for the mutual protection of the Philippine Islands and the United States."

The only explanation of this provision appears, identically, in the senate and house committee reports, linking section 6 to section 4 in this fashion:

"6. The President of the United States is authorized in his discretion to dispose of all other properties held by the United States government in the Philippines, other than diplomatic and consular establishments and others covered by the independence act, to the Philippine government."

Apropos of the retention of property titles in the United States, as provided in section 2 of the act, the house report said:

"Some have interpreted the Independence act of 1934 as providing for the relinquishment of all property titles now vested in the United States government to the government of the Philippines after July 4, 1946, the date set by law for achievement of Philippine independence. In the minds of others, this interpretation is questioned. Yet it is the feeling of this committee that this legislation is vitally necessary to clarify any doubts as to the present meaning of existing law."

And in regard to the effect of section 2, both committee reports said:

"7. Agencies of the United States government are granted the right to retain title to properties presently owned and to acquire new properties for discharge of Federal functions in the Philippines after the date of independence except in the instances of enemy properties which are otherwise provided for."

In one of this explanation of sections 2, 4, and 6 of the Philippine Property Act does there appear to be any limitation on the sweep of the plain words of section 2 under which there remains vested in the government of the United States, or its agencies or instrumentalities, all right, title, and interest to real and personal property now (July 3, 1946) vested in the government or its agencies or instrumentalities. Plainly, this reservation of title includes real and personal property of the United States used for military and naval purposes. Even applying section 6 to section 2, as we literally must in testing its meaning, section 6 effects no change in the scope and breadth of section 2. For, the provisions of the Independence act as amended, and the provisions of the joint resolutions of 1944, which are named and expressly save from amendment by section 6, are the provisions of those laws which reserveserve the title of the United States, beyond the independence date, to naval reservations and fueling stations, to diplomatic and consular property, and to base generally.

Thus, section 2 of the Philippine Property act overlaps and has confirmed the reservation of United States title to military and naval bases; and section 6 of the Property act has a limiting significance, as the house and senate committees quite logically indicated, only upon section 4. As a result, section 4 is authority for the disposing of United States property in the Philippines to the Philippine Republic, other than: 1) property acquired by the alien property custodian (covered by section 3 and 5); 2) diplomatic and consular property including property of the high commissioner (excluded by section 6), and, 3) property constituting naval reservations, fueling stations, or military bases of the United States (excluded by section 6). However, as already noted and *in fee simple in the United States" notwithstanding the grant of independence* The absence of a similar provision with respect to lands indicates that it was never intended to vest title to them in the United States after July 4, 1946.

3. The attorney general, in further justification of his theory, cites the Philippine property act of 1946, passed by the United States congress on July 3, 1946. The avowed purpose of the 1946 law is "for the retention by the United States government or its agencies or instrumentalities of real and personal property within the Philippines x x x subsequent to independence." Sections 2 to 5 of the law describe the properties embraced in the provisions of said law, as those held by the President of the United States, the Alien Property Custodian, or any such officer or agency as the President of the United States may designate under the Trading with the Enemy Act, as amended. Nevertheless, the Attorney General argues that title to the base lands remained in the United States subsequent to independence by reason of section 2 of said law.

This argument is manifestly untenable. Not only because it has been shown in the preceding discussion that under the Tydings-McDuffie Law and Joint Resolution 93 only the use or possession of the bases has been retained by the United States, but also because the Philippine Property Act itself, in its section 6, expressly provides that it shall not affect the disposition of the bases held by the United States under the Tydings-McDuffie Law and Joint Resolution 93.

4. The rest of the opinion of the Attorney General is devoted to a discussion of the power of the President of the United States to deliver to the Philippine government the title to the base lands and base properties with or without compensation

He says that there is nothing in the Bases Agreement making provision for the conveyance of title because the agreement is concerned only with the use for military purposes of the bases rather than their ownership.

However, it should be evident from what has already been stated, that the omission or failure of the Bases Agreement to include provisions for the conveyance of title to the base lands is due precisely to the simple reason that such title is deemed to be in the Philippines, as the sovereign grantor of the use of the base lands. The Philippines could not have granted the use of the base lands if it were not in the first place, the owner thereof. Under a well known principle of the law of lease, the United States government as the lessee or beneficiary of the use, is estopped to deny the title of the lessor or grantor.

I have refrained from discussing the point raised by the Attorney General regarding the adjustment of the property rights of the United States, as contemplated in section 2(b)(1) of the Tydings-McDuffie Law, which is paragraph (1), section 1, Article XVII of our Constitution. He says that there has as yet been no adjustment of the property rights of the United States in the Philippines, and cites as evidence thereof, the note of the American Ambassador, dated March 14, 1947, announcing that it was "the understanding of my government x x x in signing the agreement of March 14, 1947, x x x that the question of the adjustment of any rights and titles held by the United States x x x to real property in any of the bases covered by the aforementioned agreement or any naval reservations or fueling stations not so covered is reserved and will be settled subsequently x x x." He advances this conclusion to synchronize with his theory that the title to the base lands, being a United States property right, has not been transferred to the Philippines.

It should be observed, however, that the note of the American Ambassador reserved the right to adjust and settle the *"rights and titles of the United States to real property in any of the bases," but not its title to the base lands themselves.* The base lands should not be confused with the improvements and other forms of real property installed or constructed therein at the expense of the United States for military and naval purposes.

As repeatedly stated, the Bases Agreement correctly assumes that the title to the base lands had become vested in the Philippines, if not upon the inauguration of the Commonwealth Government in 1935, then as a direct and immediate consequence of

as is discussed more fully later, the Tydings-McDuffie act as amended, and the joint resolution of June 29, 1944, already had made provisions for the disposition, after independence, of the second and third categories of property not covered by section 4 of the Philippine Property act.

Events that have transpired since the enactment on July 3, 1946, of the Philippine Property act, add further confirmation to the continuance after Philippine independence of United States title in the base properties. On July 4, 1946, the President of the United States proclaimed the independence of the Philippines as a separate and self-governing nation. The proclamation recites that "in accord with and subject to the reservations provided for in the applicable statutes of the United States" the United States withdraws and surrenders all rights of possession, supervision, jurisdiction, control, or sovereignty in and over the territory and people of the Philippines. (Proclamation No. 2695, 11 F. R. 7517, 60 Stat. 1352).

The treaty of general relations between the United States and the Philippines, signed July 4, 1946 (effective October 22, 1946), (TIAS No. 1568, 61 Stat. 1174) repeats in Article VI the provisions of the Tydings-McDuffie act, section 2(b)(1), that the property rights of the United States of America and the Republic of the Philippines shall be promptly adjusted and settled by mutual agreement. The protocol attached to the treaty says expressly that "this treaty does not attempt to regulate the details of arrangements between the two governments for their mutual defense; for the establishment, termination or regulation of the rights and duties of the two countries, each with respect to the other, in the settlement of claims, as to the ownership or control of real or personal property," etc. Further, "it is understood and agreed that the conclusion and entrance into force of this treaty is not exclusive of further treaties and executive agreements providing for the specific regulation of matters broadly covered herein." The treaty and protocol clearly reserved the question of United States property titles for future settlement.

On March 14, 1947, there was signed the agreement between the United States and the Philippines concerning military bases in the Philippines, which entered into force March 26, 1947.

The tenor of this fairly detailed agreement was that the Philippine Republic granted to the United States the right to retain the use as bases of some 16 bases or military or naval reservations listed in Annex A (in general descriptive terms, not by metes and bounds), and agreed to permit the United States, upon notice, to use some seven additional bases similarly listed in Annex B, as the United States should determine to be required by military necessity. It was further agreed that the United States might expand such bases, exchange them for other bases, acquire additional bases, or relinquish rights to bases, as the military exigencies require.

One of the recitals of the preamble to the Military Bases Agreement might have raised a difficult-to-explain ambiguity regarding the title were it not for the surrounding circumstances. The clause stated that the two countries were desirous of cooperating in their common defense, "particularly through a grant to the United States of America by the Republic of the Philippines in the exercise of its title and sovereignty of the use, free of rent, in furtherance of the mutual interest of both countries, of certain lands of the public domain."

An exchange of notes between the United States and the Philippines, simultaneous with his signing of the agreement, makes clear that this reference to Philippine title is not to all of the lands comprising the bases and temporary installations, but is to the parts of those lands and any additional lands that the United States might require in expansion or exchanges, which happen to be undisputed Philippine public lands. The American ambassador's note of March 14, 1947, said:

"I have the honor to state, in signing the agreement of March 14, 1947, between the United States of America and the Republic of the Philippines concerning military bases, the understanding of my government that the question of the adjustment of any rights and titles held by the United States pursuant to the provisions of the act of congress of March 24, 1934 as amended, specifically section 10(b) thereof, the joint resolution of the congress of June 29, 1944, and the act of congress of July 3, 1946, and treaties and agreements heretofore entered into between the United States and the Philippines, to real property in any of the bases covered by the aforementioned agreement or any naval reservations or fueling stations not so covered is reserved and will be settled subsequently in accordance with the terms of the acts and joint resolution of the congress mentioned above."

The acknowledgment of the same date by the Philippine secretary of foreign affairs set out the United States note in full and then said:

"I have the honor to state that, without conceding the existence of any rights or titles to the real property herein referred to, my government concurs with the understanding above set forth."

So that again the matter of the United States title in and to military base land and military or naval reservations or fueling stations was not settled directly or indirectly in the military bases agreement, and the titles remained in the United States subject to future negotiation and settlement.

Nowhere in this background of conduct and transactions is there any basis for as much as implying a general passage of the title of the United States to the Philippine government in and to the properties comprising the United States military and naval bases in the Philippines. Even if some basis could be developed for implying a grant, it would be of no legal consequence in the face of the well-established principle of law concerning grants of

the grant of independence and the total withdrawal of American sovereignty in the Philippines on July 4, 1946. There has, however, been no formalization of the transfer in the sense that the muniments of title to the bases if any, have not been actually delivered to the Philippine government.

I have also refrained from discussing the fundamental question of whether, as between the United States and the inhabitants of the Philippines, the former, in strict legal theory, really acquired any absolute proprietary title to the Philippine territory which Spain ceded to her under the Treaty of Paris. This point was touched upon, but not definitely resolved by Justice Holmes in the case of Cariño V. Insular Government. It is tied up with the doctrine of the insular cases to the effect that the Philippines was an unincorporated, as distinguished from incorporated, territory of the United States, and was foreign to the United States in a "domestic sense," although a part thereof in the "international" sense.

I would like to venture a final observation, by way of conclusion, that the belated assertion by Federal officials of the retention of title by the United States in the base lands after the recognition of independence is not only in plain contravention of the unambiguous terms of the Treaty of General Relations and the Bases Agreement, but is irreconcilable with the traditional American policy toward the Philippines. That policy found vivid expression in Taft's announcement of "the Philippines for the Filipinos." It was reiterated in the preamble of the Jones Law wherein the United States Congress clarified that the acquisition of the Philippines was not "for territorial aggrandizement" and that it has always been the purpose of the American people to withdraw their sovereignty over the Islands and to recognize their independence. The policy culminated in the recognition of independence on July 4, 1946, an independence which is supposed to be full and complete.

The claim of title to the base lands, after the recognition of independence, would make that same independence incomplete, and impair the territorial integrity and sovereignty of our Republic.

The retention by the United States in the Philippines of the use and possession of military and naval bases is a matter of expediency, dictated by the needs of the two countries for mutual defense and protection, not to serve and foster any other interest of the United States. For the attainment of that objective, it is wholly unnecessary for the United States to have title of ownership to or proprietary interest in the base lands.

land by the sovereign, that a grant of the sovereign must be explicit and nothing passes by implication. *Northern Pacific Railway Co. v. Soderberg*, 188 *U.S.* 526, 534 (1903) *Great Northern Railways Co. v. United States*, 315 *U.S.* 262, 272 (1942).

Indicative of the clear understanding regarding the actual state of facts, and possibly the law, were the express, formal conveyances to the Philippine Republic in 1947 and 1949, following the execution of the Military Bases agreement, of the title of the United States to some 30 or more military reservation or properties deemed to be in excess of United States military requirements. The transfers were effected by notes from the United States embassy at Manila and accepted by the Philippine department of foreign affairs in reply notes. The notes referred explicitly to each property conveyed, and accompanying the United States notes were lists of executive orders and Torrens certificates of title under which the United States had claimed title to the military reservations conveyed.

A subsidiary question has been raised regarding title to the areas embraced in the temporary installations provided for by Article XXI of the Military Bases agreement. Most of these properties apparently have already been conveyed to the Philippine government by the specific conveyances referred to above. However, the legal adviser's memorandum indicates that there remain two such properties held by the United States, the Fort McKinley reservation and the Port of Manila Reservation.

Under Article XXI it was agreed that the United States would retain the right to occupy temporary quarters and installations existing outside of the bases listed in Annexes A and B, for a reasonable time not exceeding two years as might be necessary to develop adequate facilities within the bases for the United States armed forces. It was provided that the temporary period might be extended by mutual agreement, and there has been one such extension for three years from March 26, 1949. There is no express agreement for transferring title to these properties, and there has been no blanket transfer of the United States title in such temporary installations to the Philippine government. However, there have been the specific transfers of most of the properties individually, as indicated. The suggestion is offered in the legal adviser's memorandum that possibly the exchange of notes, which took place concurrently with the signing of the Military Bases agreement, purported to reserve only the adjustment of titles to those properties listed as Annexes A and B bases and naval reservations and fueling stations, thereby excluding Article XXI temporary installations and implying an obligation to transfer them to the Philippine government. The history of the negotiations underling the agreement and the simultaneous exchange of notes, which is set out in detail in the state department research project No. 319 of February 1953 (The negotiation of the United States-Philippines Military Bases agreement of 1947) negate this speculation. It is quite clear that the purpose of the agreement was to cover the use of the properties for military purposes, and the purpose of the notes was to leave open for future settlement the rights and titles to real property. Thus, no fine or technical distinction between Annexes A and B bases and any other type of military installation was intended in reserving for the future the issue of title.

I therefore am of the opinion that, except for such military or naval properties as the United States has expressly and formally conveyed to the Philippine republic, as in the exchange of notes contained in TIAS 1963 and TIAS 2406, the United States now has whatever title it had prior to July 4, 1946, in the land or areas comprising the bases listed in Annexes A and B of the Military Bases agreement of March 14, 1947, in the naval reservations and fueling stations not so listed in that agreement, and in the areas covered by Article XXI of the agreement.

Furthermore, I am of the view that there has been no adjustment and settlement of the property rights of the United States in the Philippines within the meaning of the Tydings-McDuffie Act. The matter has been reserved for future disposition several times and remains yet to be adjusted and settled.

II.

You have also asked whether, under our agreements with the Philippines and our statutes, the United States is obligated to transfer presently without compensation any of the titles to Annexes A and B bases of the 1947 agreement, to naval reservations and fueling stations, and to Article XXI (1947 Agreement) temporary installations; and if there is no obligation, whether the President of the United States is authorized by law to make such a transfer.

I believe there is little question ,from the history already reviewed, that the congress which enacted the Tydings-McDuffie Act in 1934 intended that title to, and any further operation of, the military reservations of the United States in the Philippines, except naval reservations and fueling stations, should pass to the new Philippine Republic upon its establishment in 1946. Conversely, as to naval reservations and fueling stations, it was contemplated that title in the United States, as well as operation by the United States, would be continued for at least two years; and thereafter, pending the conclusion of negotiations begun in that period by the President, title and operation would remain with the United States for such time as would be agreed upon by the adjustment and settlement between the President of the United States and the government of the Philippines. Nothing in the statute precluded the making of an arrangement for either permanent retention or complete transfer of the naval properties by the United States, or for some intermediate solution.

As to the naval reservations and fueling stations, there has been no change in the law or their status as United States property. Subsequent acts and agreements of the United States and the Philippines have reserved the issue for the future. The President of the United States continues to be authorized to make the final settlement with the Philippine Republic which will decide for how long and upon what conditions the naval reservations and fueling stations, reserved under the Tydings-McDuffie Act, will remain the property of the United States or be transferred to the Philippine Republic. The President is under no obligation to give these properties to the Philippine government, or to transfer them for compensation. He is vested with complete discretion in the matter.

If he concludes that it is in the interest of the United States to convey to the Philippine government title to any of the naval reservations and fueling stations in the islands, with or without compensation, he enjoys complete authority to make the conveyance under section 10 (b) of the Tydings-McDuffie Act, 48 Stat. 463. His authority extends to "the adjustment and settlement of all questions relating to the naval reservations and fueling stations." The word "settlement" in its general sense signifies "the act of conferring anything in a formal and permanent manner; a bestowing or granting under legal sanction." (80 C.J.S. 125). Since a settlement of the questions under section 10(b) might well include relinquishment of titles, the President has obviously been authorized to make any necessary conveyances. The reference in section 10(b) to his entering into negotiations with the Philippine government in no wise detracts from this full authority The language is significant only in the matter of time (i.e., he is to commence negotiations within two years after independence) since as this government's organ in foreign affairs the President is authorized by the Constitution to negotiate on any appropriate subject for negotiation with a foreign government.

Moreover, as noted at a later point in this opinion, I am of the view that the authority conferred upon the President by the joint resolution of June 29, 1944 tends to confirm, if not augment, his discretionary authority to agree with the Philippine government and convey to it any of the naval reservations and fueling stations in the Philippines.

As to the military reservations of the Tydings-McDuffie act, there has been a complete change in the law and status as provided for in 1934. In place of their passage to the Philippines upon the achievement of independence the President has been authorized under the joint resolution of June 29, 1944, after negotiation with the President of the Philippine Commonwealth or the President of Philippine Republic, to withhold and to retain as bases,

(*Continue on page* 159)

I

Natividad I. Vda. De Roxas, Petitioner-Appellant, vs. Maria Roxas, et al., Oppositors-Appellees, G. R. No. L-2396, December 11, 1950.

1. *WILLS; PROBATE; TESTIMONY OF ATTESTING WITNESSES, WHEN ENTITLED TO FULL CREDIT.* — Where the reputation for probity of the three attesting witnesses has not been impeached their testimony confirmatory of the due execution of the will, deserves full credit.
2. *ID.; ID.; ID.; RELATIVES OF TESTATOR OR HEIR NOT DISQUALIFIED TO ACT AS ATTESTING WITNESSES.* — The law does not bar relatives either of the testator or of the heirs or legatees from acting as attesting witnesses to the will.
3. *ID.; ID.; ID.; FINDINGS OF TRIAL COURT ENTITLED TO GREAT WEIGHT; EXCEPTION.* — Ordinarily, the findings of fact of a trial court, because of the benefit of having seen and heard the witnesses, are entitled to great weight. But it is not so, where the court relied on the conclusion of experts and failed to analyze the oral evidence.
4. *ID.; ID.; ID.; POOR STATIONARY, LACK OF COPY, OR NON-INTERVENTION OF LAWYER OR NOTARY, DOES NOT AFFECT VALIDITY OF WILL.* — The validity of a will is not affected by the fact that it is written on poor stationary, that it was not prepared by a lawyer or notary public, or that no copies were made.
5. *ID.; ID.; ID.; TESTIMONY OF ATTESTING WITNESSES TO PREVAIL OVER EXPERT OPINIONS.* — The positive testimony of three attesting witnesses in favor of the due execution of the will ought to prevail over expert opinions which cannot be mathematically precise but which, on the contrary, are subject to inherent infirmities. The law, in requiring the production of all the attesting witnesses present in the Philippines, impliedly recognizes the almost conclusive weight of their testimony.
6. *ID.; ID.; ID.; WILL NEED NOT BE WRITTEN IN ONE CONTINUOUS ACT.* — The law does not require that the will should be written in one continuous act.
7. *ID.; ID.; ID.; REVOCATION; CRUMPLING OF WILL BY TESTATOR WITHOUT INTENTION TO REVOKE.* — The fact that the testator crumpled the will does not amount to revocation unles it is shown that the crumpling was caused with intention to revoke.

Claro M. Recto and *Francisco A. Rodrigo* for appellant.

Vicente J. Francisco, Estanislao A. Fernandez, Jr., and *Gerardo M. Alfonso* for appellees.

DECISION

PARAS, *J.*:

Pablo Roxas died in the Municipality of Bulacan, province of Bulacan, on July 14, 1946. On August 10, 1946, Natividad Icasiano (the widow) filed in the Court of First Instance of Bulacan a petion for the probate of a will alleged to have been left by Pablo Roxas, devising all his properties to Natividad Icasiano and Reynaldo Roxas (an adulterous son). The will is typewritten and worded in Tagalog and the attesting witnesses are Jacinto Y. Enriquez, Fortunato R. Gupit and Martin Rodrigo. The will is dated, in the body, January 1, 1945. No date is given in the attestation clause.

An opposition was filed by Maria Roxas and Pedro Roxas (sister and brother of Pablo Roxas) on the ground that the alleged will was not executed and attested as required by law, and that, in any event, it was intended as a mere formal request which was, however, subsequently revoked as shown by the fact that it was crumpled with intent to destroy. Upon motion for bill of particulars filed by the petitioner Natividad Icasiano), the oppositors (Maria and Pedro Roxas) alleged that the will is vitiated by the following formal defects: "(a) The alleged last will and testament was not attested and subscribed by three or more credible witnesses in the presence of the testator and of each other; (b) The testator and the instrumental witnesses did not sign the only page of the will on the left margin, nor was the page numbered in letters on the upper part of the sheet; (c) The attestation clause does not state that the alleged witnesses thereto witnessed and signed the will in the presence of of the testator and of each other."

After trial, the Court of First Instance of Bulacan rendered a decision disallowing the probate of the will. The lower court concluded that the body of the will was typewritten and signed by the testator on a date or occasion different from and anterior to the date or occasion when the attestation clause was typewritten and signed by the attesting witnesses, with the result that the will was not signed by the testator in the presence of the witnesses, and by the latter in the presence of the testator and of each other, as required in section 618 of Act No. 190 as amended by Act No. 2645. This conclusion was motivated by the following circumstances enumerated in the decision: "(a) That the paper on which the alleged will, Exhibit D, is written has been folded and crumpled; (b) That the body of the will was typewritten before the signature of Pablo M. Roxas had been affixed thereon and before it had been folded and crumpled; (c) That after it had been folded and crumpled, it was smoothened in order to eliminate or minimize as much as possible the folds and wrinkles, preparatory, to the writing of the attestation clause on the same typewriter which was used in typewriting the body of the will; (d) That the attestation clause was typewritten, single space, and a deliberate effort was exerted to make it appear that it was written by the testator himself at the same time with the body thereof, but the tell-tale letter 'o' and the inequality of the marginal alignments of both the body and the attestation clause have betrayed the vain effort; (e) That the texture and fiber of the paper on the portion on which the signature of the attesting witnesses were affixed had been disturbed and affected by the interval of time and the ordinary exposure of the paper to the atmosphere between the signing of the testator and the attesting witnesses, which fact is revealed by the greater penetrations of the ink in the signature of Pablo M. Roxas; (f) That had the testator and the attesting witnesses signed on the same occasion, the probability was that one or two fountain pens only should have been used instead of three as testified to unanimously by the expert witnesses both for the proponent and the oppositors."

The petitioner has appealed. Her counsel insist that the testimony, unanimous in all essential points, of the three attesting witnesses should be given controlling weight. Counsel for oppositors, upon the other hand, argue that the testimony of Maria Roxas, in conjunction with the opinions of experts, should prevail.

The testimony of Fortunato Gupit, Jacinto Y. Enriquez and Martin Rodrigo (the attesting witnesses) tends to show that they were in the house of Rosario Vda. de Icasiano (mother-in-law of Gupit) in barrio Sta. Ana, municipality of Bulacan, province of Bulacan, on January 1, 1945. Between two and three in the afternoon Pablo Roxas showed up and, approaching Gupit who was then reading a book, asked him to go to the Sala with Roxas. The latter got from his hip pocket a folded sheet of paper (the will here in question) and asked Gupit to read it. In the meantime Roxas proceeded to the dining hall where a mahjong game was being played and called Enriquez and Rodrigo who thereupon went to the Sala and were asked to read the will previously handed to Gupit. Roxas then made the request for the three to act as witnesses. Roxas, using his fountain pen, signed it in the presence of Gupit, Enriquez and Rodrigo. Gupit then signed with his own pen and, noticing that ink in his signature was spreading, asked for a blotter. Roxas got a blotter from a nearby writing desk and gave it to Gupit who accordingly applied it. Enriquez and Rodrigo, using the pen of Gupit, took their turns in signing the will, the blotter being also applied. Thereafter, Roxas refolded the document and inserted the same in his hip pocket.

Fortunato A. Gupit is a certified public accountant. He is the dean of the College of Business Administration and the comptroller of the Arellano University. Jacinto Y. Enriquez comes from a distinguished family in Bulacan and is a student in the

University of Santo Tomas. Martin Rodrigo is a businessman and landowner. Gupit is the husband of a half-sister of the petitioner; Enriquez is a second cousin of petitioner; and Rodrigo is the husband of a deceased cousin of petitioner.

The testimony of oppositor Maria Roxas tends to show that on December 30, 1944, Pablo Roxas asked from her a sheet of typewriting paper. At about one in the afternoon of January 1, 1945, Pablo Roxas came back to the house of Maria and showed the will in question signed by Pablo, clean and uncrumpled, and without any attestation clause. Pablo executed the will as it was shown to Maria, as a mere ruse to make the petitioner continue loving Reynaldo Roxas (adulterous son of Pablo Roxas).

Two handwriting experts (Amadeo M. Cabe and Jose C. Espinosa) were employed by the oppositors and their testimony tends to support the theory that the body of the will up to the signature of Pablo Roxas was typewritten on a plain sheet of paper; that the sheet was subsequently removed from the typewriter and signed by the testator; that the sheet, after being crumpled and folded, was reinserted in the typewriter for the insertion of the attestation clause which was signed afterwards by the three attesting witnesses. This expert opinion is based more or less on the circumstances enumerated in the appealed decision hereinbefore quoted, except that while the trial court observed that there are "greater penetrations of the ink in the signature of Psblo M. Roxas," Espinosa and Cabe found that there is greater diffusion of ink in the signatures of the attesting witnesses.

After a careful examination of the record in the light of contentions of the parties, we have no hesitancy in holding that the appealed decision is erroneous. This case is one in which the will is couched in a language known and spoken by the testator and the signature of the testator and the signatures of the three attesting witnesses are admittedly genuine. Such being the situation, the question that arises, far from requiring the intervention of experts, is one merely of credibility of witnesses. In our opinion, the testimony of the three attesting witnesses — confirmatory of the due execution of the will — deserves full credit, not only because of their qualifications (hereinbefore pointed out) but because their reputation for probity has not been impeached. The fact that they may have come relationship with the petitioner is not sufficient to warrant the belief that they did not tell the truth. The law, in the first place, does not bar relatives either of the testator or of the heirs or legatees from acting as witnesses. In the second place, in the normal course of things and to be sure that the witnesses would not let the beneficiaries down, the testator may be inclined to employ, as attesting witnesses, relatives of such beneficiaries, if not wholly disinterested persons. In the third place, under the will, Reynaldo Roxas (adulterous son of Pablo Roxas) is named a legatee on equal footing with the petitioner, and the attesting witnesses are not related whatsoever with him. In the fourth place, whereas the three attesting witnesses have no direct interest in the subject matter of the will, oppositor Maria Roxas, like the other oppositor Pedro Roxas, is an intestate heir of Pablo Roxas and, therefore, naturally interested in having the probate of said will disallowed.

Ordinarily, the findings of fact of a trial court, because of benefit of having seen and heard the witnesses, are entitled to great weight. But, in this case, the lower court relied on the conclusions of experts, and this is obvious from (1) its recital of the circumstances that led it to believe that the will was not executed in accordance with law, and (2) its failure to analyze the oral evidence.

It is alleged that the testator had another adulterous child (Aida), sister of Reynaldo, and it is unnatural that he would have failed to provide for said child, if not for his brother and sister (herein oppositors) in the will, if the testator really intended to dispose of his properties under said will. This is again a mere conjecture which should not prevail over the testimony of the attesting witnesses, not to mention the fact that there is nothing in the record to show conclusively that the testator ever admitted that Aida is another adulterous child, coupled with the circumstance that the latter did not live with the testator. As to the omission of the herein oppositors, there might have been a reason known only to the testator why they should be excluded, or why they need no participation.

That the will in question was written on poor kind of stationery, or that it was not prepared by a lawyer or notary public, or that no copies were made, is of no moment. It should be borne in mind that the will was executed in January, 1945, when everything was practically in confusion due to the impending battles for the liberation of the Philippines, and when paper supply was almost exhausted. Aside from the fact that a will need not be prepared by or acknowledged before a notary public, it is not improbable that testator, before the date of the will in question, had prepared or seen previous wills and therefore was familiar with its wording and legal formalities, and that due to the abnormal time he undertook to prepare said will without the aid of a lawyer or notary public and without making copies thereof.

We do not venture to impute bias to the expert introduced during the trial, but we hasten to state that the positive testimony of the three attesting witnesses ought to prevail over the expert opinions which cannot be mathematically precise but which, on the contrary, are "subject to inherent infirmities." In the instant case, it is significant that while Amadeo M. Cabe observed that four different fountain pens were used in signing the will, Jose C. Espinosa was unable to determine whether the same pen was used for all the signatures. Upon the other hand, Prof. H. Otley Beyer believes that one pen was used for the testator's signature, and another pen for the signatures of the witnesses.

Too much emphasis and effort, through experts Cabe and Espinosa, had been placed on the supposition that after the body of the will had been typewritten, the sheet was removed from the machine and, after having been folded and crumpled, it was replaced in the typewriter for the insertion of the attestation clause. The law does not require that the will should be written in one continuous act; and the supposition does not necessarily, much less conclusively, prove that the signing was not done on one occasion. For the difference in the ink diffusions and penetrations between the signatures of the testator and those of the three attesting witnesses may not be due solely to the folding and crumpling of the sheet on which the will is written, but on such other factors, as class of ink, class of pens, habit of writing, condition of paper, and the use of blotter. Speculations on these matters should give way to the positive declarations of the attesting witnesses. The law impliedly recognizes the almost conclusive weight of the testimony of attesting witnesses when it provides that "if the will is contested, all the subscribing witnesses present in the Philippines and not insane, must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown to the court." (Section 11, Rule 77, Rules of Court.)

The contention made by the appellees in their opposition that the will was revoked by the testator when he crumpled the same, requires no serious consideration, in view of their failure to show that the crumpling was caused with the intention to revoke. Appellees' reference to other formal defects of the will (other than that hereinbefore dispose of) also needs no inquiry, because it is not pressed herein.

Wherefore, the appealed judgment is reversed and the will in question is hereby declared probated. So order, with costs against the appellees.

Feria, Bengzon, Tuazon, Jugo and Bautista Angelo, J. J.; concur.

Mr. Chief Justice Moran, Justices Pablo and Reyes concur with the separate dissenting opinion of *Mr. Justice Montemayor.*

Mr. Justice Padilla took no part.

MONTEMAYOR, *J.*, Dissenting:

It is a matter of deep regret to me that I have to disagree with my colleagues who signed the learned opinion penned by Mr. Justice Paras. But fully convinced of the correctness of the findings of the trial court based on the evidence on record. I am constrained to dissent and to give my reasons for doing so.

To the statement of facts made in the majority opinion, I would like to add other undisputed facts which I believe are

not only pertinent but may also shed additional light and throw decisive weight in the correct determination of this case. It is a fact testified to not only by Maria Roxas for the oppositors but partly and substantially corroborated by Natividad Icasiano, the petitioner and her witness, Remedios Logroño, that besides Reynaldo Roxas, the deceased Pablo Roxas had another illegitimate child by his mistress Remedios Logroño, a daughter named Aida, a few years younger than Reynaldo, who remained in the custody of her mother. As to Reynaldo, when a little over a year old he was taken to the marital home of Pablo Roxas and his wife Natividad Icasiano in the year 1940, to live with them because they had no children of their own. Pablo not only failed to tell his wife that Reynaldo was his own son, fruit of adulterous relations with Remedios, but he falsely told his wife that the boy whose mother was already dead came from an orphanage. According to Natividad it was only after Pablo's death that she found out Reynaldo's true paternity.

There are several theories, more or less plausible as to the intervention of Pablo Roxas in the preparation of the supposed will, Exh. "D", and what he intended by it. One of them is that Pablo Roxas did not design Exh. "D" as his will According to Maria Roxas, her brother Pablo told her on Jan. 1, 1945, when he showed her Exh. "D" with his signature on it but without the attestation clause nor the signatures of attesting witnesses, that he did not intend said document as his last will but only to counteract his wife's natural reaction and to calm and assuage her inevitable feeling of righteous anger and indignation when after his death, she came as she was bound to know that Reynaldo was his own son by his mistress Remedios; because if she were led to believe by the document that all his property would go to her and to Reynaldo in equal portions, his supposed act of liberality might at least temporarily, induce her to overlook and forgive his infidelity and prevent her from losing her affection for the boy and sending him away from her.

At first blush, this theory might appear to be far-fetched and unreasonable because husbands do not usually commit such acts of deception on their wives and widows and expect to get away with it. But, let us not forget that Pablo Roxas was not only capable of but actually succeeded in deceiving his trusting and credulous wife for about six years, from 1940 until 1946 when he died, leading her to believe that the child Reynaldo whom he had brought into their home, was a total stranger and an orphan whom he had gotten from a charitable institution out of pity and to enliven their childless home. Not only this but during those six years of deception, far from being a repentant sinner, he continued his illicit and extramarital relations which resulted in the subsequent birth of another illegitimate child, Aida.

Moreover, it is rather difficult to believe that Pablo Roxas should deliberately execute a will like Exh. "D" wherein he entirely forgot his other younger child Aida, not giving her even a centavo from his considerable estate. The same thing may be said of his mistress, Remedios Logroño. That he loved Remedios or at least liked her, there could be no doubt. She was much younger than his wife. Not a few marital troubles, even tragedies have their origin in elderly husbands tiring of their elderly wives and feeling attracted to and falling for younger women. At least Pablo had sufficient attachment to and felt enough affection for Remedios so as to forget his marital vows and cohabit with her for years and let her be the mother of his two children the illegitimate.

It should be borne in mind that Pablo Roxas was quite a wealthy man. Considering the products of his properties alone during his long married life with Natividad, there must be considerable conjugal property which he left upon his death. Therefore he must have known that out of the partnership property alone, Natividad would be well provided for in her widowhood; and yet under Exh. "D" he would be giving her one-half (1/2) of all his exclusive properties, the other half to one of his two children, and absolutely nothing to his other younger child, to their mother, and to his only brother and sister, the oppositors herein.

Ordinarily, legacies are made to those who enjoy the affection of the testator and who in his opinion need the bequest. Pablo Roxas had no legitimate children of his own and so could do with his estate as he wished, unhampered by legitimes which may be claimed by forced heirs. It would have been more natural for him to have bequeathed his estate or a part of it not only to Reynaldo but also to his daughter Aida and to their mother Remedios Logroño. It would have equally been more natural for him to have remembered his brother and sister Maria and Pedro, especially since the bulk of his exclusive properties was a donation from their common uncle Alejandro Roxas. But as it is, under the supposed will, he forgot and ignored them all and heaped all his bounty and all his liberality on only one child of his and on his wife who apparently was in no need of such bounty.

Again, when a person wants to make a will involving a considerable and valuable estate as is involved in the present case (worth much more than fifty thousand pesos), to be sure that the instrument is validly prepared in order to insure its probate, he would avail himself of the services of a lawyer, at least a notary public, presumed to be versed in such legal matters. The preparation of a will requires special and accurate legal knowledge so as to comply with the various imperative requirements of the law. How often have even lawyers themselves overlooked a small detail required by law, resulting in the rejection of the parties of wills by the courts. Pablo Roxas was by no means an ignorant man. He had been Mayor of his town for two terms. He was also a dentist. He must have realized that a layman should not recklessly and blithely prepare a will and expect it to conform with all the requirements of the law and pass the scrutiny of the courts. So, it is to be reasonably expected that if he really wanted to execute a will, he would have had it prepared by a lawyer or a notary public. Besides, realizing that it was an important document, he would have had copies of it made and kept in different places so that if the original by accident or force majeure was lost or destroyed, his wishes about the disposition of his property after his death would not be frustrated. But as it is, the parties are agreed that Pablo Roxas himself prepared and typed the body of Exh "D", without the benefit of legal advice and without making copies, and afterwards allowed it to be folded, not once but several times, and otherwise crumpled.

The foregoing considerations are in support of the theory that Pablo Roxas did not intend to make a will. A corollary theory is that after signing the body of Exh. "D", and without the attestation clause, he gave it to his wife Natividad. After his death, Natividad and here relatives believing that Pablo really intended Exh. "D" as his will, but finding it to be incomplete proceeded to add the attestation clause, and the attesting witnesses being convinced that the signature of Pablo Roxas on it was genuine and to carry out what they thought to be the wishes and will of the deceased, in good faith signed the attestation clause, believing that by so doing they were merely certifying that the signature was that of Pablo Roxas. It is of course unnecessary to state that under this theory, Exh. "D" may not be allowed probate.

The theory entertained and contended for by the petitioner is that Pablo Roxas really intended to make a will. That he prepared and typewrote the body of Exh. "D", is not disputed. But it is a fact equally undisputed that as Exh. "D" now appears, it was made irregularly and in violation of all rules of uniformity, symmetry and continuity. The body of the instrument is typewritten double spaced, and with the signature of Pablo Roxas, it fairly occupies the middle of the page or paper, considering the space or margin left above and below. Symmetry was observed. Then the attestation clause was added, not with the same double spacing but in single space, thereby destroying uniformity in spacing. Furthermore, the clause is crowded into the remaining space below, and despite the single spacing to save room it almost reaches the bottom of the page, hardly leaving enough space for the signatures of the witnesses. Symmetry is thus sacrificed. What is more, and this is important, the vertical and horizontal alignment of the left margin and the lines of the attestation clause do not coincide with

those of the body of Exh. "D". Moreover, the types of the letters in the attestation clause are lighter than those in the body of the instrument, indicating a different hand with a lighter touch on the keys. In addition, we notice and find that some letter on the body of the instrument are blurred, especially letter "o," whereas the same letters in the attestation clause are clear, showing that the attestation clause was typewritten after the types of the machine had been cleaned and brushed of accummulated dirt. All this leads to the logical conclusion and the finding that after the body of Exh. "D" was typewritten, it was removed from the typewriter; that later, perhaps much later the types of the machine were cleaned and brushed and the same paper, Exh. "D", was re-inserted and the attestation clause typewritten by another hand, not Pablo Roxas who typewrote the body. Furthermore, and this is equally important, while the crevices and folds in the paper on the body of Exh. "D" bear and show the ink of the letters typed on them, indicative of the body having been typed when the paper was still smooth, unfolded and uncrumpled, on the other hand the ink in some letters in the attestation clause, especially the letter "a" in the word "sa", as more graphically demonstrated in the photographic enlargement, did not penetrate and reach the crevices and folds in the proper caused by the folding or the crumpling, equally indicating that the attestation clause was typed after the paper had been folded and crumpled, perhaps long after the typing of the body of Exh. "D".

Then, we come to the more important detail. The ink lines in the signature of Pablo Roxas are clear and distinct and well-defined even when those ink lines meet the folds or crumplings or breaks in the paper. On the other hand, in the signatures of the attesting witnesses, where the ink lines meet those same vertical folds, breaks and crumplings, said ink lines have spread out and become not well defined because of the diffusion of the ink. This is revealed by the photographic enlargement and even to the naked eye. All this goes to show according not only to the expert testimony but also our own every day experience and observation that when Pablo Roxas signed Exh. "D", it was still unfolded and uncrumpled, and the surface and texture of the paper still smooth, undisturbed and unbroken, while at the time that the attesting witnesses affixed their signatures, the paper had already been folded and crumpled as shown by the diffusion of the ink which had gone in and crept and spread out into the crevices and breaks in the paper.

Prof. Beyer who was presented as expert witness by the petitioner admitted the possibility that judging from the lighter impression or type of the letters of the attestation clause, said clause may have been typewritten by a hand other than the one which typewrote the body. Attempting to explain the diffusions of the ink on the ink lines on the signatures of the attesting witnesses, he stated that they may be due to the class or variety of ink used in the signatures, or to a difference in the texture of the paper itself or the manner in which the signatures are affixed, some writing with a heavy hand, others with a lighter hand, and whether or not a blotter was used.

Chemical Engineer Espinosa, an expert introduced by the oppositors, on the basis of his expert training and knowledge of inks, acquired when he was employed in the Bureau of Science and placed in charge of the purchase of inks by the Government, categorically and without contradiction assured the court that the ink used in the signature of Pablo Roxas and in those of the attesting witnesses was of the same class or kind, namely, iron nutgall. So, the possibility of a difference in the ink used may well be ruled out. As to the other possibilities, assuming for a moment that all the three attesting witnesses signed with a heavy hand and on three attesting witnesses signed with a heavy hand and on a portion of Exh. "D" which happened to be porous, and used a blotter, still it is not explained why the diffusions of the ink on the ink lines of their signatures was not general and all over, but occur only when said ink lines meet the fold, breaks and crumplings in the paper.

From the foregoing, and in the assumption that Pablo Roxas really intended to make a will, we may gather the following inferences which to my mind are reasonable and logical. Pablo Roxas who, according to undisputed evidence owned an Underwood typewriter and must have been quite familiar with, if not adept, in typing ordinary documents but lacking the legal knowledge and training required for preparing a will, and ignoring the necessity of attesting witnesses, most likely typewrote the body of Exh. "D" from a rough draft he had prepared, and then signed it. As already stated, the body standing alone, with the signature, occupies the middle of the page, and perfectly complies with the rule of symmetry and uniformity in spacing and conforms with the good taste of a good typist. He folded the document and kept it or else gave it to his wife Natividad to keep. Afterwards, perhaps long afterwards, he learned or was informed that the will was incomplete because of the absence of an attestation clause and the signatures of attesting witnesses. He then had the attestation clause typewritten by someone who knew the phraseology of such a clause, by re-inserting in the typewriter the paper, Exh. "D", but after it had been folded and more or less crumpled. Then, he proceeded to locate the three attesting witnesses, told them that he had executed a will and wanted them to attest to it. These witnesses either being familiar with his signature or being assured by him that the signature above the typewritten name "Pablo Roxas" was his, readily signed the attestation clause either together on the same occasion or singly on different occasions as he found them. On the basis of our every day observation and experience, this signing by witnesses of clause and certificates attesting to the signature of a person signing the body of a document, without actually seeing him sign, is nothing strange or unusual. Not infrequently, we see a deed of sale or mortgage prepared by or on behalf of the parties, signed by them and later taken to a notary public for acknowledgment, and the notary public more often than not, upon being assured that the document expresses the wishes and true intent of the parties, makes out and signs his certificate to the effect that the parties or at least the party conveying the land or assuming the encumbrance was known to him and had appeared before him, signed and executed the document and had given the assurance that the conveyance or the assumption of the obligation was his free act and deed, when as a matter of fact, said party may never have appeared before the said notary, may not be known to him personally, much less, had given the assurance already mentioned. How often judicial officers and officials authorized to administer oaths have placed on affidavits their certificates to the effect that the affiants had been sworn and afterwards signed the affidavit in his (official's) presence, when in fact the affiant had never taken the oath, and the affidavit had been prepared and signed somewhere else and all the intervention of the official was to ask the affiant if the signature on the affidavit was his, and the contents are true and made voluntarily and without the use of force.

The signing of the attestation clause by the three attesting witnesses in this case may have been done following this quite usual and ordinary practice and all in good faith. Under this theory, it is quite clear that Exh. "D" was not duly attested to under the law which expressly requires that the testator sign in the presence of the attesting witnesses and that said witnesses sign in the presence of the testator and in the presence of each other.

But there is even reason to believe that under the last aforementioned theory the attesting witnesses were not together on the same occasion and could not have signed in the presence of the testator and of each other. Assuming that Pablo Roxas had selected the three attesting witnesses to sign the attestation clause, it is hard to believe that all said witnesses could have been found by him in the same house and the same minute without any previous concert or arrangement. Pablo Roxas was then living in the barrio of Taliptip while the house where he was supposed to have found them was in a different barrio. All the three attesting witnesses assured the court that they did not know that

Pablo Roxas had executed a will and that they were going to be witnesses thereto. His finding them there in that house and their being all together at the same time was according to them, a pure coincidence, and to me, too much of a coincidence, to merit belief. Ordinarily, when a testator executes a will he notifies his witnesses long in advance to insure attendance and then sends for them to come to his house. The execution of such a document is a solemn occasion, done only once in a lifetime. A testator does not usually go out, carrying his will, hunting for witnesses. But here, without any previous notification or agreement, Pablo leaves his barrio, goes to the barrio of Sta. Ana and there in one house, strangely enough, finds his three selected witnesses all ready for the signing. And all this in spite of the fact as shown by the evidence for the oppositors that in his own barrio of Taliptip Pablo had other friends of his own confidence, and naturally that of his family, who could well have been utilized as attesting witnesses so as to save him the trouble and the hazard of making a trip of 4-1/2 kilometers to Sta. Ana, in a horsedrawn vehicle, with a stream spanned by a destroyed bridge to negotiate. It is a story that requires considerable effort to believe.

There is another detail which tho apparently of little import, nevertheless may merit consideration. While the body of the document, Exh. "D", bears the date — January 1, 1945, when Pablo Roxas signed it, the attestation clause has no date, neither does it make reference to the date appearing on the body. Almost invariably, an attestation clause is made to bear a date, the same day that appears on the body of the will when the testator signed it, or else the clause makes reference to said date on the body of the will. At least that is the standard form as may be gathered from books on the subject such as Jones Legal Forms Annotated, ninth ed., pp. 2069-2071, Fisher's Legal and Business Forms, 1948 ed. pp. 436, 437, including Modern Philippine Legal Forms, Vol. II, pp. 1146-1147, by Tañada and Rodrigo, the latter being one of the attorneys for the petitioner-appellant. But why the absence of a date on the attestation clause on Exh. "D", or at least a reference to the date on the body? Was it a mere oversight, or was it because the witnesses actually signed on a day later than January 1, 1945, when Pablo Roxas signed the will, and said witnesses could not in conscience state on the attestation clause that they all signed it on January 1, 1945?

The majority opinion asserts that the best evidence as to the due execution of a will is the testimony of the attesting witnesses, and that their testimony on this point is practically conclusive. This may be true when there is no opposition to the probate of the will. But when the probate is opposed, evidence in the form of oral testimony to disprove the alleged due execution of the will, is of course admissible and the testimony of witnesses for the opposition is just as competent, and if worthy and credible can match, even outweigh that of the attesting witnesses. Otherwise, if with the testimony of attesting witnesses to a will we are going to disregard and ignore any other evidence about the due execution of the instrument, then we would be opening wide the door to the commission of fraud or forgery in the execution and probate of this all-important instrument. An instituted heir or a legatee in a forged will could then get three of his friend to sign the attestation clause, and if the three later testified in court that the supposed testator signed the instrument in their presence and that they signed in his presence and in the presence of each other, then the rightful heirs would forever be precluded from proving the forgery and asserting their rights in the inheritance.

> "The testimony of attesting witnesses to a will may be overcome by any competent evidence. . . . Such evidence may be direct, or it may be circumstantial; and expert and opinion evidence is just as competent as any other evidence. . . The rule contended for by appellant would frequently baffle justice and give judicial countenance to many a high-handed fraud. — Opinion by Mr. Justice Dawson in Baird vs. Shaffer, 101 Kan. 585, 168 Pacific 836 (1917)."

Sometimes, the condition and physical appearance of a document are not only competent evidence but they constitute a valuable factor which if correctly considered and evaluated in the light of surrounding circumstances, can greatly help the court in determining whether said document is genuine or forged. Animated witnesses may forget or may exaggerate or understate what they know, saw or heard or what they did. They may be biased and depart from the truth or state halftruths to mislead the court in order to favor one party and prejudice another. Not so with silent witnesses such as surrounding circumstances and facts found on the paper or object itself. Such mute witnesses play no favorites. If correctly understood and interpreted, they show and reveal the whole truth, in all its nakedness, hiding nothing, forgetting nothing, and without prejudice or mental reservation.

The majority opinion says that the determination of this case in great measure hinges upon the credibility of the witnesses. To this, I heartily agree. The trouble is that for no valid reason that I can see, the majority completely ignored the findings of the trial judge, the same official who presided over all the hearings and saw all the witnesses testify and observed their demeanor in court and was in a better position to assess the credit which each witness merits and the weight to be given his testimony; the same judicial officer who questioned and cross-examined the witnesses including the experts and even looked in the stereoscopic microscope to carefully observe the enlargements and magnifications of the portions of Exh. "D", made by experts for the opposition. That party even made an offer to bring the stereoscopic microscope to this Court so that the members of this Tribunal through personal observation and with the aid of scientific facilities could see for themselves the folds, crumplings, types, signatures and ink lines on Exh. "D", which offer, unhappily had not been accepted. It seems that it was the oppositors who have offered all the opportunities and mechanical facilities to the trial court and to this Tribunal with a view to a correct determination of how and when the typing and signing of the body and the attestation clause of Exh. "D" was done.

I am afraid that the majority had unwittingly been unduly impressed by the testimony of the three attesting witnesses because of their qualifications. Says the majority opinion on this point:

> "In our opinion, the testimony of the three attesting witnesses — confirmatory of the due execution of the will — deserves full credit, not only because of *their qualifications* (*hereinbefore pointed out*) but because their reputation for probity has not been impeached."

Said qualifications are listed and described in detail in the majority opinion which I quote:

> "Fortunato A. Gupit is a certified public accountant. He is the dean of the College of Business Administration and the comptroller of the Arellano University, Jacinto Y. Enriquez comes from a distinguished family in Bulacan and is a student in the University of Santo Tomas. Martin Rodrigo is a businessman and landowner. Gupit is the husband of a half-sister of the petitioner; Enriquez is a second cousin of petitioner; and Rodrigo is the husband of a deceased cousin of the petitioner."

But I understand that up to the present, the courts in this jurisdiction are still weighing the testimony of witnesses on the scales of sincerity, truth, and honesty rather than on academic attainments, college degrees and social prominence. Otherwise, a party in court whose witnesses happen to be simple, ignorant but honest farmers and laborers occupying the bottom of the social scale, who have not seen the inside of a barrio school, has absolutely no chance or show against the adverse party who may produce witnesses with college or university degrees and members of the aristocracy, whose names appear on the social register. I have nothing against the witnesses to the supposed will. Exh. "D". They may have testified sincerely and truthfully according to their lights. But I submit that the unknown and perhaps unlettered witnesses for the oppositors, with no social or academic background to boast of could be just as sincere and truthful. At least, the trial court had nothing to say against their testimony while at the same time, it gave no credit to the testimony of the witnesses for the petitioner as to the due execution of the will. It has

been and is still the practice and rule in appellate courts to respect the findings of a trial judge who has had an opportunity to observe the witnesses on the witness stand and to evaluate their testimony, unless there appears in the record some fact or circumstance of weight and influence which has been overlooked or the significance of which has been misinterpreted.(1) I see nothing in the record to warrant us in disturbing the findings of the trial court.

In conclusion, I am of the opinion that Pablo Roxas either did not intend to make Exh. "D" his will for the reason that if he did, he would have availed himself of the services of one who knew how to draft a will, made copies thereof, and bequeathed his estate not only to his child Reynaldo and his widow but also to his other child Aida, the mother of said two children, and perhaps to his own brother or sister; or, assuming that Pablo Roxas intended to make a will, because of his ignorance of legal requirements and technicalities, in preparing the body of Exh. "D" which he signed, he left out the attestation clause and when informed of the necessity of said clause, he had Exh. "D" re-inserted in the typewriter and the attestation clause typed by someone else and thereafter, perhaps long after, he asked and had the attesting witnesses sign said clause either singly on different occasions or on one single occasion, but naturally, without those witnesses having been present when he (Pablo Roxas) signed the body of Exh. "D". Clearly, to my mind, the requirements of the law on wills has not been duly complied with. I believe that the decision appealed from should be affirmed.

Montemayor, Moran, and Pablo, J.J. concur.
Justice Padilla took no part.

II

Trinidad Semira et als., Petitioners vs. Juan Enriquez et als., Respondents, G. R. No. L-2582, February 27, 1951.

1. *APPEALS; MANDAMUS TO COMPEL ALLOWANCE OF APPEAL; CORRECTION OF ERROR IN RECORD.* — Where the appellant timely called the attention of the trial court to a misstatement contained in its order denying appellant's motion for reconsideration, and timely filed a motion for 15 days' extension of the period for perfection of an appeal, it would be unfair and unjust for the trial court not to act on both motions for three months and then to rule that the decision in the case had become final and executory for the error was merely clerical and the period to appeal had expired even if the appellant was granted the 15-day extension. The appellant might have resorted to too technical a move, but this circumstances did not dispense with the duty of the trial judge to straighten out the record of the case for all purposes. The appellant is expected to file a record on appeal containing pertinent pleadings, motions and orders which are correct; and it cannot rightfully be contended that he is ready to do so before the said order denying reconsideratcn is changed in the sense indicated in the appellant's motion for correction.

2. *APPEALS; MOTIONS WHICH CAN BE HEARED EX PARTE; CORRECTION OF ERROR IN RECORD.* — Although the appellant set his motion for correction for hearing five days after the 30-day period for perfection of appeal, the trial judge could and should have acted thereon on shorter notice not only because he could dispose of it on his own motion (sec. 4, Rule 26) but because the mction might be heard *ex parte* in view of the nature of the order sought and the short period left for perfecting the appeal (Moya vs. Barton, 43 Off. Gaz., 836). Although litigants are not justified in taking for granted that their motions would be granted (Bonoan and Yabut vs. Ventura et al., 43 Off. Gaz., 4602), the courts are bound to act—in proper cases—on all motions with sufficient dispatch necessary to allow the parties to avail themselves of proper remedies. This is implied in the mandate that "justice shall be impartially administered without necessary delay" (sec. 1, Rule 124). The inherent power of the court "to amend and control its process and orders so as to make them conformable to law and justice" (sec. 5, Rule 124) carries the concomitant duty to correct its orders on its own initiative or upon motion of the parties. This duty is not affected by the nature of the error sought to be corrected.

Potencinno A. Magtibay for petitioners.
Respondent Judge in his own behalf.
Antonio L. Azores for respondents *Azores*.

DECISION

PARAS, *J.*:

In civil case No. 43 of the Court of First Instance of Batangas between Trinidad Semira and Isidoro G. Mercado, as plaintiffs, and Bienvenido Azores, Apolonia Azores, Manuel Azores, Juana Azores, Jose R. Azores, Sinforosa Azores, Antonio Azores and Norberta Azores, as defendants, judgment was rendered in favor of the latter on July 7, 1944, notice of which was received by counsel for plaintiffs on August 7, 1944. On August 30, 1944, counsel for plaintiffs filed a motion for reconsideration. On May 26, 1948, after the record had been reconstituted, the Court of First Instance of Batangas denied the motion for reconsideration, notice of which was received by counsel for plaintiffs on June 21, 1948. On June 5, 1948, that is, before receipt of the notice of denial, counsel for plaintiffs filed a motion for an extension of fifteen days within which to perfect an appeal in case the motion for reconsideration should be denied. In the resolution of May 26, 1949, the Court made it appear that the defendants filed the motion for reconsideration and the plaintiffs filed an opposition thereto, when the fact was that the plaintiffs filed the motion and the defendants filed the opposition. In view of this mistake, the plaintiff filed, on the same day he received the order of denial, a motion for correction which was set for hearing on July 3, 1948. Failing to receive notice of any action either on the motion for extension or on the motion for correction, counsel for plaintiffs sent a letter of inquiry to the clerk of court. Thus prompted, the court issued an order dated September 25, 1948 — received by plaintiffs on October 2, 1948, — holding that the judgment of July 7, 1944, had become final and executory for plaintiff's failure to perfect their appeal on time even if the motion for an extension of fifteen days was granted, the motion for correction filed by plaintiffs on June 21, 1943, not having suspended the time for appeal.

A petition for mandamus was filed by the plaintiffs against the Judge of the Court of First Instance of Batangas as sole respondent, to compel judicial action on the motion for correction, to set aside the order of September 25, 1948, and to have the time for appeal declared suspended. In our resolution of March 23, 1950, we directed the petitioners to amend their petition by impleading as respondents the defendants in civil case No. 43; and the case is now before us upon the corresponding amended petition and the answer thereto.

In our resolution of March 23, 1950, penned by Mr. Justice Padilla, the following decisive pronouncement was made: "The petitioner, plaintiffs in the case in the court below, were entitled to expect action by the respondent court on their petitions for extension of time to perfect the appeal and for correction of the order of 26 May 1948. The respondent court was in duty bound to decide and resolve the two petitions and it is unfair for it to declare without first complying with its duty to resolve and decide the petitions for extension of time to perfect the appeal and for correction of the aforesaid order of 26 May 1948."

When the petitioners filed on August 30, 1944, the motion for reconsideration, they had seven days out of the reglementary 30-day period for appeal. They also had the same seven days when their motion for an extension of fifteen days was filed on June 5, 1948. On June 21, 1948, when the petitioners received notice of the order of the respondent Judge denying their motion for reconsideration and when they filed their motion for correction, they still had said seven days to perfect an appeal. Although the petitioners set their motion for correction for hearing on July 3, 1948, the respondent Judge could and should have acted thereon on shorter notice not only because he could dis-

(1) U.S. vs. Melad, 27 Phil. 448; People vs. Cabrera, 43 Phil. 64.

pose of it on his own motion (Sec. 4, Rule 26) but because the motion might be heard *ex parte*, in view of the nature of the order sought and the short period left for perfecting the appeal (Moya vs. Barton, 43 O. G. 836). Although litigants are not justified in taking for granted that their motions would be granted (Bonoan and Yabut vs. Ventura, et al., 43 O. G. 4602), the courts are bound to act — in proper cases — on motions with sufficient dispatch necessary to allow the parties to avail themselves of proper remedies. This is implied in the mandate that "justice shall be impartially administered without unnecessary delay." (Section 1, Rule 124.)

The inherent power of the court "to amend and control its process and orders so as to make them conformable to law and justice," (Sec. 5, Rule 124), carries the concomitant duty to correct its orders on its own initiative or upon motion of the parties. This duty is not affected by the nature of the error sought to be corrected. In the case at bar, the petitioners timely called the attention of the respondent Judge to the misstatement contained in his order of May 26, 1948, and, more timely still, filed the motion for an extension of fifteen days to perfect an appeal. The respondent Judge, in his order of September 25, 1948, admitted that, for unknown reasons, he was not able to dispose of the two motions sooner, but ruled in the same breadth that the judgment of July 7, 1944, had become final and executory because the error was merely clerical and the period to appeal had expired even if the petitioners were granted 15-day extension. The unfairness and injustice of this ruling are obvious from the fact that, while the respondent Judge in effect admitted the necessity of swift action on petitioners' motions, the petitioners are made to suffer the consequences of his inaction.

The petitioners might have resorted to too technical a move, but this circumstance did not dispense with the duty of the respondent Judge to straighten out the record of the case for all purposes. The petitioners are expected to file a record on appeal containing pertinent pleadings, motions and orders which are correct; and it cannot rightly be contended that they are ready to do so before the order of the respondent Judge of May 26, 1948, is changed in the sense indicated in petitioners' motion for correction.

Wherefore, the respondent Judge is hereby directed to correct the misstatement appearing in his order of May 26, 1948, as pointed out in this opinion. The petitioners have seven days from notice of the order affecting the necessary corrections within which to perfect, if it is so desired, an appeal from the judgment in civil case No. 43 dated July 7, 1944. So ordered with costs against the respondents other than the respondent Judge.

Moran, Feria, Pablo, Bengzon, Padilla; Tuason; Reyes; Jugo; and *Bautista Angelo.* — *J.J.* concur.

MONTEMAYOR, *J.*, dissenting:

With all due respect to the learned opinion of the majority, I am constrained to dissent. I cannot give my assent to further prolonging this old case to the prejudice of the defendants in Civil Case No. 43 of the Court of First Instance of Batangas, who obtained a judgment in their favor as far back as July, 1944, all because of a clerical and immaterial error that had crept into, not the judgment or decision, but only the order denying the motion for reconsideration. Of course, none of the parties could be blamed for the loss of the records of the case thereafter, but I am impressed by the claim of counsel for the respondents, based on the record, that as early as August, 1945, the Clerk of Court of Batangas had sent out notices of the loss of the records, and that reconstitution was set for hearing on November 19, 1946, but that due to the numerous petitions for postponement and extension of time, filed by plaintiffs-petitioners' counsel, the hearing dragged on and no action could be taken on the motion for reconsideration until May 26, 1948, when the order of denial was rendered.

The record shows that the hearing for reconstitution set on November 19, 1946, was not held due to a motion for continuance filed by plaintiffs-petitioners. On January 21, 1947, the reconstitution was again set for hearing on February 11, 1947, but upon motion for continuance by plaintiffs-petitioners' counsel, the same was re-set on February 26, 1947. Then followed various motions by plaintiffs-petitioners for extension of time which defendants-respondents termed "dilatory tactics", which resulted in a court notice of hearing dated April 13, 1948, once more setting the hearing on May 11th of the same year. But on the latter date still another petition for postponement on behalf of the plaintiffs was filed. The last reconstitution hearing was finally held on May 26, 1948.

I agree with the trial court that the decision in this case rendered on July 7, 1944 has become final. The motion for extension of the period within which to perfect an appeal did not suspend the running of the 30-day period (Alejandro v. Endencia, 64 Phil. 325); neither did the petition for correction suspend the period for perfecting an appeal. It may be that in some cases where the error or mistake sought to be corrected is serious and prejudicial, and may mislead the parties and the courts, especially the appellate tribunal to which the case is sought to be elevated on appeal, a petition for correction may suspend the period; but in the present case, the error consisting in mere transposition of the parties, mistakenly attributing to the defendants the motion for reconsideration, and imputing to the plaintiffs the opposition thereto, when it should be the other way, is a mere oversight, a clerical error, unsubstantial, immaterial and harmless, which can neither prejudice nor mislead anyone. There was only one motion for reconsideration of the decision in the whole record, and that was filed by the plaintiffs; and there was only one opposition thereto, and that was filed by the defendants. What is more, the order mentions the date of each pleading. So there was no possibility of misleading anybody. The error was trivial and was known to the plaintiffs. So, what prejudice or harm could have such an error produced on them?

I am not in favor of courts' giving too much importance to errors of this kind, — clerical and unsubstantial, and allowing them to unduly prolong or even paralyze court proceedings, especially when, as in the present case, there is reason to believe that the motion for correction was part of a design to delay such proceedings. The defendants who obtained a favorable judgment as far back as 1944, and who have repeatedly complained to the trial court against the numerous petitions for postponement filed by the plaintiffs, in my opinion, have reason to term them as they did, "dilatory tactics", and the trial court would appear to have realized it and sympathized with said defendants; and it seems that its order of September 25, 1948, declaring the period of appeal to have long expired because the petition for correction of the error did not suspend the running of the period for appeal, was partly influenced by such realization. Said the trial court on this point:

> "Indeed, defendants have time and again objected to the dilatory tactics adopted by the plaintiffs."

The majority opinion seems to attribute the fault in not acting upon the motion for correction promptly, to the respondent Judge and inferentially, and in part bases the judgment on that supposed fault or negligence. In justice to the respondent Judge it should be stated that the fault or negligence, if any, may not be laid at his door. According to his answer dated November 24, 1948, when the motion for correction was filed by the plaintiffs on June 21, 1948, in the Court of First Instance of Batangas, Judge Enriquez was not in the province of Batangas because he was then holding court sessions in the provinces of Mindoro and Marinduque during the months of June and July of that year. The following month of August, respondent Judge was assigned to hold sessions in Batangas, Batangas. It seems that there are two court branches in the province of Batangas, one holding sessions in the City of Lipa and the other in the town of Batangas. The petition for correction was filed and kept in the Lipa branch. Naturally, respondent Judge knew nothing about it. It was only when counsel for the plaintiffs made an inquiry from the Clerk of Court in Lipa in September, 1948, that is, about three months after he filed his motion for correction, that said court official

sent the petition for correction to the respondent Judge in Batangas, on September 24, 1948, and the respondent Judge acting on it immediately, issued his order the following day, September 25, 1948. Why the plaintiffs or their counsel did not follow up their petition for correction or even their petition for extension of time, so as to insure prompt action, is not explained.

In conclusion, I hold that a petition for correction of a clerical, harmless, immaterial and non-prejudicial error in a decision or order, which error can neither prejudice nor mislead anybody, cannot and should not be allowed to suspend the period for perfecting the appeal.

III

Sebastian C. Palanca, Petitioner vs. Potenciano Pecson, etc. et al., Respondents, G. R. Nos. L-6334 and 6338, February 25, 1954.

1. SPECIAL PROCEEDINGS; ATTORNEY'S LIEN; CASE AT BAR. — In Special Proceedings No. 12126 of the Court of First Instance of Manila, D was the attorney of P, one of the heirs and an oppositor to the probate of the will of his deceased father. P did away with the services of D who withdrew as P's counsel after the appeal from the decision of the court probating the will had been elevated to the Supreme Court. On July 7, 1952, D filed in the testate proceedings a notice of attorney's lien, alleging that he was counsel for P from Sept. 1950 until March 1952 and stating the reasonable value of his services as well as the unpaid balance; and praying that the statement be entered upon the records to be henceforth a lien on the property or money that may be advanced to P, or that may be ordered paid to him by the court. On July 9, 1952, D filed in the same testate proceedings a petition, praying the court to fix and declare his attorney's fees and to enforce the unpaid balance as a lien upon the property or money that may be advanced in favor of P or upon any sum that may be ordered paid to the latter. *HELD*: Under Sec. 33, Rule 127 of the Rules of Court the attorney may cause a statement of his lien to be registered even before the rendition of any judgment, the purpose being merely to establish his right to the lien.
2. IDEM; IDEM; RECORDING OF ATTORNEY'S LIEN DISTINGUISHED FROM ENFORCEMENT OF ATTORNEY'S LIEN. — The recording is distinct from the enforcement of the lien, which may take place only after judgment is secured in favor of the client.
3. IDEM; IDEM; SECTION 3 RULE 127 CONSTRUED IN THE LIGHT OF SECTION 24 OF RULE 127 AS AMENDED BY REPUBLIC ACT 636. — The provision permits the registration of an attorney's lien, although the lawyer concerned does not finish the case successfully in favor of his client, because an attorney who quits or is dismissed before the conclusion of his assigned task is as much entitled to the protection of the rule. Otherwise, a client may easily frustrate its purpose. Indeed, this construction is impliedly warranted by section 24 of Rule 127, which is amended by Rep. Act No. 636. In the case of Dahlke vs. Viña, 51 Phil. 707, it was already pointed out that the filing of a lien for reasonable value of legal services does not by itself legally ascertain and determine its amount especially when contested; that it devolves upon the attorney to both allege and prove that the amount claimed is unpaid and that it is reasonable and just; the client having the legal right to be heard thereupon; and that the application to fix the attorney's fees is usually made before the court which renders the judgment or may be enforced in an independent and separate action.
4. IDEM; IDEM; PROBATE COURT MAY DETERMINE ATTORNEY'S LIEN FOR SERVICES RENDERED TO OPPOSITOR WHO CONTESTED THE ALLOWANCE OF THE WILL. There is no valid reason why a probate court cannot pass upon a proper petition to determine attorney's fees, if the rule against multiplicity of suits is to be activated and if we are to concede that, as in the case before us, said court is to a certain degree already familiar with the nature and extent of the lawyer's services.

Ceferino de los Santos, Sr. and *Ceferino de los Santos, Jr.* for petitioner.

Respondent Dinglasan in his own behalf.

DECISION

PARAS, *C. J.*:

In Special Proceedings No. 12126 of the Court of First Instance of Manila, Rafael Dinglasan was the attorney of Sebastian Palanca, one of the heirs and an oppositor to the probate of the will of his deceased father Carlos Palanca y Tanguinlay. Due to the differences of opinion, Sebastian Palanca did away with the services of Atty. Dinglasan who in fact withdrew as Palanca's counsel after the appeal from the decision of the Court of First Instance of Manila probating the will had been elevated to the Supreme Court. On July 7, 1952, Atty. Dinglasan filed in the testate proceedings a notice of attorney's lien, alleging that he was counsel for Sebastian Palanca from September 1950 until March 1952; that the reasonable value of his services is at least P20,000.00; that Palanca had paid upon account only the sum of P3,083 leaving an upaid balance of P16,917.00; and praying that the statement be entered upon the records to be henceforth a lien on the property or money that may be adjudged to Sebastian Palanca, or that may be ordered paid to him by the court. On August 16, 1952, Judge Potenciano Pecson ordered that the notice of attorney's lien be attached to the record for all legal intents and purposes. On July 9, 1952, Atty. Dinglasan filed in the same testate proceedings a petition, praying the Court of First Instance of Manila to fix and declare his attorney's fee at not less than P20,000.00 and to enforce the unpaid balance of P16,917.00 as a lien upon the property or money that may be adjudged in favor of Sebastian Palanca or upon any sum that may be ordered paid to the latter. Sebastian Palanca moved to dismiss the foregoing petition, but the motion was denied on August 30, 1952. Palanca's subsequent motion for reconsideration was also denied for lack of merit. The action of Judge Pecson in ordering that Atty. Dinglasan's notice of attorney's lien be attached to the record and in taking cognizance of the petition to determine his fees in Special Proceedings No. 12126, is assailed by Sebastian Palanca in a petition for certiorari filed with this Court against Judge Potenciano Pecson and Rafael Dinglasan (G. R. No. L-6334).

On July 10, 1952, Sebastian Palanca filed in the testate proceedings a petition for an advance inheritance in the sum of P2,000.00. On October 21, 1952, Judge Pecson issued an order suspending action on Palanca's petition until Atty. Dinglasan's petition to determine the amount of his attorney's lien shall have been finally disposed of. His motion for reconsideration having been denied on November 7, 1952, Sebastian Palanca instituted in this Court a petition for mandamus against Judge Pecson and Atty. Dinglasan (G. R. No. L-6346), to compel the respondent Judge to act upon Palanca's petition for advance inheritance.

We are not here concerned with the nature and extent of the contract between Palanca and Atty. Dinglasan as to the latter's professional fees, and the principal issues arising from the pleadings are (1) whether the notice of attorney's lien may be allowed at the stage when it was filed, namely, before final judgment in favor of Palanca was secured by respondent attorney, and (2) whether the respondent Judge acted properly in entertaining the petition to determine Atty. Dinglasan's fees and in holding in abeyance Palanca's petition for advance inheritance.

It is contended for petitioner Palanca that Atty. Dinglasan not having yet secured any decision or judgment in favor of the former, the notice of attorney's lien could not be allowed under section 33, Rule 127, of the Rules of Court which does not authorize a lien upon a cause of action.

Section 33 provides that an attorney "shall also have a lien to the same extent upon all judgments for the payment of money, and executions issued in pursuance of such judgments, which he has secured in a litigation of his client, from after the time when he shall have caused a statement of his claim of such lien to be

entered upon the records of the court rendering such judgment, or is suing such execution, and shall have caused written notice thereof to be delivered to his client and to the adverse party; and he shall have the same right and power over such judgments and executions as his client would have to enforce his lien and secure the payment of his just fees and disbursements." Under this provision we are of the opinion that the attorney may cause a statement of his lien to be registered even before the rendition of any judgment, the purpose being merely to establish his right to the lien. The recording is distinct from the enforcement of the lien, which may take place only after judgment is secured in favor of the client. We believe also that the provision permits the registration of an attorney's lien, although the lawyer concerned does not finish the case successfully in favor of his client, because an attorney who quits or is dismissed before the conclusion of his assigned task is as much entitled to the protection of the rule. Otherwise, a client may easily frustrate its purpose. Indeed, this construction is impliedly warranted by section 24 of Rule 127, which as amended by Republic Act No. 636 provides as follows: "A client may at anytime dismiss his attorney or substitute another in his place, but if the contract between client and attorney has been reduced to writing and the dismissal of the attorney was without justifiable cause, he shall be entitled to recover from the client the full compensation stipulated in the contract. For the payment of such compensation the attorney shall have a lien upon all judgments, for the payment of money and executions issued in pursuance of such judgments rendered in the cases wherein his services had been retained by the client." The petitioner, however, argues that this provision cannot be availed of by respondent Dinglasan because there is neither a written contract for attorney's fee nor a showing that his dismissal was unjustified. This argument is without merit, inasmuch as if there was a written contract and the dismissal was unjustified, Atty. Dinglasan would be entitled to the entirety of the stipulated compensation, even if the case was not yet finished when he was dismissed. In situation like that of respondent Dinglasan the lawyer may claim compensation only up to the date of his dismissal. For the payment of such compensation he shall nevertheless have a lien "upon all judgments, for the payment of money and executions issued in pursuance of such *judgments rendered in the cases wherein his services have been retained by the client.*" Section 24 does not state that the judgment must be secured by the attorney claiming the lien.

The petitioner's further contention that respondent Dinglasan's remedy is to file a separate action for damages or for compensation, is untenable. In the case of Dahlke vs. Viña, 51 Phil. 707, it was already pointed out that the filing of a lien for reasonable value of legal services does not by itself legally ascertain and determine its amount especially when contested; that it devolves upon the attorney to both allege and prove that the amount claimed is unpaid and that it is reasonable and just; the client having the legal right to be heard thereupon; and that the application to fix the attorney's fees is usually made before the court which renders the judgment or may be enforced in an independent and separate action. We see no valid reason why a probate court cannot pass upon a proper petition to determine attorney's fees, if the rule against multiplicity of suits is to be activated and if we are to concede that, as in the case before us, said court is to a certain degree already familiar with the nature and extent of the lawyer's services.

In view of what has been said, it is obvious that the respondent Judge neither acted without jurisdiction nor abused his discretion in the matter herein complained of. The petition for certiorari in G. R. No. L-6334 and the petition for mandamus in G. R. No. L-6346 are hereby dismissed with costs against the petitioner. So ordered.

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

IV

Aurora Paner, Petitioner, vs. Nicasio Yatco et al., Respondents, G. R. No. L-2042, August 31, 1950.

MANDAMUS: APRROVAL OF RECORD ON APPEAL; WRIT DOES NOT ISSUE WHEN APPEAL IS NOT MERITORIOUS. — An order denying petition for relief to set aside a judgment may be appealable for which writ of mandamus may be granted to compel the trial court to approve the record on appeal, but when it is very evident as shown by the facts of the case that the granting of the writ would not profit the petitioner to obtain said remedy, for like a mirage it would merely raise false hopes and in the end avail the petitioner nothing, said petition for mandamus must be dismissed.

Marcelino Lontok for petitioner.
Claro T. Almeda for respondent *Batibot.*

DECISION

MONTEMAYOR, *J:*

This is a petition for mandamus to compel the respondent Judge to approve the record on appeal filed in Civil Case No. 7685 of the Court of First Instance of Laguna. The facts necessary for an understanding and determination of this case are as follows:

On April 11, 1921, Emiteria Miranda, widow of Maximo Paner allegedly executed a deed of sale of 1/2 of lot No. 751 of the Calamba Estate Subdivision covered by Transfer Certificate of Title No. 91 in the name of Maximo Paner in favor of Severo Batibot for the sum of ₱200.00. In September, 1947, the heirs of Severo Batibot filed in the Court of First Instance of Laguna Civil Case No. 86 which after reconstitution, was given number 7685 of the same Court, against Emiteria Miranda and her granddaughter Aurora Paner alleging that in March, 1943, the defendants, particularly Emiteria Miranda, deprived the plaintiffs of the possession and ownership of the lot in question causing damage in the sum of ₱50, and asking that plaintiffs be declared the owners of 1/2 of lot No. 751, and that they be paid the damage caused. Atty. Juan A. Baes, acting as counsel for the two defendants, filed an amended answer on September 3, 1947, alleging that the deed of sale above-mentioned was a forgery, and that defendant Emiteria Miranda had no knowledge of the execution thereof and that the mark therein affixed was not hers; that the original owner of the land in question was Maximo Paner, the deceased husband of Emiteria; that after his death he was succeeded by his son Maximino Paner, father of defendant Aurora Paner; and that in February, 1945, Maximino Paner was massacred by the Japanese and he was succeeded by only child Aurora Paner. The answer prayed for the dismissal of the complaint and for payment by the plaintiffs of the sum of ₱300.00 as damages.

On the same date that the answer was filed, Atty. Baes filed a motion in court alleging that defendant Aurora was only three years old, and at the same time asking the court to appoint her co-defendant grandmother Emiteria as her *guardian ad litem.* The case was heard on September 3 and 9, during which evidence was adduced by both parties — plaintiffs and defendants. On September 10th Emiteria took her oath as *guardian ad litem* of Aurora. On September 12th the trial court rendered its decision wherein it found that the deed of sale was genuine and had been duly executed by Emiteria Miranda. The court equally found that the land covered by the deed belonged to Maximo Paner who had bought it from the Bureau of Lands since July 1 1910, before he married Emiteria Miranda, and that consequently, she had no right to sell the same as her property. The trial court declared the deed of sale null and void, but considering the good faith of the buyer Severo Batibot, the court sentenced the defendants to reimburse the purchase price of ₱200.00 to the plaintiffs with interest at 6% per annum from the date of the deed, and further sentenced the defendants to compensate the plaintiffs for the value of the improvements introduced by them or their predecessor in interest.

On behalf of the defendants, Atty. Baes filed a motion for reconsideration and new trial, dated October 17, 1947, but his mo-

tion was denied for lack of merit. He did not appeal.

About two months later or rather on December 24, 1947, Atty. Marcelino Lontok, representing defendant Aurora Paner, filed a petition in the trial court asking that its decision of September 12, 1947, be set aside, as against his client Aurora Paner, or at least to permit her to file her appeal from said decision. The plaintiffs opposed said petition and the trial court by order of January 8, 1948, denied the same on the ground that it was "not well-founded, and that the decision in this case has become final."

On January 21, 1948, Atty. Lontok filed his notice of appeal from the order denying his petition for reconsideration and prepared and submitted his record on appeal and the corresponding appeal bond. The trial court by order of Feb. 9, 1948, refused to approve the record on appeal on the ground that it was filed beyond the reglementary period.

As already stated, to compel the respondent Judge to approve said record on appeal, the present petition for mandamus was filed in this Court.

In refusing to approve the record on appeal, the respondent Judge seems to have labored under the impression that the appellant and herein petitioner was appealing from the court's decision of September 12, 1947, this, judging from the ground or reason given for the refusal, namely, that the record on appeal was filed beyond the reglementary period. But in reality the appeal was being taken from the order of January 8, 1948, denying the petition to set aside the decision of September 12, 1947, a petition presumably based on Section 2, Rule 38 of the Rules of Court. That order of denial was, of course, appealable and if the record on appeal was otherwise proper and complete, the respondent Judge was bound to approve it and he may be compelled to do so by a writ of mandamus. So, strictly and legally speaking, the present petition for mandamus may be granted. However, before acting upon the petition, we may inquire into the facts involved in order to determine whether once the writ of mandamus is granted and the case is brought up here on appeal, the appellant has any chance, even possibility of having the basic decision of the trial court of September 12, 1947, set aside or modified; for if the appellant has not that prospect or likelihood, then the granting of this writ of mandamus and the consequent appeal would be futile and would mean only a waste of time to the parties and to this Court. This inquiry can easily be made from a copy of the record on appeal now before us as well as the pleadings filed by both parties.

The whole theory of counsel for the petitioner in insisting in setting aside the judgment of September 12, 1947, against his client, the minor Aurora Paner, is that the court acquired no jurisdiction over her person at least during the trial. He contends that inasmuch as the child's grandmother and *guardian ad litem* did not take her oath as such guardian until September 10, 1947, that is, after the hearing of the case which was held on September 3 and 9, during said hearings, the minor was not duly represented and the court acquired no jurisdiction over her. Furthermore, said counsel contends that her *guardian ad litem* had interests in the case adverse to that of her ward which accounts for said guardian failing or refusing to appeal from the decision.

The contention of counsel as regards jurisdiction is based on a mere technicality. The record fails to show the day when the court appointed the grandmother Emiteria Miranda as *guardian ad litem* of her granddaughter, but in the absence of evidence on this point, it is reasonable to presume that the appointment must have been made on the very day that the court was asked to do so, namely, on September 3, 1947, the first day of the hearing. It is reasonable to presume that the respondent realized the importance and necessity of having a minor party to a case duly represented in court during its judicial proceedings, and that he must have made the appointment perhaps verbally before commencing the hearing.

During the hearings held on September 3 and 9, 1947, the attorney for the defendants Emiteria and her ward Aurora presented evidence calculated to prove that the lot claimed by the plaintiffs was never sold to them, evidence which can in no manner be regarded as contrary to the interests of Aurora Paner. On the contrary, it was designed to keep whole and preserve Aurora's title to the property in litigation.

Counsel for petitioner claims that Emiteria did not take her oath as *guardian ad litem* until September 10, 1947, that is, one day after the last day of the hearing. In the absence of any denial by respondents of this claim, we shall assume it to be true. But even then, as long as during the court proceedings, Emiteria had acted as such guardian to represent her ward and protect her interests, her belated taking of oath did not in any way adversely affect or prejudice the intrests of the minor. After all, the oath-taking was a mere formality.

It should be remembered that when the decision was rendered on September 12, 1947, the grandmother Emiteria Miranda, had already taken her oath as *guardian ad litem* and she was fully authorized to appeal from the decision. In fact, through counsel said guardian and her ward filed a motion for reconsideration and new trial but when that motion was denied they did not appeal. The reason for said failure to appeal is found in a letter written at the time by the defendants' counsel to the lawyer of the plaintiffs which quoted in part reads as follows:

> "I did not appeal the case because I believe that in doing so, the parties will incur more expenses than the actual price of the land in litigation."

And, we are inclined to agree with the said counsel that considering the amount involved in the decision, it was really wiser to abide by said decision instead of taking an appeal, and paying the necessary court and attorney's fees, with no definite guaranty or assurance of winning the case in the end.

As to the alleged conflict in interests between the guardian and her ward, we fail to see said divergence. We should bear in mind that the guardian was no stranger to but a grandmother of the ward. In her answer to the complaint in the trial court, said guardian far from claiming the lot in question as her own, said that it belonged to her ward as an inheritance from her grandfather, deceased husband of the guardian. In fact, in order to protect and conserve the property so that it may go to her granddaughter and ward, whole and unburdened, the grandmother and guardian went to the extent of disclaiming and denying any previous alienation or conveyance of said property to the plaintiffs. All this fails to show any conflict of interests between guardian and ward.

Now, coming to the petition filed in the trial court on December 24, 1947, to set aside the decision of September 12, 1947, although it was presumably filed under the provisions of Rule 38 of the Rules of Court, said petition made no mention whatsoever of said Rule and what is more important, it failed to allege any of the grounds on which a petition for relief is usually based, namely, fraud, accident, mistake, or excusable negligence. As a matter of fact, after examining the record we are unable to find that any of these grounds existed or could be successfully invoke by the minor, and may be that was the reason why they were not alleged in the petition. And, if the case were taken to this Court on appeal and we were to examine the facts of the case from the record on appeal as we have done now, we do not see how the decision of the trial court of September 12, 1947, even assuming it to be erroneous as not altogether in conformity with the law and evidence, can be set aside. From all this it is not difficult to imagine and believe that the trial court was not without reason in refusing to set aside its decision of September 12, 1947, and that it would not profit the petitioner to obtain the remedy of mandamus now sought, for like a mirage it would merely raise false hopes and in the end avail her nothing.

In view of the foregoing the petition for mandamus is hereby dismissed without pronouncement as to costs.

Moran, Ozaeta, Paras, Pablo, Bengzon; Tuazon and Reyes. JJ. concur.

V

Domingo T. Dikit, Petitioner, vs. Ramon A. Ycasiano, et al., Respondents, G. R. No. L-3637, May 23, 1951.

PLEADING & PRACTICE: UNLAWFUL DETAINER; PRELIMINARY PREVENTIVE INJUNCTION CANNOT ISSUE IN UNLAWFUL DETAINER. — In an action for unlawful detainer, the judge of the municipal court issued a writ of preliminary injunction ordering the occupant of the premises in question, his attorneys, representatives, agents and employees to refrain from entering or making use of the same. HELD: If the action in which the preliminary injunction was issued were of forcible entry, the judge did not act in excess of his jurisdiction in issuing said preliminary injunction, under section 3 of Rule 72 but as the action was of unlawful detainer, the judge acted in excess of his jurisdiction and, therefore, the writ of preliminary injunction issued must be set aside as null and void.

Jose Cando for appellant.

Assistant Solicitor General Inocencio Rosal and *Solicitor Jesus A. Avanceña* for appellee.

DECISION

FERIA, *J.*:

This is a special civil action of certiorari against the respondents based on the ground that the respondent Judge of the Municipal Court of Manila acted in excess of the court's jurisdiction in issuing a writ of preliminary injunction, upon a petition *ex-parte* of the respondent Consolidated Investment Bldg., Inc., as plaintiff, against the petitioner as defendant in the civil action or case No. 9708 of the said Municipal Court to eject the latter from the premises leased to him by the former. In said writ the respondent Judge ordered that said defendant, his attorneys, representatives, agents and employees refrain from entering or making use of the lobby and mezzanine of the Consolidated Investment Building at Plaza Goiti, Manila.

There is no question or dispute between the parties and they both agree that if the action instituted by respondent Consolidated Investment Bldg. Inc. against the petitioner Domingo T. Dikit in said civil case No. 9708 were of forcible entry, the respondent Judge did not act in excess of the court's jurisdiction in issuing said preliminary injunction under Section 3, Rule 72 of the Rules of Court; but if it were of unlawful detainer, the respondent Judge acted in excess of the court's jurisdiction and, therefore, the writ of preliminary injunction issued must be set aside as null and void (Piit vs. De Lara and Velez, 58 Phil. 765, 767; Sevilla vs. Judge De los Santos, G.R. No. L-1980, promulgated on May 25, 1950).

Section 1, Rule 72 of the Rules of Court, which defines and distinguishes forcible entry from unlawful detainer, provides:

> SECTION 1. *Who may institute proceedings, and when.* —Subject to the provisions of the next succeeding section, a person deprived of the possession of any land or building by force, intimidation, threat, strategy, or stealth, or a landlord, vendor, vendee, or other person against whom the possession of any land or building is unlawfully withheld after the expiration or termination of the right to hold possession, by virtue of any contract, express or implied, or the legal representatives or assigns of any such landlord, vendor, vendee, or other person, may, at any time within one year after such unlawful deprivation or withholding of possession bring an action in the proper inferior court against the person or persons unlawfully withholding or depriving of possession, or any person or persons claiming under them, for the restitution of such possession, together with damages and costs.

Applying the above quoted provisions to the present case, we are of the opinion, and so hold, that the facts alleged in the complaint filed in said case No. 9780, constitute an action of unlawful detainer and not of forcible entry, and therefore the respondent Judge acted in excess of the Municipal Court of Manila's jurisdiction in issuing the writ of preliminary injunction complained of. The pertinent parts of the complaint reads as follows:

> That with the aforementioned representations and assurances given to herein plaintiff as a basis, defendant had applied for the lease of the lobby and mezzanine of the Consolidated Investments Building located at the Plaza Goiti, City of Manila, and within the jurisdiction of this Honorable Court, under the basic conditions of constructing the partitions that will separate the lobby from the side entrances of the building, to pay an advance rental of ₱30,000.00 applicable to the last six (6) months under a proposed 5-year lease-contract, and to pay in advance the current monthly rental of ₱5,000.00 from the time that the construction of the separating walls or partitions is completed.
>
> x x x x x x x
>
> That by reason and on the strength of said undertakings of the defendant, the defendant succeeded in getting the possession of the lobby and mezzanine of the Consolidated Investment Building, proceed with the construction of the separating walls or partitions mentioned above and carried out the remodelling work that said defendant would require to put the premises in question in condition to be used by "The Bank of Manila" which, the said defendant had assured the plaintiff, will start operating early in July, 1949.
>
> That the monthly rental of ₱5,000.00 would accrue and become payable in advance within the first five (5) days of each month upon completion of the construction of the separating walls or partitions mentioned above.
>
> x x x x x x x
>
> That having failed to obtain the proper license to operate his proposed "The Bank of Manila", the defendant on September 1, 1949, had relinquished and turned over to the plaintiff the lobby and mezzanine of the Consolidated Investments Building, and said defendant had accepted the position of Vice-President of the proposed "The Bank of Manila" under a new group of capitalists.
>
> That subsequently thereafter defendant regained possession of the lobby and mezzanine of the Consolidated Investments Building by representing to the plaintiff that he (the defendant) was able to obtain the cooperation of certain Filipino residents of Hawaii who were ready to capitalize his proposed "The Bank of Manila" and that said capitalists were willing to pay to herein plaintiff an advance rental of ₱100,000.-00 applicable to the last months under a 5-year lease-contract, at the rate of ₱5,000.00 per month. x x x
>
> x x x x x x x
>
> That defendant, notwithstanding the several extensions of time requested by him, not only has failed to pay the advance rental promised by him, but also has failed and refused to pay unto the plaintiff the current rentals corresponding to the months of October and November, 1949, at the rate of ₱5,000.00 monthly, notwithstanding the repeated and persistent demands made on him by the plaintiff for at least five days prior to the filing of the complaint.
>
> That plaintiff likewise had demanded of the defendant that the latter vacate the lobby and mezzanine of the Consolidated Investments Building, which demand was made for more than five days prior to the filing of this complaint, but said defendant has failed and refused to comply with said friendly demand up to the present time.

The plaintiff's action was not of forcible entry, but of unlawful detainer, because according to said Section 1 of Rule 72, forcible entry is the act of depriving a person of the material or actual possession of land or building or of taking possession thereof by force, intimidation, threat, strategy or stealth, against the will or without the consent of the possessor; while unlawful detainer is the act of unlawfully withholding the possession of a land or building against or from a landlord, vendor, vendee or other persons, after the expiration or termination of the detainer's right to hold possession by virtue of a contract, express or implied. In forcible entry, the possession of the intruder or person who deprives another of the possession of the land or building is illegal from the beginning, because his entry into or taking possession thereof is made against the will or without the consent of the

former possessor. In unlawful detainer the possession of the detainer is originally legal or lawful but it becomes illegal only after the expiration or termination of his right to hold possession of the land or building by virtue of a contract, as the possession of a tenant after termination of the contract of lease for non-payment of the rents due or violation of the terms of said contract. In the present case, according to the above quoted complaint, the petitioner took possession of the part of the building leased, not against the will or without the consent, but with the express consent of the owner or possessor thereof by the virtue of the contract of lease entered between them, and therefore his possession of the premises leased was legal or lawful from the beginning, and it became illegal only after the termination of his right to continue in possession of said premises for having failed to pay the rents or other conditions of the contract of lease. The fact that the petitioner obtained the consent of the lessor to enter into said contract and take possession of the premises leased through false misrepresentation as alleged in the complaint, did not make petitioner's possession illegal from the beginning and the action instituted against him one of forcible entry. The stealth, strategy or fraud employed to deprive a person of his possession of a land or building under Section 1 of Rule 72, are the means used by the intruder to take possession of said land or building, without the consent or knowledge of the person in possession thereof. Such as, for instance, entering into the possession of a house taking advantage of the absence therefrom of its possessor or inhabitant, or after the latter has gone out of it because he was deceived or told by the intruder to go to another place at the request of one of his friend or relative. c

Besides, in an action of forcible entry, no previous demand to vacate is required by law before the filing of the action, while Section 2 of Rule 72 it requires that in an action of unlawful detainer by a landlord against his tenant, such demand is required, and compliance with this demand or condition is alleged in the last quoted paragraph of the complaint.

In view of the foregoing, the writ of preliminary injunction was issued by the respondent Judge in excess of the court's jurisdiction, and therefore it is set aside with costs against the respondent Consolidated Investments Bldg. Inc.

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

VI

Ernest Berg, Plaintiff and Appeliant vs. Valentin Teus, Defendant and Appellee, G. R. No. L-2987, February 20, 1951.

1. *OBLIGATION AND CONTRACTS; MORATORIUM; RECEIVERSHIP.* — Plaintiff presented a petition to put the premises and chattel in litigation in the hands of a receiver, petition which appears of urgent character. Defendant opposed the motion for receivership and moved for dismissal of the complaint on the grounds that plaintiff's cause of action had not accrued by reason of Executive Orders Nos. 25 and 32, on moratorium. The lower court opines that Executive Order Nos. 25 and 32 were still in force unaffected by Republic Act No. 342 as to debts contracted during the Japanese occuupation. Plaintiff contends that those executive orders had passed out of existence by the disappearance of the emergency contemplated thereby. HELD: Decision on this question can be deferred. For the purpose of this case, Executive Orders Nos. 25 and 32 are assumed to be still in full force and effect. This is done to pave the way for and hasten action on the petition to put the premises and chattels involved in the hands of a receiver. The constitutionality of Executive Orders Nos. 25 and 32 and Republic Act No. 342 and allied issues can wait. These issues are delicate and would require prolonged study and deliberation. Besides, there is a pending bill in Congress repealing those executive orders and law. The fact that the appointment of a receiver is an ancillary remedy is one powerful reason why the case should be dismissed. Case is remanded to the court below for further proceeding. The way is left open to the defendant to ask for the arrest or stay of execution in the event of an adverse monetary judgment, and for the plaintiff to impugn anew, if necessary, the constitutionality of Executive Orders Nos. 25 and 32 and Republic Act No. 342 and/or their being still in force.

2. *ID.; ID.: ID.* — In Medina v. Santos (L-1280, May 26, 1947, 44 Off. Gaz., No. 10, 3811), it was held that an action for the recovery of a truck with prayer for payment of its value in case the truck was not returned, could proceed notwithstanding the moratorium law. The court observed that the indemnity sought was a subsidiary liability and would not come into being unless and until decision rendered against the defendants for such payment. In Moya vs. Barton (L-745, Aug. 27, 1947, 45 Off. Gaz., No. 1,227-), the court said that when the cause of action was in part covered by the moratorium and in part not, it was not unjust to render judgment for the payment of the entire obligation with the understanding that execution with respect to the amounts that had fallen due before March 10, 1945, would be stayed. In the case of Alejo v. Gomez (L-1969, May 30, 1949), the court ruled that suit for unlawful detainer and rents in arrears was not affected by the moratorium, the recovery of the unpaid rentals, it was said, being accessory to the main action. And, lastly, in Realty Investments, Inc. et al vs. Villanueva et al (L-1949, Oct. 31, 1949), the court, citing the above-mentioned cases, decided that the court should go ahead with the trial of the action on the merits without prejudice to the right of the defendant to arrest the execution should one for payment of money be issued. In that case the plaintiff, which had sold to the defendant a piece of land on installment basis, was demanding payment of the installments still unpaid (installments which the defendant claimed to have fully settled with the Japanese alien property custodian), or, in default, restoration of the ownership and possession of the property. In revoking the lower court's order of dismissal, it is pointed out that De Venecia vs. General (L-894, 44 Off. Gaz., 4912) and Ma-ao Sugar Central Co. V. Barrios et al (L-1539, 45 Off. Gaz., 2444) were distinguishable from Moya vs. Barton, Medina vs. Santos, and Alejo v. Gomez in that the suits in the first two named cases had for their *sole* object the enforcement of a monetary obligation. The case at bar falls within the relaxed rule of the Supreme Court's late decisions.

Alva J. Hill for appellant.

J. Perez Cardenas for appellee.

DECISION

TUASON, *J.*:

This appeal is from an order of the Court of First Instance of Ilocos Sur dismissing the above-entitled action by reason of Executive Order No. 25, as amended by Executive Order 32, on moratorium.

Ernest Berg brought the action against Valentin Teus to foreclose a real estate and chattel mortgage executed in November, 1944, to secure six promissory notes of the aggregate value of ₱80,000 and payable on demand two years after declaration of armistice between the United States and Japan. An amended or supplementary complaint was later admitted against the defendant's objection. The complaints recited that by stipulation of the parties, the mortgager had undertaken, among other things, to insure and pay the taxes on the mortgaged properties; not to alienate, sell, lease, encumber or in any manner dispose thereof; and to keep and maintain the said properties in good order and repair; but that, it was alleged, he (defendant) had failed to keep taxes fully paid; had made material alterations on the premises, and had sold and conveyed them to Central Azucarera del Norte. It further alleged that the mortgagor had agreed that should he fail to perform any of his obligations as stipulated, "the mortgage shall be deemed to be automatically foreclosed this mortgage either extrajudicially, even after the death of the Mortgagor, in pursuance of the provisions of Act No. 3135, as amended;" and on the basis of this agreement it was prayed that the mortgage is declared auto-

matically foreclosed and the plaintiff entitled to immediate possession of the properties in question. In a separate motion Berg's attorney also asked for the appointment of a receiver.

Counsel for the defendant having moved for the dismissal of the complaint on the grounds that plaintiff's cause of action had not accrued by reason of the executive order hereinbefore cited, and having opposed the motion for receivership, Judge Zoilo Hilario entered an order holding that as to the collection of the six notes the suit had been prematurely brought, but setting the cause for trial on the merits because, according to His Honor, the reasons alleged in the motion to dismiss were not "indubitable" with reference to the appointment of a receiver sought by the plaintiff. As we understand this order, its result was that the moratorium ought not to interfere with the plaintiff's motion for appointment of receiver.

However that may be, the plaintiff subsequently filed a "complete complaint" in which the original complaint and the amended or supplementary complaint were consolidated. This "complete complaint", which was admitted without objection, apparently was supposed to have restored the case to its original status. Consequently the attorney for the defendant filed a new motion to dismiss; and Judge Luis Ortega, who had replaced Judge Hilario, ignoring the latter's order entered the order now on appeal by which the entire action was quashed on the theory advanced in the motion to dismiss. The new order was silent on both the application for receivership and the prayer that the plaintiff be adjudged authorized by the terms of the mortgage to foreclose it extrajudicially and seize the properties.

Judge Ortega opined that Executive Orders Nos. 25 and 32 were still in force unaffected by Republic Act No. 342 as to debts contracted during the Japanese occupation. Plaintiff contended that those executive orders had passed out of existence by the disappearance of the emergency contemplated thereby, and the contention is reiterated in this instance. But from the view we take of the case, decision on this question can be deferred. For the purpose of the present decision, we will assume that Executive Orders Nos. 25 and 32 are still in full force and effect. This we do to pave the way for and hasten action on the petition to put the premises and chattels involved in the hands of a receiver, petition which appears of urgent character. The constitutionality of Executive Orders Nos. 25 and 32 and Republic Act No. 342 and allied issues can wait. These issues are delicate and would require prolonged study and deliberation. Besides, there is a pending bill in Congress repealing those executive orders and law.

In Ricardo Medina v. Ambrosio Santos, G. R. No. L-1280, May 26, 1947, 44, No. 10 Off. Gaz., 3811, it was held that an action for the recovery of a truck with prayer for payment of its value in case the truck was not returned could proceed notwithstanding the moratorium law. The Court observed that the indemnity sought was a subsidiary liability and would not come into being unless and until decision was rendered against the defendants for such payment.

In Moya v. Barton, G. R. No. L-745, August 27, 1947, 45, No. 1, Off. Gaz., 237, the Court said that when the cause of action was in part covered by the moratorium and in part not, it was not unjust to render judgment for the payment of the entire obligation with the understanding that execution with respect to the amounts that had fallen due before March 10, 1945, would be stayed.

In the case of Alejo v. Gomez, G. R. No. L-1969, May 30, 1949, the Court ruled that suit for unlawful detainer and rents in arrears was not affected by the moratorium, the recovery of the unpaid rentals, it was said, being accessory to the main action.

And, lastly, in Realty Investments, Inc. et al. v. Mariano Villanueva et al., G. R. No. L-1949, October 31, 1949, the Court citing the above-mentioned cases decided that the court should go ahead with the trial of the action on the merits without prejudice to the right of the defendant to arrest the execution should one for payment of money be issued. In that case the plaintiff, which had sold to the defendant a piece of land on installments basis, was demanding payment of the installments still unpaid, (installment which the defendant claimed to have fully settled with the Japanese alien property custodian) or, in default, restoration of the ownership and possession of the property. In revoking the lower court's order of dismissal, we pointed out that De Venecia v. General, G. R. No. L-894, 44 Off. Gaz., 4912, and Mao Sugar Central Co. v. Conrado Barrios et al., G. R. No. L-01539, 45 Off. Gaz., 2444, were distinguishable from Moya v. Barton, Medina v. Santos, and Alejo v. Gomez, in that the suits in the first two named cases had for their *sole object* the enforcement of a monetary obligation.

The case at bar falls within the relaxed rule of this Court's later decisions. The alleged violation of the conditions of the mortgage contract, if true, make it necessary if not imperative, for the protection of the interest of the plaintiff, that the mortgaged properties be placed in the custody of the court. The fact that the appointment of a receiver, as the defendant emphasizes, is an ancillary remedy is precisely one powerful reason why the case should not be dismissed. Because receivership is an auxiliary remedy dismissal of the main action would eliminate the only basis for the appointment of receiver and thus completely bar the door to any relief from mischiefs.

Under the circumstances of the case, the least that should have been done, if that were feasible as a matter of procedure, was to adopt the steps which Judge Hilario had proposed to do. Judge Hilario evidently saw the grave injustice to the plaintiff and the irreparable injury to which his rights would be exposed if an indefinite suspension of the entire proceeding were decreed.

In suspending the right of creditor to enforce his right the President and Congress had no idea of depriving him of all means of preventing the destruction or alienation of the security for the debts, destruction which would virtually write off, in some cases, the whole credit. If that were the intention, it is doubtful if the orders and the law invoked could stand the test of constitutionality.

The order appealed from will therefore be reversed and the case remanded to the court below for further proceeding according to the tenor of this decision. We leave the way open to the defendant to ask for the arrest or stay of execution in the event of an adverse monetary judgment, and for the plaintiff to impugn anew, if necessary, the constitutionality of Executive Orders Nos. 25 and 32 and Republic Act No. 342 and/or their being still in force. Costs of this appeal will be charged against the appellee.

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

VII

Eulogio R. Lerum et al., Petitioners-appellants v. The People of the Philippines, Necessary Party, vs. Roman A. Cruz et al., Respondents-Appellees, G. R. No. 2783, *November* 29, 1950.

DECLARATORY RELIEF; IN A CRIMINAL CASE; PARTIES; INTEREST AND PERSONALITY OF PRIVATE PROSECUTOR. — In a petition for declaratory relief filed to test the sufficiency or probative value of certain testimony given in a criminal case, the interested party is the people of the Philippines. In such case, the city attorney should be the one to ask for the declaratory relief if it is desired to have said matter tested in court and if and when this step is feasible under the law. Inasmuch as all criminal actions can only be prosecuted under the direction and control of the fiscal and for that matter he is the only official who can represent the people of the Philippines, private prosecutors, who can only intervene subject to the control of the fiscal or city attorney, are not the proper parties to file the aforesaid petition for declaratory relief.

Antonio Barredo, Eulogio R. Lerum and G. Viola Fernando for appellants.

No appearance for appellees.

DECISION

BAUTISTA ANGELO, *J.*:

This is an appeal from an order of the Court of First Instance of Rizal (Quezon City) dismissing the petition for declaratory relief filed by attorneys Eulogio R. Lerum and G. Viola Fernando as private prosecutors in behalf of the People of the Philippines for the purpose of testing the sufficiency and probative value of the testimony of former Judge Roman A. Cruz to prove a decree of divorce issued by him while a judge of First Instance of Manila sometime in 1944.

It appears that a case for bigamy was filed against Nello

Y. Roa in the Court of Instance of Rizal (Case No. 962). In the course of the trial held in June 16 and 30; 1948, former Judge Roman A. Cruz was placed on the witness stand by the defendant to prove that his wife Elena Muñoz has already secured a decree of divorce against him in July 1944. The prosecution objected to this move of the defendant, but the objection was overruled, and so the prosecution filed a petition for a writ of prohibition with this Court praying that the respondent judge be enjoined from allowing the defendant to prove the alleged decree of divorce by oral evidence (G. R. No. L-2340). The petition was dismissed for lack of merit. Judge Roman Cruz then was allowed to testify, and his testimony reads as follows:

"SR GUANLAO:

P Conoce Ud. personalmente a Elena Muñoz?

R Si, señor.

P Conoce Ud. Personalmente a Nello Roa?

x x x x x x x

P Porque dice Ud. que conoce a Elena Muñoz?

R La conozco porque fue demandante en una causa de divorcio que se habia ventilado en una de las salas que yo presidia entonces en el Juzgado de Primera Instancia de Manila durante mi incumbencia en 1944.

SR. VIOLA FERNANDO:

Pido Su Señoria el descarte de esta parte del testimonio del testigo por ser incompetente y, ademas, es una conclusion.

JUZGADO:

El testigo esta declarando sobre hechos de su conocimiento propio.

SR. VIOLA FERNANDO:

Es una conclusion.

JUZGADO:

El testimonio del Juez Cruz no puede considerarse como una prueba secundaria, sino mas bien que vendria a ser como una prueba primaria o principal, cuyo expediente surgio a rais de sus actuaciones oficiales como Juez (Steno. Notes, Transcript, pp. 4-7).

x x x x x x x

SR. GUANLAO:

P De su propio conocimiento y segun su mejor recuerdo, se tramito ante Ud. la causa de referencia?

x x x x x x x

JUZGADO:

Se la pregunta si recuerda. x x x x x x

JUZGADO:

Eso incumbe al Juzgado. Puede contestar.

R Si, señor. (Steno. Transcript Notes, p. 6.)

x x x x x x x

JUZGADO:

Puede contestar.

TESTIGO:

Si, señor, Se ha tramitado ese asunto de divorcio durante mi incumbencia en 1944, cuando presidia entonces una de las salas de Juzgado de Primera Instancia de Manila.

P Y cual fue el resultado de ese asunto de divorcio si Ud. recuerda?

R Se concedio el divorcio solicitado por la entonces demandante.

P Sabe Ud. se el demandado apelo de esa decision?

R No podia haber apelado porque era un divorcio concedido mediante rebeldia.

P Pero Ud. no esta seguro si el demandado apelo o no?

R Que yo sepa, ni sequiera peticion de reconsideracion se presento, ni que se hay dado curso a alguna apelacion. (Steno. Notes, Transcript, pp. 13-14, hereto attached as Exhibit "A"). "(Copied from G.R. No. L-2783, pp. 23-25, record on appeal)."

The prosecution moved for the striking out of the above testimony of Judge Cruz, and when the motion was denied, the prosecution again brought the case to this Court through certiorari (G. R. No. L-2483), and again the petition was denied on the ground that the respondent judge had power and authority to rule on the question raised therein. After the steps taken by the prosecution to foil the attempt to prove the alleged decree of divorce by oral evidence proved futile, the private prosecution filed the present petition for declaratory relief.

It also appears that the petition was at first filed by City Attorney Jose F. Fernandez, and by attorneys Eulogic R. Lerum and G. Viola Fernando as private prosecutors in the bigamy case No. 962, but later, upon motion filed by City Attorney Fernandez, his name was stricken out from the pleadings, and so an amended petition was filed wherein attorneys Lerum and Viola Fernando appeared as the only petitioners representing the People of the Philippines. It finally appears that attorneys Lerum and Viola Fernando made an attempt to have the Solicitor General appear as counsel, but this attempt was again ruled out on the ground that under the law the Solicitor General can only be required to intervene when the validity of a statute is involved.

While the petitioners have assigned in their brief seven (7) errors which are alleged to have been committed by the lower court, we believe that the issues raised can be boiled down into two, to wit, (1) whether petitioners have the necessary personality and interest to file the petition under consideration; and (2) whether the subject matter of the petition is among those that can be determined by way of declaratory relief under Rule 66 of the Rules of Court.

1. The incident giving rise to the petition for declaratory relief arose in a criminal case for bigamy instituted against one Nello Y. Roa. The information was filed by City Attorney Jose F. Fernandez as required by the Rules of Court, and attorneys Eulogio R. Lerum and G. Viola Fernando appeared as private prosecutors in behalf of the offended party. The incident concerns the presentation of the oral testimony of former Judge Roman A. Cruz to prove a decree of divorce issued by him as judge of First Instance of Manila in an effort to bring about the acquittal of the defendant. The interested party, therefore, in testing the sufficiency or probative value of the aforesaid testimony is the People of the Philippines. In fact it is the City Attorney who filed the two certiorari cases with this court in a vain attempt to get a ruling on the matter. This being the case, the City Attorney should be the one to ask for the declaratory relief if it is desired to have said matter tested in court and if and when this step is feasible under the law. It appears, however, that City Attorney Jose F. Fernandez has refused to join the petitioners in filing the herein petition for declaratory relief as shown by his attitude in asking that his name be stricken out from the pleadings. This attitude is indicative that the government has no interest in prosecuting the petition, and inasmuch as all criminal actions can only be prosecuted under the direction and control of the fiscal and for that matter he is the only official who can represent the People of the Philippines (Sec. 4, Rule 106, of the Rules of Court: Herrero et al. v. Diaz, 42 Off. Gaz., 1166), it is evident that the petitioners herein, who as private prosecutors can only intervene subject to the control of the City Attorney (Herrero et al. v. Diaz, id.), are not the proper parties to file the petition under consideration.

2. Granting for the sake of argument that the petitioners herein can be considered as parties in interest within the meaning of the statute, the next question to determine is whether the subject matter which they want to be tested is among those mentioned in section 1, rule 66, of the Rules of Court.

Under this rule, only a person who is interested "under a deed, will, contract or other written instrument, and whose rights are affected by a statute or ordinance, may bring an action to determine any question of construction or validity arising under the instrument or statute and for a declaration of his rights or duties thereunder." This means that the subject matter must refer to a deed, will, contract or other written instrument,

or to a statute or ordinance, to warrant declaratory relief. Any other matter not mentioned therein is deemed excluded. This is under the principle of *expressio unius est exclusio alterius.*

Now, does the subject matter under consideration come within the import of the rule? The answer cannot but be in the negative, for it does not refer to any written instrument, statute or ordinance. It merely refers to the sufficiency or probative value of an oral evidence concerning a decree of divorce issued by a former judge, which the court trying the bigamy case has ample power and authority to pass upon. This is not the opportune moment to look into the correctness of the ruling of the court in said bigamy case allowing the presentation of oral evidence to prove a decree of divorce under the circumstances at present obtaining, for the bigamy case is still pending determination. This will be determined in due time when properly presented before this Court. For the purposes of this appeal, it suffices for this Court to declare that the subject matter of the petition does not warrant the granting of declaratory relief within the meaning of said Rule 66.

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

Moran, Paras, Feria, Pablo; Bengzon; Padilla, Tuason; Montemayor, Reyes, and *Jugo.* — *J.J.* concur.

VIII

Lucila Ornedo, Petitioner vs. Judge Eusebio F. Ramos et al., Respondent G. R. No. L-2898, December 23, 1950.

CERTIORARI; CERTIORARI IS PREDICATED ON LOWER COURT'S POSITIVE ACTION BUT NOT A REMEDY FOR INACTION. — By its nature, certiorari is predicated on a positive or affirmative action that is injurious to the interests of the complainant. It is not a remedy for a lower court's inaction irrespective of the reasons given therefor.

F. Milambiling for petitioner.

Panfilo M. Manguera for respondents *Mabute* and *Magna Labaguis.*

DECISION

TUASON, *J.*:

It appears that Epifania Mabute applied in the Court of First Instance of Marinduque for letters of administration of the intestate estate of Severina Mistal, application which was docketed as Civil Case No. 656. Shortly thereafter Jacinta Ornedo filed a similar application with reference to the estate of Juan Ornedo, Severina Mistal's husband who died after her. The latter application was docketed as Civil Case No. 659.

Lucila Ornedo, Juan Ornedo's illegitimate daughter whose mother he married after his first wife's death, and Natalia Musnit, Lucila's mother, opposed both applications. It seems that the basis of the opposition, or the principal basis, was that the title to the properties of both decedents had already vested in Lucila Ornedo by donation from her father.

The two applications, by agreement of the parties, were heard jointly before Judge Mariano Melendres on July 9, 1946. On July 24, before the applications were decided, six cousins of Severina Mistal filed a complaint in intervention which was admitted. The intervenors claimed a share in Severina Mistal's estate by agreement with Juan Ornedo as Severina's surviving espouse.

Judge Melendres having been assigned to another judicial district before he could write his decision, and as the stenographic notes taken at the trial had been lost, the two applications for letters of administration and the intervention were again set down for hearing and, also by agreement of the parties, were consolidated for trial before Judge Enriquez who had succeeded Judge Melendres. In the second trial as well as in the first the ownership to the properties involved was submitted and in Judge Enriquez's decision adjudicated in the manner set forth in the next following paragraph.

On July 31 Judge Enriquez dismissed both applications for letters of administration and the complaint in intervention. The reasons were: (1) all the property of Severina Mistal had passed to her surviving spouse, Juan Ornedo, by operation of law, Mistal having no legal heirs; (2) Juan Ornedo in life had donated his property to his daughter Lucila; and (3) the deed of partition between Juan Ornedo and the intervenors by virtue of which the latter were assigned a share in Severina Mistal's estate, was, in the opinion of the court, void and of no effect.

The two applicants and the intervenors filed motions for reconsideration on the ground that "the decision is against the law." As Judge Enriquez this time had been detailed to another province, like Judge Melendres before him, it fell upon the lot of Judge Eusebio F. Ramos, who had taken Judge Enriquez's place, to act on the said motions for reconsideration.

Judge Ramos' decision or order rendered on October 15 set aside Judge Enriquez's order or decision on the ground that "it does not appear that the original hearing of the petition(s) in said cases have been duly published as required by the Rules of Court" so that the court, Judge Ramos opined, had acquired no jurisdiction. But Judge Ramos did not stop here. With apparent inconsistency, he decreed the definite dismissal of Case No. 656 and of the intervention and held (1) that Natalia Musnit, Juan Ornedo's widow and Lucila Ornedo's co-opponent, had no interest in her deceased husband's estate "at least (except) as usufructuary over a certain (portion) of the property," and (2) that "when Severina Mistal died her heir was her husband Juan Ornedo to the exclusion of her cousins," the intervenors. In other words, although as he said, the court had acquired no jurisdiction, His Honor went into the merits of the controversy.

With regard to case No. 659, the set-aside order was in keeping with the theory of lack of jurisdiction. With reference to this case, the order was that "the hearing of the petition x x x be published as required by law, the date of the hearing to be set at next calendar of this Court."

The present petition for certiorari was brought by Lucila Ornedo without her mother, her co-opponent to the application for letters of administration, and makes Judge Ramos, Jacinta Ornedo and the intervenors respondents. For answer, the respondents question, among other things, the availability of certiorari to review Judge Ramos' order, it being contended that the respondent Judge did not act outside or in excess of his jurisdiction and that there is plain, speedy and adequate remedy by appeal.

The issues and the arguments have been complicated and confused by the inclusion in the proceedings below and in the various orders, of matters not quite germane to the right of the applicants to appointments as administratrixes, such as the conflicting claims of ownership to the properties. The order complained of presents two aspects which should be taken up separately for clarity's sake. And before we proceed, it is well to take note that Judge Ramos' order is not assailed in so far as it refers to case No. 656 which, for that reason, will be left out of the following discussion.

As has been seen, Judge Ramos did not render a decision on the merits of the application in Case No. 659; he merely directed that the application be published and he postponed the hearing thereof to the next calendar of the court after such publication should have been made.

It is at once obvious that this order is not a cause for complaint on the part of Lucila Ornedo. The postponement of the hearing and the publication of the application are not the concern of the opponent, except perhaps for the delay they would entail. The cost of publication is to be defrayed by the applicant, and the opponent is in possession of the questioned property to the exclusion of all others and is not being bothered in the enjoyment of its produce. In this aspect of the case the petitioner clearly has no cause of action.

The true reason, not plainly apparent on the surface of the pleadings and the memoranda, for the seeming paradox of the applicant's acquiescence in or defense of the respondent Judge's order and for the opponent's vigorous exception thereto is, that in setting aside Judge Enriquez's order, Judge Ramos destroyed an advantage Lucila Ornedo had already achieved. Judge Enriquez's order not only dismissed the application for letters of administration but made a definite declaration that Lucila Ornedo was the absolute owner of the properties sought to be placed under judicial administration. By this award the opponent had,

in a manner of speaking, won the first and very important round of the contest which Judge Ramos' order set at naught.

It is said, with good reason, apropos of this feature of the case that the respondent Judge was wrong in saying that the application had not been published. Lucila Ornedo's counsel points out that the required publication was made in *La Nueva Era*, a newspaper of general circulation in the province of Marinduque, before the first trial, and that copies of the periodical carrying the notice plus supporting testimonial evidence were introduced at that trial held by Judge Melendres.

Lucila Ornedo's counsel also calls attention, with support of precedents and authorities, to the fact that with the consent or acquiescence of the parties concerned, title to property involved in a testate or intestate proceeding may be litigated and adjudged by the probate court. Lucila Ornedo did not do so but she could also cite the fact that the movants' motions for reconsideration of Judge Enriquez's order did not impugn the sufficiency of the publication, nor did they attack the court's jurisdiction to give judgment on the conflicting claims of ownership between the parties.

Even so, certiorari does not lie. Relief must be sought by other mode of procedure. The error, if error was committed by Judge Ramos, was one of omission and not commission. To set aside Judge Enriquez's order was within Judge Ramos' jurisdiction, in much the same manner and to the same extent that Judge Enriquez, if he had not been replaced, would have authority to change, modify or reverse his decision or order.

Judge Ramos' order amounts simply to a refusal, notwithstanding the parties' agreement, to determine the validity of the alleged donation executed by the now deceased Ornedo in favor of his daughter, partly because, according to the Judge, the application for letters of administration had not been published, and principally because, in his judgment, this matter should be tried in a separate, ordinary action. In the last analysis, the petitioner's contention could only be that in the present state of the proceedings in the court below Judge Ramos should decide the motions for reconsideration and affirm Judge Enriquez's order without requiring a new publication of the application for letters of administration.

By its nature, certiorari is predicated on a positive or affirmative action that is injurious to the interests of the complainant. It is not a remedy for a lower court's inaction, irrespective of the reasons given therefor.

Upon the foregoing considerations, the petition for certiorari is dismissed without special finding as to costs.

Moran, Feria, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo, and *Bautista Angelo,* concur.

Mr. Justice Paras voted for dismissal.

IX

Paz E. Siguiong, Plaintiff-Appellee vs. Go Tecson et al., Defendant-Appellants, G. R. Nos. L-3430-3431, May 23, 1951.

1. DESCENT & DISTRIBUTION; MORTGAGES; ONLY ACTUAL FILING OF CLAIM IN INTESTATE OR PROCEEDINGS CAN CONSTITUTE WAIVER OF MORTGAGE LIEN. — In order that a mortgage creditor may be said to have waived his mortgage lien against an estate, he must appear to have formally filed his claim in the testate or intestate proceeding. The fact that the administrator has merely made an overture to pay the mortgage debt and the mortgagees (or one of them) have signified willingness to accept payment, is not sufficient to constitute a waiver of the mortgage lien, where there is nothing to show that the offer of payment has been preceded by the formal filing of a claim. Without that formality, the mortgagees cannot be deemed to have waived their mortgage so as to be estopped from bringing a foreclosure suit.

2. PLEADING & PRACTICE; ANSWER; MATTER NOT SET UP AS DEFENSE IN ANSWER OR MOTION TO DISMISS CAN NOT BE RELIED UPON AS A GROUND ON APPEAL. — The validity or the constitutionality of Republic Act 342 cannot be made an issue on appeal, where moratorium has not been invoked as a defense or as a ground for a motion to dismiss.

Bienvenido A. Tan, Jr. for appellant.

J. Perez Cardenas for appellees.

DECISION

REYES, J.:

On October 1, 1927, Paulino P. Gocheco mortgaged to Paz E. Siguion a piece of registered real property in the City of Manila to secure a debt of ₱30,000.00. Some ten years later, he constituted a second mortgage on the same property in favor of Paz E. Siguion's son, Alberto Maximo Torres, to secure a debt of ₱20,000. Both mortgages were duly registered.

Gocheco died in 1943 without having discharged either mortgage. The following year, proceedings for the settlement of his estate were instituted in the Court of First Instance of Manila, and Go Tecson was appointed judicial administrator.

On February 3, 1949, the present actions were filed against the administrator Go Tecson for the foreclosure of the two mortgages, and judgment having been rendered against him in both, he has elevated the cases here by way of appeal, contending that the lower court erred in not holding (1) that he could no longer be sued as administrator because the administration proceedings had already been closed; (2) that the matter in controversy was already *res judicata;* (3) that plaintiffs' claim had already been paid; and (4) that Republic Act No. 342 was unconstitutional and void.

The first error assigned deserves no serious consideration, it appearing from the certificate of the Clerk of the Court of First Instance of Manila (Exh. "B") that the order for the distribution of the estate among the heirs has not as yet been complied with. In fact, counsel for appellant admits in his brief that, technically speaking, the administration proceedings are still pending.

As to the second assignment of error, the record does not disclose facts sufficient to support the claim of *res judicata.* The record of the administration proceedings, if already reconstituted, has not been presented, and nowhere does it appear that a claim for the mortgage indebtedness was formally filed in the administration proceedings and that it was there litigated and judicially determined. There is, for sure an alleged order read at the hearing, which says:

> ORDER
>
> "A written constancia having been forwarded to this Court by registered mail by Paz E. Siguion, wherein she made known her willingness to accept the payment for the mortgage obligation contracted by the deceased, Paulino P. Gochocho within ten (10) days after receipt of the written notice from the administrator signifying his intention to pay, the Court hereby advises the herein administrator to take the necessary steps to make payment to said Paz E. Siguion.
>
> So ordered.
>
> "Manila, Philippines September 7, 1944
>
> "(SGD.) ROMAN A. CRUZ
>
> Judge"

This order conveys the information that the administrator has made an overture to pay the mortgage debt and the mortgagees (or one of them) have signified willingness to accept payment. But there is nothing in the order to show that the offer of payment has been preceded by the formal filing of a claim. Without that formality, the mortgagees cannot be deemed to have waived their mortgage so as to be estopped from bringing a foreclosure suit.

> "In order that the mortgage creditor may be said to have waived his mortgage lien, he must appear to have filed formally his claim in the testate or intestate proceeding. The fact that he requested the committee on claims (now abolished) to take the necessary measures to have his claim paid at its maturity, does not imply that he has presented such claim as to be estopped from foreclosing his mortgage. So, also, the mere fact of bringing his credit to the attention of the committee on claim for the purpose of having it included among the debts and taken into account in case the estate should be

sold, but with a statement at the same time that said claim is secured by a mortgage duly registered, is not equivalent to filing the claim and does not, therefore, constitute a waiver of said mortgage." (II Moran, Comments on the Rules of Court 3rd ed. p. 406).

The payment alleged in the third assignment of error is not evidenced by any receipt, and there is nothing to support it except the bare declaration of the administrator's former attorney, Judge Bienvenido Tan, to the effect that, threatened with contempt proceedings for refusing to receive payment, the appellee Paz E. Siguion came to see him in his office and accepted the payment tendered by him. But the testimony is denied by this appellee, and we note that Judge Tan has merely inferred from what she told him on that occasion that she was then accepting the money tendered by him in payment for the debt, an inference not warranted by appellee's actual words, as may be seen from following testimony of Judge Tan:

"Q Meaning to say that you personally paid her the money?

"A After the motion (to cite for contempt) was presented Mrs. Paz Siguion went to my office and told me that there was no need of presenting the motion and for me to ask the court that she be declared in contempt since she was willing to accept payment. And I told her that if she was willing to accept payment I have the money in my office. I took the money from a 'bayong' and delivered it to her but she said: 'Well, I am sorry I cannot carry this bag of money with me because it is very dangerous and besides I am going to the province. Will you please keep it yet in your office until I call for it?' That is what I meant that she accepted the payment.

"Q And, the money, Judge Tan, remained with you?

"A Yes, it remained with me.

"Q Until when?

"A Until now. It is still in the office."

Far from expressing actual acceptance of payment and consequent signification of intention to have the money kept for her by Judge Tan as her depositary despite the fact that he was attorney for the adverse party, appellee's words should rather be construed as a refusal on her part to receive payment, an interpretation which would be consistent with her previous attitude in repeatedly declining to receive payment, as denounced in Judge Tan's motion for contempt, and also in consonance with what may be expected to be the natural reaction of any creditor to a tender of payment in the depreciated currency of those days (October, 1944). Indeed, had the money really been accepted, considering the amount involved, a receipt would surely have been required for the same; and not only a receipt, but also a release or discharge of mortgage. No such document, however, has been signed by Paz E. Siguion, it does not even appear that the money was counted. In the circumstances, we have no hesitation in holding that the lower court did not err in not finding that the mortgage debt has already been paid.

As to the fourth and last assignment of error, the record does not show that appellant has in a definite and suitable manner invoked moratorium in the court below. That defense was neither pleaded in the answer nor made a ground for a motion to dismiss. On the other hand, the answer admits the allegation of the complaint that the moratorium on prewar debts has already been lifted by Republic Act No. 342 subject to the exception or condition therein specified in favor of debtors who have filed their claim with the War Damage Commission, to which class the estate represented by appellant does not belong since it has not filed any war damage claim. All this reveals lack of intention to resort to the defense of moratorium, especialy when considered in connection with the allegation in the answer that despite defendant's repeated attempts to pay the debt, plaintiffs have refused to accept payment. It is true that at the conclusion of the trial appellant's counsel in open court asked for leave to amend his answer "so as to allege therein," to use his own language, "that the moratorium is unconstitutional." By this counsel probably meant to challenge the constitutionality of Republic Act No. 342. But the petition to amend was withdrawn when it encountered determined opposition from the adverse party, and in any event the validity of that Act cannot be made an issue since moratorium has not been invoked as a defense or as a ground for a motion to dismiss.

In view of the foregoing, and without passing on the constitutionality of Republic Act No. 342 because it is not a necessary issue in the case, the decision appealed from is affirmed, with costs against the appellant.

Paras, Feria, Bengzon, Padilla, Tuason, Montemayor, Jugo and Angelo. — J.J. concur

Pablo, J., took no part.

X

Hernandez et al., Petitioners vs. Emilio Peña et al., Respondents, G.R. No. L-2777, May 19, 1950.

FORCIBLE ENTRY AND DETAINER; DEPOSIT OF RENT DURING PENDENCY OF APPEAL; EXTENSION OF TIME NOT ALLOWED. — Section 8 of Rule 72 of the Rules of Court provides that should the defendant fail to make the payment or deposit of the rent during the pendency of the appeal, the Court of First Instance, upon motion of the plaintiff of which the defendant shall have notice, and upon proof of such failure, shall order the execution of the judgment appealed from. The court has no jurisdiction to allow extensions of time for such payment

Leoncio C. Jimenez for petitioners.

Pedro Valdes Liongson for respondents.

DECISION

OZAETA, *J.*:

Ines Oliveros, as defendant in an unlawful detainer case pending before the respondent Judge Emilio Peña on appeal from the Municipal Court, failed to deposit with the Clerk of Court the rent of ₱200 corresponding to the month of October, 1948, in accordance with the judgment of the Municipal Court. A motion for the issuance of a writ of execution was filed by the petitioners on November 23, 1948, which was opposed by the respondent on the ground that her failure to make the deposit was due to the fact that she had instituted in this court a petition for certiorari and prohibition (G.R. No. L-2602), in which she prayed to be relieved of the obligation of making a monthly deposit of ₱200.

Acting upon said motion and the reply thereto, the respondent judge on December 21, 1948, issued the following order:

> "The Court orders the defendants to deposit in Court the rents corresponding to the months of October and November, 1948, within five days from the receipt of a copy of this order, and should they fail to do so, it is hereby ordered that the corresponding writ of execution be issued."

The above-quoted order, which is the subject of the present petition for certiorari and mandamus, is contrary to section 8 of Rule 72 and the decisions of this court in various cases. Said rule provides that should the defendant fail to make the payment or deposit of the rent during the pendency of the appeal, "the court of First Instance, upon motion of the plaintiff of which the defendant shall have notice, and upon proof of such failure, *shall* order the execution of the judgment appealed from . . ." This court has repeatedly held that the Court of First Instance has no jurisdiction to allow extensions of time for such payments. (Lapuz *vs.* Court of First Instance of Pampanga, 46 Phil. 77; Arcega *vs.* Dizon, G.R. No. L-195, 42 Off. Gaz. 2138; Meneses *vs.* Dinglasan, G.R. No. L-2088, Sept. 9, 1948.)

The mere filing by the respondent Ines Oliveros of a petition for certiorari and prohibtion, praying that she be relieved of the obligation of making the monthly deposit, did not ipso facto relieve her of such obligation, as the respondent judge himself impliedly held by requiring her to make the deposit within five days.

The order complained of is set aside, and the respondent judge is hereby directed to issue the writ of execution prayed for by the petitioners, with costs against the respondent Ines Oliveros.

Pablo, Bengzon, Tuason, Montemayor, and Reyes, — J.J.; concur

Agustina Paranete et. al., Petitioners, vs. Hon. Bienvenido Tan, et al., Respondents, G.R. No. L-3791, November 29, 1950.

PROHIBITION; OWNERSHIP OF REAL PROPERTY IN LITIGATION; ORDER REQUIRING ACCOUNTING AND DEPOSIT OF PROCEEDS OF HARVEST WITH CLERK OF COURT, IMPROPER. — A trial court issuing an order requiring the party in possession of the property whose ownership is in litigation, to to make an accounting and to deposit the proceeds of the sale of the harvest with the Clerk of Court acted in excess of its jurisdiction. That order, in effect, made the Clerk of Court a sort of a receiver charged with the duty of receiving the proceeds of sale and the harvest of every year during the pendency of the case with the disadvantage that the Clerk of Court has not filed any bond to guarantee the faithful discharge of his duties as depositary; and considering that in actions involving title to real property, the appointment of a receiver cannot be entertained because its effect would be to take the property out of the possession of the defendant, except in extreme cases when there is clear proof of its necessity to save the plaintiff from grave and irremediable loss or damage, it is evident that the action of the respondent judge is unwarranted and unfair to the defendants

Emiliano M. Ocampo for petitioners.

Jose E. Morales for respondents *Felix Alcaras*, and *Fructuosa, Maxima* and *Norberta*, all surnamed *Vasquez*.

DECISION

BAUTISTA ANGELO, *J.*:

This is a petition for a writ of prohibition wherein petitioner seeks to enjoin the respondent judge from enforcing his order of March 4, 1950, on the ground that the same was issued in excess of his jurisdiction.

On January 16, 1950, Felix Alcaras, Fructuosa Vasquez, Maxima Vasquez and Norberta Vasquez filed a case in the Court of First Instance of Rizal for the recovery of five (5) parcels of land against Agustina Paranete and six other codefendants. (Civil Case No. 1020). On January 28, 1950, plaintiffs filed a petition for a writ of preliminary injunction for the purpose of ousting the defendants from the lands in litigation and of having themselves placed in possession thereof. The petition was heard *ex parte*, and as a result the respondent judge issued the writ of injunction requested. On February 28, 1950, the defendants moved for the reconsideration of the order granting the writ, to which plaintiffs objected, and after due hearing, at which both parties appeared with their respective counsel, the respondent judge reconsidered his order, but required the defendants to render an accounting of the harvest for the year 1949, as well as all future harvests, and if the harvest had already been sold, to deposit the proceeds of the sale with the Clerk of Court, allowing the plaintiffs or their representative to be present during each harvest. This order was issued on March 4, 1950. Defendants again filed a motion for the reconsideration of this order, but it was denied, hence the petition under consideration.

The question to be determined is whether or not the respondent judge exceeded his jurisdiction in issuing his order of March 4, 1950, under the terms and conditions set forth above.

We hold that the respondent judge has acted in excess of his jurisdiction when he issued the order above adverted to. That order, in effect, made the Clerk of Court a sort of a receiver charged with the duty of receiving the proceeds of sale and the harvest of every year during the pendency of the case with the disadvantage that the Clerk of Court has not filed any bond to guarantee the faithful discharge of his duties as depositary; and considering that in actions involving title to real property, the appointment of a receiver cannot be entertained because its effect would be to take the property out of the possession of the defendant, except in extreme cases when there is clear proof of its necessity to save the plaintiff from grave and irremediable loss or damage, it is evident that the action of the respondent judge is unwarranted and unfair to the defendants. (Mendoza v. Arellano, 36 Phil. 59; Agonoy v. Ruiz, 11 Phil. 204; Aquino v. Angeles David, L-375; prom. Aug. 27, 1946; Ylarde v. Enriquez, *supra*; Arcega v. Pecson, 44 Off. Gaz. (No. 12) 4384; Carmen Vda. de De la Cruz v. Guinto, 45 Off. Gaz. pp. 1309, 1311.) Moreover, we find that Agustina Paranete, one of the defendants, has been in possession of the lands since 1943, in the exercise of her rights as owner, with her codefendants working for her exclusively as tenants, and that during all these years said Agustina Paranete had made improvements thereon at her own expense. These improvements were made without any contribution on the part of the plaintiffs. The question of ownership is herein involved and both parties seem to have documentary evidence in support of their respective claims, and to order the defendants to render an accounting of the harvest and to deposit the proceeds in case of sale thereof during the pendency of the case would be to deprive them of their means of livelihood before the case is decided on the merits. The situation obtaining is such that it does not warrant the placing of the lands in the hands of a neutral person as is required when a receiver is appointed. To do so would be unfair and would unnecessarily prejudice the defendants.

While the respondent judge claims in his order of March 25, 1950, that he acted as he did because of a verbal agreement entered into between the lawyers of both parties, we do not consider it necessary to pass on this point because the alleged agreement is controverted and nothing about it has been mentioned by the respondent judge in his order under consideration.

Wherefore, petition is hereby granted. The Court declares the order of the respondent judge of March 4, 1950 null and void and enjoins him from enforcing it as prayed for in the petition.

Paras, Feria, Pablo, Bengzon, Padilla; Tuason; Montemayor; Reyes, and *Jugo, JJ.*, concur.

XI

Tomas T. Fabella, Petitioner, vs. Tiburcio Tancinco et al., Respondents, G. R. No. L-3541, May 31, 1950.

PLEADING & PRACTICE; EXECUTION; PROCEDURE IN ORDER THAT BOND FOR PRELIMINARY INJUNCTON MAY BE APPLIED TO SATISFACTION OF JUDGEMENT. — A bond filed for the issuance of preliminary injunction is not one given under section 2 of Rule 39 to guarantee the performance of an appealed judgment. The preliminary injunction issued in this case was for the purpose of staying the execution of a judgment which is sought to be set aside on the ground of fraud, accident, mistake or excusable negligence. Such a bond is specifically authorized by section 5 of Rule 38, and its condition is that if the petition to reopen is dismissed or petitioner fails on the trial of the case upon its merits, the petitioner "will pay the adverse party all damages and costs that may be awarded to him by reason of the issuance of such injunction, or the other proceedings following the petition." Such bond "will not answer for the amount of the judgment sought to be set aside." (I Moran, Rules of Court, 636.) As directed by section 9 of Rule 60 the damages recoverable on a bond of this kind "shall be claimed, ascertained and awarded under the same procedure as prescribed in section 20 of Rule 59, which clearly contemplates that before damages could be recovered on the bond, there must first be an application with due notice to the other party and his sureties setting forth the facts showing applicant's right to damages and the amount thereof. To this application, the other party may interpose his pleading, and upon the issue thus being joined the matter will be tried and determined.

Alberto R. de Joya for petitioner.

Cecilio I. Lim and *Antonio M. Castro* for respondents.

DECISION

REYES, *J.*:

This is a petition for certiorari to annul two orders of the Court of First Instance of Manila in Civil Case No. 3354, entitled Juan A. Ramos et al. vs. Tomas T. Fabella.

It appears that on December 24, 1947, plaintiffs in said case obtained a judgment against defendant for the sum of P4,050.00 plus legal interest and costs. Defendant did not appeal, but on March 17, 1948, he filed a petition to have the judgment set aside,

and, in accordance with section 5 of Rule 38, Rules of Court, and upon the filing of a bond for ₱4,050.00, he had the court issue a preliminary injunction to prevent the judgment from being executed.

The petition to set aside the judgment was granted. But in the new trial that followed, defendant again lost. Not only that; plaintiffs were allowed to recover more, for in the new judgment that was rendered, defendant was ordered to pay them ₱12,400.00, plus interest, in addition to the sum previously adjudged. Notified of this new judgment on July 21, 1949, defendant filed his motion for reconsideration 33 days thereafter, but it was denied by the court on the ground that the said judgment had already become final.

On August 30, 1949, the court, at the instance of plaintiffs, ordered the issuance of a writ of execution, and on the 21st of the following month, again at plaintiffs' instance, ordered the above mentioned bond confiscated, "to be applied," so the order says, "in partial satisfaction of the judgment rendered herein." Reconsideration of this last order having been denied by the court below, its annulment is now sought in the present petition.

On October 4, 1949, defendant filed a petition to set aside the order of August 30, denying reconsideration of the second decision for the reason that the same had already become final. As ground for this petition defendant alleged that the late filing of his motion for reconsideration was due to mistake and excusable negligence, more specifically as follows:

> "1. That the said motion for reconsideration was not filed on time, i. e., August 20, 1949, due to mistake and excusable neglect on the part of the clerk of the undersigned counsel, which consists in that said clerk, Miss Jovita Nierras, had been sick from August 18, 1949 to August 22, 1949, and consequently she was absent and did not come to the office of the undersigned, during the said period; that inasmuch as the undersigned had been relying upon her said clerk to remind him of the filing of pleadings, records, briefs, etc. as they become due, and that said clerk had been absent during the said period, and failed to notify the undersigned of the last day for the filing of the said record on appeal, and the undersigned counsel not knowing of the exact last day for the perfection of the appeal in this case, he was not able to perfect the appeal in this case; that the truth of the matter being said clerk had been preparing the record on appeal in this case; that defendant had not had the intention to abandon his appeal in this case; that the amount involved in the appeal is more than ₱16,400; that it would be an injustice to the herein defendant to be deprived of his right to appeal in this case; that the said defendant has been the victim of persecution, criminal and civil, which has impoverished him; that his case is meritorious and that the judge then presiding over this Honorable Court, the Hon. Buenaventura Ocampo had not fully appreciated the evidence and the law in this case; that no violation of any substantial right of the plaintiffs in this case could be incurred, in view of the fact that said plaintiffs had already levied upon all the properties of the herein defendant, including those which are by law exempt from execution, thus totally depriving the herein defendant of his only means of livelihood."

This petition was also denied in an order rendered November 4, 1949. This is the second order whose annulment is herein sought.

Going back to the order for the confiscation of the bond, it should be noted that the said bond is not one given under section 2 of Rule 39 to guarantee the performance of an appealed judgment, but one required for the issuance of a writ of preliminary injunction to stay the execution of a judgment which is sought to be set aside on the ground of fraud, accident, mistake or excusable negligence. Such a bond is specifically authorized by Section 5 of Rule 38, and its condition is that if the petition to reopen is dismissed or petitioner fails on the trial of the case upon its merits, the petitioner "will pay the adverse party all damages and costs that may be awarded to him by reason of the issuance of such injunction, or the other proceedings following the petition." Such a bond "will not answer for the amount of the judgment sought to be set aside." (I Moran, Rules of Court, 636).

As directed by Section 9 of Rule 60, the damages recoverable on a bond of this kind "shall be claimed, ascertained and awarded under the same procedure as prescribed in section 20 of Rule 59," which, in so much as is pertinent to this case, provides:

> "x x x x. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or, in the discretion of the court, before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. x x x."

This provision clearly contemplates that before damages could be recovered on the bond here under consideration, there must first be an application with due notice to the other party and his sureties setting forth the facts showing applicant's right to damages and the amount thereof. To this application, the other party may interpose his pleading, and upon the issue thus being joined, the matter will be tried and determined. But the respondent judge appears to have completely disregarded this procedure and, without hearing on the amount of damages and without even notice to the surety, declared the bond confiscated and ordered it applied to the satisfaction of the judgment, merely on the gratuitous assumption that the plaintiffs had suffered damages in the amount of the bond. The order is illegal and should therefore be revoked.

As to the other order herein complained of, it should be recollected that defendant's motion for a reconsideration of the second judgment was filed after the said judgment had already become final. It was, therefore, properly denied. It may be added that the motion was merely pro forma. But 35 days after the denial of the motion. defendant sought reconsideration of the order of denial, alleging as a ground that the tardiness in the filing of the first motion was due to "mistake and excusable neglect" on the part of his clerk who, it was alleged, had been absent from office on account of sickness, and invoking the precedent established by this Court in Coombs vs. Santos, 24 Phil. 446, and in Siguenza vs. Mun. of Hinigaran, 14 Phil. 495. It may well be disputed whether an attorney could be excused for the negligence of his clerk where there is no showing that he himself has shown diligence or has done anything to guard against such negligence. But assuming that a case of that kind is covered by the precedent laid down in the cases cited, it may not be amiss to point out that the defendants in those cases had not had their day in court, for judgment was obtained against them by default, and this consideration must have weighed heavily in the mind of the Court. Such is not the situation here. The judgment which petitioner seeks to set aside is one that has been rendered after regular trial, and the first motion for reconsideration does not contain any *prima facie* showing that the judgment was wrong. Indeed, said motion for reconsideration was merely *pro forma*, based on the bare statement that the decision was contrary to law and was not supported by the evidence. And nothing was said at that time why the motion was filed out of time.

A petition for reconsideration on the ground of excusable negligence is addressed to the sound discretion of the court. This discretion can not be interfered with except in a clear case of abuse. Taking into account all the circumstances of the case, we are not prepared to say that the respondent judge did not make a good use of its discretion in refusing to set aside his order denying reconsideration of the judgment on the ground that this had already become final.

Wherefore, the order of September 21, 1949, for the confiscation of the bond is hereby revoked; but the order of November 4, 1949, denying the motion to set aside the order of August 30. which in turn denies reconsideration of the judgment, is affirmed. Without pronouncement as to the costs.

Ozaeta, Pablo, Bengzon, Tuason, Montemayor, J.J.; concur.

XII

Santiago Degala, Plaintiff-Appellee vs. Cecilia Reyes et al., Defendants-Appellants, G.R. No. 2402, November 29, 1950.

PLEADING AND PRACTICE; INDISPENSABLE PARTIES; DECLARATORY RELIEF. — The Roman Catholic church, or its legal representative, the Roman Catholic Bishop of Nueva Segovia, has interest in defending the validity of the trust created in the will in question and its interest would be affected by the declaration of nullity of the trust. "When declaratory relief is sought all persons shall be made parties *who have or claim* any interest which would be affected by the declaration..." (Rule 66, sec. 3.) "And the absence of a defendant with such adverse interest is a jurisdictional defect, and no declaratory judgment can be rendered (1 C.J.S., p. 1049). But the Roman Catholic Church, or its legal representatives, was not included as party defendant in the present case.

J. Quintillan for appellants.
Antonio Directo for appellee.

DECISION

FERIA, *J.*:

During the pendency of the appeal from the order of the Court of First Instance of Ilocos Sur probating a will executed by the late Placida Mina of Santa Maria, Ilocos Sur, on April 22, 1927, Santiago Degala, alleging that he is one of the legal heirs of said Placida Mina, filed a petition with the court praying that the provisions of said will and testament creating a trust be declared null and void because there is no *cestui que trust* named therein, under Rule 66 on Declaratory judgment.

The said will provides, among others, the following:

"SEGUNDO. — Las rentas o productos de mis terrenos, casas y animales con excepcion de las parcelas de terreno arriba mencionadas se aplicaran al pago de amillaramiento de mis propiedades para la reparacion y continuacion de la construccion de mis dos casas de mamposteria que estan frente a frente, y para la realizacion de las misas dispuestas en este testamento; y caso de que sobrare algo se dispondra, en caso necesario, para ayudar en los gastos de la reparacion de la iglesia, convento y la antigua capilla del cementerio romano de Santa Maria y la iglesia de Burgos.

x x x x

OCTAVO. — Ordeno que todos los años empezando desde mi muerte se celebren misas cantadas en las fechas del dia de mi nacimiento y muerte, en sufragio de mi alma, de las de mis parientes mencionadas al comienzo de este testamento y de las de mis difuntos abuelos Santiago Mina y Florentina Degala, padre y madre de mi padre, y de las de Mariano Directo y Anastacia Peralta, padre y madre de mi madre."

The only persons who were made party defendants in the petition for declaratory judgment are Cecilia Reyes, petitioner for the probate of the will in Case No. 3689, Valentin Umipig, special administrator of the estate of the deceased appointed by the court, and Leona Leones and Cipriana Alcantara named as trustees under the will.

After the hearing of the petition, the Court of First Instance of Ilocos Sur held that if it were not the unanimous desire of all the parties that the court declare, once and for all, whether certain provisions of the will are null and void or not, it would dismiss the petition for declaratory judgment in accordance with American precedents, because the judgment of the lower court probating the will was then still pending appeal in the Supreme Court. But in view of such unanimous desire, the court declared, among others, that the above quoted provisions of the will creating a fideicomiso or trust are null and void, because the testatrix has not named the first heir *or cestui que trust* and because they are contrary to the law on perpetuities.

The defendants Cecilia Reyes and Valentin Umipig appealed from the said judgment to this court.

The appellants in a well written brief contend (1) that the provisions in the will or testament of the late Placida Mina which leave certain properties of the testatrix for the saying of masses for the soul of the testatrix and her relatives and for the maintenance and repair of the church, convent and the old chapel of the Roman Catholic cemetery of Sta. Maria and of the church of Burgos, Ilocos Sur, create a charitable and religious trust, and this court in the case of Government of the P. I. vs. Abadilla, 46 Phil. 642, 647, quoting Perry on Trusts, held that in regard to private trust it is not always necessary that the *cestui que trust* should be in *esse* at the time the trust is created in his favor, and that in charitable trust the rule is still further relaxed. And (2) as to prohibition to alienate the properties in trust, Art. 785 of the Civil Code provides that in fiduciary substitutions "dispositions, imposing perpetual prohibition and temporary prohibition beyond the limits fixed by Art. 781" are inoperative; and that Art. 792 prescribes that, impossible conditions and those contrary to law and good morals imposed in testamentary disposition shall be considered as not imposed, and shall not prejudice that heir or legatee in any manner whatsoever, even should the testator otherwise provide.

It is obvious, that the Roman Catholic church or its legal representative the Roman Catholic Bishop of Nueva Segovia, has interest in defending that validity of the trust created in the will and its interest would be affected by the declaration of nullity of the trust. Sec. 3, Rule 66, of the Rules of Court provides that "when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall, except as otherwise provided in these rules, prejudice the rights of persons not parties to the action." The nonjoinder of necessary parties would deprive the declaration of the final and pacifying function it is calculated to subserve, as they would not be bound by the declaration and may raise the identical issue (Hoskyns vs. National City Bank of New York, G.R. No. L-1877, promulgated December 29, 1949) "And the absence of a defendant with such adverse interest is a jurisdictional defect, and no declaratory judgment can be rendered (Corpus Juris Secundum, Vol. I, p. 1049). But the Roman Catholic Church, or its legal representatives was not included as party defendant in the present case.

In view of the foregoing, the judgment appealed from in so far it declares the trust under consideration null and void, is set aside, without pronouncement as to costs.

So ordered.

Moran, Paras, Pablo, Bengzon, Tuason, Montemayor; Reyes; Jugo, and *Bautista Angelo, J.J.,* concur.

XIII

Feliciano Jover Ledesma, Petitioner, vs. Buen Morals et al., Respondents, G. R. No. L-3251, August 24, 1950.

PLEADING AND PRACTICE; COUNTERCLAIM MAY BE FILED IN ACTION FOR DECLARATORY RELIEF. — In a special civil action for declaratory relief, to the petition filed by the petitioner, the defendant or respondent may set up in his answer a counterclaim based on or arising from the same transaction, deed or contract on which the petition is based. He may also set up said counterclaim in an amended answer filed before judgment, provided that his failure to include the counterclaim in the original answer was due to oversight, inadvertence or excusable neglect. Courts should be liberal in the admission, especially of compulsory counterclaims which may be barred unless so interposed.

Jover-Ledesma and *Zaragoza* and *Ricardo C. Puno* for petitioner.
Alberto R. de Joya for respondents.

DECISION

MONTEMAYOR, *J.*:

On April 17, 1944, Buen Morales obtained a loan from Feliciano Jover Ledesma in the amount of P2,023.86 in Japanese military notes. To secure payment of said loan, Morales executed a real estate mortgage on a parcel of land in the City of Manila. According to the terms of the loan, it was to be paid within three years without interest but that before the expiration of two years the mortgagee cannot be compelled to accept payment of the debt or any part thereof; that in case of foreclosure, judicially or extra-

judicially, on account of the failure of the mortgagor to pay the debt, said mortgagor will pay to the mortgagee an additional sum equivalent to 15% of the amount due for attorney's fees.

On May 10, 1948, mortgagor Morales filed in the Court of First Instance of Manila a petition for declaratory judgment against mortgagee Ledesma making reference to the loan and the mortgage already described alleging that she (Morales) had offered to pay the indebtedness in October, 1944 but that mortgagee Ledesma had refused to accept payment because of the stipulation contained in the deed of mortgage that the mortgagee may not accept payment until after the expiration of two years; that after the expiration of said two years, after liberation, petitioner Morales had tendered full payment of the debt by offering "victory peso" money in a sum equivalent to the amount of the loan under the Ballantyne schedule, but that Ledesma had refused to accept the offer, he (Ledesma) insisting that the entire debt be paid in victory peso. that it was the agreement between the parties that in the event that at the time of payment of the debt, the Japanese military note was no longer legal tender, then the debt should be paid only in its equivalent value in legal currency, but that this agreement was not expressed in the deed of mortgage for fear of the Japanese. The petitioner in that case asked the court to state and declare the equivalent value in the present currency of the ₱2,023.86 military notes so that she might pay off the obligation, and that said equivalent value declared by the court be accepted by mortgagee Ledesma.

Respondent Ledesma answered the petition claiming that the real agreement between the parties was that the mortgage debt was to be paid in genuine Philippine currency after the war, and for that reason it was stipulated that the loan was not to be paid until after the expiration of two years, within which period the parties believed that war shall have terminated. and so he prayed that the petitioner be declared indebted to him in the full amount of ₱2,023.86.

About a month after filing said answer respondent Ledesma filed a motion to admit an amended answer which included a counterclaim, the principal purpose of which, was to declare the petitioner indebted to him not only in the amount of the loan of ₱2,023.86 but also in the additional sum of ₱303.57 representing attorney's fees, and that upon petitioner's failure to pay said two sums, within the period provided by the lower court, the mortgaged property be sold thru public auction by way of foreclosure of the mortgage.

Petitioner Morales objected to the admission of the amended answer. She was sustained in her opposition by the trial Judge who in an order dated July 6, 1949 denied the motion to admit his amended answer. Ledesma filed a motion for reconsideration claiming that his failure to include the counterclaim in his original answer was due to oversight and inadvertence. Respondent Judge in an order dated July 25, 1949 denied the motion on the ground that the counterclaim relates to matters entirely outside the subject of the petition for declaratory relief. Ledesma has now filed a petition for certiorari in this Court to review and to set aside said order of denial on the ground that the trial Judge had abused his discretion, and that said Judge be directed to admit petitioner's amended answer.

The question to be determined in this case is whether a counterclaim may be filed and entertained in declaratory relief proceedings.

By far, the great majority of courts in the United States of America allow the setting up of a counterclaim in a petition for declaratory relief or judgment. (87 ALR 1249 and 68 ALR 113). The only requirement is that the subject matter of the said counterclaim be connected with the subject matter of the action and must, of course, arise out of the same transaction. (Anderson on Declaratory Judgment p. 263). There, it is even allowed to bring in third parties by counterclaim or cross-complaint. See also Borchard on Declaratory Judgment, pp. 812-814.

In this jurisdiction we see no objection to allowing the filing of a counterclaim in a petition for declaratory relief. Rule 10 of the Rules of Court provides for the filing of a counterclaim. And section 6 of said Rule 10 further provides that a counterclaim not set up shall be barred if it arises out of or is necessarily connected with the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. This is what is generally termed a compulsory counterclaim, one which a defendant must interpose in order to prevent it from being barred in a subsequent, separate action.

The philosophy of the Rule seem to be to discourage separate actions which make for multiplicity of suits and wherever possible, to permit, and sometimes require, combining in one litigation all the cross-claims of the parties, particularly where they arise out of the same transaction. (Gallahar v. George A. Rheman Co., 7 Fed. Rules Service, p. 299, cited in Moran's Comments on the Rules of Court, Vol. I, p. 183).

Of course, the counterclaim involved in the present case was not included in the original answer but was set up in an amended answer which the petitioner prayed the court for permission to file. Section 5 of the same Rule 10 provides that when a pleading fails to set up a counterclaim thru *oversight, inadvertence* or *excusable neglect*, he may, by leave of court set up the counterclaim by amendment before judgment. In his motion for reconsideration, petitioner herein alleged oversight and inadvertence as reasons for his failure to include the counterclaim in his original answer.

In the case of Gallahar v. Rheman Co., *supra*, a motion to strike counterclaims on the ground that they were omitted from the answers as originally filed and were brought in too late by amendment was overruled since the counterclaims arose out of a transaction which was the subject matter of the opposing party's claim and if not adjudicated in the proceeding, defendants might lose all right to have them determined. The circumstances attending the filing of the counterclaims in said case being exactly the same as those involved in the present case, this ruling in the Gallahar case has particular application in the present considerations.

One might contend, however, that Rule 10 above-cited and commented on, applies only to ordinary civil actions and not to a special civil action like a petition for declaratory relief. But we should bear in mind that Rule 65 of the Rules of Court expressly states that "the provisions of the preceding rules (including Rule 10 of course), shall apply in special civil actions for *declaratory relief*, certiorari, prohibition, x x x which are not inconsistent with or may serve to supplement the provisions of the Rules relating to such special civil action."

In the special civil action pending in the lower court, at least one of the claims of the defendant, contained in his counterclaim, that referring to attorney's fees, arises from or is intimately connected with the transaction or contract on which the petition for declaratory relief is based. Said counterclaim seeks to increase the amount allegedly payable and due to the defendant by adding thereto the amount corresponding to attorney's fees, and if not set up in that special civil action, may be forever barred.

In conclusion, we believe and hold that in a special civil action for declaratory relief, to the petition filed by the petitioner, the defendant or respondent may set up in his answer a counterclaim based on or arising from the same transaction, deed or contract on which the petition is based. He may also set up said counterclaim in an amended answer filed before judgment, provided that his failure to include the counterclaim in the original answer was due to oversight, inadvertence or excusable neglect. Courts should be liberal in the admission, especially of compulsary counterclaims which may be barred unless so interposed.

In view of the foregoing, the order of the respondent Judge denying the motion to admit the amended answer and the other order denying the motion for reconsideration are hereby set aside and said respondent Judge is directed to admit the amended answer, including the counterclaim. No pronouncement as to costs.

Moran, Ozaeta, Pablo, Bengzon and Reyes — J.J. concur.
Mr. Tuason took no part.

XIV

Trinidad Semira and Isidoro G. Mercado, Petitioners vs. Juan Enriquez, Respondents, G. R. No. L-2582, March 23, 1950.

JUDGMENTS; PETITION FOR CORRECTION OF JUDGMENT AND EXTENSION OF TIME TO APPEAL; DUTY OF COURT TO DECIDE. — In case a party to a case files a petition for correction of the judgment rendered and for an extension of time to perfect an appeal, he is entitled to expect action thereon by the court. The latter is in duty bound to decide and resolve the two petitions and it is unfair for it to declare the judgment rendered in the case final and executory without first complying with its duty to act on the petitions for extension of time to perfect the appeal and for correction of judgment. Certiorari granted.

Potenciano A. Magtibay for petitioner.
Respondent Judge in his own behalf.
Antonio L. Azores for respondents *Azores*.

RESOLUTION

PADILLA, *J.*:

This is a petition for a writ of *mandamus* to compel the respondent court to correct an erroneous statement made in its order of 26 May 1948, entered in civil case No. 43 of the court of first instance of the province of Batangas entitled "Trinidad Semira et al., plaintiffs, v. Jose R. Azores et al., defendants;" to secure declaration by this Court that the motion for correction of 21 June 1948 filed in said case by the petitioners, the plaintiffs in the court below, suspended the running of the 30-day period within which an appeal could be taken; and to have the order of 25 September 1948 entered by the respondent court in the case, whereby it declared that the judgment rendered therein had become final an executory, set aside.

Answering the petition, the judge of the respondent court alleges that the defendants in the case, in which the judgment sought to be appealed was entered, are necessary parties and must be joined; and, after setting forth the proceedings in the court below pertinent to the question raised by the petitioners, prays that the petition be dismissed for lack of merit.

The facts alleged in the petition are as follows: The petitioners are the plaintiffs and Jose R. Azores, Sinforoso Azores, Antonio Azores, Norberta Azores, Bienvenido Azores, Apolonio Azores, Manuel Azores and Juana Azores are the defendants in civil case No. 43 of the court of first instance of Batangas. On 7 July 1944, judgment was rendered therein for the defendants. Counsel for the plaintiffs received a copy of the judgment on 7 August 1944. Twenty-seven (27) (should be 23) days after receipt of the notice of judgment, and three (3) (should be 7) days before the last day of the 30-day period within which the losing party could perfect an appeal, or on 30 August 1944, counsel for the plaintiffs filed a motion for reconsideration. On 26 May 1948, after the record of the case had been reconstituted, the respondent court denied the motion for reconsideration. On 21 June, counsel for the plaintiffs received a copy of the order denying the motion for reconsideration. But prior to the receipt of a copy of the last order, on 5 June 1948 counsel for the plaintiffs filed an urgent ex-parte petition *ad cautelam*, dated 1 June 1948, for additional 15 days within which to perfect the appeal, should the court deny the motion for reconsideration. As in the order of 26 May of 1948, denying the motion for reconsideration, a misstatement was made, to wit: that the defendants filed the motion for reconsideration and the plaintiffs filed an opposition thereto, when it was just the reverse, on 21 June 1948, or on the same day counsel for the plaintiffs received a copy of the last mentioned order, counsel filed a petition for correction and set it for hearing on 3 July following. As counsel for the plaintiffs did not receive notice of any action taken by the court on the two petitions for extension of time and for correction, he addressed a letter to the clerk of the court of first instance of Batangas inquiring as to what action, if any, had been taken on the petition for correction. On 2 October 1948, counsel for the plaintiffs received a copy of the order dated 25 September 1948, holding that the judgment rendered in the case on 7 July 1944 had become final and executory, because the motion for extension of time, in the opinion of the court below, could be granted for good reasons only and not when it is for the purpose of delay, and that the petition for correction did not stop the running of the 30-day period within which an appeal could be perfected, because the misstatement was just a clerical error which could not and did not mislead the plaintiffs — now petitioners. The respondent court added that if the extension of time prayed for had been granted, the last day would have been 9 (should be 13) July 1948, and if denied, the last day would have been 24 (should be 28) June 1948.

That the defendants in the case for whom judgment was rendered and from which the plaintiffs —now petitioners— attempted to appeal should have been brought in or joined as respondents, admits of no doubt. They are the parties directly affected in these proceedings.

The petitioners, plaintiffs in the case in the court below, were entitled to expect action by the respondent court on their petitions for extension of time to perfect the appeal and for correction of the order of 26 May 1948. The respondent court was in duty bound to decide and resolve the two petitions and it is unfair for it to declare the judgment rendered to the case final and executory without first complying with its duty to resolve and decide the petitions for extension of time to perfect the appeal and for correction of the aforesaid order of 26 May 1948.

The petitioners are directed to amend their petition to include or implead as respondents the defendants in the case in the court below, within five (5) days from notice or receipt of a copy of this resolution; and, after such amendment shall have made, let the new respondents answer the petition within five (5) days from date of service upon them of the amended petition.

Moran, Ozaeta, Pablo, Bengzon, Tuason, Montemayor and Reyes. J.J. concur

Torres voted in favor of the dispositive part of this resolution.

XV

Angela Goyena de Quizon, plaintiff-Appellant vs. Philippine National Bank et al., Defendants-Appellees, G. R. No. L-2851, January 31, 1950.

1. PLEADING AND PRACTICE; CONTEMPT IN EXECUTING JUDGMENT. — When, as in this case, the judgment requires the delivery of real property, it must be executed, not in accordance with section 9 of Rule 39, but in accordance with paragraph *d* of section 8, Rule 39, and any contempt proceeding arising therefrom must be based on paragraph *H* of section 3, Rule 64, and not on paragraph *b* of the same section in relation to section 9 of Rule 39.
2. ID.; EXECUTION OF JUDGMENT REQUIRING DELIVERY OF REAL PROPERTY. — "According to these sections (provisions of Act 190 from which Rule 39, sec. 8-d was taken), it is exclusively incumbent upon the sheriff to execute, to carry out the mandates of the judgment in question, and, in fact, it was he himself, and he alone, who was ordered by the justice of the peace who rendered that judgment, to place the plaintiff in possession of the land. The defendant in this case had nothing to do with that delivery of possession, and, consequently, his statements expressing his refusal or unwillingness to effect the same, are entirely officious and impertinent and therefore could not hinder, and much less prevent, the delivery being made, had the sheriff known how to comply with his duty. It was solely due to the latter's fault, and not to the alleged disobedience of the defendant, that the judgment was not duly executed. For that purpose the sheriff could even have availed himself of the public force, had it been necessary to resort thereto." (U.S. vs. Ramayrat, 22 Phil. 183.) This means that the sheriff must despossess or eject the losing party from the premises and deliver the possession thereof to the winning party. If subsequent to such dispossession or ejectment the losing party enters or attempts to enter into or upon the real property, for the purpose of executing acts of ownership or possessoin, or in any manner disturbs the possession of the person adjudged to be entitled thereto, *then and only then* may the loser be charged with and punished for contempt under paragraph *h* of section 3, Rule 64.

Andres M. Hagad for appellant.
Meneses and *Dimayuga* for appellees.

DECISION

OZAETA, J.:

On June 18, 1946, upon agreement of the parties, judgment was rendered by the Court of First Instance of Batangas in the above-entitled case the dispositive part of which reads as follows:

"Wherefore, the Court hereby renders judgment approving the agreement above quoted and declaring:

a) Defendants Alex F. Magtibay and Paulina B. de la Cruz to be the absolute owners of the properties under litigation and described in the complaint;

b) Authorizing the plaintiff Angela Goyena de Quizon to buy the properties referred to above for the sum of FIVE THOUSAND FIVE HUNDRED PESOS (₱5,500.00), THREE THOUSAND PESOS (₱3,000.00) to be paid within 90 days from the date of the said agreement, and TWO THOUSAND FIVE HUNDRED (₱2,500.00), within the period of one (1) year from the same date of said agreement, both payments to be made without interest. Failure, however, on the part of the said plaintiff Angela Goyena de Quizon to comply with any of the stipulations contained in the above-quoted agreement shall cause forfeiture of the plaintiff's right to purchase said properties, with the obligation on her part to vacate the premises and deliver the possession thereof to said defendant Alex F. Magtibay and Paulina B. de la Cruz; provided, however, that should the plaintiff pay the sum of THREE THOUSAND PESOS (₱3,000.00), as above mentioned, but failed to pay the balance of TWO THOUSAND FIVE HUNDRED PESOS (₱2,500.00) within the period stipulated as aforesaid, the plaintiff shall forfeit the amount already paid;

c) Ordering said defendants Alex F. Magtibay and Paulina B. de la Cruz that upon payment to them by said plaintiff of the amount of FIVE THOUSAND FIVE HUNDRED PESOS (₱5,500.00), agreed upon as hereinabove mentioned, to execute a deed of absolute sale of the properties under litigation in favor of said plaintiff within 30 days from date of the last payment."

Plaintiff paid the first intallment of ₱3,000 mentioned in said judgment but failed to pay the second installment of ₱2,500, alleging that her failure to do so was due to the subsequent separation of the defendants, the spouses Magtibay and her inability to determine who of said spouses was entitled to receive the payment.

Resolving plaintiff's motion for interpleader and defendants' motion for execution of the judgment, the court on August 28, 1947, entered the following order:

"Con la conformidad de las partes y los abogados que representan a las mismas, se concede a Angela Goyena de Quizon un plazo hasta el Sabado, 30 del actual, a las 12:00 de dicho dia, para que deposito en poder del Escribano de este Juzgado y en beneficio de Paulina B. de la Cruz la suma de ₱2,500.00, corriendo a cuenta de la depositante los derechos y comision del juzgado, y de no hacerlo dentro de ese plazo, el juzgado declararia que dicha Angela Goyena de Quizon ha perdido el derecho sobre la finca envuelta en este asunto, de acuerdo con la decision dictada en el mismo."

Because the plaintiff failed to deposit the sum of ₱2,500 within the period mentioned in the order last above quoted, the defendant Paulina B. de la Cruz again asked for a writ of execution, and Judge Eugenio Angeles, on September 11, 1947, issued an order the dispositive part of which reads as follows:

"WHEREFORE, enforcing the judgment rendered herein, the Court hereby declares that, because of the failure of the plaintiff to pay the amount of ₱2,500.00 which said plaintiff had agreed to pay on or before June 18, 1947, the plaintiff has forfeited to the defendants, Alex F. Magtiby and Paulina B. de la Cruz the said amount of ₱3,000.00, and said plaintiff has lost the right to repurchase the property the subject matter of the present action, and said plaintiff is hereby ordered to vacate the promises and deliver the possession thereof to the said defendants Alex F. Magtibay and Paulina B. de la Cruz."

On October 2, 1947, the plaintiff deposited the sum of ₱2,500 with the clerk of the lower court, who in turn then and there deposited it with the provincial treasurer, as appears on folio 67 of the record below.

The record does not show action was taken by the lower court with regard to said belated deposit. But the record does show that by virtue of an order of Judge Juan P. Enriquez dated January 2, 1948, the clerk of court issued a writ of execution which reads as follows:

"EL SHERIFF PROVINCIAL DE BATANGAS

"SALUD:

"Por cuanto en 18 de Junio de 1946 se dicto decision en esta causa de conformidad con el convenio firmado por las partes y sus abogados;

"Por cuanto dicha decision quedo firme y ejecutoria, y, en 2 del actual, el Juzgado ordeno la ejecucion de la decision aludida;

"POR TANTO es ordenamos que entregueis a los demandados Alex F. Magtibay y Paulina de la Cruz la siguiente propiedad:

> "A parcel of residential land and building constructed on the same with all existing improvements thereon, situated in the poblacion of Rosario, province of Batangas, bounded on the N. by Provincial Road (San Juan-Batangas road); on the E. by property of Rufino Goyena and River; on the S. by River and on the W. by River also. x x x x x which has a total assessment value of ₱2,040, under tax declaration No. 35883 in the name of Angela Goyena in the province of Batangas."

dichos Alex F. Magtibay y Paulina B. de la Cruz, los demandados, recobraron en 11 de Septiembre de 1947 en nuestro Juzgado, de la demandante Angela Goyena de Quizon, y devolvais la presente dentro del plazo fijado por la Ley, consignando en su dorso vuestras diligencias correspondientes.

"Dada por el Honorable JUAN P. ENRIQUEZ, Juez de dicho Juzgado, en la Ciudad de Lipa, hoy a 3 de Enero de 1948.

(Sgd.) EUSTACIO S. LUSTRE
Escribano"

The return of the sheriff states that on the morning of January 5, 1948, he went to Rosario, Batangas, accompanied by Alejandro Magtibay, son of the defendant spouses Magtibay, and with one policeman of the town went directly to the place where the land and building were located, and "I contacted the occupants of the ground floor of the said house and explained to him (sic) the writ of execution issued by the Court of First Instance of Batangas, Lipa City. After determining the boundaries as described in the execution, I delivered the herein — described parcel of residential land and building to Mr. Alejandro Magtibay."

On May 22 and July 10, 1948, Paulina B. de la Cruz and Alex F. Magtibay, respectively, filed separate petitions in court asking that the plaintiff be declared in contempt of court and punished in accordance with Rule 64 on the ground that she had disobeyed the order of Judge Angeles of September 11, 1947, and the order of execution of Judge Enriquez of January 2, 1948, "by refusing to vacate the premises in question and to deliver the possession thereof to the defendants Alex F. Magtibay and Paulina B. de la Cruz."

After hearing both parties Judge Gustavo Victoriano, on October 6, 1948, entered the following order:

"This is a petition to declare the plaintiff, Angela Goyena de Quizon, in contempt of court for having failed to comply with the orders of this Court of September 11, 1947, January 2, 1948, and August 28, 1947.

After considering the pleadings and arguments presented by both parties during the hearing of this petition for contempt, the Court is of the opinion and so holds that the plaintiff Angela Goyena de Quizon has committed contempt of court in failing to obey the aforementioned orders of this Court and, therefore, sentences her to be imprisoned until she complies with the same by vacating the premises in question and delivering the possession thereof to said defendants Alex F. Magtibay and Paulina B. de la Cruz.

In case of appeal, the appeal bond is hereby fixed at ₱500.00."

From the order last above quoted, the plaintiff has appealed to this court.

The judgment involved here requires the plaintiff "to vacate the premises and deliver the possession thereof to the said defendants Alex F. Magtibay and Paulina B. de la Cruz." Under section 8 (d) of Rule 39, if the judgment be for the delivery of the possession of real property, the writ of execution must require the sheriff or other officer to whom it must be directed to deliver the possession of the property, describing it, to the party entitled thereto. This means that the sheriff must dispossess or eject the losing party from the premises and deliver the possession thereof to the winning party. If subsequent to such dispossession or ejectment the losing party enters or attempts to enter into or upon the real property, for the purpose of executing acts of ownership or possession, or in any manner disturbs the possession of the person adjudged to be entitled thereto then and only then may the loser be charged with and punished for contempt under paragraph (h) of section 3, Rule 64.

In United States vs. Ramayrat, 22 Phil. 183, a similar writ of execution was invoked to punish the defendant for contempt of court. The defendant, who had been adjudged in a civil case to deliver the possession of a certain parcel of land to the plaintiff, manifested to the sheriff in writing that he was not willing "to deliver to Sabino Vayson (the plaintiff) or to the deputy sheriff of this municipality, Cosme Nonoy, the land in my possession, as I have been directed to do by the said sheriff, in order that, in the latter case, he might deliver the same to the aforementioned Vayson, in conformity with the order issued by the justice of the peace of this municipality." In affirming the order of the Court of First Instance acquitting the defendant of contempt, this court, interpreting the provisions of the Code of Civil Procedure from which paragraph (d) of section 8, Rule 39, was taken, held:

> "According to these sections, it is exclusively incumbent upon the sheriff to execute, to carry out the mandates of the judgement in question, and, in fact, it was he himself, and he alone, who was ordered by the justice of peace who rendered that judgment, to place the plaintiff, Vayson, in posssesion of the land. The defendant in this case had nothing to do with that delivery of possession, and, consequently, his statements expressing his refusal or unwillingness to effect the same, are entirely officious and impertinent and therefore could not hinder, and much less prevent, the delivery being made, had the sheriff known how to comply with his duty. It was solely due to the latter's fault, and not to the alleged disobedience of the defendant, that the judgment was not duly executed. For that purpose the sheriff could even have availed himself of the public force, had it been necessary to resort thereto."

In the present case it does not even appear that the plaintiff had been required by the sheriff, and had refused, to vacate the premises described in the writ of execution. All that appears in the return of the sheriff is that he contacted the occupants of the ground floor of the house and explained to them the writ of execution, and that after determining the boundaries as described in the execution he delivered the premises to Mr. Alejandro Magtibay, the son of the winning parties. Who those occupants of the ground floor were, has not been specified. For all we know, they may be strangers to the case.

Appellant cannot be punished for contempt under paragraph (b) of section 3, Rule 64, for disobience of or resistance to the judgment of the trial court because said judgment is not a special judgment enforcible under section 9 of Rule 39, which reads as follows

> "Sec. 9. *Writ of execution of special judgment.*—When a judgment requires the performance of any other act than the payment of money, or the sale or delivery of real or personal property, a certified copy of the judgment shall be attached to the writ of execution and may be served by the officer upon the party against whom the same is rendered, or upon any other person required thereby, or by law, to obey the same, and such party or person may be punished for contempt if he disobeys such judgment."

In other words, when as in this case, the judgment requires the delivery of real property, it must be executed not in accordance with section 9 above quoted but in accordance with paragraph (d) of section 8, Rule 39, and any contempt proceeding arising therefrom must be based on paragraph (h) of section 3, Rule 64, and not on paragraph (b) of the same section in relation to section 9 of Rule 39.

Acquitting appellant of contempt of court, we reverse the order appealed from with costs against the appellees Alex F. Magtibay and Paulina B. de la Cruz.

Moran, Paras, Bengzon, Tuason, Reyes, Pablo, Padilla, Montemayor, Torres, J.J. concur.

XVI

Pedro P. Villa, Petitioner vs. Fidel Ibañez et al., Respondent, G. R. L-3413, March 20, 1951.

1. PLEADING & PRACTICE; EXTRAORDINARY LEGAL REMEDIES; WHEN PETITION FOR CERTIORARI MAY BE CONSIDERED AS ONE FOR PROHIBITION.—A petition for certiorari which is in reality one for prohibition, may be regarded as a petition for the latter remedy.
2. ADMINISTRATIVE LAW; APPOINTMENT OF ADDITIONAL COUNSEL TO ASSIST FISCAL.—Appointments by the Secretary of Justice in virtue of the provisions of section 1686 of the Administrative Code, as amended by section 4 of Commonwealth Act No. 144, were upheld in Lo Cham vs. Ocampo (L-831, Nov. 21, 1946), Canape et al vs. Jugo et al (L-876, Nov. 21, 1946), People v. Dinglasan (44 O.G. 458), and Ko Cam et al v. Gatmaitan et al (L-2856, Mar. 27, 1950). But in those cases, the appointees were officials or employees in one or another of the bureaus or offices under the Department of Justice, and were rightly considered subordinates in the office of the Secretary of Justice within the meaning of section 1686, *ante*. An attorney who is a regular officer or employee in the Department of the Interior, belongs to the class of persons disqualified for appointment to the post of special counsel. The obvious reason is to have appointed only lawyers over whom the Secretary of Justice can exercise exclusive and absolute power of supervision.
3. CRIMINAL PROCEDURE; JURISDICTION; MOTION TO QUASH.—The chief of the division of investigation in the office of the City Mayor, was appointed by the Secretary of Justice as special counsel to assist the City Fiscal in the cases of city government officials he had investigated. In pursuance of that appointment, he subscribed, swore to and presented an information charging a criminal offense. The defendant had pleaded to the information before he filed a motion to quash. It is contended that by his plea he waived all objections to the information. *HELD*: The contention is correct as far as formal objections to the pleading are concerned. But by clear implication, if not by express provision, of section 10 of Rule 113 of the Rules of Court, and by a long line of uniform decisions, questions of want of jurisdiction may be raised at any stage of the proceedings. Now, the objection to the special counsel's actuations goes to the very foundations of jurisdiction. It is a valid information signed by a competent officer which, among other requisites, confers jurisdiction on the court over the person of the accused and the subject matter of the accusation. In consonance with this view, an infirmity of the nature noted in the information can not be cured by silence, acquiescence, or even by express consent.

Macario M. Peralta for petitioner.

City Fiscal Eugenio Angeles, Assistant Fiscal of Manila Lorenzo Relova and *Abelardo Subido* for respondents.

DECISION

TUASON, *J.*:

Attorney Abelardo Subido, chief of the division of investigation

in the office of the Mayor of the City of Manila, was appointed by the then Secretary of Justice, Honorable Ricardo Nepomuceno, as special counsel to assist the City Fiscal of Manila in the cases of city government officials or employees he had investigated; and in pursuance of that appointment, he subscribed, swore to and presented an information against Pedro P. Villa, the present petitioner, for falsification of a payroll of the division of veterinary service, Manila health department. Attorney Subido's authority to file the information was thereafter challenged by the accused but was sustained by His Honor, Judge Fidel Ibañez. Hence this petition for certiorari, which is in reality a petition for prohibition and will be so regarded.

Chief ground of attack, the resolution of which will dispose of the other and to which this opinion will therefore be confined, has to do with Attorney Subido's legal qualifications for the appointment in question under Section 1686 of the Revised Administrative Code, as amended by Section 4 of Commonwealth Act No. 144, which reads as follows:

> Sec. 1686. *Additional counsel to assist fiscal.*—The Secretary of Justice may appoint any lawyer, being either a subordinate from his office or a competent person not in the public service, temporarily to assist a fiscal or prosecuting attorney in the discharge of his duties, and with the same authority therein as might be exercised by the Attorney General or Solicitor General.

Appointments by the Secretary of Justice in virtue of the foregoing provisions of the Revised Administrative Code, as amended, were upheld in Lo Cham vs. Ocampo et al., Canape et al. v. Jugo et al., People v. Dinglasan et al., 44 O. G. 458, and Ko Cam et al. v. Gatmaitan et al., G. R. No. L-2856. But in those cases, the appointees were officials or employees in one or another of the bureaus or offices under the Department of Justice, and were rightly considered subordinates in the office of the Secretary of Justice within the meaning of Section 1686, *ante*.

The case at bar does not come within the rationale of the above decisions. Attorney Subido was a regular officer or employee in the Department of Interior, more particularly in the City Mayor's office. For this reason he belongs to the class of persons disqualified for appointment to the post of special counsel.

That to be eligible as special counsel to aid a fiscal the appointee must be either an employee or officer in the Department of Justice is so manifest from a mere reading of Section 1686 of the Revised Administrative Code as to preclude construction. And the limitation of the range of choice in the appointment or designation is not without reason.

The obvious reason is to have appointed only lawyers over whom the Secretary of Justice can exercise exclusive and absolute power of supervision. An appointee from a branch of the Government outside the Department of Justice would owe obedience to, and be subject to orders by, mutually independent superiors having, possibly, antagonistic interests. Referring particularly to the case at hand for illustration, Attorney Subido could be recalled or his time and attention be required elsewhere by the Secretary of Interior or the City Mayor while he was discharging his duties as public prosecutor, and the Secretary of Justice would be helpless to stop such recall or interference. An eventuality or state of affairs so undesirable, not to say detrimental to the public service and specially the administration of justice, the legislature wisely intended to avoid.

The defendant had pleaded to the information before he filed a motion to quash, and it is contended that by his plan he waived all objections to the information. The contention is correct as far as formal objections to the pleading are concerned. But by clear implication if not by express provision of Section 10 of Rule 113 of the Rules of Court, and by a long line of uniform decisions, questions of want of jurisdiction may be raised at any stage of the proceeding. Now, the objection to the respondent's actuations goes to the very foundations of jurisdiction. It is a valid information signed by a competent officer which, among other requisites, confers jurisdiction on the court over the person of the accused and the subject matter of the accusation. In consonance with this view, an infirmity of the nature noted in the information can not be cured by silence, acquiescence, or even by express consent.

The petition will therefore be granted and the respondent Judge ordered to desist from proceeding with Criminal Case No. 11963 upon the information filed by Attorney Abelardo Subido, without costs.

Moran, Paras, Pablo, Bengzon, Padilla; Reyes; Jugo and *Bautista. Montemayor* did not take part.
Paras voted to grant the petition.

XVII

Urban Estates, Inc., Petitioner vs. Agustin P. Montesa and the City of Manila, Respondents, G. R. L-3830, March 15, 1951.

1. EXPROPRIATION PROCEEDINGS; MOTION TO DISMISS; EVIDENCE ON TO MOTION DISMISS.—U, the owner of the division sought to be expropriated, alleged and offered to prove in support of his motion to dismiss (1) the true and fair market value; (2) that one-half of its total area has been already sold at a very fair and reasonable price, some lots having been paid for in full and down payments having been made on others; and (3) that a big portion of the tract is reserved for playground as evidenced by Plan duly approved by the National Urban Planning Commission and the Director of Lands. The trial court refused to receive evidence on these allegations on the theory that a motion to dismiss assumes the truth of the facts stated in the complaint. HELD: In expropriation proceedings "each defendant, in lieu of an answer, shall present in a single motion to dismiss... all of his objections and defenses to the right of the plaintiff, to take his property for the use specified in the complaint" (Rule 69, sec. 4). "The ascertainment of the necessity must precede or accompany, and not follow, the taking of the land" (City of Manila v. Chinese Community of Manila, 40 Phil. 349). As the City itself, the plaintiff, objected to the substantiation of the facts set forth in the motion to dismiss, and since on their face and by their nature these facts are based on documentary proof, they can be taken for granted instead of remanding the case to the court below for further proceeding.

2. EXPROPRIATION; NECESSITY FOR.—"The very foundation of the right to exercise eminent domain is a genuine necessity, and that necessity must be of a public character" (City of Manila v. Chinese Community of Manila, 40 Phil. 349). The decisions in Guido v. Rural Progress (L-2089, Oct. 31, 1949), Commonwealth v. Arellano Law College (L-2929, Feb. 28, 1950), warned of the tendency to expand the construction of section 4, Article XIII, of the Constitution "to the limit of its logic." The Constitution contemplates large-scale purchases or condemnation of lands with a view to agrarian reforms and the alleviation of acute housing shortage. These are vast social problems with which the Nation is vitally concerned and the solution of which would redound to the common weal. Condemnation of private lands in a makeshift or piecemeal fashion, random taking of a small lot here and a small lot there to accommodate a few tenants or squatters is a different thing. This is true be the land urban or agricultural. The first sacrifices the rights and interests of one or a few for the good of all; the second is deprivation of a citizen of his property for the convenience of another citizen or a few other citizens without perceptible benefit to the public. The first carries the connotation of public

use; the last follows along the lines of a faith or ideology alien to the institution of property and the economic and social systems consecrated in the Constitution and embraced by the great majority of the Filipino people.

3. ID.; ID.;—Wherein resorting to expropriation, the city government was prompted, not by the unwillingness of the owners to part with their property but by the inability of the present tenants or squatters to meet the owner's price, expropriation proceeding is not proper. The City cannot acquire land, by the simple expedient of eminent domain, for a price far below the capital invested therein and sell it at cost to help the homeless who may have been forced to migrate from the provinces in search of safer haven in this city. If the price of lots for sale is beyond the reach of some people who want to buy, the City cannot bring down the price to the level the poor could afford. That the city authorities have no power to do such thing, however altruistic may be the motive behind their action, seems too obvious for argument.

4. ID.; PARTIES.—In expropriating a subdivision, if the intention is to expropriate the lots that have been disposed of but have not been fully paid for, along with the rest of the entire tract, the purchasers should be made parties.

Gibbs, Gibbs, Chuidian and *Quasha* for petitioner.

City Fiscal Eugenio Angeles and *Assistant Fiscal Eulogio S. Serrano* for respondents.

DECISION

TUASON, *J.*:

This case, brought here on appeal from an order of Judge Agustin P. Montesa denying defendant's motion to dismiss, concerns the authority of the City of Manila to expropriate a tract of land situated within the city limits and having an area of 49,553.10 square meters, more or less.

Urban Estates, Inc., defendant, alleged and offered to proved in support of its motion to dismiss, that the true, fair market value of the property in question is ₱1,002,074.00 and the assessed value ₱363,150.00; that this land is mortgaged to Juan E. Tuason for ₱470,530.00 and is used to secure an overdraft with the People's Bank & Trust Co. in the sum of ₱150,000.00, so that it has at least a loan value of ₱620,530.00; that the said land is a subdivision property and one-half of its total area has been sold already at a very fair and reasonable price, some lots having been paid for in full and down payments having been made on others; and that a big portion of the tract is reserved for playground as evidenced by Plan Psd-24832 duly approved by the National Urban Planning Commission and the Director of Lands.

But the trial court refused to receive evidence on these allegations on the theory that they were improperly made in a motion to dismiss; the court was of the opinion that a motion to dismiss assumes the truth of the facts stated in the complaint.

Section 4, Rule 69, of the Rules of Court, entitled "Defenses and Objections" provides: "Within the time specified in the summons, each defendant, in lieu of an answer, shall present in a single motion to dismiss or for other appropriate relief, all of his objections and defenses to the right of the plaintiff to take his property for the use specified in the complaint. All such objections and defenses not so presented are waived. A copy of the motion shall be served on the plaintiff's attorney of record and filed with the court with the proof of service." And in the City of Manila v. Chinese Community of Manila, 40 Phil. 349, this Court laid down this rule: "The very foundation of the right to exercise eminent domain is a genuine necessity, and that necessity must be of a public character. The ascertainment of the necessity must precede or accompany and not follow, the taking of the land." The Court cited this passage in Blackstone's Commentaries: "So great is the regard of the law for private property that it will not authorize the least violation of it, even for the public good, unless there exists a very great necessity thereof."

As the City itself, the plaintiff, objected to the substantiation of the facts set forth in the motion to dismiss, and since on their face and by nature these facts are based on documentary proof, we will take them for granted instead of remanding the case to the court below for further proceeding.

The matter of the right of the Government to condemn urban private lands for subdivision or resale to private persons has been discussed so extensively in Guido v. Rural Progress Administration, G. R. No. L-2089, De Borja v. Commonwealth of the Philippines, G. R. No. L-1496, and Arellano Law Colleges v. City of Manila, G. R. No. L-2929, that we should think the question is no longer open, at least as far as inferior courts are concerned. Lest those decisions may have been misread or misconstrued, a few remarks are in order in further elucidation of their meaning.

The Guido, De Borja and Arellano Colleges decisions expressly recognize the power of the Government to expropriate urban lands or rural estates for subdivision into lots. What those decisions emphasize is the distinction, set in broad outline, between taking that inures to the welfare of the community at large and taking that benefits a mere handful of people bereft of public character. In explaining the distinction we mentioned public benefit, public utility, or public advantage as the universal test of the exercise of the right of eminent domain, and warned of the tendency to expand the construction of Section 4, Article XIII, of the Constitution "to the limit of its logic."

It is a matter of common knowledge that there were and there are lands, comprising whole towns and municipalities, which were or are owned by one man or a group of men from whom their inhabitants hold the lots on which their homes are built as perpetual tenants. These are *urban* lands. And there are private lands which it may be necessary in the public interest for the Government to convert into townsites and the townsites into house lots. It is also a matter of past and contemporary history that feudalism has been the root cause of popular discontent that led to revolutions and of present unrest and political and social disorders.

It was such lands taken for such purpose which we said the framers of the Constitution had in mind and which the National Government and, with appropriate legislative authority, the cities and municipalities may condemn. We stated that it is economic slavery, feudalistic practices, endless conflicts between landlords and tenants, and allied evils which it is the authority, nay the duty, of the State to abolish by acquiring landed estates by purchase if possible or by condemnation proceedings if necessary.

In brief, the Constitution contemplates large-scale purchases or condemnation of lands with a view to agrarian reforms and the alleviation of acute housing shortage. These are vast social problems with which the Nation is vitally concerned and the solution of which would redound to the common weal. Condemnation of private lands in a makeshift or piecemeal fashion, random taking of small lot here and small lot there to accommodate a few tenants or squatters is a different thing. This is true be the land urban or agricultural. The first sacrifices the rights and interest of one or a few for the good of all; the second is deprivation of a citizen of his property for the convenience of another citizen or a few other citizens without perceptible benefit to the public. The first carries the connotation of public use; the last follows along the lines of a faith or ideology alien to the institution of property and the economic and social systems consecrated in the Constitution and embraced by the great majority of the Filipino people.

Strickley v. Highland Boy Gold Min. Co., 50 Law Ed. 581, cited to bolster the plaintiff-appellee's case, is in reality against its contention. In that case the finding was that the plaintiff was a "carrier for itself and others (and) that the line (right of way) is dedicated to carrying for whatever portion of the public may desire to use it." The expropriation in that case was thus affected with public use and public interest. Our own railroad companies have been conferred with power of eminent domain.

Clark v. Nash, 49 Law Ed. 1085, mentioned in Strickley v. Highland Boy Min. Co. was a case in which the Supreme Court of

Utah had found and decided that the plaintiff was "entitled to a decree condemning a right of way through defendant's said ditch, to the extent of widening said ditch one foot more than its present width, and to a depth of said ditch as now constructed through the entire length thereof down to plaintiff's said land, for the purpose of carrying his said waters of said Fort Canyon creek to the land of the plaintiff for the purpose of irrigation, and is entitled to an easement therein to the extent of the enlarging of said ditch, and for the purposes aforesaid, and to have a perpetual right of way to flow waters therein to the extent of the said enlargement." This was the background of Mr. Justice Holmes' statement "that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation." To condemn private land and give it to another is a far cry from "the condemnation of the land of one individual for the purpose of allowing another individual to obtain waters from a stream *in which he has an interest*, to irrigate his land, which otherwise would remain absolutely valueless." Similar rights of riparian owners are expressly recognized by our own Civil Code independently of constitutions.

Attempts are made to differentiate this Court's recent decisions from the present case. Actually the material differences which we can discern serve to show that there is less necessity for condemnation in this case than in either of the three cases before referred to, from the standpoint of the persons intended to be favored, let alone the public. In the first place, it has been seen that the land sought to be condemned here has actually been subdivided by its owners, who have spent considerable money for its improvements and in the laying out of streets, and is being offered for sale. Some lots in fact have already been sold and paid for in full or in part. The people on whose behalf this action has been instituted could acquire the remaining lots by direct purchase from the defendant like those purchasers.

In the face of these circumstances, it would appear that in resorting to expropriation, the plaintiff was prompted, not by the unwillingness of the owners to part with their property but by the inability of the present tenants or squatters to meet the owner's price. By the simple expedient of eminent domain, the City would acquire the land for a price far below the capital invested therein and sell it at cost to help the homeless who, it is said in the appealed decision, have been forced to migrate from the provinces in search of safer haven in this city. What all this adds up to then is ceiling price for lands. If the price of lots for sale is beyond the reach of some people who want to buy, the City would bring down the price to the level the poor could afford. That the city authorities have no power to do such thing, however altruistic may be the motive behind their action, seems too obvious for argument.

In the second place, the remaining lots after eliminating the lots that have already been alienated, are said to be about one-half of the entire subdivisions or smaller than the land involved in the Guido case. If the intention is to expropriate the lots that have been disposed of but have not been fully paid for, along with the rest of the entire tract, the purchasers have not been made parties, unlike the buyers to whom title has been issued and who have been included in the complaint but as to whose lots the complaint has been dismissed.

The order is reversed and the action dismissed with costs of both instances against the plaintiff.

Moran, Paras, Feria, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo, Bautista Angelo, — J.J. concur.

Manila Herald Publishing Co., et al., Petitioners, vs. Hon. Simeon Ramos, et al., Respondents, G. R. No. L-4268, January 18, 1951.

1. PLEADING AND PRACTICE; DISMISSAL OF ACTION BY COURT MOTU PROPIO.—Section 1 of Rule 8 enumerates the grounds upon which an action may be dismissed, and it specifically ordains that a motion to this end be filed. In the light of this express requirement, the Court of First Instance has no power to dismiss a case, wherein no motion to dismiss or an answer had been filed. Even if the parties file memoranda upon the court's indication in which they discuss the proposition that the action was necessary and was improperly brought, this would not supply the deficiency. Rule 30 of the Rules of Court provides for the cases in which an action may be dismissed, and the inclusion of those therein provided excludes any other, under the familiar maxim, "inclusio unius est exclusio alterius." The only instance in which, according to said rules, the court may dismiss upon the court's own motion an action is, when the "plaintiff fails to appear at the time of the trial or to prosecute his action for an unreasonable length of time or to comply with the Rules or any order of the court." To dismiss the case without any formal motion to dismiss, would be acting with grave abuse of discretion if not in excess of jurisdiction.

2. ID.; PRELIMINARY INJUNCTION; THIRD-PARTY CLAIMS.—Section 14 of Rule 59, which treats of the steps to be taken when property attached is claimed by any other person than the defendant or his agent, contains the proviso that "Nothing herein contained shall prevent such third person from vindicating his claim to the property by any proper action." What is "proper action"? Section 1 of Rule 2 defines action as "an ordinary suit in a court of justice, by which one party prosecutes another for the enforcement or protection of a right, or the prevention or redress of a wrong," while section 2, entitled "Commencement of Action," says that "civil action may be commenced by filing a complaint with the court." "Action" has acquired a well-defined, technical meaning, and it is in this restricted sense that the word "action" is used in the above rule. In employing the word "Commencement" the rule clearly indicates an action which originates an entire proceeding and puts in motion the instruments of the court calling for summons, answer, etc., and not any intermediary step taken in the course of the proceeding whether by the parties themselves or by a stranger. It would be strange indeed if the framers of the Rules of Court or the Legislature should have employed the term "proper action" instead of "intervention" or equivalent expression if the intention had been just that. The most liberal view that can be taken in favor of the attaching party's position is that *intervention* as a means of protecting the third-party claimants' right is not exclusive but cumulative and suppletory to the right to bring a new, independent suit. It is significant that there are courts which go so far as to take the view that even where the statute expressly grants the right to intervention in such cases as this, the statute does not extend to owners of property attached, for under this view, "it is considered that the ownership is not one of the essential questions to be determined in the litigation between plaintiff and defendant;" that "whether the property belongs to defendant or claimant, if determined, is considered as shedding no light upon the question in controverry, namely, that defendant is indebted to plaintiff." (See 7 C.J.S. 545 and footnote No. 89 where extracts from the decision in Lewis v. Lewis, 10 N.W. 586, leading case, are printed.)

3. ID.; ID.; ID.. — Separate action was indeed said to be the correct and only procedure contemplated by Act No. 190, *intervention* being a new remedy introduced by the Rules of Court as addition to, but not in substitution of, the old process. The new Rules adopted section 121 of Act No. 190

and added thereto Rule 24(a) of the Federal Rules of Civil Procedure. (See I Moran's Comments on the Rules of Court, 3rd Ed., 238, 239.) Yet, the right to intervene, unlike the right to bring a new action is not absolute but left to the sound discretion of the court to allow. This qualification makes intervention less preferable to an independent action from the standpoint of the third-party claimants, at least.

4. ID.; ID.; ID. — Q filed a civil action against B and secured preliminary attachment on *B's properties*. M and P filed with the sheriff separate third-party claims alleging that they were the owners of the property attached; and instead of intervening in the case, M and P filed an independent action jointly against the sheriff and Q. The first case was pending before the branch of the court presided over by Judge S, and the new action is before the branch of the court presided over by Judge R. Can Judge R *entertain* a motion to discharge the preliminary attachment in the action pending before Judge S? *Held*: The sheriff is not holding the properties in question by order of Judge S; in reality this is true only to a limited extent. Judge S did not direct the sheriff to attach the particular property in dispute The order was for the sheriff to attach B's properties. He was not supposed to touch any property other than that of B, and if he did, he acted beyond the limits of his authority and upon his personal responsibility. It is true of course that property in custody of the law cannot be interferred with without the permission of the proper court and property legally attached is property in *custodia legis*. But for the reason just stated, this rule is confined to cases where the property belongs to B or one in which B has proprietary interest. When the sheriff, acting beyond the bounds of his office, seizes M's and P's properties, the rule does not apply and interference with his custody is not interference with another court's order of attachment. None of what has been said, however, is to be construed as implying that the setting aside of the attachment prayed for in the case before Judge R should be granted. The preceding discussion is intended merely to point out that Judge R has jurisdiction to act in the premises, not the way the jurisdiction should be exercised.

Edmundo M. Reyes and *Antonio Barredo* for petitioners.
Bausa and *Ampil* for respondents.

DECISION

TUASON, *J.*:

This is a petition for "certiorari with preliminary injunction" arising upon the following antecedents:

Respondent Antonio Quirino filed a libel suit, docketed as Civil Case No. 11531, against Aproniano G. Borres, Pedro Padilla and Loreto Pastor, editor, managing editor and reporter, respectively, of the Daily Record, a daily newspaper published in Manila asking damages aggregating ₱90.000.00. With the filing of this suit, the plaintiff secured a writ of preliminary attachment upon certain office and printing equipment found in the premises of the Daily Record.

Thereafter the Manila Herald Publishing Co. Inc. and Printers, Inc., filed with the Sheriff separate third-party claims, alleging that they were the owners of the property attached. Whereupon, the Sheriff required of Quirino a counterbond of ₱41,500 to meet the claim of the Manila Herald Publishing Co., Inc., and another bond of ₱59,500 to meet the claim of Printers, Inc. These amounts, upon Quirino's motion filed under Section 13, Rule 59, of the Rules of Court, were reduced by the court to ₱11,000 and ₱10,000 respectively.

Unsuccessful in their attempt to quash the attachment, on October 7, 1950, the Manila Herald Publishing Co., Inc. and Printers, Inc. commenced a joint suit against the Sheriff, Quirino and Alto Surety & Insurance Co. Inc., in which the former sought (1) to enjoin the latter from proceeding with the attachment of the properties above mentioned and (2) ₱45,000.00 damages. This suit was docketed as Civil Case No. 12263.

Whereas Case No. 11531 was being handled by Judge Sanchez or pending in the branch of the Court presided by him, Case No. 12263 fell in the branch of Judge Pecson who issued a writ of preliminary injunction to the Sheriff directing him to desist from proceeding with the attachment of the said properties.

After the issuance of that preliminary injunction, Antonio Quirino filed an *ex-parte* petition for its dissolution, and Judge Simeon Ramos, to whom Case No. 12263 had in the meanwhile been transferred, granted the petition on a bond of ₱21,000.00. However Judge Ramos soon set aside the order just mentioned on a motion for reconsideration by the Manila Herald Publishing Co. Inc. and Printers, Inc. and set the matter for hearing for October 14, then continued to October 16.

Upon the conclusion of that hearing, Judge Ramos required the parties to submit memoranda on the question whether "the subject matter of Civil Case No. 12263 should be ventilated in an independent action or by means of a complaint in intervention in Civil Case No. 11531." Memoranda having filed, His Honor declared that the suit, in Case No. 12263, was "unnecessary, superfluous and illegal" and so dismissed the same. He held that what Manila Herald Publishing Co., Inc., and Printers, Inc., should do was intervene in Case No. 11531.

The questions that emerge from these facts and the arguments are: Did Judge Ramos have authority to dismiss Case No. 12263 at the stage when it was thrown out of court? Should the Manila Herald Publishing Co., Inc., and Printers, Inc., come as intervenors into the case for libel instead of bringing an independent action? And did Judge Pecson or Judge Ramos have jurisdiction in Case No. 12263 to quash the attachment levied in Case No. 11531?

In Case No. 12263, it should be recalled, neither a motion to dismiss nor an answer had been made when the decision under consideration was handed down. The matter then before the court was a motion seeking a provisional or collateral remedy, connected with and incidental to the principal action. It was a motion to dissolve the preliminary injunction granted by Judge Pecson restraining the Sheriff from proceeding with the attachment in Case No. 11531. The question of dismissal was suggested by Judge Ramos on a ground perceived by His Honor. To all intents and purposes, the dismissal was decreed by the court on its own initiative.

Section 1 of Rule 8 enumerates the grounds upon which an action may be dismissed, and it specifically ordains that a motion to this end be filed. In the light of this express requirement we do not believe that the court had power to dismiss the case without the requisite motion duly presented. The fact that the parties filed memoranda upon the court's indication or order in which they discussed the proposition that the action was unnecessary and was improperly brought outside and independently of the case for libel did not supply the deficiency. Rule 30 of the Rules of Court provides for the cases in which an action may be dismissed, and the inclusion of those therein provided excludes any other, under the familiar maxim, *inclusio inius est exclusio alterius*. The only instance in which, according to said Rules, the court may dismiss upon the court's own motion an action is, when the "plaintiff fails to appear at the time of the trial or to prosecute his action for an unreasonable length of time or to comply with the Rules or any order of the court."

The Rules of Court are devised as a matter of necessity, intended to be observed with diligence by the courts as well as by the parties, for the orderly conduct of litigation and judicial rules which gives the court jurisdiction to act.

We are of the opinion that the court acted with grave abuse of discretion if not in excess of its jurisdiction in dismissing the case without any formal motion to dismiss.

The foregoing conclusions should suffice to dispose of this proceeding for certiorari, but the parties have discussed the second question and we propose to rule upon it if only to put out of the way a probable cause for future controversy and consequent delay in the disposal of the main cause.

Section 14 of Rule 59, which treats of the steps to be taken when property attached is claimed by any other persons than the defendant or his agent, contains the proviso that "Nothing herein contained shall prevent such third person from vindicating his claim

Utah had found and decided that the plaintiff was "entitled to a decree condemning a right of way through defendant's said ditch, to the extent of widening said ditch one foot more than its present width, and to a depth of said ditch as now constructed through the entire length thereof down to plaintiff's said land, for the purpose of carrying his said waters of said Fort Canyon creek to the land of the plaintiff for the purpose of irrigation, and is entitled to an easement therein to the extent of the enlarging of said ditch, and for the purposes aforesaid, and to have a perpetual right of way to flow waters therein to the extent of the said enlargement." This was the background of Mr. Justice Holmes' statement "that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation." To condemn private land and give it to another is a far cry from "the condemnation of the land of one individual for the purpose of allowing another individual to obtain waters from a stream *in which he has an interest*, to irrigate his land, which otherwise would remain absolutely valueless." Similar rights of riparian owners are expressly recognized by our own Civil Code independently of constitutions.

Attempts are made to differentiate this Court's recent decisions from the present case. Actually the material differences which we can discern serve to show that there is less necessity for condemnation in this case than in either of the three cases before referred to, from the standpoint of the persons intended to be favored, let alone the public. In the first place, it has been seen that the land sought to be condemned here has actually been subdivided by its owners, who have spent considerable money for its improvements and in the laying out of streets, and is being offered for sale. Some lots in fact have already been sold and paid for in full or in part. The people on whose behalf this action has been instituted could acquire the remaining lots by direct purchase from the defendant like those purchasers.

In the face of these circumstances, it would appear that in resorting to expropriation, the plaintiff was prompted, not by the unwillingness of the owners to part with their property but by the inability of the present tenants or squatters to meet the owner's price. By the simple expedient of eminent domain, the City would acquire the land for a price far below the capital invested therein and sell it at cost to help the homeless who, it is said in the appealed decision, have been forced to migrate from the provinces in search of safer haven in this city. What all this adds up to then is ceiling price for lands. If the price of lots for sale is beyond the reach of some people who want to buy, the City would bring down the price to the level the poor could afford. That the city authorities have no power to do such thing, however altruistic may be the motive behind their action, seems too obvious for argument.

In the second place, the remaining lots after eliminating the lots that have already been alienated, are said to be about one-half of the entire subdivisions or smaller than the land involved in the Guido case. If the intention is to expropriate the lots that have been disposed of but have not been fully paid for, along with the rest of the entire tract, the purchasers have not been made parties, unlike the buyers to whom title has been issued and who have been included in the complaint but as to whose lots the complaint has been dismissed.

The order is reversed and the action dismissed with costs of both instances against the plaintiff.

Moran, Paras, Feria, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo, Bautista Angelo, — J.J. concur.

Manila Herald Publishing Co., et al., Petitioners, vs. Hon. Simeon Ramos, et al., Respondents, G. R. No. L-4268, January 18, 1951.

1. PLEADING AND PRACTICE; DISMISSAL OF ACTION BY COURT MOTU PROPIO.—Section 1 of Rule 8 enumerates the grounds upon which an action may be dismissed, and it specifically ordains that a motion to this end be filed. In the light of this express requirement, the Court of First Instance has no power to dismiss a case, wherein no motion to dismiss or an answer had been filed. Even if the parties file memoranda upon the court's indication in which they discuss the proposition that the action was necessary and was improperly brought, this would not supply the deficiency. Rule 30 of the Rules of Court provides for the cases in which an action may be dismissed, and the inclusion of those therein provided excludes any other, under the familiar maxim, "inclusio unius est exclusio alterius." The only instance in which, according to said rules, the court may dismiss upon the court's own motion an action is, when the "plaintiff fails to appear at the time of the trial or to prosecute his action for an unreasonable length of time or to comply with the Rules or any order of the court." To dismiss the case without any formal motion to dismiss, would be acting with grave abuse of discretion if not in excess of jurisdiction.

2. ID.; PRELIMINARY INJUNCTION; THIRD-PARTY CLAIMS.—Section 14 of Rule 59, which treats of the steps to be taken when property attached is claimed by any other person than the defendant or his agent, contains the proviso that "Nothing herein contained shall prevent such third person from vindicating his claim to the property by any proper action." What is "proper action"? Section 1 of Rule 2 defines action as "an ordinary suit in a court of justice, by which one party prosecutes another for the enforcement or protection of a right, or the prevention or redress of a wrong," while section 2, entitled "Commencement of Action," says that "civil action may be commenced by filing a complaint with the court." "Action" has acquired a well-defined, technical meaning, and it is in this restricted sense that the word "action" is used in the above rule. In employing the word "Commencement" the rule clearly indicates an action which originates an entire proceeding and puts in motion the instruments of the court calling for summons, answer, etc., and not any intermediary step taken in the course of the proceeding whether by the parties themselves or by a stranger. It would be strange indeed if the framers of the Rules of Court or the Legislature should have employed the term "proper action" instead of "intervention" or equivalent expression if the intention had been just that. The most liberal view that can be taken in favor of the attaching party's position is that *intervention* as a means of protecting the third-party claimants' right is not exclusive but cumulative and suppletory to the right to bring a new, independent suit. It is significant that there are courts which go so far as to take the view that even where the statute expressly grants the right to intervention in such cases as this, the statute does not extend to owners of property attached, for under this view, "it is considered that the ownership is not one of the essential questions to be determined in the litigation between plaintiff and defendant;" that "whether the property belongs to defendant or claimant, if determined, is considered as shedding no light upon the question in controversy, namely, that defendant is indebted to plaintiff." (See 7 C.J.S. 545 and footnote No. 89 where extracts from the decision in Lewis v. Lewis, 10 N.W. 586, leading case, are printed.)

3. ID.; ID.; ID.. — Separate action was indeed said to be the correct and only procedure contemplated by Act No. 190, *intervention* being a new remedy introduced by the Rules of Court as addition to, but not in substitution of, the old process. The new Rules adopted section 121 of Act No. 190

and added thereto Rule 24(a) of the Federal Rules of Civil Procedure. (See I Moran's Comments on the Rules of Court, 3rd Ed., 238, 239.) Yet, the right to intervene, unlike the right to bring a new action is not absolute but left to the sound discretion of the court to allow. This qualification makes intervention less preferable to an independent action from the standpoint of the third-party claimants, at least.

4. ID.; ID.; ID. — Q filed a civil action against B and secured preliminary attachment on *B's properties*. M and P filed with the sheriff separate third-party claims alleging that they were the owners of the property attached; and instead of intervening in the case, M and P filed an independent action jointly against the sheriff and Q. The first case was pending before the branch of the court presided over by Judge S, and the new action is before the branch of the court presided over by Judge R. Can Judge R *entertain* a motion to discharge the preliminary attachment in the action pending before Judge S? *Held*: The sheriff is not holding the properties in question by order of Judge S; in reality this is true only to a limited extent. Judge S did not direct the sheriff to attach the particular property in dispute The order was for the sheriff to attach B's properties. He was not supposed to touch any property other than that of B, and if he did, he acted beyond the limits of his authority and upon his personal responsibility. It is true of course that property in custody of the law cannot be interferred with without the permission of the proper court and property legally attached is property in *custodia legis*. But for the reason just stated, this rule is confined to cases where the property belongs to B or one in which B has proprietary interest. When the sheriff, acting beyond the bounds of his office, seizes M's and P's properties, the rule does not apply and interference with his custody is not interference with another court's order of attachment. None of what has been said, however, is to be construed as implying that the setting aside of the attachment prayed for in the case before Judge R should be granted. The preceding discussion is intended merely to point out that Judge R has jurisdiction to act in the premises, not the way the jurisdiction should be exercised.

Edmundo M. Reyes and *Antonio Barredo* for petitioners.
Bausa and *Ampil* for respondents.

DECISION

TUASON, *J.*:

This is a petition for "certiorari with preliminary injunction" arising upon the following antecedents:

Respondent Antonio Quirino filed a libel suit, docketed as Civil Case No. 11531, against Aproniano G. Borres, Pedro Padilla and Loreto Pastor, editor, managing editor and reporter, respectively, of the Daily Record, a daily newspaper published in Manila asking damages aggregating ₱90,000.00. With the filing of this suit, the plaintiff secured a writ of preliminary attachment upon certain office and printing equipment found in the premises of the Daily Record.

Thereafter the Manila Herald Publishing Co. Inc. and Printers, Inc., filed with the Sheriff separate third-party claims, alleging that they were the owners of the property attached. Whereupon, the Sheriff required of Quirino a counterbond of ₱41,500 to meet the claim of the Manila Herald Publishing Co., Inc., and another bond of ₱59,500 to meet the claim of Printers, Inc. These amounts, upon Quirino's motion filed under Section 13, Rule 59, of the Rules of Court, were reduced by the court to ₱11,000 and ₱10,000 respectively.

Unsuccessful in their attempt to quash the attachment, on October 7, 1950, the Manila Herald Publishing Co., Inc. and Printers, Inc. commenced a joint suit against the Sheriff, Quirino and Alto Surety & Insurance Co. Inc., in which the former sought (1) to enjoin the latter from proceeding with the attachment of the properties above mentioned and (2) ₱45,000.00 damages. This suit was docketed as Civil Case No. 12263.

Whereas Case No. 11531 was being handled by Judge Sanchez or pending in the branch of the Court presided by him, Case No. 12263 fell in the branch of Judge Pecson who issued a writ of preliminary injunction to the Sheriff directing him to desist from proceeding with the attachment of the said properties.

After the issuance of that preliminary injunction, Antonio Quirino filed an *ex-parte* petition for its dissolution, and Judge Simeon Ramos, to whom Case No. 12263 had in the meanwhile been transferred, granted the petition on a bond of ₱21,000.00. However Judge Ramos soon set aside the order just mentioned on a motion for reconsideration by the Manila Herald Publishing Co. Inc. and Printers, Inc. and set the matter for hearing for October 14, then continued to October 16.

Upon the conclusion of that hearing, Judge Ramos required the parties to submit memoranda on the question whether "the subject matter of Civil Case No. 12263 should be ventilated in an independent action or by means of a complaint in intervention in Civil Case No. 11531." Memoranda having filed, His Honor declared that the suit, in Case No. 12263, was "unnecessary, superfluous and illegal" and so dismissed the same. He held that what Manila Herald Publishing Co., Inc., and Printers, Inc., should do was intervene in Case No. 11531.

The questions that emerge from these facts and the arguments are: Did Judge Ramos have authority to dismiss Case No. 12263 at the stage when it was thrown out of court? Should the Manila Herald Publishing Co., Inc., and Printers, Inc., come as intervenors into the case for libel instead of bringing an independent action? And did Judge Pecson or Judge Ramos have jurisdiction in Case No. 12263 to quash the attachment levied in Case No. 11531?

In Case No. 12263, it should be recalled, neither a motion to dismiss nor an answer had been made when the decision under consideration was handed down. The matter then before the court was a motion seeking a provisional or collateral remedy, connected with and incidental to the principal action. It was a motion to dissolve the preliminary injunction granted by Judge Pecson restraining the Sheriff from proceeding with the attachment in Case No. 11531. The question of dismissal was suggested by Judge Ramos on a ground perceived by His Honor. To all intents and purposes, the dismissal was decreed by the court on its own initiative.

Section 1 of Rule 8 enumerates the grounds upon which an action may be dismissed, and it specifically ordains that a motion to this end be filed. In the light of this express requirement we do not believe that the court had power to dismiss the case without the requisite motion duly presented. The fact that the parties filed memoranda upon the court's indication or order in which they discussed the proposition that the action was unnecessary and was improperly brought outside and independently of the case for libel did not supply the deficiency. Rule 30 of the Rules of Court provides for the cases in which an action may be dismissed, and the inclusion of those therein provided excludes any other, under the familiar maxim, *inclusio inius est exclusio alterius*. The only instance in which, according to said Rules, the court may dismiss upon the court's own motion an action is, when the "plaintiff fails to appear at the time of the trial or to prosecute his action for an unreasonable length of time or to comply with the Rules or any order of the court."

The Rules of Court are devised as a matter of necessity, intended to be observed with diligence by the courts as well as by the parties, for the orderly conduct of litigation and judicial rules which gives the court jurisdiction to act.

We are of the opinion that the court acted with grave abuse of discretion if not in excess of its jurisdiction in dismissing the case without any formal motion to dismiss.

The foregoing conclusions should suffice to dispose of this proceeding for certiorari, but the parties have discussed the second question and we propose to rule upon it if only to put out of the way a probable cause for future controversy and consequent delay in the disposal of the main cause.

Section 14 of Rule 59, which treats of the steps to be taken when property attached is claimed by any other persons than the defendant or his agent, contains the proviso that "Nothing herein contained shall prevent such third person from vindicating his claim

to the property by any proper action." What is "proper action"? Section 1 of Rule 2 defines action as "an ordinary suit in a court of justice, by which one party prosecutes another for the enforcement or protection of a right, or the prevention or redress of a wrong," while Section 2, entitled "Commencement of Action," says that "civil action may be commenced by filing a complaint with the court."

"Action" has acquired a well-defined, technical meaning, and it is in this restricted sense that the word "action" is used in the above rule. In employing the word "commencement" the rule clearly indicates an action which originates an entire proceeding and puts in motion the instruments of the court calling for summons, answer, etc., and not any intermediary step taken in the court of the proceeding whether by the parties themselves or by a stranger. It would be strange indeed if the framers of the Rules of Court or the Legislature should have employed the term "proper action" instead of "intervention" or equivalent expression if the intention had been just that. It was all the easier, simpler and the more natural to say intervention if that had been the purpose, since the asserted right of the third-party claimant necessarily grows out of a pending suit, the suit in which the order of attachment was issued.

The most liberal view that can be taken in favor of the respondents' position is that intervention as a means of protecting the third-party claimants' right is not exclusive but cumulative and suppletory to the right to bring a new, independent suit. It is significant that there are courts which go so far as to take the view that even where the statute expressly grants the right of intervention in such cases as this, the statute does not extend to owners of property attached, for, under this view, "it is considered that the ownership is not one of the essential questions to be determined in the litigation between plaintiff and defendant;" that "whether the property belongs to defendant or claimant, if determined is considered as shedding no light upon the question in controversy, namely, that defendant is indebted to plaintiff." See 7 C. J. S. 545 and footnote No. 89 where extracts from the decision in Lewis v. Lewis, 10 N.W. 586, a leading case, are printed.

Separate action was indeed said to be the correct and only procedure contemplated by Act No. 190, intervention being a new remedy introduced by the Rules of Court as addition to, but not in substitution of, the old process. The new Rules adopted Section 121 of Act No. 190 and added thereto Rule 24 (a) of the Federal Rules of Procedure. Combined, the two modes of redress are now Section 1 of Rule 13(1) the last clause of which is the newly added provision. The result is that, whereas, "under the old procedure, the third person could not intervene, he having no interest in the debt (or damages) sued upon by the plaintiff," under the present Rules, "a third person claiming to be the owner of such property may, not only file a third-party claim with one sheriff, but also intervene in the action to ask that the writ of attachment be quashed." (I Moran's Comments on the Rules of Court, 3rd Ed. 238, 239.) Yet, the right to intervene, unlike the right to bring a new action, is not absolute but left to the sound discretion of the court to allow. This qualification makes intervention less preferable to an independent action from the standpoint of the claimants, at least. Because availability of intervention depends upon the court in which Case No. 11531 is pending, there would be no assurance for the herein petitioners that they would be permitted to come into that case.

Little reflection should disabuse the mind from the assumption that an independent action creates a multiplicity of suits. There can be no multiplicity of suits when the parties in the suit where the attachment was levied are different from the parties in the new action, and so are the issues in the two cases entirely different. In the circumstances, separate action might, indeed, be the more convenient of the two competing modes of redress, in that intervention is more likely to inject confusion into the issues between the parties in the case for debt or damages with which the third-party claimant has nothing to do and thereby retard instead of facilitate the prompt dispatch of the controversy which is the underlying objective of the rules of pleading and practice. That is why intervention is subject to the court's discretion.

The same reasons which impelled us to decide the second question, just discussed, urge us to take cognizance of and express an opinion on the third.

The objection that at once suggests itself to entertaining in Case No. 12263 the motion to discharge the preliminary attachment levied in Case No. 11531 is that by so doing one judge would interfere with another judge's actuations. The objection is superficial and will not bear analysis.

It has been seen that a separate action by the third-party who claims to be the owner of the property attached is appropriate. If this is so, it must be admitted that the judge trying such action may render judgment ordering the sheriff or whoever has in possession the attached property to deliver it to the plaintiff-claimant or desist from seizing it. It follows further that the court may make an interlocutory order, upon the filing of such bond as may be necessary, to release the property pending final adjudication of the title. Jurisdiction over an action includes jurisdiction over an interlocutory matter incidental to the cause and deemed necessary to preserve the subject matter of the suit or protect the parties' interests. This is self-evident.

The fault with the respondents' argument is that it assumes that the Sheriff is holding the property in question by order of the court handling the case for libel. In reality this is true only to a limited extent. That court did not direct the Sheriff to attach the particular property in dispute. The order was for the Sheriff to attach Borres', Padilla's and Pastor's property. He was not supposed to touch any property other than that of these defendants', and if he did, he acted beyond the limits of his authority and upon his personal responsibility.

It is true of course that property in custody of the law can not be interfered with without the permission of the proper court, and property legally attached is property in *custodia legis*. But for the reason just stated, this rule is confined to cases where the property belongs to the defendant or one in which the defendant has proprietary interest. When the sheriff acting beyond the bounds of his office seizes a stranger's property, the rule does not apply and interference with his custody is not interference with another court's order of attachment.

It may be argued that the third-party claim may be unfounded; but so may it be meritorious for that matter. Speculations are however beside the point. The title is the very issue in the case for the recovery of property or the dissolution of the attachment, and pending final decision, the court may enter any interlocutory order calculated to preserve the property in litigation and protect the parties' rights and interests.

None of what has been said is to be construed as implying that the setting aside of the attachment prayed for by the plaintiffs in Case No. 12263 should be granted. The preceding discussion is intended merely to point out that the court has jurisdiction to act in the premises, not the way the jurisdiction should be exercised. The granting or denial, as the case may be, of the prayer for the dissolution of the attachment would be a proper subject of a new proceeding if the party adversely affected should be dissatisfied.

The petition for certiorari is granted with costs against the respondents except the respondent Judge.

Moran, Paras, Feria, Pablo, Bengzon, Padilla; Montemayor; Reyes, Jugo, Bautista Angelo, J.J. concur.

(1) Section 1. When Proper.—A person may, at any period of a trial, be permitted by the court, in its discretion, to intervene in an action if he has legal interest in the matter in litigation or in the success of either of the parties, or an interest against both, or when he is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

RECOGNIZE THEIR RESPECTIVE RESPONSIBILITY

(*Continued from page* 111)

(which, by the way, is represented not only by the Supreme Court but also by the Court of Appeals, Court of First Instance, municipal and justice of the peace courts, and even such other commissions and boards as are exercising quasi-judicial powers). As this Convention closes and the conventionists return to their own localities, it is my fervent hope and plea that all concerned will ever be responsibility conscious.

Happy New Year to all.

(REPUBLIC ACT NO. 847)

AN ACT TRANSFERRING THE MEDICAL AND DENTAL SERVICES TO THE DEPARTMENT OF EDUCATION.

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

SECTION 1. The Medical and Dental Services in the Public Schools which is now functioning as a division of the Bureau of Health, since January first, nineteen hundred and fifty-one, is hereby transferred or returned back to the Department of Education as a division of that Department where it originally belonged from nineteen hundred and forty-six to nineteen hundred and fifty: *Provided*, That the supervision of hygiene and sanitation shall be exercised by the Department of Health.

Sec. 2. All laws, acts, executive orders, or parts thereof, inconsistent with provision of this act are hereby repealed.

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

Enacted on May 23, 1953, without the Executive approval.

(REPUBLIC ACT NO. 837)

AN ACT REORGANIZING THE GENERAL AUDITING OFFICE

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

Section 1. The Auditor General is hereby authorized to reorganize with the approval of the President of the Philippines, the General Auditing Office within six months from the date of approval of this Act.

Sec. 2. The reorganization herein authorized shall be done within the limits of the appropriation of the General Auditing Office as provided in the General Appropriation Act in force at the time of such reorganization. The Auditor General, is however, authorized to use savings from said appropriation to carry out the provisions this Act: *Provided*, That the Deputy Auditor General shall receive an annual salary not exceeding twelve thousand pesos and each head of department and his assistant, not exceeding seven thousand two hundred pesos and six thousand pesos, respectively.

Sec. 3. Effective upon the approval of this Act, the salaries of provincial and city auditors shall be paid in the same manner as they are paid now from provincial and city funds, as the case may be, at rates not less than those fixed by law for provincial and city treasurers in the respective places where they are appointed.

Sec. 4. The reorganization to be made by the Auditor General pursuant to the provisions of this Act shall be reported, through the President of the Philippines, to the Congress not later than thirty days from the date it becomes effective and shall be valid and subsisting until Congress shall provide otherwise in its next regular session in connection with the annual appropriation law.

Sec. 5. All laws or parts of laws which are or may be in conflict with any of the provisions of this Act are hereby repealed.

Sec. 6. This Act shall take effect upon its approval.

Approved, March 20, 1953.

(REPUBLIC ACT NO. 945)

AN ACT TO AMEND SECTION ONE THOUSAND SIX HUNDRED AND FIFTY-NINE OF THE REVISED ADMINISTRATIVE CODE, AS AMENDED.

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

Section 1. Section one thousand six hundred and fifty-nine of the Revised Administrative Code, as amended, is hereby further amended to read as follows:

"Sec. 1659. *Chief Officials of Office of the Solicitor General.* —The Office of the solicitor General shall have one chief to be known as the Solicitor General whose salary shall be twelve thousand pesos *per annum* and shall have the rank of an Undersecretary of a Department. He shall be assisted by one First Assistant Solicitor General whose salary shall be ten thousand pesos *per annum*. When the Solicitor General is unable perform his duties or in case of a vacancy in the office, the First Assistant Solicitor General shall temporarily perform the functions of said officer, or, in his absence, the next Assistant Solicitor General who is senior in the service. There shall also be four Assistant Solicitors General each of whom shall receive a salary of seven thousand eight hundred pesos *per annum*, and twenty-four Solicitors whose salaries shall be as follows:

"(*a*) Four Solicitors, six thousand six hundred pesos *per annum* each;

"(*b*) Four Solicitors, six thousand pesos *per annum* each;

"(*c*) Five Solicitors, five thousand four hundred pesos *per annum* each;

"(*d*) Five Solicitors, five thousand one hundred pesos *per annum* each;

"(*e*) Six Solicitors, four thousand eight hundred pesos *per annum* each.

"The qualifications for appointment to the posistion of Solicitor General, the First Assistant Solicitor General and the four Assistant Solicitors General shall be the same as those prescribed for Judges of Courts of First Instance and those of Solicitors shall be the same as those prescribed for provincial fiscals."

Sec. 2. To carry out the purposes of this Act and in addition to such sum as may have been provided for under current appropriation there is hereby appropriated out of any funds in the National Treasury not otherwise appropriated the amount of twenty-two thousand nine hundred pesos for the fiscal year nineteen hundred and fifty-four.

Sec. 3. This Act shall take effect on July first, nineteen hundred and fifty-three.

Approved, June 20, 1953.

(REPUBLIC ACT NO. 912)

AN ACT TO REQUIRE THE USE, UNDER CERTAIN CONDITIONS, OF PHILIPPINE MADE MATERIALS OR PRODUCTS IN GOVERNMENT PROJECTS OR PUBLIC WORKS CONSTRUCTION, WHETHER DONE DIRECTLY BY THE GOVERNMENT OR AWARDED THRU CONTRACTS.

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

SECTION 1. In construction or repair work undertaken by the Government, whether done directly or thru contract awards, Philippine made materials and products, whenever available, practicable and usable, and will serve the purpose as equally well as foreign made products or materials, shall be used in said construction or repair work, upon the proper certification of the availability, practicability, usability and durability of said materials or products by the Director of the Bureau of Public Works and/or his assistants.

SEC. 2. For the purpose of carrying into effect the purposes of this Act, the Director of Public Works shall prepare or cause to be prepared, from time to time, a list of building and construction materials and products made in the Philippines that are available, durable, usable and practicable for construction and building purposes.

SEC. 3. No contract may be awarded under the provisions of this Act unless the contractor agrees to comply with the requirements of this Act, and a contract already awarded may be rescinded for unjustified failure to so comply.

SEC. 4. It shall be the duty of the Director of Public Works and/or his assistants, including the district engineers, to see to it that the requirements of this Act are faithfully complied with by the persons concerned, and failure on their part to do so shall subject them to dismissal from the government service or other disciplinary action.

SEC. 5. The Director of Public Works, subject to the approval of the Secretary of Public Works and Communications, is hereby empowered to promulgate such rules and regulations as may be necessary to carry into effect the purposes of this Act.

SEC. 6. This Act shall take effect upon its approval.

Approved, June 20, 1953.

MEMORANDUM OF THE CODE COMMISSION

(Continued from the February Issue)

This memorandum comments upon proposed amendments to Book III of the new Cvil Code. Except in regard to succession, the articles are consecutively dealth with, thus: Arts. 712, 719, 721, etc.

In the part concerning succession, the amendments are commented upon by placing together those that are proposed by the same proponent. Moreover, those suggestions not coming from either Congressman Tolentino or Justice J. B. L. Reyes are discussed together.

ARTICLE 712

Justice J. B. L. Reyes criticizes the placing of donation in Book III as one of the modes of acquiring ownership.

The Code Commission knew that there were civilists who disagreed with this arrangement, among them Sanchez Roman. However, after careful consideration, the Commission perferred to retain the arrangement of the Spanish Civil Code, for these reasons:

1. The reasonings of Sanchez Roman did not quite convince the Commission. It should be noted that the Commission adopted the solution of Sanchez Roman concerning intellectual creation and prescription and therefore included these two subjects among the modes of acquiring ownership. However, in regard to donation, Sanchez Roman did not quite convince the Commission, and preferred the reasons of Manresa found in Vol. 6 of his commentaries where he discusses the grounds for not placing donation among the contracts. Manresa says:

"Atendiendo a estos preceptos, las donaciones entre vivos son indudablemente contratos, porque hay concurso de voluntades, hay objeto y causa. Son contratos gratuitos o de pura beneficencia, cuyo objeto es la dacion de una cosa o de un derecho sobre esa cosa.

"Pero este argumento es de aquellos que, pro probar demasiado, nada prueban contra la idea del legislador, al separar la donacion como un modo especial de adquirir. Consentimiento, objeto y causa hay en las sucesiones, en el matrimonio, et cetera, y podrian estimarse tambien contratos dentro de estos limnamentos generales que tanto abarcan. El Codigo no niega que pueda estimarse como contrato la donacion, pero la estudia aparte y la considera como un modo especial de adquirir, porque no ha podido menos de observar que son demasiadas las especialidades que presenta respecto a los demas contratos ordinarios, especialidades que la acercan bastante a las sucesiones.

"A que obedece esa especialidad? La unica diferencia, dice Savigny, entre el contrato y la donacion, consiste en que aquel puede aplicarse a toda clase de relaciones de derecho, mientras que esta aplica solamente al derecho de bienes. Pero no es esto solo: no obedece le especialidad de la donacion a que sea su objeto la dacion de una cosa, y, por tanto, modo de adquirir y transmitir la propiedad, porque lo mismo ocurre en la compraventa, la permuta, el censo, etc., y a estos actos se les llama contratos y se incluyen como un modo distinto de transmitir y de adquirir. No obedece tampoco la especialidad a que constituyan las donaciones un acto de pura liberalidad, porque el mandatario que administra gratuitamente los bienes de un amigo o pariente, el gestor de negocios, en iguales casos, el que voluntariamente y sin premio ni interes alguno presta un servicio cualquiera, obran tambien gratuitamente y por mera liberalidad, y, sin embargo, estos actos son tratados por el Codigo entre los contratos.

"El caracter especial de las donaciones nace de las dos circunstancias reunidas a que nos hemos referido, no de una sola de ellas. Notese que los actos gratuitos de que hemos hecho mencion no constituyent modos de adquirir el dominio no, consisten en la dacion de cosas. Notese que los otros modos de adquirir que, como contratos, estudia el Codigo, tienen todos una causa onerosa o remuneratoria. Notese, por ultimo (articulo 1,187) que la condonacion, unico acto que puede reunir los expresados caracteres, sigue las reglas de las donaciones, como que es una verdadera donacion.

"Hay, pues, un grupo especial de actos, o si se quiere de contratos, que al mismo tiempo tienen una causa gratuita y constituyen un modo de adquirir. Este grupo esta formado exclusivamente por las donaciones.

"Pero tambien es un modo de adquirir, con causa puramente gratuita, la sucesion testada o intestada. *Luego las donaciones tienen una naturaleza muy semejante a las sucesiones. Pues de esta casi identidad de naturaleza, de esta estrecha relacion entre ambas instituciones, nace forzosamente y contra la voluntad de todo legislador que intendra desconocerlo, la especialidad de la donacion como modo de adquirir.*

"Cierto que las donaciones producen sus efectos en vida del donante, y en las sucesiones esos efectos se producen por la muerte del que dispone de los bienes; cierto que, como una consecuencia de los dicho, es irrevocable la donacion y puede revocarse el testamento hasta la hora de la muerte. Pero precisamente por esos motivos, ambas instituciones sin dejar de ser semajantes no son identicas. Si bien el heredero, continua a veces la personalidad de causante no hacemos mencion de esta circunstancia porque no es un caracter distinto todas las sucesiones, y que los legatarios y aun los mismos herederos, si aceptan la herencia a beneficio de inventario, suceden por testamento y no confuden su personalidad con la del difunto.

"Desde el momento en que hay actos por los que se transmite gratuitamente la propiedad en vida, y actos por los que gratuitamente se transmite la propiedad para despues de la muerte, la ley tiene que imponer a unos y otros actos iguales limitaciones. *Como va a prohibir a un testador que disponga libremente de sus bienes para despues de su muerte, si consiente que se desprenda de ellos gratuitamente durante su vida?* O habia que suprimir las legitimas, o era necesario limitar las donaciones.

"Ante esta necesidad, las reglas generales de los contratos no podian sevir para las donaciones. Y no se diga que cada contrato tiene su modo de ser especial, debiendo forzosamente seguir reglas distintas la compraventa que la sociedad, el mandato que la fianza, etc., porque ni nos referimos solo a las reglas especiales, ni contrato alguno, como la donacion, es, del mismo modo que las sucesiones modo de adquirir por titulo gratuito.

"Asi es que empezamos por notar que muchos que pueden contratar no pueden hacer donaciones, y que, en cambio, pueden ser donatarios y aun acentar donaciones muchos que no pueden contratar. Bajo el primer aspecto, como van a justificar el padre o el tutor la necesidad o la utilidad de que el hijo o el menor nagan donacion simple de sus bienes? Bajo el segundo, basta leer los articulos 625 y 626 para convencerse de que la capacidad para adquirir por donacion se acerca mas a la capacidad para adquirir por herencia o legado, y aun tiene menos trabas legales, porque hay menos temor de que sea onerosa la adquisicion.

"Continuamos viendo que una persona puede contratar sobre todos sus bienes, nero no todos puede donarlos, y que nadie puede dar ni recibir por via de donacion mas de lo que pueda dar recibir por testamento.

"Vemos, por ultimo, la especialidad de las reglas de la donacion para su rescision en el caso de que haya fraude de acreedores, sus especiales causas de revocacion, su reduccion por inoficiosas, y, en fin, las reglas que llenan el Codigo en el tratado de los sucesion, y no se aplican a los contratos, sino solo a las donaciones de las que ofrecen ejemplo los articulos 811, 812 817, al 820, 825, 869, 968, 1.035, 1,039, 1.040, 1044, 1046 a 1.048, etc.

"Y como todas esta reglas no son caprichosas, como obedecen a una verdadera necesidad y arrancan de la naturaleza misma de la donacion, no hay mas remedio que reconocer con cuanta razon el Codigo español, siguiendo el ejemplo de otros muchos, ha considerado a las donaciones como un modo especial de adquirir y las ha estudiado separadamente de los contratos."

2 Aside from the foregoing considerations of Manresa, the Code Commission had in mind the distinction between *actos jurídicos* and *contratos*. The former are more under the control of law than of the will of the parties. Therefore, in adoption and marriage, for example, the parties are not free to agree upon the conditions of the marriage or adoption because the law steps in for reasons of public policy to fix special conditions and limitations. The same thing occurs in regard to donation; thus there is a limit as to the amount that may be donated (Art. 750 to 752), incapacity to succeed by will is applicable to donations *inter vivos* (Art. 740); donations have special ways of revocation and reduction (Chap. IV, Title III, Book III.) in this connection, Sanchez Roman himself, in spite of his reasonings, had to define donation as "un *acto* de liberalidad" and did not use the word "contrato." He also admits that:

"x x x si puede tener el acto independiente existencia jurídica por la sola voluntad del donante, y si bajo este punto de vista, *en su origen* la donacion, como consecuencia del derecho que tenemos a disponer de lo que es nuestro, es unica y exclusivamente un acto de nuestra liberrima voluntad, sin tener para nada en cuenta el consentimiento del donatario, y *en este sentido hemos considerado la donacion* en general, *al determinar su naturaleza x x x.*"

3. But Sanchez Roman says that: "una vez concurriendo las dos voluntades de donante, y donatario por la aceptacion, ese acto unilateral viene a convertirse en una relacion contractual, y la donacion de simple acto de beneficiencia o liberalidad, transformase en un contrato," Our comment is that the perfection of the act of liberality by the donee's acceptance does not give rise to a contract but to a *donation*.

4. Lastly, there is something to be said in favor of Napoleon's view that "el contrato impone cargas mutuas a los dos contratantes, y por tanto esta expresion contrato no puede convenir a la donacion." A pure gift being a sheer act of generosity imposes no obligations on the donee. Therefore, in the common acceptance of the word "contract," it can not properly be applied to a simple donation.

With regard to the proposal of Justice Reyes that the title of tradition should be dealt with separately and not merely under the Title on Sales, that suggestion should be discussed in connection with the proposed amendment adding Title VI on tradition.

Title I. — OCCUPATION

Justice Reyes says that the Code fails to make an exception of goods found and salvaged at sea, which are governed by special rules. (Salvage Act). He further says that the Code also fails to clarify the situation of the movables cast ashore by the sea waves and those sunk and lying in the water, at the bottom of the sea or rivers.

Our comment is that, as to the first point, this matter is governed by the Salvage Act and should not be covered again in the new Civil Code.

With regard to the second class of cases, they should be the subject of special legislation. (See our comment under Art. 507.)

Title II. — INTELLECTUAL CREATION

Justice Reyes says that paragraph 4 should be amended so as to read: "(4). The discoverer or inventor with regard to his discovery or invention," omitting the words "scientist or technologist" in order that by the *ejusden generis* rule of interpretation the sentence may not be limited to technologically trained men.

We are sorry to disagree with the proposed amendment because the phrase "any other person" is broad enough to cover any other person. There is no ground to fear that if any layman, not a scientist, should make a scientific discovery any court would deny him the right to have a patent just because he is not a scientist. Moreover, there is nothing in the law on Patents which limits the right to give a patent to a scientist or technologist. In this connection Art. 742 provides that special laws govern copyright and patent.

ARTICLE 724

Justice Reyes says that this article should include trade-marks and trade-names. The suggestion is accepted. Moreover, the word "service-mark" should also be included. As amended, the article should read as follows:

'ART. 724. Special laws govern copyrights, patents, trade-marks, service-marks and trade-names."

Title III. DONATION
ARTICLE 725

Justice Reyes reiterates his suggestion that this entire title should be transferred to an appropriate place in Book IV on Obligations and Contracts. Reference is made to our comment under Art. 712.

ARTICLES 733 and 754

Justice Reyes suggests the amendment of Art. 733, by calling donations with a burden, onerous donations, so that the article will not conflict with Art. 754.

There is no contradiction between Arts. 733 and 754 because they refer to the same kind of donation with a burden, although the donation in Art. 733 is looked at from the standpoint of the *cause*, while the donation in Art. 754 is viewed from the standpoint of *effect*. In both articles the thing donated is worth more than the burden.

Castan divides donations on the basis of their *cause*, into simple and remuneratory; and on the basis of their effect, into pure, conditional and *onerous*. The very wording of Art. 733 shows that a remuneratory donation may carry with it a burden, that is to say, a donation motivated by a desire to reward services may impose a burden on the donee. This makes Art. 733 entirely consistent with Art. 754 where an onerous donation, viewed from the standpoint of its *effect*, also implies a burden.

In support of the foregoing, we quote Castan's "Derecho Civil Español," in his exposition of "Donacion" (vol. 3, pp. 96-99):

"3. *Sus clases.*—

x x x.

"B. *Por su causa o motivo.* — Se dividen a este respecto las donaciones en *simples* y *remuneratorias*. Son *simples* las que no reconocen otras causa que la liberalidad del donante; y *remuneratorias* acquellas a que alude el art. 619 del codigo civil, al decir que es tambien donacion la que se hace a una persona por sus meritos o por los servicios prestados al donante, siempre que no constituyan deudas exigibles x x x.

"C. *Por sus efectos.* — Se dividen las donaciones en puras, condicionalis y *onerosas*. El Codigo se refiere a estas ultimas al decir que son tambien donaciones aquellas en que se impone al donatario un gravamen inferior al valor de lo donado (art. 619), y que las donaciones con causa onerosa se rigen por las reglas de los contratos (art. 622). Pero esta ultima disposicion *hay que entender sera solo apicable a las donaciones impropras que impongan un gravamen equivalente al valor de lo donado; pues en las otras es natural que al excedente de la donacion sobre el gravamente se le apliquen las reglas de la donacion.*"

Our comment is that this last is a *donacion remuneratoria by its causa or motivo*.

ARTICLE 737

Congressman Arturo M. Tolentino suggests that Art. 737 be amended so as to read as follows: "The donor must have the capacity to donate at the time he makes the donation and when he learns of its acceptance."

Atty. R. M. Jalandoni also makes the same proposal.

The reason adduced is that inasmuch as under Art. 734 donation is perfected from the moment the donor knows of its acceptance by the donee, therefore, the capacity of the donor must also exist at the said moment in order that the donation may be valid.

However, the Code Commission does not believe that Art. 734 should require the capacity of the donor at the time of the acceptance by the donee is conveyed, because if, for example, the donor has become insane, his guardian's knowledge of the acceptance should be sufficient. In the case the donor should become a bankrupt, the knowledge of the acceptance communicated to the assignee should like be sufficient.

Justice Reyes proposes that it should be made clear that bankruptcy or civil interdiction of the donor after making the donation does not bar the effectivity.

However, it is quite clear from the wording of the article, that if the donor loses his capacity after making the donation, that does not rescind the donation, because it is expressly stated that the donor's capacity shall be determined *as of the time of the making of the donation*. In other words, subsequent incapacity does not affect the donation.

ARTICLE 739

Justice Reyes says that the word "void" should be changed to "voidable".

However, the intention of the Code Commission is to make these donations void from the beginning, because they are immoral or against public policy. The fact that the last paragraph refers to an action for declaration of nullity does not mean that the donation is only voidable, because even if a contract is void from the beginning, a judicial declaration to that effect is necessary. Art. 1410 provides: "The action or defense for the declaration of the inexistence of a contract does not prescribe."

In this connection, Art. 1409 provides: "The following contracts are inexistent and void from the beginning:

"x x x x x.

"(7). Those expressly prohibited or declared void by law."

The donations in Art. 739 are among the transactions prohibited or declared void by law. This is clear from the fact that the first line of Art. 739 clearly states, "The following donations *shall* be void."

ARTICLE 740

Justice Reyes proposes that the words "and *vice versa*" should be added to accord with Art. 1028. The latter article provides: "The prohibitions mentioned in article 739, concerning donations *inter vivos* shall apply to testamentary provisions."

In view of the clearness of Art. 1028, the words "and *vice versa*" need not be added to Art. 740.

ARTICLE 742

There is no vagueness in Art. 742 because Arts. 311, 316 and 320, clearly state who represent the child.

ARTICLE 749, Last Par.

Justice Reyes asks who is supposed to make the notification to the donor that his donation has been accepted. He states that it is doubtful if notaries have the power under the Administrative Code, to make the notification.

The last paragraph of this article states that the donor shall be notified "in an authentic form." The notification need not be done by the notary; it may be done by the donee himself in writing signed by him, transmitting the separate instrument of acceptance, which shall be in a public document, according to paragraph 2

ARTICLE 750

Justice Reyes proposes that donations exceeding, say ₱500, be approved by the court in order to be valid. He says this would save ulterior litigation.

The Code Commission believes that such requirement would be an expensive red-tape and would hamper the generosity of benefactors. Before the donation is approved, creditors and heirs would appear and make objections which may not be well founded.

With regard to the possibility of fraud on creditors, if any person wants to perpetrate such fraud, he usually makes a simulated sale of his property. Therefore, to be logical, it should also be required that all sales shall be approved by the court, because they may be intended to defraud the creditors.

We believe that the requirement herein proposed by Justice Reyes will be an undue interference with the citizen's freedom of action. If he is violating the law, the statutes both penal and civil are sufficiently comprehensive to make him suffer the consequences.

ARTICLE 753

Justice Reyes suggests that the last part of the first paragraph be amended to read: "There shall be no right of accretion among them *by reason of a donee's incapacity, refusal or failure to accept the donation*, unless the donor has otherwise provided."

His reasons are as follows:

1. That predecease is not applicable unless the death takes place before the donation is perfected.

2. It is rare to meet an express repudiation of donations; most of the time, the donee will simply fail to accept.

With regard to the first reason, inasmuch as Justice Reyes himself admits that death before the donation is perfected may give rise to accretion, therefore, predecease is one of the possibilities foreseen in the article. The first paragraph, therefore, provides that in such a case there shall be no right of accretion, unless the donor has otherwise provided.

With regard to the second reason, failure to act is an implied repudiation.

ARTICLE 760 Par. 3

Justice Reyes asks why adoption in paragraph 3 should refer only to a minor child, whereas Art. 337 permits adoption of a person of legal age.

The intention of the Commission is that the subsequent adoption of a minor child should be the only case where adoption may cause the revocation or reduction of the donation, for these reasons:

1. The adoption of a person of legal age is usually not to have an heir but only for purpose of expressing the adopter's affection.

2. The subsequent adoption of a person of age should not give the latter a chance to ask the donee for the revocation or reduction of donations previously made, because this would give him an opportunity to meddle with, or inquire into, past generosities of the adopter. The Code Commission believes that such would be a reprehensible act of interference on the part of the adopted person.

ARTICLE 761

Justice Reyes proposes that the fourth and fifth lines of this article be eliminated, that is to say, "taking into account the whole estate of the donor at the time of the birth, appearance or adoption of a child."

The question involved is whether the basis of computation should be the property of the donor at the time of the birth, appearance or adoption of a child, or at the time of the donor's death.

Justice Reyes says that it should be the latter. But inasmuch as the action is usually brought during the lifetime of the donor, there is no way of computing his property at the time of his death, therefore, the only way to have an approximate computation is to take into account the property of the donor at the time of the birth or appearance or adoption of the child.

But, Justice Reyes says, that testator may acquire sufficient assets after the appearance of the child to render revocation or reduction of the donation unnecessary. In such a case the revocation may be rescinded or the reduction modified upon petition of the donor.

There is some similarity in this way of computation to the case of the compulsory dowry under the old Civil Code. In accordance with Art. 1341 of the old Code, the compulsory dowry consisted in one-half of the presumptive strict legitime.

ARTICLE 762-763

Justice Reyes proposes the elimination of these two articles for the reasons he stated in Art. 761.

Inasmuch as the reasons have been refuted, these two articles should be retained.

ARTICLE 763

Atty. R. M. Jalandoni proposes that the words " or from his legitimation, recognition" be eliminated from Art. 763 because, he says, the mere birth of a child of the donor, whether the child be legitimate or illegitimate, is a ground for a revocation.

It is true that even a spurious child is entitled to a legitime under the new Civil Code. However, the relation of parent and child, that is to say, paternity and filiation, must be judicially declared in order that the spurious child may be entitled to a legitime. For this reason, the words "from the judicial declaration of filiation" are used in Art. 763.

The words "birth of the first child" refer to a legitimate child; "or from his legitimation" refer to a legitimated child; "recognition" refers to an acknowledged natural child or a natural child by legal fiction; "or adoption" refer to an adopted child. And, lastly, the words "or from the judicial declaration of filiation" refer to a spurious child.

Therefore, the amendment would not be necessary or in order.

ARTICLE 765

Justice Reyes proposes that this article should make reference to Art. 107 as an additional ground for revoking donations by reason of ingratitude.

Art. 107 provides: "The innocent spouse, after a decree of legal separation has been granted, may revoke the donations by reason of marriage made by him or by her to the offending spouse. Alienations and mortgages made before the notation of the complaint for revocation in the Registry of Property shall be valid.

"This action lapses after four years following the date the decree become final."

It is not necessary to refer expressly to Art. 107 because par. 1 of Art. 765 says: "(1) If the donee should commit some offense *against the person, the honor* or the property of the donor, or of his wife or children under his parental authority." Art. 107 is a mere application of the principle in par. 1 of Art. 765, so that revocation under Art. 107 may be effected under Art. 765, par. 1, without the necessity of resorting to Art. 107.

Respectfully submitted,
JORGE BOCOBO
Chairman, Code Commission

Manila, February 24, 1951

MEMORANDUM ON THE PROPOSED AMENDMENTS TO THE PROVISIONS THE NEW CIVIL CODE ON SUCCESSION (BOOK III) EMBODIED IN HOUSE BILL NO. 1019.

ARTICLE 779

This article defines testamentary succession but fails to define legal or intestate succession. It is proposed to have this article amended so as to give the concept of legal or intestate succession. In the original draft of the Code Commission, legal or intestate succession is defined in Article 799 thus:

"Legal or intestate succession takes place by operation of law in the absence of a valid will."

The Code Commission agrees with the amendment so that Article 799 will give the concept of both testamentary and intestate successions, while Article 780 provides for mixed succession.

ARTICLE 782

An amendment to this article is proposed to read thus:

"Art. 782. An heir is a person called to the WHOLE OR AN ALIQUOT PORTION OF THE INHERITANCE either by the provision of a will or by operation of law.

"Devisees and legatees are persons to whom gifts of real and personal property are respectively given by virtue of a will."

The proposed amendment is not necessary because the word "succession" as used in this article does not mean "property" but *a right*, and an heir may not be entitled to the "whole or an aliquot portion of the inheritance" because of *disinheritance* or *unworthiness*.

ARTICLE 815

It is proposed to amend this Article so as to read, thus:

"Art. 815. When a Filipino is in a foreign country, he is authorized to make will in any of the forms established by the law of the country in which he may be. Such will may be probated in the Philippines, AS IF EXECUTED IN ACCORDANCE WITH ITS LAWS."

There is no serious objection to the proposed amendment, although it seems that there is no necessity for the same inasmuch as if the will may be probated in the Philippines, it goes without saying that said will shall be considered as if executed in accordance with the laws of this country.

ARTICLE 828

The last paragraph of this Article is sought to be amended by adding the following: "THE RIGHT OF THE TESTATOR TO REVOKE HIS WILL, HOWEVER, SHALL NOT BE BARRED BY ITS ALLOWANCE DURING HIS LIFETIME."

The proposed amendment is a superfluity because of the provisions of Article 828, which ordains that a "will may be revoked by the testator at any time before his death", and which is in accordance with the principle that every will is revocable. Moreover, Article 777 provides that "the right to the succession are transmitted from the moment of the death of the decedent."

ARTICLE 878

The following amendment to this Article is suggested:

"Art. 878. A suspensive term OR CONDITION IN A TESTAMENTARY DISPOSITION does not prevent the instituted heir from acquiring his rights and transmitting them to his heirs even before the arrival of the term OR THE HAPPENING OF THE CONDITION."

The Code Commission begs to disagree with the proposed amendment for the following reasons:

1. This Article of the new Civil Code avoids the conflict between Articles *759* and *799* of the Spanish Civil Code.

2. Article 878 of the new Civil Code speaks only of a "suspensive term" which does not prevent the instituted heir from acquiring and transmitting his rights to his own heirs even before the arrival of the term.

The law allows the acquisition and transmission of rights before the arrival of the term because the *"term" or period is sure to come* although the exact arrival may not be ascertained.

Condition is an uncertain event, so uncertain that it may not happen; hence, the instituted heir should not acquire nor transmit any right to his own heirs before the fulfillment of such suspensive condition — which fulfillment gives rise to his right to succeed.

3. Article 884 of the new Civil Code provides that "conditions imposed by the testator upon his heirs shall be governed by the rules established for conditional obligations in all matters not provided for by this Section." In accordance with the provisions of the new Civil Code on conditional obligations, the fulfillment of *suspensive condition* gives rise to an obligation or right as the case may be. Hence, if the said suspensive condition is not fulfilled, no right or obligation arises.

ARTICLE 1027

No. (4) of this Article is proposed to be amended to read as follows:

"(4) Any attesting witness to the execution of a will, the spouse, parents, or children, or any one claiming under such witness, spouse, parents, or children, UNLESS THERE ARE THREE OTHER COMPETENT WITNESS TO THE WILL."

The Code Commission has no objection to the proposed amendment.

This Article is also proposed to be amended by adding No. (5) which reads:

"(5) THE NOTARY PUBLIC BEFORE WHOM THE WILL IS ACKNOWLEDGED."

The Code Commission also accepts the proposed amendment.

An amendment to Article 1035 is proposed to read as follows:

"Art. 1035. The person excluded from the inheritance by reason of incapacity SHALL LOSE HIS RIGHT TO THE LEGITIME, BUT SHOULD HE be a child or descendant of the decedent and should have children or descendants, the latter shall acquire his right to the legitime.

"The person so excluded shall not enjoy the usufruct and and administration of the property thus inherited by his children."

We cannot accept the above amendment for three reasons:

1. The use of the word "person" in the first line may imply that there may be persons entitled to the legitime although they are not compulsory heirs.

2. The causes of deprivation of succession by reason of incapacity may apply to persons other than compulsory heirs. (See Article 1027 and 1032).

3. The provisions of Article 1035 as they are in the new Civil Code do not need any clarification.

ARTICLES ON SUCCESSION PROPOSED TO BE REPEALED IN HOUSE BILL NO. 1019

ARTICLE 793

This Article of the new Civil Code provides:

"Art. 793. Property acquired after the making of a will shall only pass thereby, as if the testator had possessed it at the time of making the will, should it expressly appear by the will that such was his intention."

The Code Commission believes that the above provisions should remain in the Code for the following reasons:

1. It is necessary to prevent the occurrence of mixed succession.

2. The law should favor testate succession as much as

[§ 261] 5. *Particular regulations.* — a. *In general.* "While there is some conflict as to what grant of authority will justify particular regulations, under the power to regulate and control markets municipal corporations may enact and enforce all regulations which are desirable for the protection of public health, and they may adopt and enforce any reasonable and proper rules and regulations in regard to the market and the business transacted therein. The corporation may enact any reasonable regulation necessary to preserve the cleanliness of market places; may confine the sale of particular articles to certain designated stands or portions of the market and prevent their sale elsewhere; may limit the sales in a market to specific articles; may forbid delivering within the municipal limits meat that has not been exposed for sale in the public market; may prohibit the sale of groceries in meat and vegetable markets; may prohibit the sale of less than a specified quantity of meat outside of market stalls; may prohibit the standing wagons containing perishable produce within the market limits for over a specified period of time between specified hours unless permitted by a designated market official; may prohibit the selling of provisions at the public market which have been previously purchased within the municipal boundaries outside of the markets; may regulate market hours; or may require diseased or unwholesome articles to be removed. The corporation cannot prohibit the sale of perishable articles entirely within the municipal limits.

"*The ordinary rules of construction* apply to the construction of statutes and ordinances or regulations relating to the establishment and regulation of markets."[128]

Illustration. The municipal council of Daet, Province of Camarines Norte, passed Ordinance No. 7, which was duly approved by the provincial board on June 12, 1948, "prescribing the zonification of the public markets, and rules and regulations with regard to the rights to occupy space in the market buildings, and penalties therefor." The pertinent portions of said ordinance are as follows:

"Sec. 2. All occupants in the building publicly known as market proper, should observe strictly the regulations with regards to the zonification in the following manner:

"Zone 1. Market Building No. 1. — Opposite Market Tiendas block A and B will be designated to all merchants or dealers of dry goods and general merchandise;

"Zone 2. Market Building No. 2. — Opposite Market Tiendas block C and D will be designated to all merchants dealing in "Cafeterias',' 'Carenderias' and 'Sari-Sari'; and

"Zone 3. Market Building No. 3 — New Market Building will be designated to all merchants of dry and fresh fishes, meat and vegetable vendors.

Sec. 3. It is hereby prohibited for any merchants or dealers in goods to sell his goods and wares in the zone not allocated for the purpose as regulated above.

It appears that prior to the passage of said Municipal Ordinance No. 7 and the approval of Resolution No. 104 of the municipal council of Daet, the public market of the municipality consisted of only two buildings designated as Nos. 1 and 2. A third building known as building No. 3 having been completed, the municipal council passed the ordinance in question and by said Resolution No. 104 decided to enforce the provisions of said ordinance by requiring the merchants and vendors occupying the places in Buildings Nos. 1 and 2 to transfer their places of business in accordance with the classification provided for in section 2 of the ordinance, so that "dealers or merchants of dry goods and general merchandise" shall be located in Zone 1 (Building No. 1); "merchants operating cafeterias, carenderias and sari-sari" are assigned to Zone No. 2 or Market Building No. 2; and merchants dealing in "dry and fresh fishes, meat and vegetables" shall operate their place of business in Zone 3, known as Market Building No. 3. The above-quoted section 3 of the Ordinance expressly prohibits "any merchants or dealer in goods to sell his goods and wares in the zone not allocated for the purpose as regulated above."

Prior to the completion of Building No. 3 and the passage in 1948 of Municipal Ordinance No. 7, the petitioners, engaged in the business of carenderia and cafeteria, were located in Building No. 1, and they contended that Municipal Ordinance No. 7 which required and compelled them to transfer to another building, is unconstitutional, illegal, null and void, because it is unjust, discriminatory, unreasonable and confiscatory in so far as it refers to the plaintiffs and their business in the market stall occupied by them in the Market Building No. 1 of the municipality of Daet. They filed a complaint against the municipality of Daet, praying that said Ordinance No. 7 be declared unconstitutional, illegal null and void, and that, pending the determination of this case, a writ of preliminary injunction be issued against the defendants, its instrumentalies, agents, officers and representatives, enjoining them from evicting, removing or throwing out the plaintiffs from their market stalls in Market Building No. 1 of Daet, and that after trial of said case the injunction be made permanent.

After hearing, the Court of First Instance of Camarines Norte upheld the constitutionality and legality of the ordinance in question and declared that the municipal council of Daet, being empowered to enact said ordinance and the same having been enacted for the good of the public, the same is not null, void and unconstitutional and confiscatory as contended by the petitioners. The court, therefore, dismissed the complaint without pronouncement as to costs.

In the appeal, the plaintiffs-appellants, besides assailing the constitutionality and legality of the ordinance, contend that the court should have found that the plaintiffs are entitled to continue in the occupancy of their stalls in the market of Daet in accordance with Republic Act No. 37 and should have perpetually enjoined the defendant, its officers and representatives, from evicting and throwing them out from their market stalls in Building No. 1.

There is no dispute as to the facts. It has been established at the hearing that these appellants were occupants of stall in Building No. 1 of the market of the municipality of Daet, and were engaged in the business of conducting cafeterias and carenderias prior to the passage of Resolution No. 104, series of 1948, whereby the municipal council of Daet seeks to enforce the provisions of Municipal Ordinance No. 7.

With reference to the contention of appellants that Republic Act No. 37 is applicable to them, our perusal thereof shows that it can not be of any help to their case, because said act has for its purpose the "granting preference to Filipino citizens in the lease of public market stalls." In the case at bar, the issue of the nationality of the stallholders has not been raised by appellants, and is not at all mentioned in the provisions of Ordinance No. 7 and Resolution No. 104 of the municipal council of Daet, and under the provisions of said ordinance the appellants are not divested of the

128 43 C. J. 396-397.

None

possible, and the provisions of this article have this policy in mind.

3. There may be cases where a person intends to have property which he may acquire subsequent to the making of his will to be distributed according to his own personal wishes.

Section 615 of the Code of Civil Procedure contains the same provisions although *on real estate only.* (See also Article 596, Lower Canada).

ARTICLE 891

This Article provides for the "Reserva Troncal" which was eliminated from the original draft of the Code Commission, but inserted by the House of Representatives.

The Code Commission would be glad to see this Article eliminated and repealed as recommended in the House Bill No. 1019. The presence of this article in the new Civil Code contravenes the fundamental philosophy of the law on succession — socialization of ownership of property, economic stability, and elimination of feudalistic heirarchy, as explained in the Report of the Commission, p. 116-117.

Respectfully submitted,
PEDRO Y. YLAGAN
Member, Code Commission

Manila, February 20, 1951.

possession of their stalls in the market.

Held: Regarding the alleged unconstitutionality and illegality, etc., of the ordinance in question, upon close scrutiny of its provisions, its wording and its purpose, we find nothing that would support the contentions of appellants. They can not deny that under the general welfare clause contained in section 2238 of the Revised Administration Code, the municipal council of Daet, is empowered to "enact ordinances and make regulations, not repugnant to law, as may be necessary and proper to carry into effect and discharge the powers and duties conferred upon it by law and such as shall seem necessary and proper to provide for the health and safety, promote the prosperity, improve the morals, peace, good order, comfort, and convenience of the municipality and the inhabitants thereof, and for the protection of property therein."

"Ordinance No. 7 provides for the good, comfort, and convenience of the public and the market vendors as well. By the zonification and classification provided for by its provisions, the public, the consumers, can easily locate the place where they can find the particular goods or commodities they want to buy. Even the merchants and vendors occupying the stalls are likewise benefited by the zonification and classification provided for in the ordinance, in that they will be placed where they should belong, instead of being mingled in the same building with vendors or merchants dealing in goods or merchandise or foodstuffs or goods in which they are dealing. To be sure, these appellants who according to the petition, are dealing in cafeterias and carenderias, and consequently their customers, will not feel happy to be among fish vendors or the like.

"That the act performed by the municipality of Daet in enacting Municipal Ordinance No. 7, is entirely within the power of the municipal corporation, is decided by the Supreme Court in various similar cases (Seng Kee & Co. vs. Earnshaw, 56 Phil., 204). In U.S. Salaveria (39 Phil. 102) which holds that the presumption is all in favor of the validity of the ordinance, the Supreme Court held:

"Although such regulation often interferes with an owner's desire as to the use of his property and hamper his freedom in regard to it, they have generally been sustained as valid exercise of the police power, provided that there is nothing arbitrary or unreasonable in the laying out of the zones, and that no uncontrolled discretion is vested in an officer as to the grant or refusal of building permits.

"Not only the State effectuates its purpose through the exercise of the police power, but the municipalities does also. Like the State, the police power of a municipality extends to all matters affecting the peace, order, health, morals, convenience, comfort, and safety of its citizens — the security of social order — the best and highest interests of the municipality. The best considered decisions have tended to broaden the scope of action of the municipality in dealing with police offenses. The public welfare is rightly made the basis of construction."[129]

[§ 262] 6. *Sales outside markets*. "As a general rule a municipal corporation may prohibit by ordinance or by-law the sale of marketable articles within certain limits or during certain hours except at the established market. And it is within the power of the legislature to authorize municipal corporations to do so. While there are decisions which deny the right of a municipal corporation to prohibit selling outside of the public markets, under a general power to regulate and control markets, it is ordinarily held that such restrictive regulations as to selling outside of market limits may be made under a general power to establish and regulate markets, and that, where adequate market facilities are furnished, such regulations are not unreasonable or in restraint of trade but a proper regulation of it, although the rule is otherwise where market facilities are not furnished. In some cases such ordinances or by-laws have been held void on the ground that they were unreasonable and in restraint of trade. The validity of such ordinances and by-laws as being in restraint of trade obviously depends very largely upon the extent of the prohibition or regulation contained in the particular ordinance or by-law, it being well settled that such ordinances or by-laws must be reasonable. The ordinance or by-law must fall within the scope of the power granted. More particularly municipal corporations may, when duly authorized, regulate private markets, prohibit the maintainance of private markets within certain distance of a public market, prohibit the sale of anything but fruit by keepers of fruit stands within two thousand one hundred feet of the market, or prescribe such regulations as to the time and place of selling outside of the market limits as the general welfare of the municipality may demand. It seems to be uniformly held that under a power to regulate the vending of meats, etc., a municipality may prevent their being retailed outside of the public markets. A municipality may also, under a power to prevent the obstruction of streets, prohibit the standing of wagons for the sale of market produce within certain limits, or prevent any street vending without a permit. It may prescribe that huckster wagons shall not stand in the market place longer than a prescribed time."[130]

Illustration. A woman and two other persons were prosecuted and convicted in the Court of First Instance of Samar for having sold meat at a place other than the public market in violation of a municipal ordinance of Catarman, Samar.

They appealed, contending that the said ordinance was discriminatory, unreasonable and oppressive: discriminatory, because its provisions applied exclusively to the defendant Maria Vda. de Sabarre as may be seen from a reading of article 1, which prohibited butchers and any other person from selling meat in any place except the public market; and from that of article 2, which prohibited fishermen or any other person from selling fresh fish and other commodities in the public streets of the *poblacion*, thereby permitting their sale in other places; because the public market of Catarman was located in an unsanitary place, in the outskirt of the town and amidst muddy, dirty, and obnoxious surroundings to which nobody went to sell foodstuffs. The municipality having failed to keep it in proper condition for lack of funds, and its location not being easily accessible to the health authorities for their inspection; and oppressive because the prohibition to sell meat in any place other than the public market compelled the meat vendors to offer their goods for sale in one determined place without taking into account the peculiar conditions prevailing in the small town of Catarman, the insanitary condition of its market, and, above all, the absence of vendors and buyers therein, thus forcing said meat vendors to move their business to another place where there were no people, no other vendors, merchants or customers.

Held: "Although the ordinance in question makes a distinction by prohibiting in its article 1 butchers and meat vendors from selling meat outside of the public market and in article 2 the fishermen and fish vendors from selling fish in the public streets of the *poblacion*, said distinction is not unreasonable because in so far as the public health is concerned there is a great difference between meat and fish in their susceptibility to decay, especially where no ice is used to preserve them.

"In the case of People vs. Montil (53 Phil., 580), this court laid down the following doctrine:

"'1. MUNICIPAL CORPORATION MAY PROHIBIT. — As a general rule, a municipal corporation may prohibit by ordinance the sale of marketable articles within certain limits or during certain hours outside of an established market.

"'2. WHAT MAY BE DONE UNDER A GENERAL POWER. — Under a general power to regulate and control markets, restrictive regulations as to selling outside the market limits may be made under a general power to establish and regulate markets, and where adequate market facilities are furnished, such regulations are not unreasonable or in restraint of trade, although the rule is otherwise where market facilities are not furnished.'

"The ordinance in question, therefore, is not unconstitutional inasmuch as the classification is based on a substantial distinction, which constitutes a real difference; is germane to the purposes of the ordinance; is not confined to existing conditions only; and applies equally to all fishermen and fish vendors and to all butchers and meat vendors (People vs. Chan, 38 Off. Gaz., 1539; 12 Corpus Juris, 1128, sec. 855.)

"The fact that the public market is dirty and unsanitary and is located in a muddy and filthy place to which no people go to make purchases, does not render the ordinance oppressive and unreasonable. It being a duty of the municipality to maintain its public market in sanitary condition and the municipal council be-

129 Ebona et als. vs. Mun. of Daet, 47 O.G. 3479-3482.

130 43 C.J. 397-398.

The section in which the above-quoted provision is to be found is entitled *"Certain legislative powers of mandatory character"*.

[§ 269] (2) *Municipalities in specially organized provinces.* "The municipal council shall have power by ordinance or resolution:

"* * * *"

"(aa) *Nuisances.* — To declare, prevent, and abate nuisances.

"* * * *"[138]

[§ 270] (3) *Municipalities in specially organized provinces.* "The municipal council shall have power by ordinance or resolution:

"* * * *"

"(cc) *Ringing of bells.* — To regulate and restrain the ringing of bells and the making of loud or unusual noises.

"* * * *"[139]

[§ 271] (4) *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *"[134]

"(ee) To declare, prevent, and provide for the abatement of nuisances; to regulate the ringing of bells and the making of loud or unusual noises; to provide that owners, agents, or tenants of buildings or premises keep and maintain the same in sanitary condition, and that in case of failure to do so, after sixty days from the date of serving of a written notice, the cost thereof be assessed to the owner to the extent of not to exceed sixty per centum of the assessed value, which cost shall constitute a lien against the property . . .

"* * * *"[140]

[§ 272] 2. *What constitutes nuisance; determination by municipal authorities.* "The Civil Code defines and classify nuisances.[141]

"For purposes of municipal regulation and suppression, as, generally speaking, in other instances, nuisances may thus be classified: (1) those which in their nature are nuisances per se, or are so denounced by the common law or by statute; (2) those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; (3) those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. With reference to things which fall into the first and third classes — that is, things which in their nature are nuisances and are so recognized by the law, and things which are of such a character that in their nature they may be nuisances but as to which honest differences of opinion may exist among men of impartial minds as to whether they are actually nuisances — it is settled that a municipality may appropriately deal with them by legislative police ordinances and enactments under grant of power from the legislature. On the other hand, as to things which fall into the second class — that is, things which in their nature are not in themselves nuisances, but which may become such by reason of their locality, surroundings, or the manner in which they are conducted — a municipal corporation has no power conclusively to declare them to be nuisances, but can only declare such of them to be nuisances as are so factually, because general authority to define and abate nuisances does not empower a municipality to declare that to be a nuisance which is not a nuisance in fact, or which is not a nuisance per se and does not come within the common-law or a statutory definition of a nuisance. There has been a tendency in municipal councils to imagine that by declaring a certain use of property to be a public nuisance all discussion is foreclosed, and that by virtue of such declaration, the power of the municipality to suppress such use is unquestionable. Such a notion, however, rests upon a failure to distinguish between the different classes of subjects which may under some conditions fall within the category of nuisances."[142]

[§ 273] 3. *Method of abatement.* It would seem that the method of abating municipal nuisance is now governed by the new Civil Code.[143]

[§ 274] R. *Newspapers.* — 1. *In general.* "Municipal corporations may within reasonable limits regulate the sale of newspapers or similar publications. But such regulations must be reasonable."[144]

138 Sec. 2628, Rev. Adm. Code.
139 Sec. 2625, Rev. Adm. Code.
140 Sec. 18, Rep. Act No. 409.
141 See Arts. 694 & 695 N. C. Code.
142 37 Am Jur. 935-938
143 See Art. et Seq., N.C. Code.
144 43 C. J. 399.

ing made up of persons chosen by the people to administer their interests and safeguard the health of the inhabitants, the latter have a remedy, if their officials are neglectful in the discharge of their duties, by complaining to the higher authorities."[131]

[§ 263] c. *Inspection.* "A municipal corporation, in the exercise of its power now under consideration, may provide for the inspection of the quality of articles sold within the market and the weights and measures employed in making sales. It also may provide that the market itself shall be regularly inspected by designated public officials, and impose the cost of inspection upon the owner or operator of such markets. The governing body of the corporation exercises a wide discretion in determining the amount of the fee for inspection, but such fee cannot be unreasonable or arbitrary; the fee must be in proportion to the amount necessary to meet the expense and cost of the service."[132]

[§ 264] 6. *Boards and officers.* "In the exercise of the power municipal corporations may create administrative offices for the enforcement of their market regulations, and may prescribe the duties of market officials, and their salaries. Ordinarily the selection of market officials, following the general rule, in the absence of provision to the contrary, is made by the municipal governing body. Market regulations are enforceable by, and only by, those officials or the board in whom the power to enforce such regulations has been vested. The fact that a board of health is authorized to regulate markets in regard to their 'cleanliness, ventilation and drainage,' and is the supreme authority in regard to matters affecting the public health, does not prevent the department having the general control of markets from making regulations in furtherance of the same objects; but a board of health invested only with powers necessary to the preservation of the public health and life cannot, irrespective of these considerations, order the removal of stands or stalls attached to the public market on the ground that they are obstructions upon the public street."[133]

[§ 265] P. *Needy; statutory statement as to Philippine municipal corporations.* — 1. *Municipalities in regular provinces.* "The municipal council shall have authority to exercise the following discretionary powers:

"* * * *"

"(b) To make provisions for the care of the poor, the sick or persons of unsound mind.

"* * * *"[134]

[§266] 2. *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *"

"(f) To authorize the free distribution of medicine by the city physician to the employees and laborers of the city, and of fresh native milk, if available, to indigent mothers residing in the city.

"* * * *"[135]

[§ 267] Q. *Nuisances.* — 1. *In general.* — a. *Generally.* "It is definitely settled, without dissent, that a state legislature may lawfully delegate to municipal corporations, to be exercised within their corporate boundaries, the power to declare what shall constitute nuisances, and to prevent or abate them; such power is, as a matter of fact, generally given to the municipalities, either in their specific charters or general state statutes. The regulation and abatement of nuisances is one of the ordinary functions of the police power, and municipalities are generally considered as having been given the right, in connection with their exercise of such power, to suppress them. It has been held or stated on numerous occasions, however, that municipal corporations have no control over nuisances within their corporate limits except such as is conferred upon them by their charters or by general laws, and can exercise no powers in this regard beyond those expressly given or necessarily implied."[136]

[§ 268] b. *Statutory statement as to Philippine municipal corporations.* — (1) *Municipalities in regular provinces.* "It shall be the duty of the municipal council, conformably with law:

"* * * *"

"(h) To declare and abate nuisances.

"* * * *"[137]

131 People of the Philippines vs. Sabarre, 65 Phil. 684, 688-689.
132 43 C.J. 399.
133 43 C.J. 399.
134 Sec. 2242, Rev. Adm. Code.
135 Sec. 18 Rep. Act No. 409.
136 37 Am. Jur. 933-934.
137 Sec. 2242, Rev. Adm. Code.

"Establishment of municipal gazette. It has been held within the powers of a municipal corporation to establish a paper or gazette for the purpose of giving information to its inhabitants upon matters of general interest affecting the municipal welfare."[145]

[§ 275] 2. *Prohibition.* "It is generally held that it is without the powers of municipal corporations to prohibit the publication of newspapers."[146]

Reasons for, and discussion of, rule. "The power to prohibit the publication of newspapers is not within the compass of legislative action in this State, and any law enacted for that purpose would clearly be in derogation of the Bill of Rights. 'The constitutional liberty of speech and of the press, as we understand it,' says Mr. Cooley, 'implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy obscenity, or scandalous character may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords.' Cool. Const. Lim., 518. To prevent the abuse of this privilege as affecting the public, the Legislature has prescribed penalties to be enforced at the suit of the State, leaving the matter of private injuries to be determined between the parties in civil proceedings. We are not informed of any authority which sustains the doctrine, that a municipal corporation is invested with the power to declare the sale of newspapers a nuisance. The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the Constitution must prevail in this State, which clothes the citizen with liberty to speak, write, or publish his opinion on any and all subjects, subject alone to responsibility for the abuse of such privilege."[147]

[§ 276] S. *Obscenity.* — 1. *In general.* "While municipal corporations may enact ordinances forbidding particular acts of obscenity which are unlawful or which tend to corrupt the public morals, the power to forbid particular acts of obscenity must be expressly granted or necessarily incident to a power expressly granted. By force of statute municipal corporations may prohibit the publication of obscene matter. A publication of articles in a paper, attacking the Jews as a race, is not indecent, obscene, or scandalous, within a municipal ordinance prohibiting the offering for sale of a publication containing indecent, obscene or scandalous articles. The limit of the power to enforce an ordinance prohibiting the sale of obscene or scandalous publications is to conduct a prosecution for the specific offense thus committed. The corporation cannot, by establishment of a censorship in advance of future publications, prohibit generally the sale thereof upon the streets."[148]

[§ 277] 2. *Statutory provisions as to Philippine municipal corporations.* — a. *Municipalities in specially organized provinces.* "The municipal council shall have power by ordinance or resolution:

"* * * *"

"(gg) . . . to prohibit the printing, sale, or exhibition of immoral pictures, books, or publications of any description.

"* * * *"[149]

[§ 278] b. *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *"

"(r) To provide for the prohibition and suppression of . . . the printing, circulation, exhibition or sale of obscene pictures, books, or publications, and for the maintenance and preservation of peace and good morals.

"* * * *"[150]

[§ 279] T. *Patrol service or duty from male residents; 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 authorize the mayor to require able-bodied male residents of the municipality, between the ages of eighteen and fifty years, to assist, for a period not exceeding five days in any one month in apprehending outlaws or other lawbreakers and suspicious characters, and to act as patrols for the protection of the municipality, not exceeding one day in each week.

"Nothing herein contained shall authorize the mayor to require such service of officers or employees of the National Government, or the officers or servants of companies or individuals engaged in the business of common carriers on sea or land, or priests, ministers of the gospel, physicians, *practicantes, druggists or practicantes de farmacia* actually engaged in business, or lawyers when actually engaged in court proceedings."[151]

Illustration. A resident of the municipality of Iloilo was in 1914 charged with having criminally and without justifiable motive failed to render service on patrol duty, in violation of the municipal ordinance of Iloilo on the subject patrol duty.

The accused contended that the ordinance upon which the criminal complaint was based was unconstitutional, for the reason that it was contrary to the provisions of the then Organic Act of the Philippines, the Philippine Bill, which guaranteed the liberty of the citizens.

The said ordinance appeared to have been adopted in accordance with Act No. 1309, which amended section 40 of Act No. 82 (the Municipal Code at the time). The amendment empowered the municipal council, by ordinance, to authorize the president: (a) To require able-bodied male residents of the municipality, between the ages of 18 and 55, to assist, for a period not exceeding five days in any one month, in apprehending ladrones, robbers, and other law breakers and suspicious characters, and to act as patrols for the protection of the municipality, not exceeding one day each week; (b) To require each householder to report certain facts, enumerated in said amendment.

Held: "Is there anything in the law, organic or otherwise, in force in the Philippine Islands, which prohibits the central Government, or any governmental entity connected therewith, from adopting or enacting rules and regulations for the maintenance of peace and good government? May not the people be called upon, when necessary, to assist, in any reasonable way, to rid the state and each community thereof, of disturbing elements? Do not individuals whose rights are protected by the Government, owe some duty to such, in protecting it against lawbreakers, and the disturbers of the quiet and peace? Are the sacred rights of the individual violated when he is called upon to render assistance for the protection of his protector, the Government, whether it be the local or general Government? Does the protection of the individual, the home, and the family, in civilized communities, under established government, depend solely and alone upon the individual? Does not the individual owe something to his neighbor, in return for the protection which the law affords him against encroachment upon his rights, by those who might be inclined so to do? To answer these questions in the negative would, we believe, admit that the individual, in organized governments, in civilized society, where men are governed by law, does not enjoy the protection afforded to the individual by men in their most primitive relations.

"If tradition may be relied upon, the primitive man, living in his tribal relations before the days of constitutions and states, enjoyed the security and assurance of assistance from his fellows when his quiet and peace were violated by *malhechores.* Even under the feudal system, a system of land holdings by the Teutonic nations of Europe in the eleventh, twelfth, and thirteenth centuries the feudal lord exercised the right to call upon all his vassals of a certain age to assist in the protection of their individual and collective rights. (Book 2, Cooley's Blackstone's Commentaries, 44; 3 Kent's Commentaries, 487; Hall, Middle Ages; Maine, Ancient Law; Guizot, History of Civilization; Stubbs' Constitutional History of England; Chisholm vs. Georgia, 2 Dall. (U. S.) 419; DePeyster vs. Michael, 6 N. Y., 467.) Each vassal was obliged to render individual assistance in return for the protection afforded by all.

"The feudal system was carried into Britain by William the Conqueror in the year 1085 with all of its ancient customs and usages.

145 Id. 399-400.
146 43 C. J. 400.
147 Ex p. Neill, 32 Tex. Cr. 275, 22 SW 926.
148 43 C. J. 410.
149 Sec. 2625. Rev. Adm. Code.
150 Sec. 18 Rep. Act No. 409.
151 Sec. 2275, Rev. Adm. Code.

MR. BROWNELL'S . . . (*Continued from page 120*)

in addition to the naval reservations and fueling stations, any and all reservations of the United States as he may deem necessary for the mutual protection of the Philippine Islands and the United States, and by such means as he finds appropriate. In addition, he has been authorized by the same joint resolution to acquire bases and to retain them for the same purpose and by the same means. As a result, the President was and is vested with complete discretionary authority to retain or convey to the Philippine government the title in and to any military bases of the United States in the Philippines.

The language of the joint resolution of June 29, 1944, 58 Stat. 625, referring to "bases" without qualification and "in addition to any provided for by the Act of March 24, 1934," is comprehensive enough to include the naval reservations and fueling stations as well as military reservations, so that the President's earlier authority as to naval reservations and fueling stations is reinforced by the joint resolution.

Again, as in the case of the naval reservations and fueling stations, there is no obligation on the part of the President to transfer title to the bases without compensation. Likewise, there is no obligation on the part of the President to demand compensation in connection with a transfer. His discretion is complete.

A further question has been raised in regard to those properties of the United States which have been or are being used as "temporary installations" under Article XXI of the Military Bases Agreement in contrast to the Annexes A and B bases under that agreement. It is said that because of their temporary nature it might be implied that upon termination of their use the temporary installations would be conveyed to the Philippine government without compensation. But there is nothing in the agreement making provision for such conveyance of title; and as noted earlier in this opinion, the contemporaneous exchange of notes accompanying the Military Bases agreement was intended to reserve the whole issue of title to properties involved in the bases agreement for future settlement in accordance with the acts and joint resolution of the congress. Article XXI, like the rest of the agreement pertaining to the Annexes A and B bases, is concerned with the use for military purposes of the property involved, rather than its ownership.

The memorandum of the legal adviser points out that the number of temporary installations has been greatly reduced by the specific, formal conveyances to the Philippine government of most of the United States military properties coming under the head of temporary installations. In the category of real property constituting a temporary installation there remains, he says, only the Fort McKinley reservation, and the Port of Manila reservation as to which Article XXI makes special provision. The past conveyances of almost all of temporary installations without compensation in 1947 and 1949 might be claimed to be some evidence of a "moral obligation" to convey the remainder of the temporary installation without compensation. I do not find any legal obligation requiring the United States to convey title to the remainder of the temporary installations; nor is there any provision of law or agreement dealing differently with those titles than is provided in the case of the Annexes A and B bases and the naval reservations and fueling stations. If in the past the President was moved to convey to the Philippine government title to the military installations which were surplus to the United States needs, without compensation, he was well within his authority, as has been already described. As the history of the period indicates, he may well have been motivated by the desire to obtain Philippine cooperation in supplying other properties or facilities for United States use. Equally, the President may find today that those expectations have not been realized, in view of the fact that at the present time the United States is having difficulty obtaining property from the Philippine government needed for expansion of the bases. But these are reasons of policy, calling for the exercise of the discretion vested in the President. They do not constitute legal obligations.

I therefore conclude that there is no different law governing the disposition of United States titles to properties comprising the Article XXI temporary installations than is provided for disposition of the titles to the Annxes A and B bases of the Military Bases Agreement.

As to all three categories of base property, viz., Annexes A and B bases, naval reservations and fueling stations, and Article XXI installations, there is no obligation on the part of the United States to transfer presently to the Philippine government title to any such properties, with or without compensation. However, the President is authorized in his discretion, to make transfers of such base property as he deems to be in the interest of the United States on such terms and conditions as he may deem advisable, in agreement with the government of the Philippine Republic.

In view of the possible negotiations with the Philippine government, which lie ahead, it is my understanding that you do not want this opinion to be published. Therefore, for the present, I am maintaining the same classification for this opinion as has been assigned to be the incoming material.

I am sending copies of this opinion to the director of the bureau of the budget, the secretary of the navy, and the secretary of the air force.

Sincerely,
HERBERT BROWNELL, JR.
Attorney General

"We find in the days of the 'hundreds,' which meant a division of the state occupied by one hundred free men, the individual was liable to render service for the protection of all. (Book 3, Cooley's Blackstone's Commentaries, 160, 245, 293, 411.) In these 'hundreds' the individual 'hundredor,' in case of the commission of a crime within the country or by one of the "hundredors,' as against another 'hundred,' was obliged to join the 'hue and cry' (*hutesium et clamor*) in the pursuit of the felon. This purely customary ancient obligation was later made obligatory by statute. (Book 4, Cooley's Blackstone's Commentaries, 294; 3 Edward I., Chapter 9; 4 Edward I., Chapter 2; 13 Edward I., Chapters 1 and 4.)

"Later the statute provided and directed: 'That from thenceforth every county shall be so well kept, that, immediately upon robberies and felonies committed, fresh suit shall be made from town (pueblo) to town, and from county to county; and that 'hue and cry' shall be raised upon the felons, and they that keep the town (pueblo) shall follow with 'hue and cry,' with all the town (pueblo), and the towns (pueblos) near; and so 'hue and cry' shall be made from town (pueblo) to town, until they be taken and delivered to the sheriff.'

"Said statute further provided that in case the 'hundred' failed to join the 'hue and cry' it should be liable for the damages done by the *malhechores*. Later, by statute (27th Elizabeth, chapter 13) it was provided that no 'hue and cry' would be sufficient unless it was made with both horsemen and footmen. The "hue and cry" might be raised by a justice of the peace, or by any peace officer, or by any private person who knew of the commission of the crime.

"This ancient obligation of the individual to assist in the protection of the peace and good order of his community is still recognized in all well-organized governments in the 'posse comitatus' (power of the county, *poder del condado*). (Book I Cooley's Blackstone's Commentaries, 343; Book 4, 122.) Under this power, those persons in the state, county, or town who were charged with the maintenance of peace and good order were bound, ex officio, to pursue and to take all persons who had violated the law. For that purpose they might command all the male inhabitants of a certain age to assist them. This power is called 'posse comitatus' (power of the county). This was a right well recognized at common-law. Act No. 1309 is a statutory recognition of such common-law right. Said Act attempts simply to designate the cases and the method when and by which the people of the town (pueblo) may be called upon to render assistance for the protection of the public and the preservation of peace and good order. . .

* * * * * *

"We are of the opinion, and so hold, that the power exercised under the provisions of Act No. 1309 falls within the police power of the state and that the state was fully authorized and justified in conferring the same upon the municipalities of the Philippine Islands, and that, therefore, the provisions of said Act are constitutional and not in violation nor in derogation of the rights of the persons affected thereby."[152]

152 U.S. vs. Pompeya, 31 Phil. 245, 250-252.

"LAUGHTER IS LEGAL"

CROSS-COUNTRY CLASSIC

Have you heard a story about the man in the market for a new car who saw an ad in a Long Island paper offering a 1952 Cadillac for sale for $50? The first day he passed it up as a joke, but when it appeares for the third time he went to look at the car. The address given turned out to be a beautiful estate. The owner, an attractive middle-aged woman, showed him the car and let him drive it. It was in perfect condition, and he promptly clinched the deal. After the bill of sale was in his hand, he couldn't suppress his curiosity any longer. "Would you mind," he asked the woman," telling me why you are selling a beautiful car for $50 when you could have gotten at least $4,000?"

"Not at all." she replied." In my husband's will he left instructions to deliver the proceeds from the sale of his cadillac to his secretary, who had been so kind to him."

SLIM CHANCE

In Manchester, England, after Mrs. Maude Mitchell produce photogranhs to show her husband's alleged cruelty had cause her to lose 2 pounds in two years. the judge remarked that the loss of weight had enhanced her appearance, denied her separation plea.

GOOD OLD MOUNTAIN JUSTICE

In Kentucky hill country, a man was on trial for being drunk, and the judge couldn't find an unprejudiced jury. The fellow had too many friends and too many enemies, and there was only one man in town who said he was neutral. So the judge decided on a one-man jury. The trial ended. and the jury went off to consider its verdict.

After an hour went by without a word. the judge told the clerk to go and see what was happening. The twelve jury men all rolled into one sent a message: "We ain't decided, Judge." The judge kept sending new messengers every hour and always got the same answer. Finally about midnight he was pretty mad and went to the jury room himself.

The fellow was sitting there. looking worried. "Judge, I was just coming to tell you, the jury can't argree."

WITNESS NEEDED

"Would you like an adiournment to obtain an attorney?" the Judge asked a bewildered foreign-born defendant who stood before him.

"No thanks, Judge."

"Have you money for a lawyer?"

"I ain't got no money."

"Would you like the court to appoint a lawyer who will protect your interest and represent you — without any cost to you?"

"Thanks, your honor, Judge. This is a wonderful country. You are so good to men — you offer me a lawyer, but Judge, to tell you the truth. I don't need a lawyer so much — what I need right now is a helluva good witness!"

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"What is your age?" asked the judge. "Remember you're under oath."

"Twenty-one years and some months," the woman answered.

"How many months?" the judge persisted.

"One hundred and eight."

THE BIG QUESTION

When Henry Norris Russell, the Princeton astronomer. concluded a lecture on Milky Way, a woman asked him: "If our world is so little and the universe is so great, can we really believe that God pays any attention to us?"

"That, madame," replied Dr. Russell, "depends entirely on how big a God you believe in."

SALARY

Two years ago my son, who was then 13, proudly announced one day: "I was the only one in our class that got a 100 in social living test."

"That's fine," I said. "Were the questions hard?"

"Well, the only one I didn't know the answer to was 'what is the salary of the chief Justice of the United States?' but I figured it out. I knew that Ted Williams got $100,000 a year from the Red Sox, and I decided that a Chief Justice would probably get about a fourth as much. So I put down $25,000, and it was right."

WASHINGTON WONDERLAND

A busy man forgot to file his income tax return until a few days after the deadline. "I have no excuse," he confessed to the Government in an accompanying note. "I just forgot. I am enclosing the required five percent fine." Shortly, he received a ponderous and official letter. Would he be good enough to fill out enclosed form. setting forth the reasons for his delinquency, and have it notarized?

"No excuse," he wrote back. "Have paid fine."

Last week he got another letter: No excuse, it said in essence. is not an excuse. "Please file notarized affidavit testifying that you had no Excuse."

WISE GIs

The Commanding General of a line division in Korea was inspecting one sunny afternoon when three sniper bullets from nearby hill whizzed over his head. Jumping into a bunker that was occupied by a sergeant, he barked, "Locate that sniper!"

"We know exactly where he is," the sergeant replied calmly.

"Why in the devil don't you shoot him then?" demanded the general.

"Sir, that fellow has been sniping at this hill for weeks now and hasn't hit anybody yet. We're afraid if we kill him, they might replace him with someone that can shoot."

EMERGENCY

"How do you know you were going only 15 miles an hour?" the judge asked the driver accused of speeding.

"I was on my way to the dentist!"

TEXAS TALK

When a woman having dinner in a Dallas restaurant gave the waiter a $500 bill to pay for her check. the manager suggested, "See if she doesn't have something smaller."

"Yes, sir", said the waiter." but I don't think she do, boss. She had to rummage around in her money to find this."

THEY ASKED FOR IT

The owner of a $10,000 limousine, pulling up at a light beside a small car driven by a friend, couldn't resist the chance to heckle.

"Gosh sakes man," he said, "what is that dreadfull rattling sound in your car?"

"Oh, that? said the small car's driver calmly. That's just $9,000 jingling around in my pocket!"

QUOTABLE QUOTES

Herbert Hoover: All Presidents go fishing because they want to be alone to think once in a while. Except for prayer, fishing is about the only time people respect the privacy of the President.

APOLOGIA

We wish to apologize to our patron, the WORLD-WIDE INSURANCE & SURETY COMPANY INC., for having failed to publish the name of the said insurance company in the advertisement of the January Issue of the Lawyers Journal on account of an oversight on the part of the Printers.

Lawyer's Directory

(In view of the present difficulty of locating the offices of practicing attorneys, the Journal publishes this directory to acquaint not only their clients but also the public of their address. Lawyers may avail themselves of this service upon payment of Two Pesos for each issue of this publication.)

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