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In this issue

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WILL THE SENATE SANCTION THIS?

A most shocking court case with all the trimmings of political intrigue and persecution has recently come to light. In a way, it proves once again that eternal vigilance is not only the price of liberty, but also of the independence of the judiciary, an independence which in less than two years has been placed in a kind of legislative jeopardy.

Had the House of Representatives been a little more vigilant, a little more concerned with that independence, it surely would not have passed the innocent and inoffensive-looking bill (H. No. 2505) amending the Judiciary Act. The measure's hidden purpose was to punish a judge for his temerity in refusing to yield to political pressure brought to bear upon him by no less than a powerful politician. For sheer cynicism, the act of the lawmaker can hardly find a parallel in the annals of power-intrigue and political legislation. Far from elevating him in the eye of the public, his motives tend to convict him of deliberate abuse of power.

The facts surrounding the case are vitally interesting. They show that the persecution of the judge concerned stemmed from his having heard the protest filed by former Cavite Gov. Dominador Camerino against the alleged election of his opponent, Delfin Montano, as governor of Cavite. The ground given was fraud. The steps taken by the proclaimed governor after the filing of the election protest form a rapid sequence, shrewd and dramatic in places. What went behind the scene is not very clear, but it can easily be imagined, knowing the influential parties involved.

In a systematic and persistent attempt to disqualify or inhibit Judge Francisco Geronimo of the Second Branch of Cavite's Court of First Instance from hearing the protest, Governor Montano filed with the Court of Appeals on March 23, 1957, a petition for preliminary injunction. Obviously, the object was to restrain the respondent judge from proceeding further with the hearing of the protest. Montano charged that the judge had committed among other things abuse of discretion by (1) denying his previous motions for postponements; (2) exerting efforts to terminate the protest as speedily as possible; (3) acquitting Camerino of arbitrary detention in a criminal case after the judge had been appointed to preside over the second branch; (4) taking cognizance of the protest without previous raffling.

After due hearing, the Court of Appeals dismissed Montano's petition and made him pay for the costs. Undeterred, Montano filed a motion for reconsideration, but as was to be expected it was promptly denied. He appealed to the Supreme Court. To his disappointment, deserved, no doubt, the highest tribunal of the land dismissed his petition. Still in a fighting mood, Montano filed a second motion for reconsideration. Apparently offended by his unabated persistence, the Supreme Court denied the second motion with the warning that the denial was final.

Final or not, Montano displayed a strategy and technique that would amaze and astound an ordinary lawyer. With the Court of Appeals, his original battleground, he again filed as in a repeat performance a petition for preliminary injunction, this time against Judge Geronimo and Camerino. His underlying purpose was the same: to inhibit the judge. His reason was that Camerino was confined in Muntinglupa, serving his sentence for arbitrary detention, the decision having meanwhile become final.

Before the appellate court could resolve the new petition, Camerino was granted absolute pardon. The Court of Appeals dismissed Montano's petition. Again, he elevated his case to the Supreme Court. Seeing that the petition had absolutely no merit, the Supreme Court dismissed it.

In the latter part of last year, he again filed with the Supreme Court a petition for certiorari, mandatory injunction and prohibition, with a prayer for preliminary injunction. But, as in the earlier cases, the Supreme Court refused to give due course to the petition, dismissing the same outright.

After that one would think that Governor Montano was entirely balked and frustrated and would desist. Not he. He presented an administrative case with the Supreme Court against Judge Geronimo, charging him with bias. His object was the same: to enjoin the judge from proceeding further with the election protest. It must have appeared to the Supreme Court that Montano was just going round and round much like a perpetual motion. The administrative case, the Court ruled, was entirely devoid of merit.

The matter should have ended there, but Congressman Justiniano S. Montano, father of the governor and assistant House majority floor leader, came to the rescue. He introduced an amendatory bill aimed at exiling Judge Geronimo to Cavite's new and ghost capital, Trece Martires, the roads to which are reportedly infested with cutthroats and bandits. The judges of the first and third branches of Cavite's courts of first instance, the Montano bill provides, "shall be stationed in the City of Cavite," but the judge of the second branch, meaning Judge Geronimo, must be stationed in the City of Trece Martires, possibly to become the fourteenth martyr.*

Evidently unaware of the scheme, the House chairman of the committee on judiciary recommended last February 26 approval of the bill without amendment. The House of Representatives, suspecting nothing either, passed the measure much in the spirit of compañerismo. *When the matter was finally brought to the attention of a number of the members, they confessed that they had been caught by surprise.*

Finding himself on the spot and knowing the mercurial temper of the bandits infesting Cavite, Judge Geronimo rushed an SOS to Sen. Quintin Paredes, chairman of the Committee on judiciary of the Senate. "In the seemingly innocent-looking amendment to the Judiciary Act," he complained, "there is one curious fact . . . that instead of transferring Branch I which normally should be located in the Capital, it is Branch II that has been chosen to be transferred. Under the Judiciary Act, all first branches of the courts of first instances are invariably located in the capitals of provinces, and it is indeed surprising why in Cavite it is the second branch that will be located in the Capital which is Trece Martires. I confess that I can find no (other) plausible explanation for this unprecedented innovation than . . . my refusal to yield to the pressure which Congressman Montano attempted to apply to me on behalf of his son Governor Montano, defendant in the electoral protest by ex-Goveror Camerino. He wants now to banish me to a place whose conditions leave much to be desired. I submit that on higher principle of morals and ethics, legislation . . . should never

(Continued next page)

* Sec. 3. "...The judges of the first and third branches of the Courts of First Instance of the province of Cavite and the cities of Trece Martires, Cavite and Tagaytay shall be stationed in the City of Cavite, and the judge of the second branch, in the city of Trece Martires."

THE NEED OF THE DAY IS NOT SO MUCH FOR REVISION OF OUR CONSTITUTION AS FOR ITS IMPLEMENTATION, ESPECIALLY THROUGH THE PROCESS OF EDUCATION*

By HON. MANUEL LIM
Secretary of Education

As I extend to the Philippine Lawyers' Association my appreciation for the opportunity to participate on this celebration of the Twenty-fourth Anniversary of this Constitution Day, may I also congratulate all of you for your faithfully sustained program of holding this annual event, and thereby helping keep alive among our people, the consciousness of their living under the rule of law. And the matter of keeping that consciousness fresh and vigorous is by no means easy since in the lives of men, as well as in the lives of nations, the law of nature inevitably projects itself, and neither is such consciousness a trifling matter, for as someone has aptly said, "Law is nothing unless close behind it stands a warm, living public opinion." (Wendell Phillips)

May I likewise hasten to extend my greetings to the fortunate surviving delegates to the Constitutional Convention — whether they are with us at this occasion or are elsewhere in their chosen fields of activity and enterprise. One is naturally tempted to reminisce on the incidents, tribulations and hard work endured for almost one year required to complete our work, during which time the delegates, true to their mission, labored, mornings, afternoons, and evenings, with a per diem insufficient to meet their lodging expenses. But this is not for this occasion. It should be refreshing, however, to recall at this moment what our fellow-delegate, Dr. Jose M. Aruego, in his books on the Philippine Constitution, has written about these delegates that with the exception of four who had already passed then their seventieth birthday and sixteen who were still below thirty years, they were middle-aged men, ranging in ages from thirty-five to fifty, and that because of this fortunately-elected congregation, let alone the fact that they had had ample experience in public and private affairs, in law and legislation, in labor and industry, in education and religion, in science and agriculture, they brought to the Convention a truly wide range of views and a veritable wealth of talent and devotion which could not but bespeak the successful completion of their task. It is not to indulge in any act of self-glorification — since you know it was my distinction and honor, along with Salvador Araneta and the late Gregorio Perfecto and Rafael Palma, to represent Manila in that Convention — but simply to express a frank natural feeling, that I say now that the delegates to the Constitutional Convention, by their work, which has resulted in a law that "is the reflection of the manners of the nation" (De Tocqueville), "the embodiment of the moral sentiment of the people" (Blackstone), deserve well and fully of our memory and respect. Of the people's gratitude to these framers of our Constitution, let it not be said "that it is a virtue most deified and yet most deserted; that it is the ornament of rhetoric and the libel of practical life."

Man is not perfect, and none of his works is. Providence is perhaps kinder to us this way because then we can pursue a gallant and stirring — not a dull and stultifying — life dedicated to the continual search for improvement or advancement, not to say for perfection. Indeed, the striving for the ideal, since it usually, if not always, involves a forward act, is in itself an experience devoutly to be desired, even if we know that the goal, in most things at least, is unattainable. A constitution, therefore, is and must be subject to necessary changes.

Now, as every lawyer knows, constitutions may be amended formally in any of the ways authorized by the Constitution itself. Of course, they can be modified and expanded informally, and the informal methods consist, according to Willoughby (as quoted again by Malcolm and Laurel), "not only in the constantly changing construction placed upon the power of government through decisions of our courts, but in the development of political institutions and practices which profoundly modify our system of gov-

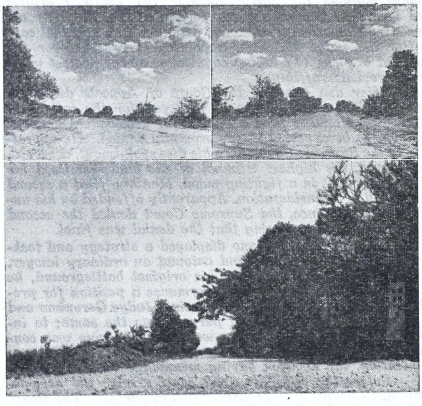
* Speech delivered in connection with the celebration of Constitution Day by the Philippine Lawyers Association, February 8, 1959, at the Winter Garden, Manila Hotel.

WILL THE SENATE . . .

be used to gratify directly or indirectly any personal revenge or ill-will. On this score, more than personal risks to which my proposed transfer will expose me, I beg leave to register my vigorous protest against this proposed bill."

The question now is: Will the Senate permit that so vile and atrocious an outrage on the judiciary be committed? And what will the House say when it learns that it has been — shall we say? — duped, used as a convenient if unwitting tool in the fight between the Montanos and the judge?

As to the merits of the bill, it may be said that there is no need of stationing one judge in the town of Trece Martires. The provincial capitol at Trece Martires lies amidst a virtually uninhabited area. Its only access is a secluded and desolate 6-kilometer stretch of dirt road — an ideal place for ambush in a locality where ambushes are not uncommon. No responsible transportation company has found it wise, because of the few houses along the way, to commit several buses on the route. Transport facilities are few. And while Trece Martires has a population of 2,000 only, including the people of its barrios, Cavite City has a population of 40,000, according to the census. All these considerations make it patent that the three branches of the Court of First Instance of Cavite must remain stationed at Cavite City.



MAIN ROADS LEADING TO TRECE MARTIRES

ernment in its actual operation." Then, too, there is such a thing as "constitutional expansion by statutory elaboration," or by the process known as judicial statesmanship.

Thus there should be no question that, where the necessity therefor arises, we might with reason consider amendments to our Constitution. But we have to be thoroughly certain this time that there is such necessity. Man, as I have some moments ago said, is not perfect, but then he has his excellencies, and among them, as the sages will tell us, is that he can conceive of wisdom, or form an idea of maturity, far beyond the range of his actual deeds and experiences. This is to say, insofar as our Constitution is concerned, that its framers, men of talent, training, and experience that they were, saw well into the foreseeable future and, in their own light and conscience, provided the necessary safeguards against its pitfalls.

And so today, departing from the practice of proposing all possible amendments to the Constitution, a practice that seems to have become the pastime of almost anybody, not only of men engaged actively in the art of politics and statesmanship, but also of others who are obsessed with the desire to interpret the Constitution in their own way, I should like to invite the leaders of our country and the rest of its intelligentsia, not to say our people as a whole, to re-read our Constitution, to re-study its provisions, to recall its background, and in so doing gather from that document many an inspiration and idea that can lead to the solution of the pressing problems of our day and hour. It is not at all unlikely that the more thoroughly we re-examine the Constitution, the greater will be our understanding of its intendment and our appreciation of its connotative or applicative power.

It is said that history repeats itself. Since the dawn of time one nation after another has gone through fire and fury in their search for what they believed was the ultimate and optimum in their national destiny. Hardly any country has escaped from this experience — not England, for instance, not even the United States of America. In the recent past both Asia and Africa have furnished examples of such a crisis — some of them called silent revolutions, but revolutions nonetheless. And even today a country in the Caribbean Sea in the Western Hemisphere hugs the headlines of the world's newspapers because of happenings that are an aftermath of a two-year revolution.

We in the Philippines may look upon these political upheavals with something of a supreme complacency. We may shrug our shoulders, shake our heads, and in self-confidence — or perhaps in self-conceit — declare, "That will never happen in this peaceful land of ours." Would to God that this be true! But even as we had that faith, it would not do, in the fashion of ostriches, to bury our heads in the sand and ignore the causes or dismiss the circumstances, which brought about such great events. Eternal vigilance has always been the bedrock of liberty.

Now if we analyze the underlying reasons of all these revolutions, we shall find that their basis lies mainly in the discontent of the people over their social milieu. The revolution may have its political undertones or overtones and, as in the case of Hungary, may be compounded with hatred for a brutal foreign intruder, but its causes are essentially the social dislocations resulting from the failures of governments to adopt the necessary measures to promote the general welfare or to enforce the proper remedies against evils that tend to vitiate or nullify such welfare. And these failures of governments are generally not the fault of law — not the fault of the common law and much less of the fundamental law — but of the men who, entrusted with its compliance or its enforcement and with a false cloak of misguided authority, with abuse and misuse of that authority, wittingly or unwittingly or rather for selfish motives, have chosen to ignore the binding force of our constitutional mandates.

Insofar as our country is concerned, we know the obstacles and difficulties of what our President himself has called "a trying situation." There is the lack of dollars and the continual depletion or diminution of our international reserves. There is the lack of funds with which to import raw materials indispensable to our existing and expanding industries. And there is the lack of initiative as well as capital — especially capital drawn from the people's savings — with which to start new industrial or commercial enterprises. And then, there are the problems of non-employment, under-employment and juvenile delinquency and other social ailments. To quote the President again as regards "the present predicament, "the need for fiscal and economic stabilization is urgent."

As most everybody knows, a number of reasons have been advanced for this rather precarious financial and economic situation, among those reasons being:

1. The inadequacy of our technical know-how, in the applied sciences and in the industries. In other words, there has been a deficiency somewhere in our educational system, perhaps a misdirection that we have not been able to regulate or right, a gap that we have not so far amply filled.

2. The tendency of some of our businessmen to ask for unjustified tax exemptions or present claims for priority dollar allocations which they know are irregular, to engage in surreptitious trade through circumvention of the barter or no-dollar importation laws, to resort to the illegal export and import practices of overpricing or underpricing, or to evade the payment of just duties and other tax levies, through under-declarations or short-weighing. In other words, there has been a deterioration — nay a tremendous deterioration, if not actual bankruptcy, — in our sense of values, both moral and patriotic.

Did the framers of our Constitution foresee all such eventualities? If so, did they adopt the requisite provisions to forestall them? What are these provisions?

Where the root cause of "this trying situation" is, as I have said, lack of technical know-how necessary for the development of our economy, what does our Constitution say? Right in its Preamble, our fundamental law promulgates that its purpose is to establish a government that, among other things, "Shall conserve and develop the patrimony of the nation." The Constitution solemnly declares that "the Government shall establish and maintain a complete and adequate system of public education... (that) shall aim to develop moral character, personal discipline, civic conscience, and vocational efficiency, and to teach the duties of citizenship..." (and that shall offer) "optional religious instruction...as now authorized by law" (from Section 5, Article XIV also). It adds that "the State shall promote scientific research and invention" and "shall create scholarships in...science . . . for especially gifted citizens" (from Sections 4 and 5, Article XIV, General Provisions). But, it warns that "the natural right and duty of parents in the rearing of the youth for civic efficiency should receive the aid and support of the Government" (Section 4, Article II, Declaration of Principles).

Again, where the primary reason lies, as I have also said, in the deterioration of our sense of moral values as evidenced by the irregular, unlawful, or unethical practices resorted to, in some cases on a scandalously mammoth scale, by quite a number of our traders and industrialists, with the culpable tolerance and corrupt conspiration of a disgraceful, and I hope, small sector of dishonest public officials, we can go back to the self-same Constitutional provisions I have just cited for stimulation, direction, and guidance. As good and patriotic citizens, let us extend our unqualified and firm aid in the sustained efforts of our Government in repressing and suppressing them in accordance with the democratic processes established in our Constitution.

For the present generation, and the generations to come, education is the only cure for many of the diseases which the modern world has engendered — or, as Aristotle would express it, "all who have meditated on the art of governing mankind have been convinced that the faith of empires depends on the education of youth." The framers of our Constitution were well aware of this fact, and therefore they made it a basic principle, through the provisions which, in part or in full, I have already quoted, that the State is in duty bound to provide, to promote, and encourage education in every possible way.

Exactly what is the meaning of this? Although the Consti-

tution (Section 5, Article XIV) states that "the Government shall establish and maintain a complete and adequate system of public education, and shall provide at least free public primary instruction..." (let me repeat, free public primary instruction), it was obvious from the discussions on this matter in the Constitutional Convention — if not from the letter and spirit of this very section of the Constitution itself — that regardless of any express commitment, it was the intent of the framers of the Constitution to make it incumbent upon the Government to maintain an uninterrupted line in our system of education, from the elementary grades through the secondary years to college. Let me recall, in this connection, what Delegate Aruego in his book *"The Framing of the Philippine Constitution,* said by way of explaining the reasons which impelled certain delegates (Osias, Sobrepeña, Benitez), who were members of the Committee on Public Instruction of the Convention, to recommend the establishment by the state of a complete and adequate system of public education:

> "They pointed out that it was the duty of the state to its citizens to maintain not only a system of elementary and secondary public education but also at least the nucleus for a university which would set up standards to be followed by similar institutions of learning under private auspices; that each generation should be left to define for itself what it considered complete and adequate for its particular needs, demands, and interests; that, although the state would be definitely committed to the policy of giving free elementary education, there was no such commitment with respect to education in the higher levels. Whether or not this should also be given free would depend upon the financial ability of the State from time to time."

But partly if not mainly because many delegates believed it would be too expensive for the State to maintain an educational system embracing all levels, the amendment containing the abovementioned recommendation, when put to a vote, was defeated. But let me quote from Delegate Aruego again:

> "On January 25, 1935, Delegate Manuel Lim presented a motion for the reconsideration of the defeated Osias-Maramara amendment which motion was to be considered the following evening.
>
> "Before the next session, many delegates, most of whom were alumni of the University of the Philippines, worked hard to secure a favorable reconsideration of the Osias-Maramara amendment in order to guarantee the existence of the Institution. Before voting time, they had secured enough votes to assure the approval of the amendment. When it was put to a vote, the motion for reconsideration was then subsequently approved by 49 votes against 39 negative votes."

It is not without rhyme or reason that we say the Government should maintain what I have said is an uninterrupted line in our system of education. God willed that I should implement a constitutional principle I helped to be adopted, and with the help of Divine Providence, under whose protection we confided our Constitution, I shall see to it that the provision is carried to its best results. For what kind of system would it be, to use a figure of speech, where the base of the pyramid — the primary schools — and the apex — the state university and other state colleges — provide free public instruction and its other strata or parts — the intermediate and secondary schools — do not or hardly do so. That would be illogical and would not be in keeping with the concept, recognized in many modern constitutions, that it is the duty of the state to advance the cause and gospel of education in every conceivable way inasmuch as education is basic to the understanding and preservation of the rights and liberties of a people. For a time the question of financial support may deter us in the full implementation of this concept, but the concept should be there — within clear focus — reachable, unerring, lasting.

Precisely because public education in the Philippines is the constitutional duty of the government, it devolves upon the lawmaking branch of that government to provide such education, at least within its financial limitations. Constitutional authorities are agreed that the establishment as well as control of the public schools is intrinsically an exercise of legislative functions "not only because the education of the youth is a matter of great public utility, but also and chiefly, because it is one of the great public necessities for the protection and welfare of the state itself." (Bissel v. Davison [1894] 65 Conn. 183, 32 Atl. 348, as quoted by Malcolm and Laurel in *Philippine Constitutional Law*). Thus — and this time let me quote from a series of articles bearing on the basic principles of Philippine education as embodied in the Constitution, by Mario G. Ramos, published *In the Grade Schools* — "The Constitution of the Philippines is, in the main, the legal basis of education in this country. For public elementary education, the legal basis is the Educational Act of 1940, including of course its amendments. The legal basis of private education is Commonwealth Act No. 180, along with its amendments and supplementary laws. The University of the Philippines was authorized by Act No. 1870.

It is again in line with this legislative prerogative that the Second Congress of the Philippines, on May 10, 1950, during its First Session, adopted Concurrent Resolution No. 8, declaring patent the desire of the Senate and the House of Representatives that, in pursuance and implementation of the fundamental aims of education as expressed in Section 5, Article XIV of the Constitution, all schools and other educative agencies of the country shall consider it their duty "to teach Filipino Citizens:

> "1. To live a moral life guided by faith in God and love for fellowmen;
>
> "2. To love and serve the Republic of the Philippines willingly performing civic duties, intelligently exercising individual and collective rights, and faithfully practising the ideals of democracy that should be preserved at any cost;
>
> "3. To be able to read and listen understandingly, talk and write intelligently, and think and act wisely in solving the problems of daily life;
>
> "4. To be efficient in earning an honest living and thereby contribute through productive labor and wise use and conservation of the Nation's resources to the economic well-being of the Philippines;
>
> "5. To maintain family unity, live a happy home life, and discharge efficiently responsibilities of the home;
>
> "6. To carry on healthful living in a wholesome environment so as to be physically strong and mentally fit to meet the requirements of a useful life;
>
> "7. To make wise use of leisure time for self-improvement and for the service of the community;
>
> "8. To appreciate the arts and letters and to attain self-fulfillment by enriching them with their own contributions; to apply science and add to the universal fund of knowledge so that life may be made rich and abundant;
>
> "9. To carry on the Filipino way of life, retaining the priceless heritage in our basic culture, especially the ethical virtues, while using to advantage the valuable experiences of the human race; and
>
> "10. To understand other countries, develop goodwill toward their peoples, and promote the cause of world peace and security, and the ideal of world brotherhood."

As a guide we have President Quezon's Executive Order No. 217 issued on August 19, 1939, prescribing a Code of Citizenship and Ethics to be taught in all schools in the Philippines, with which code I am sure we are all familiar.

The Board of National Education on November 6, 1956, promulgated the fundamental objectives of education, to wit:

> "I. To inculcate moral and spiritual values inspired by an abiding faith in God;
>
> "II. To develop an enlightened, patriotic, useful and upright citizenry in a democratic society;
>
> "III. To instill habits of industry and thrift, and to prepare individuals to contribute to the economic development and wise conservation of the Nation's natural resources;
>
> "IV. To maintain family solidarity, to improve community

life, to perpetuate all that is desirable in our national heritage, and to serve the cause of world peace;

"V. To promote the sciences, arts and letters for the enrichment of life and the recognition of the "dignity of the human person."

These are the principles, to which in the course of our work — in our case in the Department of Education as mentors of our youth — when doubts harass us or confusion impedes our march, we can always refer for reflection. Indeed, we shall find it often necessary to return, as it were, to the fundamentals, if only to let us keep our bearing and better enable us "to distinguish between the enduring values of life and the distempers of immediate difficulties." Of course, in this connection, we should not forget what Confucius said: that he who merely knows right principles is not equal to him who loves them — and, I may add, to one who makes them the springs of his actions.

This brings me back to the two factors which I said somewhere at the start of this speech lie at the root of many of the problems in our present social order, namely, the inadequacy in our technical orientation and preparation, and the deterioration in our sense of moral values. The Department of Education is all too keenly aware of these facts, and it is to indulge in a truism for me to say that it is exerting every effort to help meet and grapple with them.

About the first factor or point, I may limit myself at the moment to saying that we have re-examined our educational program the better to know its deficiencies and, accordingly, match these with its strengths; have introduced in it certain changes, among them a system of guidance and counselling, so as to make it possible for the schools to discover early enough the innate interests, the inherent traits, the latent capabilities, of our youth in school; and have so shaped up, so to speak, its curriculum offerings as to give to mathematics and science the importance which they so richly deserve. By way of footnote to what we have said is the emphasis we are now giving to mathematics and science in our schools, let me quote again from Mario G. Ramos, in another of his articles on the basic principles of Philippine education as embodied in our Constitution: "Very recently Education Secretary Manuel Lim created a scholarship committee of the Department of Education that would manage and arrange proper dissemination of information on scholarships, fellow-ships, or travel grants offered by or to the Education Department."

As regards the second point — that which has to do with the deterioration in our sense of moral values — the Department of Education, through its public and private schools, has been equally conscious and assertive. More than ever before, if I may say so, it has torn the matter of citizenship training apart from its context in dull books and given it an application at once vibrant and consistent with the stern realities of living. Through curricular, co-curricular, or extra-curricular offerings, it has brought to the fore, in greater degree than ever, the practical corollaries of that training — such as, for instance, genuine appreciation of the need for taxes or sincere readiness to pay them. More than this, through the full implementation that it has accorded to the Constitutional mandate on optional religious instruction, the Department has made it palpable to our youth in school — again more than theretofore — that it is the duty of youth, not only as a gesture of understandable self-interest but even more so as a measure of their intrinsic goodness, to help preserve and to help enlarge what Huxley has called "that organization of society, created out of the toil and blood of long generations before (our) time," without which, to quote him freely again, "(we) should probably have had nothing but a flint axe and an indifferent hut to call (our) own; and even those would be (ours) only so long as no stronger savage came (our) way."

In short, through administrative orders, directives, circulars, memoranda, follow-ups, and reminders, as well as speeches and conferences, we have introduced new concepts and methods to fill existing vacuums, improved faulty or insufficient approaches to educational problems, and corrected practices and measures that in some way or another were not conducive or were ineffective to develop moral character, personal discipline, civic conscience, and vocational efficiency, and to teach the duties of citizenship" or to implement adequately the legally authorized "optional religious instruction." Among many others, we have ruled against mass promotion; reviewed the criteria for the efficiency ratings of teachers; opened new avenues and created incentives for their academic improvement, either by in-service training or regular study in graduate courses; enforced strictly the civil service rules, supplemented by competitive examinations where eligibles are unavailable; applied without any favor and discrimination and free from any pressure or influence, accepted and sound rules that we promulgated to strengthen the seniority and merit system, particularly in cases of promotions; required the highest standard of morality and integrity among teachers; took protective measures to safeguard their health and welfare; guaranteed the tenure in office to those teachers who are efficient and devoted to their duties; and appealed to them time and again to the extent of being repetitious, to be loyal, efficient, and faithful to their missionary work, established a unified and coordinated program of physical education, that will keep our students healthy, vigorous, and in trim and eventually qualify those gifted in all fields of athletic competition, in which we have been lagging behind; re-establish a separate subject on good manners and proper conduct, at elementary and secondary levels; and in general, upgrade the methods of instruction, both in academic, vocational, and professional courses.

Where the Department was hamstrung by legal opinions and barriers, we have proposed a number of well-studied, discussed and considered constructive legislation, such as a School Foundation Program to stabilize the financing of the operation of our schools and to attract the local governments to participate and cooperate in this magnificent common labor for education; an Education Building Trust Fund, as well as a Vocational Equipment Trust Fund, both to be funded from the Japanese Reparations proceeds, that may be made available immediately through financial loans secured by the annuities accruing thereto for the next twenty years from said Reparations proceeds; the nationalization of the Medical and Dental Services, that will tend to the education and preservation of the health of our 5,000,000 school population, — the source of our manpower of tomorrow; adoption of a teacher certification system that will require a uniform examination as a prerequisite for the practice of the teaching profession, both in public and private schools, up to secondary level; to obtain further and higher pay for teachers in science, mathematics, and in guidance and counselling; to secure more adequate appropriations for the improved supervision of our schools, both public and private; to limit the distributable profits of educational corporations or associations to 12%, annually, investing the rest in the physical improvement of the schools and their facilities or in valuable research projects; to require entrance or qualification examinations from Grade IV to Grade V, and from Grade VI or VII to high school, as well as from high school to collegiate, to avoid useless waste of public funds; to establish and promote more scholarships in science and mathematics; to strengthen and give more emphasis on the teaching and propagation of our national language, the Filipino; to strengthen and vitalize with adequate equipment, tools, and instructors our vocational courses, attuned to local conditions of industry and trade; to improve and modernize the textbooks used in our schools; to purchase and operate bookmobiles that will reach remotest barrios; to use the radio as a media for general educational program; to regulate promote, encourage, and revitalize our lagging home industries thru improved methods supported by an adequate appropriation; and other related legislation that may establish a better and fruitful system of education, leading to the solution of our alarming and difficult problem of unemployment or under-employment.

Nor is it only the youth in school whom we have encompassed in our program of citizenship training. A writer — Bernard Iddings Bell, in *Crisis in Education: A Challenge to Complacency*— once said that, and I quote, "ours is the century of the uneducated

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LABOR UNDER THE CONSTITUTION*

By JUSTICE JUAN L. LANTING
Associate Justice of the Court of Appeals

The Philippine Constitution was adopted twenty-four years ago. Inspired undoubtedly by the experience of older and more advanced countries and induced by the increasing public demand for the improvement of the lot of the common masses, especially the workers, the Constitutional Convention included some provisions in our organic law intended to further the cause of social justice. The key provision is found in Section 5, Article 2, which says that "the promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State". Then in Section 6 of Article 13, we find this provision: "The State shall afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and in agriculture. The State may provide for compulsory arbitration".

There are other provisions in the Constitution which may be regarded also as promotive of social justice. They are in the Bill of Rights, which among other things, command: (1) that no person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws; (2) that the right to form associations or societies for purposes not contrary to law shall not be abridged; (3) that no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances; (4) that no involuntary servitude in any form shall exist except as a punishment for crime whereof the party shall have been duly convicted; and (5) that free access to the courts shall not be denied to any person by reason of poverty.

While the provisions of the Bill of Rights are applicable to all, they benefit most the small man, the common tao. Take, for example, the freedom of association and the freedom of speech. Without these freedoms, workers may not establish or join labor organizations of their own choosing; neither may they declare strikes and picket to secure such concessions as may be necessary to improve their working and living conditions.

The realm of labor is narrower in scope than the realm of social justice which extends to almost all situations affecting the rights and interests of the handicapped and the underprivileged. Thus, the principle of social justice has been invoked even in those cases concerning the expropriation of large landed estates for resale on easy terms to the homeless or landless. Most often, however, when one speaks of social justice he means protection of labor. It is because it is in the field of labor that the principle finds the most appropriate and fullest application. It is in relation to labor that I shall discuss social justice.

The most comprehensive definition of social justice as found in our jurisprudence is that made by Mr. Justice Laurel. According to him, "social justice is the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated. Social justice is not social equality, because social inequality will always exist as long as social relations depend on personal or subjective proclivities. It is not legal equality, because legal equality is a relative term based on personal or natural incapacity or sex. Social justice means the promotion of the welfare of all the people, the adoption by the Government of measures calculated to insure economic stability of all the component elements of society, through the maintenance of a proper economic and social equilibrium in the inter-relations of the members of the community, constitutionally, through the adoption of measures legally justifiable, or extra-constitutionally, through the exercise of powers underlying the existence of all governments on the time-honored principle of *salus populi est suprema lex.*

"Social justice therefore must be founded on the recognition of the necessity of interdependence among divers and diverse units of a society and of the protection that should be equally and evenly extended to all groups as a combined force in our social and economic life, consistent with the fundamental and paramount objective of the state of promoting the health, comfort, and quiet of all persons, and of bringing about the greatest good to the greatest number.

"The promotion of social justice, however, is to be achieved not through a mistaken sympathy towards any given group."

Social justice is a notion, a sentiment, a concept or an idea; it is even a virtue. It is a notion, a sentiment, a concept or an idea which may be translated into a legislative enactment, judicial pronouncement or a governmental policy. It is the law-making body which, of all government instrumentalities, has the broadest power and opportunity to advance the cause of social justice because the exercise of its legislative function is subject only to the limitations in the Constitution, and together with the Executive Power, it also sets the government policy on this matter, subject to the same limitations. The Executive Power, to a small extent, may restrict or liberalize the application and enforcement of the laws passed by the legislature but it can do no more than carry out the legislative will. The judiciary cannot transcend the letter and spirit of a legislative enactment and its discretion is necessarily limited by the rules of statutory construction.

The declaration of social justice principle and the mandate for the protection of labor are intended as a guide for the three departments of the government, although the primary responsibility for their observance rests with the legislature. Thus, any definition of social justice which relates it exclusively to law-making or to law enforcement and execution or to the judicial sphere of interpretation and application will be inadequate. In its generic sense, the phrase "social justice" means that sentiment which animates a man as a member of society to promote the common good and primarily to help those that are less fortunate than he in a manner consistent with the inviolable rights of others.

According to a decision of the Court of Appeals, social justice is intended to ameliorate the hardships of persons acting within the law. That is a fairly correct statement of the limitations of the application of social justice in the face of an existing statute. Stated differently, the benefits of social justice should be extended in cases where it can be done without violating any existing legal provision, and that should be so because social justice is not intended to oppress any person or group of persons. Most frequently when this magic term is invoked, it conflicts with individual liberty or property right both of which are also protected by the fundamental law. Other things being equal, however, property right must yield to the right to live. This principle expresses an ideal which liberal-minded men everywhere are striving to reach but which under our legal system cannot be fully achieved. The reason is that property right, the same as individual liberty, is protected and guaranteed by our Constitution. The same is true with the freedom of contract. But property right and the liberty of the individual, including his freedom to enter into any contract, can be curtailed to some extent by the State in the exercise of its paramount police power. This paramount right of the State has been invoked and generally allowed to prevail in cases where employers have refused to give reasonable concessions to workers on the pretext that the granting of such concessions would be tantamount to deprivation of liberty or property or both without due process of law. Police power has been the justification for the outlawing of onerous,

* Address delivered at the Francisco College in connection with the celebration of Constitution Day, February 7, 1959.

and sometimes inhuman, contracts and agreements entered into by workers with their employers under the compulsion of economic necessity. There have been numerous instances where workers were made to agree to inhuman and unjust conditions and terms of employment because they have to earn a livelihood for themselves and their families. They have no choice. In legal contemplation, both employers and workers have freedom of contract, but, as Mr. Justice Holmes declared, this freedom is not absolute and can be restrained in the public interest because there is no equality of positions between the contracting parties, the economic advantage of the employers being a deterrent and a restriction upon the freedom of the workers. This point was also well stressed by Mr. Justice Brandeis who, like Holmes, is well known and admired for his liberal and lucid thinking as a member of the U. S. Supreme Court. Speaking of the emergence of the U. S. policy as to unionization he said:

> "Politically, the working man is free. But is he really free? Can any man be really free who is constantly in danger of becoming dependent for mere subsistence upon somebody and something else than his own exertion and conduct? Financial dependence is consistent with freedom only where the claim to support rests upon right, not upon favor."

The inequality of the bargaining position of the employer and the worker is the basic reason for the modern tendency to raise the latter to a level at which he can deal with the former on a basis of equality or to give allowance for his inferior position in interpreting their agreements. The first alternative is accomplished by legislation; the second by judicial declaration.

Our Constitution is fairly progressive in so far as it deals with the question of social policy. While broadly speaking, our legislature can enact laws or adopt policies calculated to improve the social and economic status of the Filipino workers under the provisions of our Constitution to which I have referred, it would be a good idea, I submit, to enlarge the constitutional provisions on labor and social justice in order to afford a more definite and specific guide for the Government in the formulation and implementation of labor and social legislation.

The Constitution of the ILO would be a good guide for us in this task. It is the instrument that points in the most comprehensive manner the goals to be achieved if social justice shall be made a reality. The promotion-of-social-justice and the protection-of-labor provisions in our Constitution are so abstract that it would seem necessary to indicate some of the problems that must be met by the government. For this purpose, we may expand said provisions by also declaring that the State recognizes as its solemn obligation the achievement of (a) full employment and the raising of standards of living; (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measures of their skill and attainments and make their greatest contribution to the common well-being; (c) the provision, as a means of the attainment of this end, of facilities for training and the transfer of labor for employment; (d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection; (e) the effective recognition of the right of collective bargaining, the co-operation of management and labor in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures; (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care; (g) adequate protection for the life and health of workers in all occupations; (h) provision for child welfare and maternity protection; (i) the provision of adequate nutrition, housing and facilities for recreation and culture; and (j) the assurance of equality of educational and vocational opportunity. These objectives are identical to those enumerated in the so-called Philadelphia Declaration which is now part and parcel of the ILO Constitution.

I am not unmindful of the inadvisability of making our Constitution, or any national constitution for that matter, descend into details and particulars. But if a Constitution is intended to embody or reflect the highest aspirations of a people to the attainment of which every effort must be directed, it must contain ample provisions indicating the course to be followed in eliminating the chronic maladies of poverty and social maladjustment. My proposal, if adopted, would give further solemn sanction to the social justice policy and will continually focus public attention on the problems connected with its pursuit.

Before the adoption of the Constitution, our labor legislation was very meagre, and I believe this was due to the lack of any provision formulating a social or labor policy in either the Philippine Bill of 1902 or the Philippine Autonomy Act otherwise known as the Jones Law. Among the few legislative acts then existing, the only important one was the original Workman's Compensation Law, providing for the payment of compensation to employees for personal injuries, death or illness contracted in the performance of duty. From the time the Constitution was adopted up to the present, except during the dark days of the Japanese Occupation, labor measures were approved in rapid succession, so much so that now we have more than fifty labor laws in our statute books. Within a few years following the approval of the Constitution, the legislature enacted a good number of labor laws, the most important of which is Commonwealth Act 103, creating the Court of Industrial Relations and providing for compulsory arbitration of labor-management disputes. Moreover, the Department of Labor has been enlarged and some other minor labor offices created. Not content with only one labor court to settle industrial and tenancy disputes, another tribunal, the Court of Agrarian Relations, was created just a few years ago so as to give the fullest protection possible to agricultural tenants throughout the country. Even our New Civil Code, which became effective only in 1950, contains some provisions concerning labor contracts and household service. Our courts, especially the CIR, the CAR and the Supreme Court, have evinced some degree of concern and solicitude for the welfare of the laboring class.

There is no question in my mind that the Constitution is the main factor which has generated the tremendous interest we are now witnessing among our people in social and labor problems. The Constitution not only enjoins; it also inspires and educates. In spite, however, of the sincere efforts so far exerted to raise the living and working standards of our workers, much still remains to be done.

Since the First World War, there has been a tendency to include in national constitutions broad but clear-cut declarations of social and economic policy. There has been a tendency to recast constitutional arrangements in order to meet the requirements of a new era. It has long been realized by outstanding leaders of the world that complete peace in any country can be established only if it is based upon social justice. In the Philippines, we can no longer ignore the fact that peace and order and, indeed, the stability of the Government itself depends basically on the economic and social status of our people. It would be idle to dream of complete peace as long as the major portion of our population remains submerged in ignorance and poverty, and deprived of the ordinary comforts of civilized life. Considering the paramount importance of the social and economic problems confronting this nation, we can do no less than formulate our social and economic objectives in a legal instrument of constituent character. These problems are as important, if not more so, as the various proposals for constitutional reform which have so far been advocated by politically-minded people, such as the synchronization of the election of our national and local officials and the election of our Senators by district instead of at-large. It is regrettable that, as usual, our politicians pay more attention to our internal political problems than to our social and economic problems. It is time that there be a shift of emphasis so that

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THE BELL CASE AND THE FREEDOM OF SPEECH AND OF THE PRESS *

By Mayor ARSENIO H. LACSON

Twenty-four years ago, the Philippine Constitution took its place among the characters of human freedom. It was described at the time by no less than President Franklin Delano Roosevelt as "one of the most progressive documents ever conceived by men."

By and large, the Constitution has served its historic function as the fundamental law of the land, enriching by its liberal spirit and letter the tempo of our political life and the sweep of our jurisprudence. In moments of national stress, in periods of strain, the people have invariably rallied around the Constitution, drinking deep in its inspiration and rededicating themselves to its preservation as the testimonial of their solemn covenant to make this nation grow and endure.

But those who should guard the Constitution with their lives and their sacred honor have not always kept faith with its spirit and its mission. Today, we are witness to a day-to-day travesty on the Constitution, a travesty contrived by the mendacity, the greed, the avarice, and the callousness of men and women who are entrenched in power as a result of the vagaries of destiny and political fortune. Everywhere, one sees evidence of a general breakdown of law and order engendered by the nefarious practices of a political regime that brooks no interference from constitutional practices in its mad pursuit of partisan and personal ends. The crowning irony of such travesty is that those who are primarily responsible for it, have made it a practice of late to decry the lack of popular respect for constitutional authority. The devil can, indeed, quote the holy scriptures to suit his own purposes.

To give point to the present discussion of the Constitution, let us address ourselves to a current public issue, freedom of information.

This issue has been dramatized by the adamant refusal of the Garcia administration to grant a visa to *Time-Life* correspondent James Bell.

Since I last discussed the implications in terms of freedom of the Bell incident, the President has put a new face on the question. At his press conference sometime ago, President Garcia stated that he was not infringing on the freedom of the press when he banned the *Time-Life* correspondent, and that *Time* could always send another man to gather news and information in the Philippines.

Mr. Garcia declared that "the higher interests of the two countries, the Philippines and the United States, are above the personal interests of the people involved." He said that Mr. Bell's articles in *Time* magazine were among "irritants" plaguing Philippine-American relations.

I shall presently answer the President's arguments, point for point. But before doing so, I would like to recapitulate certain basic premises which I laid down in my last broadcast:

First. Viewed in the perspective of our libertarian conquests, our constitutional traditions, and our commitments in the United Nations, the denial of a visa to James Bell is a backward step which should earn for the Garcia administration and its minions dishonor at home and contempt abroad;

Second. The denial of a visa to the *Time-Life* correspondent has the practical effect of setting up a barrier to the free flow of news and information; and

Third. It is sheer presumptuousness on the part of the Garcia administration to take the position that the articles attributed to Bell are a deliberate insult to the Filipino people, as President Garcia and his administration are not by any stretch of the imagination *the* Filipino people or nation.

I would like to be charitable, but it is obvious that the President does not realize the implications in terms of freedom of information of the denial of a visa to the *Time-Life* correspondent. He implied in his press conference that, as *Time* could always send another correspondent to the Philippines, no injury was done to the right of the magazine to gather news and information in this country. Yes, *Time* could very well send another correspondent to the Philippines. But such correspondent will be free to come and go only as long as he reports on Philippine affairs in a manner which the Garcia administration does not consider as uncomplimentary, derogatory, and defamatory. This is the clear implication of the Bell incident and the President's statement that *Time* could always send another correspondent to the Philippines.

President Garcia's apologists love to talk about what they represent as his mastery of the law. I am not by any chance half as well grounded in the law. But I know enough of the law to impugn the legal position of President Garcia on the Bell case on two grounds: *first*, the denial of a visa to Bell is, in effect, a reprisal for the articles attributed to him; *second*, the ruling on the visa application of Bell would have the practical effect of a previous restraint on the freedom of whoever comes next as *Time-Life* correspondent. My position is predicated on the established doctrine that "the freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern *without vestraint or fear of subsequent punishment.*" This doctrine is complemented by the juridical dictum that "if liability for any sort of publication which the legislature chooses to penalize may be imposed upon the publisher after the act, the result may easily be to effectually prevent indirectly and so establish a censorship and evade the guarantee."

If, as President Garcia says, the Bell case is an individual case, "judged exclusively on its own merits," then it is clear that the Garcia administration has chosen to penalize *Time* and impose liability upon Mr. James Bell "after the act."

As to the President's statement that "the higher interests" of the Philippines and the United States "are above the personal interests of the people involved," let me remind Mr. Garcia that there is absolutely no room here for a conflict of interests as between the two countries, on one hand, and on the other, the interests of "the people involved." The conflict, rather, is between arbitrary official authority, on one hand, and fundamental freedoms, on the other. In this conflict, *Time* and Mr. James Bell are but incidents, which have brought into sharp focus the ineluctable collision between freedom of access to information and those who would seek to thwart it, between progress and reaction, between popular rule and autocratic authority.

Philippine-American relations are not at stake in the controversy over *Time* and its Far Eastern correspondent. *Time does not speak* for the American people and government any more than, say, a Manila newspaper or magazine critical of American policies speaks for the Filipino people and Philippine government. Of course, one must reckon with the human equation. Are we to understand that, under the Garcia regime, Philippine-American relations can be cordial and friendly only as long as the American press, or any section thereof, steers clear of subjects which do not sit well with the prevailing order? It seems difficult to answer this question in the negative in the light of President Garcia's oft-repeated declaration that Mr. Bell's articles are among the "irritants" plaguing Philippine-American relations.

I am reminded by what Napoleon Bonaparte used to say of a kinsman he made into a princeling: "How resplendent are

* Speech delivered on Constitution Day, February 8, 1959, in his weekly "In This Corner" radio broadcast.

the trappings of authority he has chosen, but, alas, how incongruous they look on a man so puny and so petty." And I say to our President and his cohorts: the mantle of constitutional authority hangs uneasy and ungainly on the shoulders of men who, deep down in their hearts, have no regard for the Constitution. The effective and faithful discharge of constitutional responsibility requires bigness. Of this Mr. Garcia and his cohorts are incapable. Yet, they have the audacity to tell the people in none too subtle a manner that they, Mr. Garcia and his cohorts, are *the* people.

President Garcia said, also at his last press conference, that the United States has, for its part, denied visa to certain Filipino newsmen. There is no analogy whatever between the action of the United States government on the visa application of these newsmen and the denial by the Philippine government of a visa to Mr. James Bell. In the case of Washington, the reason for the denial was based on grounds of "national security." The laws of the United States, as indeed our own laws, empower the state to deny entry to the country of journalists who, in its judgment, are security risks.

The Filipino newsmen in question were considered security risks, not because they were Filipinos, but because they were communists or suspected of being communists. In the case of Manila, the reason for the denial is that Mr. Bell by allegedly slandering Mr. Garcia and his administration, had insulted the entire Filipino people. It is a perverted imagination that can claim that the entry of Mr. Bell into the Philippines involves the security of the state, unless it is, of course, pretended that Mr. Garcia is *the* state.

Mr. Garcia, his propagandists, and a motley assortment of congressmen and senators have tried to fan popular feeling against *Time* into flames—that is, of course, granting that there is such a feeling—by depicting *Time* as a stranger and Mr. Bell as an "intruder." They have made much of what they represent as wounded Filipino pride. I would like to take issue with them on these points.

In a fast growing international community, at a time when science is progressively doing away with distance and annihilating space, it is provincial, it is tribal, to speak of *Time* as a stranger. I, for one, do not have much love as a reader for *Time* magazine. I, for one, do not, and cannot, subscribe to *Time*'s neo-Fascist philosophy. But I am realistic enough to admit that *Time*, whether we like it not, is a fact of life in the international community in which we as a nation must live if we are not to lag behind in the pace of human history and civilization. As to the claim that Bell is an "intruder" to our household, it should be pointed out that every time he had been here before, he was properly visaed. Not only that. Mr. Bell was born and grew up in Baguio. He has a daughter studying in Baguio, whom he wanted to visit when he last applied for a visa in Hongkong. But the most unsavory implication of the allusion to Bell as an intruder is that we have one set of laws for ourselves, and another for outsiders. Are constitutional guarantees in our country and under our Republic available only to Filipino citizens and nationals?

Yet, Mr. Garcia was one of the members of the Philippine delegation to San Francisco and the Philippine delegation to Bretton Woods. In this historic conferences, which lie in the inspiring background of the United Nations, no member of our delegation could excel Mr. Garcia in paying lip service to the sacrosanct principles of universal freedom, which found eloquent expression in the following provision of the United Nations Charter: "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," is "one of the basic objectives of the Organization."

President Garcia has given assurance to Filipino newspapermen that curtailing their freedom is "farthest from (his) mind." To my fellow newspapermen, let me address this admonition by the late Justice Brandeis: "Sly attacks on freedom are fraught with more dangers than the frontal assaults, because they are calculated to take advantage of the complacency of people who are wont to believe that they are secure in the enjoyment of their liberties." In the ruling on the Bell case, President Garcia has laid down a precedent which amply allows for what Benjamin Franklin called "the nefarious tactic of whittling away at individual freedom and constitutional rights." If the enjoyment of freedom is once placed at the pleasure, whim, or fancy of a chief executive or ruler, it can be so placed twice, thrice, or, for that matter, an infinite number of times. This is one of the most explosive implications in terms of civil liberties of the presidential dictum on the Bell case.

The freedom of speech and of the press is a right guaranteed by our Constitution which, ironically enough, we honor today, Constitution Day. It is not a special dispensation, to be granted or withheld at Mr. Garcia's pleasure.

The ruling of our Department of Foreign Affairs on the Bell visa application cites Article 2 of the Draft Convention on Freedom of Information. The provision says: "The exercise of this freedom carries with it duties and responsibilites." It is pointed out that nine limitations are set forth in the same provision, and that one of them is "expressions about persons, natural or legal, which defame their reputation."

It must be noted that the provision referred to is part of the Draft Convention on Freedom of Information. Being at best a tentative proposal, it is not definitive, and does not have the moral force and sanction ascribed to it by Mr. Serrano's ruling.

On the other hand, as has been repeatedly pointed out by Mr. Melchor P. Aquino, the newspaperman who sat as the Philippine representative on the committee that elaborated the final text of the Universal Declaration of Human Rights, Article 19 of this epochal charter of human rights and fundamental freedoms says: "Every one has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The Declaration was approved by the United Nations General Assembly in Paris in 1948. We, as a nation, fought for its approval. We, as a nation, are perforce solemnly committed to its observance. Is the denial of a visa to a correspondent who seeks entry into the Philippines the Garcia formula for implementing in our own time and place Article 19 of the Universal Declaration of Human Rights?

A review of the proceedings leading to the adoption of the Universal Declaration of Human Rights shows that the Soviet representative, Dr. Pavlov, had similar formulas in mind as Mr. Garcia and his talented Secretary of Foreign Affairs. Dr. Pavlov sought to qualify the circumstances under which freedom of information is to be enjoyed and exercised; the Philippine representative objected, pointing out that the Soviet proposal would have the practical effect of creating a controlled press such as existed in all totalitarian countries.

The Soviet proposal was resoundingly rejected, and it reappeared in substance in the proposal in the Draft Convention on Freedom of Information referred to by the Secretary of Foreign Affairs in his ruling on the Bell case. For proper historical background, for their information and guidance, we commend to Mr. Garcia and the Foreign Office the definitive UN publication in book form, *These Rights and Freedoms*, published by the United Nations Department of Public Information in 1950.

We agree with President Garcia in one respect, that is, the danger adverted to by him of extremists seizing on the unpleasant atmosphere created by such incidents as the Bell affair to confuse the picture of Philippine-American relations. There are two schools of extremists on this subject which I find repugnant and condemnable.

One school of extremists is represented by one who literally drools when he speaks of America and fawns at the feet of the American people when he exhorts us to be "forever grateful to the Americans" for their magnanimity and altruism. This fawning attitude is a dishonor to the Filipino people. If I know the American people, it is an *unwelcome sop* to their pride and vanity. For all

their shortcomings and weaknesses, they can easily see through a phony and slavish display of affection.

Between friends and wartime allies such as the Philippines and the United States, there are bonds of friendship and understanding which transcend time and the vicissitudes of political fortune. But we, Filipinos, do not have to grovel and cringe before the Americans to preserve these ties; they find sustenance in our common heritage of freedom. We, Filipinos, have earned our right to freedom through death and suffering. For this boon we do not have to abase ourselves before any people or nation. We have paid the price which all free men who fight for freedom pay, and we stand in no uneasy thankfulness before any man, be he white, black or brown.

Let those who doubt this read the story in the butcher's list containing the names of thousands and thousands of Filipinos who gave up their lives in defense of the American flag. Let them read it in the thunder and in the cyclone of fire and steel in Bataan and Corregidor where one of the most brilliant chapters in the history of the American nation was written — mostly with Filipino blood. Let them read it in the anguish of the American and Filipino boys who were brutally bayonetted or shot during the horrible nightmare that was the Bataan death march; let them read it in the martyrdom of Jose Abad Santos who preferred to die rather than break his oath of allegiance to the United States; let them read it in the agony of the men and women who lived out their numbered days in torment in the dungeons of Fort Santiago, or in the flaming funereal pyre that was the City of Manila in 1945 — the men and women whose only crime, in the words of American's own distinguished Brother American, General Carlos P. Romulo, was loyalty to mother America. Let them read it in the countless homes left desolate in the wake of the war, in the destitute widows and orphans who today starve, mourning their loved ones, in the broken minds and mangled limbs of our war veterans who seek relief and hospitalization, desperately crying for assistance in the spirit of patriotism proven and faith justified, and then, let them dare talk of the meaning of gratitude. Let them read this in the story of our cities and towns levelled to the ground, of our country systematically looted by the hungry Imperial forces of Japan on the march through the issue of useless paper money which we Filipinos had to honor or die, and then dare talk again to us of the meaning of gratitude.

If today we seek American help to make this country strong, it is because America and the Philippines are again fighting side by side against a common enemy, in the same manner that they have fought together on the blood-soaked terrain of Bataan and Corregidor, and Korea in defense of prostrate liberty, and we seek this help from our American ally, as one equal to another, as friends bound together in indestructible bonds of friendship fully forged and tested in the crucible of the last war. If America had sacrificed in that last war, we, too, had sacrificed, and proportionately speaking, to a greater degree, for the war was fought in our country, after the long bitter night of enemy occupation.

Yes, we Filipinos have paid the price which all free men who fight for freedom pay, and today we stand in no uneasy thankfulness before any man, be he white, black or brown.

At the other extreme, we have the school of thought represented by a congressman who would ban from the Philippine mails all foreign periodicals and publications that contain attacks against President Garcia and his administration. These men speak of the "police power" of the state as though they really mean the power of a police state. What an ignominy that a congressman, whose party, the Liberal Party, prides itself on the record of the Liberals in international conferences where conventions and agreements dedicated to the promotion of human freedom and progress came into being, should now father a House bill providing for such an arbitrary and capricious curb on freedom of information.

Mr. Garcia justifies many of the moves his administration has made of late with the cry of Asian nationalism. He preaches closer ties with Asia. With this I most heartily agree. It has always been my conviction that we must open up avenues to friendly relations with other Asian countries, aware of the cruel irony of geography and of history that we are in Asia, but *not of* it.

But I am afraid, deathly afraid, that, under the Garcia administration, there may be a miscarriage of the policy of promoting friendly ties with other Asian countries. We may see instead a resurgence of "Asia for the Asians", that glib and infamous Japanese slogan which we thought had died in Nagasaki and Hiroshima, but which Mr. Garcia called back to life when he was our Secretary of Foreign Affairs. If this should eventuate, Mr. Garcia and the Garcia order shall have played straight into the hands of the Communists who have revived "Asia for the Asians" in their search for a magic formula to win the oppressed starving masses of Asia to their cause. The late President Magsaysay, in his own simple unaffected way, may have foreseen this danger when he upbraided his Foreign Secretary for glibly mouthing "Asia for the Asians."

Before I am done, I would like to return to an old theme which I have discussed repeatedly over the years. Our constitution is only as good as we make it. Unless we give it life and meaning in the context of our national life, unless the beautiful political, social, and economic principles it proclaims assume practical validity in our government, in short, unless we, the people, give it the breath of life, the Constitution will become an ornamental collection of empty impractical abstractions.

Make no mistake about it. Our Constitution is under siege — under unrelenting siege, day in and day out, by willful men, who have sworn to uphold and defend it but who find it a drag on their mad quest for autocratic power.

Let us resolve to give our Constitution the massive support of our collective power as a free and sovereign people. In this resolution, the blows to freedom of men like Mr. Garcia and his cohorts will be as gusts of wind beating in vain against the ramparts of freedom.

LABOR UNDER . . . (*Continued from page* 79)

we may continue building the political edifice on a more stable, solid and enduring foundation. After all, a form of government is only as strong as the social order upon which it rests.

Another provision which, I believe, should be written into the Constitution is this: The State fully recognizes the right of the workers to form or join labor organizations of their own choosing for the purpose of collective bargaining and for the promotion of their moral, social and economic well-being.

Some may consider this proposal unnecessary because its subject-matter is covered substantially by the Bill of Rights and specifically by an existing statute (R.A. 875, known as the Industrial Peace Act). At present, despite existing constitutional and statutory provisions recognizing the workers' right to self-organization, there are employers who still persist in interfering with the exercise of this right, in union-busting and in refusing to recognize legitimate unions for collective bargaining purposes. This propensity of employers to ignore the most important right of workers has been, in most cases, the cause of industrial conflict and is the main deterrent to the attainment of industrial peace. I do not propose to expound on the value and importance of the workers' right to organize. I shall only repeat what an American Jesuit Father said, and it is this: "Trade unionism is the natural reply to the pre-empted position of men who believe that money and power are of greater value than human beings and decent human living".

I should like to think that the days of the plutocrats and the feudal lords are gone and that we are living in a different age, the age of the workingman. This is an age of rapid changes in the economic and social situations not only here but throughout the world. This is an age in which smug-thinking selfish individualists should step aside and allow progressive socially-minded men to lead. This is an age in which our legal and social outlook and practices need constant re-examination to make them responsive to the exigencies of modern life.

I submit that if our Constitution is to be re-examined and amended, its provisions affecting labor should be expanded along the lines I have indicated. Let us hope that the obvious value of social justice shall not be overlooked when the task of amending the Constitution is actually undertaken.

AN ARMY OF PRINCIPLES

In a spacious marble building in New Delhi last week, earnest men from 53 nations quietly undertook a task of more potential importance to 20th century man than the cracking of the atom or the exploration of space. Their goal: to foster the rule of law throughout the world by defining the minimum legal safeguards that all men everywhere could reasonably demand of their governments.

The men who met in New Delhi were members of a unique organization — the International Commission of Jurists. Born in 1952 out of revulsion at the drumhead trials then going on in Communist East Germany, and supported by 20,000 lawyers throughout the world, the jurists' commission is tied to no national government, is so thoroughly self-financed that the delegates to last week's congress had to dig into their own pockets to get up the air fare to New Delhi. Thanks to its freedom from official pressures, the commission does not have to worry about diplomatic niceties. No lawyers from Spain, Portugal, South Africa or the Soviet bloc were invited to New Delhi, on the ground that the rule of law is not in operation in their countries.

The jurists' commission does not try to make international law. It concentrates on specific violations of civil liberties. It sent observers to the political trial of Yugoslavia's Milovan Djilas and to South Africa's mass treason trial, and believes that their presence may have helped to shame the prosecution into redrafting the flimsy indictments of the 91 defendants in the South African trial. To New Delhi Britain sent a high-powered delegation that hoped, in after-hours talk, to impress on lawyers who had come from newly independent Commonwealth countries the need for strict constitutional limitations on the powers of such ambitious rulers as Ghana's Premier Kwane Nkrumah.

Real focus of the commission's interest, however, was its ambitious attempt to come up with a universally acceptable set of "principles, institutions and procedures.... to protect the individual from arbitrary government and to enable him to enjoy the dignity of man." Right at the start, the jurists' qualifications for this job were challenged by India's Prime Minister Jawaharlal Nehru, himself a onetime barrister-at-law of London's Inner Temple. India is bothered by the setting up of military dictatorships all over Southeast Asia; it is itself a democracy, but does not scruple on occasion to hold political prisoners without trial. Said Nehru: "It may be that in a changing society, (the executive) represents reality more than the statute law which the judge administers."

How little Nehru's classic rationalization for arbitrary government impressed the free world's lawyers was made clear in the final resolution of the New Delhi congress. Among its recommendations:

Any legislative powers granted to the executive branch of a national government "should be within the narrowest possible limits."

"Limitations on legislative power should be incorporated in a written constitution and the safeguards therein should be protected by an independent judicial tribunal."

An accused person must be assumed innocent until proved guilty.

Judges should be chosen in such a way, and assured of long-enough tenure of office, that they can act independently.

As realistic men, the jurists had no illusions that these vital safeguards to liberty would sweep the earth overnight. "Our business here," said India's ex-Supreme Court Judge Vivian Bose, "is to see whether we as lawyers, judges and jurists cannot stir the conscience of the world into insisting that there shall be certain common decencies for all men in all lands." To some it might seem improbable that the conscience of the world would ever greatly affect the actions of totalitarian rulers. But the men who met in New Delhi last week had behind them the experience of one of history's most successful propagandists. Wrote Tom Paine 175 years ago: "An army of principles will penetrate where an army of soldiers cannot." — *TIME, January* 19, 1959.

JUST PEACE THROUGH THE RULE OF LAW

Because Secretary of State John Foster Dulles has refused to negotiate away U. S. strengths for Communist promises, he has been derided by the idealists as "negative" and "inflexible," taxed for such hard-hitting phrases as "massive retaliation" and "brink of war." Last week, in a notable speech to the New York State Bar Association in Manhattan, Dulles made it clear that he is trying to steer U. S. policy toward the most positive and flexible peace-seeking goal known to civilized man: a world rule of law that substitutes "justice and law for force," leaves room for "peaceful change whereby justice is manifested," and provides for "a system of order based upon the replacement of force by community justice, reflecting moral law.

"Often peace is identified with the imposition by strong nations of their 'benevolent' rule upon the weaker," said Dulles. "Most of these efforts collapsed in war... But the world of today is very different from the world of past centuries. It cannot be ruled. Hence the time is ripe for the rule of law."

"We in the U. S. have from the very beginning of our history insisted that there is a rule of law which is above the rule of man. That concept we derived from our English forebears, but we played a part in its acceptance. As John Marshall put it, 'There are principles of abstract justice which the Creator of all things has impressed on the mind of his creature man.'

"Thus, since its inception, our nation has been dedicated to the principle that man, in his relationship with other men, should be governed by moral, or natural law. It was believed that this was something that all could comprehend. So great responsibilities were placed upon a jury, and the conscience of the chancellor was relied upon to temper legal rigors with equity. And legislatures annually change our statute laws in the hope of thereby making these laws more conformable to justice."

"We now carry these concepts into the international field. The U. S. helped base the United Nations Charter on peaceful settlement of disputes in conformity with the principles of justice and international law." Since then, the Communists—to whom laws are means "whereby those in power suppress or destroy their enemies"—have used the U.N. as a propaganda forum made safe by their veto power while using force everywhere else from Hungary to Tibet. The U. S. meanwhile helped 21 new nations advance to freedom by lawful, orderly means.

Hardest testing point of this principle of law: the U. S. stand against its friends, when it opposed the British-French-Israeli Suez invasion in November 1956. "The invading forces were withdrawn. Tolerable solutions were found through peaceful means." Had the U. S. tolerated the rule of force by its friends at Suez, "the whole peace effort represented by the U.N. would have collapsed... While it is premature to say that the Suez affair marks a decisive historical turning point, it may so prove."

Now, said Dulles the U.S. needs more than ever before to advance the rule of law as a "shield and protector of those who rely on good faith in international engagements." Specifically, the U.S.—and the other members of the U.N.—need to:

Condemn more and tolerate less the anti-community ac-

(*Continued on page* 108)

PROFILES: MEMBERS OF THE BENCH AND BAR

Judge JESUS P. MORFE

Judge Jesus P. Morfe is a frank and outspoken judge with a reputation for independence of mind. He does not mince words when he disagrees with accepted schools of thought. That is why every now and then the national spotlight is focused upon his bench in the Pangasinan court of first instance.

Sometime ago, he took a side opposed to the Supreme Court on the question of whether or not the crime of rebellion can be complexed with other crimes. The legal controversy arose when former Manila Councilor Amado V. Hernandez, together with other Huks, were convicted of the crime of complex rebellion and given a life sentence. On Hernandez' appeal, the Supreme Court held that the crime of rebellion absorbed other crimes perpetrated as necessary means of committing rebellion. Its view was that Hernandez should have been charged with simple rebellion only, paving the way for Hernandez' release on bail. Judge Morfe took common cause with then Solicitor General Ambrosio Padilla who formally sought a reversal of the Supreme Court ruling. In a memorandum asking to be allowed to appear before the Court, Judge Morfe assailed the tribunal for encroaching upon the legislature by indulging in "judicial legislation." He maintained that the tribunal's doctrine holds true only if rebels kill policemen, destroy government buildings or seize public funds. But if the rebels also kill civilians or burn civilian houses, they should be punished for the complex crime. "When the cause of the rebels is righteous as when the government is guilty of unpardonable abuses or of suppression of civil liberties, then the civilians gladly cooperate with them..." But "when their cause is right, there is no need for killing civilians or burning their houses to get their cooperation as shown during the Japanese regime." Furthermore, he maintained that rebellion, being a lesser offense, cannot absorb such grave felonies as murder, robbery, or arson.

While the Supreme Court did not allow Judge Morfe to appear before it in the Hernandez case he nevertheless won a moral victory when Congress subsequently passed a law cancelling the penalty for rebellion of imprisonment from 6 to 12 years, and making it a capital offense.

But the people was bound to hear some more from Judge Morfe. This time he boldly encouraged government employees to cast off their administrative strait-jackets and enter actively into politics. This was in a decision acquitting a registrar of a public school of the charge of politicking for allegedly having campaigned for the Liberal Party in the 1953 elections by distributing political pamphlets and delivering speeches during political rallies. In his decision, he said that the Constitutional provision totally prohibiting government personnel from voicing political opinions and from working for the best candidates is "unrealistic." He charged that the constitutional prohibition is a hangover from an original executive order issued by American governors-general in the Philippines when the country's colonial status properly demanded that the goverment employes keep away from political agitators. Such prohibition is no longer warranted now that we are already politically independent, he said, citing the fact that in some countries even judges are elected by popular vote.

He urged the government to restore to millions of intelligent voters in the government service the freedom to take part in political activities. If we have unworthy and corrupt public officials it is because of the freezing of the freedom of speech of intelligent voters in the goverment payroll, he asserted.

At still another time Judge Morfe waded valiantly into the row over the administration's lavish spending of its presidential contingent funds in a manner that was suspiciously like electioneering. He attacked the congressional allocation of funds to the President as unconstitutional and an abdication of legislative authority and unlawful delegation to the chief executive of legislative power to appropriate funds. He said that such legislative abdication in favor of the President "is destructive to the balance of power between the legislative and the executive deparments and might in the long run convert the Philippine Republic into a dictatorship in the guise of a democracy like Peron in Argentina and Getulio Vargas in Brazil."

Born January 12, 1905 in Infanta, Quezon, Judge Morfe spent his early schooling in his hometown. From the time he completed the secondary course at the YMCA High School in Manila until he received his bachelor of laws degree from the University of Manila he had been a self-supporting student throughout.

Passing the bar examinations in 1933, he became member of the legal staff of Senator Claro M. Recto from said year to 1935. When Senator Recto was appointed justice of the Supreme Court in 1935 he became the latter's private secretary up to 1937. From 1937 to 1941 he was the head of the legal staff of the Recto Law Office.

In 1942-1943 he was the Welfare Officer and Special Attorney of the Bureau of Public Welfare, whose office was to represent indigent litigants in court as a public service.

During the Occupation he was named assistant director of the Bureau of Political Affairs, Ministry of Foreign Affairs, of the Occupation Republic. As such, he was in charge of making representation with the Japanese authorities for the redress of grievances and/or the release of Filipino victims of Japanese abuse and atrocities. As a result of his efforts thousands of civilians and guerrillas were released from 1943 to 1944, as records now in Malacañang will show.

From 1945 to 1954 he was again head of the legal staff of the Recto Law Office. In 1954, he was appointed judge of the court of first instance—a position he holds up to the present with honor and distinction.

UNITED STATES SUPREME COURT

Advance Opinion

JOHN LEE, Petitioner,
v
PAUL J. MADIGAN, Warden, Federal Penitentiary, Alcatraz, California
— US —, 3 L ed 2d 260, 79 S Ct —
[No. 42]
Argued December 9 and 10, 1958. Decided January 12, 1959

SUMMARY

Petitioner, while in the Army, had been convicted by a court-martial, dishonorably discharged, and sentenced to prison; while serving that sentence in the custody of the Army within the United States, he was convicted by a court-martial of the crime of conspiracy to commit murder, this offense having occurred on June 10, 1949. His petition for habeas corpus, challenging the jurisdiction of the court-martial on the ground that the conspiracy to commit murder was committed "in time of peace" within the meaning of the proviso of Article of War 92 to the effect that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the United States "in time of peace," was denied by the United States District Court for the Northern District of California, Southern Division (148 F Supp 23). The District Court's decision was affirmed by the Court of Appeals for the Ninth Circuit (248 F2d 783).

On certiorari, the judgment below was reversed by the United States Supreme Court. DOUGLAS, J., speaking for six members of the Court, held that the petitioner's 1949 crime was committed "in time of peace," notwithstanding that World War II had not officially terminated, as to either Germany or Japan, until after that date. The view taken was that it could not be assumed that Congress used "in time of peace" in Article 92 to deny soldiers or civilians the benefit of jury trials in capital offenses committed 4 years after all hostilities had ceased.

HARLAN, J., joined by CLARK, J., dissented, on the ground that the term "in time of peace," as used in Article 92, signified peace in the complete sense, officially declared. The dissenters also rejected petitioner's contention (not reached by the majority) that he could not constitutionally be tried by court-martial because he was not a member of the Armed Forces at the time his 1949 offense was committed.

FRANKFURTER, J., did not participate.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Statutes Sec. 178; *War Sec.* 1.—*construction—meaning of "peace."*

1. The term "in time of peace," as used in a statute, is to be construed in light of the precise facts of each case and the impact of the particular statute involved.

War Sec. 1.—*war or peace — terminology.*

2. In drafting laws, Congress may decide that the nation may be "at war" for one purpose and "at peace" for another, and it may use the same words broadly in one context and narrowly in another.

Statutes Secs. 109, 178; *War Sec.* 37—*construction—meaning of "peace."*

3. In ascertaining whether, within the meaning of a statute containing the term "in time of peace," a particular act occurred during such time, the problem of judicial interpretation is to determine whether, in the sense of the particular statute, peace had arrived; only mischief can result if the term is given a particular meaning regardless of the statutory context.

War Sec. 31 — *military tribunals—jurisdiction.*

4. The jurisdiction of a military tribunal, having attached in time of actual war, is not lost merely because hostilities cease, but continues until the end of the trial and the imposition of the sentence.

Courts Sec. 86; *War Sec.* 31 — *offenses—jurisdiction.*

5. Prior to the enactment of the 1863 statute (12 Stat 736) authorizing military tribunals to try soldiers for the capital crimes of murder and rape in times of war, insurrection, or rebellion, only a state court could try a soldier for such crimes.

Courts Sec. 86; *War Sec.* 31 — *offenses—jurisdiction.*

6. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no intention to give to the military exclusive jurisdiction of criminal prosecutions against military personnel should be ascribed to Congress in the absence of clear and direct language to that effect.

Criminal Law Secs. 46; *Jury Secs.* 17, 17.6—*trial by jury.*

7. When a citizen, whether soldier or civilian, is charged with a capital crime such as murder or rape, important guaranties come into play, the most significant of which is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed.

Statutes Sec. 149.—*construction—citizens' rights.*

8. Statutory language is construed to conform as near as may be to traditional guaranties that protect the rights of the citizen.

Courts Sec. 86; *War Sec.* 31—*jurisdiction—citizens' rights.*

9. The courts will attribute to Congress a purpose to guard jealously against the dilution of the liberties of the citizen that would result if the jurisdiction of military tribunals were enlarged at the expense of civil courts.

Courts-Martial Sec. 6—*jurisdiction—time of peace.*

10. The proviso of Article of War 92 that no person shall be tried by court-martial for murder or rape committed within the United States in time of peace should be read generously to the end that officers and soldiers shall be protected by having secured to them a trial by their peers.

Courts Sec. 86; *Courts-martial Sec.* 6—*jurisdiction—civil and military courts—time of peace.*

11. The courts will not construe the term "in time of peace," as used in the proviso of Article of War 92 that no person shall be tried by court-martial for murder or rape within the United States "in time of peace," so narrowly as to supplant all civilian laws and to substitute military for judicial trials of civilians not charged with violations of the law of war; instead, the courts will impute to Congress an attitude more consonant with our traditions of civil liberties.

Courts-martial Sec. 6—*jurisdiction—time of peace—cessation of hostilities.*

12. The crime of conspiracy to commit murder, committed on June 10, 1949, by one serving, in the custody of the Army and within the United States, a sentence imposed by a court-martial, occurs "in time of peace," within the meaning of that term as used in the proviso of Article of War 92 to the effect that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the United States "in time of peace," notwithstanding that World War II was not terminated as to Germany until October 19, 1951, or as to Japan until April 28, 1952; whatever might have been the plan of a later Congress in continuing some controls long after World War II hostilities ceased, it is not to be assumed that the Congress which used the term "in time of peace" in Article 92 did so in order to deny soldiers or civilians the benefit of jury trials for capital offenses committed 4 years after all hostilities had ceased.

POINT FROM SEPARATE OPINION

Courts-martial Sec. 6; *Jury Sec.* 17—*jurisdiction—constitutional rights.*

13. One who, while serving with the Army, is convicted by court-martial, dishonorably discharged, and sentenced to prison in the custody of the Army, has no constitutional right not to be tried by court-martial for a separate crime committed while serving the sentence imposed upon him. (From separate opinion by Harlan and Clark JJ.)

APPEARANCES OF COUNSEL

Carls S. Rhoads, of Detroit, Michigan and *Robert E. Hannon,* of Castro Valley, California, argued the cause for petitioner.

John F. Davis, of Washington, D.C. argued the cause for respondent.

OPINION OF THE COURT

Mr. Justice *Douglas* delivered the opinion of the Court.

Article of War 92, 10 USC (1946 ed. Supp IV) Sec. 1564, which, prior to the adoption of the Uniform Code of Military Justice governed trials for murder or rape before courts-martial, contained a proviso "that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

The question for decision concerns the meaning of the words 'in time of peace" in the context of Article 92.

Petitioner, while serving with the United States Army in France, was convicted by a court-martial, dishonorably discharged, and sentenced to prison for 20 years. He was serving that sentence in the custody of the Army at Camp Cooke, California, when he was convicted by a court-martial of the crime of conspiracy to commit murder. This offense occurred on June 10, 1949, at Camp Cooke. The question is whether June 10, 1949, was "in time of peace" as the term was used in the 92d Article. The question was raised by a petition for a writ of habeas corpus challenging the jurisdiction of the court-martial. Both the District Court (148 F Supp 23) and the Court of Appeals (248 Fed 783) ruled against petitioner. We granted certiorari, 356 US 911, 2 L ed 2d 585, 78 S Ct 672.

The Germans surrendered on May 8, 1945 (59 Stat 1857), the Japanese on September 2, 1945 (59 Stat 1733). The President on December 31, 1946, proclaimed the cessation of hostilities, adding that "a state of war still exists." 61 Stat 1048. In 1947, Senate Joint Resolution 123 was passed (61 Stat 449) which terminated, inter alia, several provisions of the Articles of War but did not mention Article 92. The war with Germany terminated October 19, 1951, by a Joint Resolution of Congress (65 Stat 451) and a Presidential Proclamation (66 Stat c3). And on April 28, 1952, the formal declaration of peace and termination of war with Japan was proclaimed by the President (66 Stat c31), that being the effective date of the Japanese Peace Treaty. Since June 10, 1949—the critical date involved here—preceded these latter dates, and since no previous action by the political branches of our Government had specifically lifted Article 92 from the "state of war" category, it is argued that we were not then "in time of peace" for the purposes of Article 92. That argument gains support from a dictum in Kahn v. Anderson, 255 US 1, 9, 10, 65 L ed 469, 474, 475, 41 S Ct 224, that the term "in time of peace" as used in Article 92 "signifies peace in the complete sense, officially declared." Of like tenor are generalized statements that the termination of a "state of war" is "a political act" of the other branches of Government, not the Judiciary. See Ludecke v. Watkins, 335 US 160, 169, 92 L ed 1881, 1888, 68 S Ct 1429. We do not think that either of those authorities is dispositive of the present controversy. A more particularized and discriminating analysis must be made. We deal with a term that must be construed in light of the precise facts of each case and the impact of the particular statute involved. Congress in drafting laws may decide that the Nation may be "at war" for one purpose, and at peace for another. The problem of judicial interpretation is to determine whether "in the sense of this law" peace had arrived. United States v. Anderson (US) 9 Wall 56, 69, 19 L ed 615, 618. Only mischief can result if those terms are given one meaning regardless of the statutory context.

In the Kahn case, the offense was committed on July 29, 1918, and the trial started November 4, 1918—both dates being before the Armistice. It is, therefore, clear that the offense was not committed "in time of peace." Moreover, a military tribunal whose jurisdiction over a case attaches in a time of actual war does not lose jurisdiction because hostilities cease. Once a military court acquires jurisdiction that jurisdiction continues until the end of the trial and the imposition of the sentence. See Carter v. McClaughry, 183 US 365, 383, 46 L ed 236, 246, 22 S Ct 181. The broad comments of the Court in the Kahn Case on the meaning of the term "in time of peace" as used in Article 92 were, therefore, quite unnecessary for the decision.

Ludecke v. Watkins, 335 US 160, 92 L ed 1881, 68 S Ct 1429, belongs in a special category of cases dealing with the power of the Executive or the Congress to deal with the aftermath of problems which a state of war brings and which a cessation of hostilities does not necessarily dispel. That case concerns the power of the President to remove an alien enemy after hostilities have ended but before the political branches have declared the state of war ended. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 US 146, 64 L ed 194, 40 S Ct 106 involves the constitutionality under the war power of a prohibition law passed in 1918 after the armistice with Germany was signed and to be operative "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." Woods v. Cloyd W. Miller Co. 333 US 138, 92 L ed 596, 68 S Ct 421, concerns the constitutionality of control of housing rentals promulgated after hostilities were ended and before peace was formally declared. These cases deal with the reach of the war power, as a source of regulatory authority over national affairs, in the aftermath of hostilities. The earlier case of McElrath v. United States, 102 US 426, 26 L ed 189, is likewise irrelevant to our problem. It was a suit for backpay by an officer, the outcome of which turned on a statute which allowed dismissal of an officer from the service "in time of peace" only by court-martial. The President had made the dismissal; and the Court held that such action, being before August 20, 1866, when the Presidential Proclamation announced the end of the rebellion and the existence of peace, was lawful, since there was extrinsic evidence that Congress did not intend the statute to be effective until the date of the Proclamation.

Our problem is not controlled by those cases. We deal with the term "in time of peace" in the setting of a grant of power to military tribunals to try people for capital offenses. Did Congress design a broad or a narrow grant of authority? Is the authority of a court-martial to try a soldier for a civil crime, such as murder or rape, to be generously or strictly construed? Cf. Duncan v. Kahanamoku, 327 US 304, 90 L ed 688, 66 S Ct 606.

We do not write on a clean slate. The attitude of a free society to the jurisdiction of military tribunals—our reluctance to give them authority to try people for non-military offenses—has a long history.

We reviewed both British and American history, touching on this point, in Reid v. Covert, 354 US 1, 23-30, 1 L ed 2d 1148, 1167—1170, 77 S Ct 1222. We pointed out the great alarms sounded when James II authorized the trial of soldiers for non-military crimes and the American protests that mounted when British courts-martial impinged on the domain of civil courts in the country. The views of Blackstone became deeply imbedded in our thinking:

"The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are

open for all persons to receive justice according to the laws of the land." 1 Blackstone's Commentaries 413. And see Hale, History and Analysis of the Common Law of England (1st ed 1713), 40-41. We spoke in that tradition in United States ex rel. Toth v. Quarles, 350 US 11, 22, 100 L ed 8, 17, 76 S Ct 1, "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."

The power to try soldiers for the capital crimes of murder and rape was long withheld. Not until 1863 was authority granted. 12 Stat 736. And then it was restricted to times of "war, insurrection, or rebellion." The theory was that the civil courts, being open, were wholly qualified to handle these cases. As Col. William Winthrop wrote in Military Law and Precedents (2d ed 1920) about this 1863 law:

"Its main object evidently was to provide for the punishment of these crimes in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority can not be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government.'

Civil courts were, indeed, thought to be better qualified than military tribunals to try non-military offenses. They have a more deeply engrained judicial attitude, a more thorough indoctrination in the procedural safeguards necessary for a fair trial. Moreover important constitutional guarantees come into play once the citizen whether soldier or civilian—is charged with a capital crime such as murder or rape. The most significant of these is the right to trial by Jury, one of the most important safeguards against tyranny which our law has designed. We must assume that the Congress, as well as the courts, was alive to the importance of those constitutional guarantees when it gave Article 92 its particular phrasing. Statutory language is construed to conform as near as may be to traditional guarantees that protect the rights of the citizen. See Ex parte Endo, 323 US 283, 301-304, 89 L ed 243, 255, 256, 65 S Ct 208; Rowoldt v. Perfetto, 355 US 115, 2 L ed 2d 140, 78 S Ct 180; Kent v. Dulles, 357, US 116, 129, 2 L ed 2d, 1204, 1212, 78 S Ct 1113. We will attribute to Congress a purpose to guard jealously against the dilution of the liberties of the citizen that would result if the jurisdiction of military tribunals were enlarged at the expense of civil courts. General Enoch H. Crowder, Judge Advocate General, in testifying in favor of the forerunner of the present proviso of Article 92 spoke of the protection it extended the officer and soldier by securing them a trial by their peers. We think the proviso should be read generously to achieve that end.

We refused in Duncan v. Kahanamoku, 327 US 304, 90 L ed 688, 66 S Ct 606, to construe "martial law," as used in an Act of Congress, broadly so as to supplant all civilian laws and to substitute military for judicial trials of civilians not charged with violations of the law of war. We imputed to Congress an attitude that was more consonant with our traditions of civil liberties. We approach the analysis of the term "in time of peace" as used in Article 92 in the same manner. Whatever may have been the plan of a later Congress in continuing some controls long after hostilities ceased, we cannot readily assume that the earlier Congress used "in time of peace" in Article 92 to deny soldiers or civilians the benefit of jury trials in capital offenses four years after all hostilities had ceased. To hold otherwise would be to make substantial rights turn on a fiction. We will not presume that Congress used the words "in time of peace" in that sense. The meaning attributed to them is at war with common sense, destructive of civil rights, and unnecessary for realization of the balanced scheme promulgated by Articles of War. We hold that June 10, 1949 was "in time of peace" as those words were used in Article 92. This conclusion makes it unnecessary for us to consider the other questions presented, including the constitutional issues which have been much mooted.

Reversed.

Mr. Justice *Frankfurter* took no part in the consideration or decision of this case.

SEPARATE OPINION

Mr. Justice *Harlan*, whom Mr. Justice *Clark* joins, dissenting.

The Court today holds that on June 10, 1949, the date of this capital offense, this country was "in time of peace" within the meaning of Article of War 92, 10 USC (1946 ed, Supp IV) Sec. 1564, and therefore that the court-martial before which petitioner was tried was without statutory jurisdiction to entertain the proceedings. Believing that the ground upon which the Court nullifies petitioner's conviction has long been settled squarely to the contrary, and that a *de novo* examination of the question also requires the conclusion that the United States, on June 10, 1949 was not "in time of peace" within the meaning of Article 92, I respectfully dissent.

In Kahn v. Anderson, 255 US 1, 10, 65 L ed 469, 475, 41 S Ct 224 this Court unanimously held that the term "in time of peace" in Article 92 "signifies peace in the complete sense, officially declared." See also Givens v. Zerbst, 255 US 11, 21, 65 L ed 475, 480, 41 S Ct 227. The Court now dismisses this square holding as dictum and as "quite unnecessary for the decision," pointing out that the statement of facts in Kahn shows that the capital offense for which petitioner there was tried was committed before the Armistice which resulted in the termination active hostilities in World War I, and that the court-martial which tried him was also convened before the Armistice. I think that Kahn can hardly be dismissed so lightly. The conclusion there as to the meaning of "in time of peace" might have been regarded as unnecessary to decision only had the Court proceeding on a theory entirely different from that which it actually adopted, relied on the date of the offense or of the beginning of trial as dispositive. But plainly the Court did not proceed on any such basis. Rather, it accepted at least arguendo petitioners contention that the court-martial which had tried him did not have jurisdiction to continue "in time of peace" even a trial previously begun. It is thus not sound to say that the holding that "peace" in Article 92 "signifies peace in the complete sense, officially declared," was unnecessary to the decision in Kahn. Given the ground upon which the court chose to decide the case it was quite indispensable. The idea that the ground on which a court actually decides a case becomes dictum because the case might have been decided on another ground is novel doctrine to me.

I think that Congress, and the military authorities charged with the implementation and enforcement of the Articles of War, should be able to rely on a construction given one of those Articles by an unanimous decision of this Court. The conclusion in Kahn was not reached lightly without full consideration, as is shown by the fact that nearly two pages of the summary of counsel's argument contained in the report of the case are devoted to a discussion of the question, and another two pages of the summary of counsels' pages to the court's expression of the point. In 1948, 27 years after Kahn and a single year before the prosecution here involved, Congress re-enacted Article 92 without change in the relevant language. The Court now holds that between 1921 and 1949 the meaning of the statute underwent an inexplicable change, and that the authority under the statute then confirmed must now be denied. I see no warrant for thus speculating anew as to the motives of Congress in enacting and re-enacting the phrase "in time of peace" in Article 92.

Entirely apart from Kahn, I think today's decision is demonstrably wrong. This Court has consistently for nearly 100 years recognized, in many contexts, that a cessation of active hostilities does not denote the end of "war" or the beginning of "peace" as those or similar terms have been used from time to time by Congress in legislation. In McElrath v. United States, 102 US 426, 26 L ed 189, there was before the Court a statute of Congress prohibiting summary dismissal by the President of military officers "in time of peace". Although I venture to say that almost as many reasons could be conjured up for construing the term loosely in that context as in that now before us, the the Court, unanimously held that July 1866 was not "in time of

peace" although active hostilities between North and South had long since ceased, and that "peace, in contemplation of law" did not exist until the Presidential Proclamation of August 20, 1866. See also United States v. Anderson (US) 9 Wall 56, 19 L ed 615. In Ludecke v. Watkins, 335 US 160, 168, 169, 92 L ed 1881, 1888, 68 S Ct 1429, this Court in construing a statute recognized that, "The state of war" may be terminated by treaty or legislation or Presidential Proclamation. Whatever the mode, its termination is a political act." See also Woods v. Cloyed W. Miller Co. 333 US 138, 92 L ed 596, 68 S Ct 421; United States ex rel. Knauff v. Shaughnessy, 338 US 537, 94 L ed 317, 70 S Ct 309, both expressly recognizing that the state of war between this country and the Axis powers was not terminated by either the Presidential Proclamation of 1946 nor the Joint Resolution of July 1947.

The Court says that "Congress in drafting laws may decide that the Nation may be 'at war' for one purpose, and 'at peace' for another. Of course it may. But the Court points to no case, and I know of none, which has construed statutory language similar to that found in Article 92 to mean anything but "peace in the complete sense, officially declared." Under these circumstance, and given McElrath and Kahn the conclusion seems to me unmistakable that Congress intended that "peace" in Article 92 mean what we have always, until today, held it meant in this and other congressional legislation. When Congress has wished to define "war" or "peace" in particular statutes as meaning something else, it has explicitly done so. See, e.g., War Brides Act, 59 Stat 659: "For the purpose of this Act, the Second World War shall be deemed to have commenced on December 7, 1941, and to have ceased upon the termination of hostilities as declared by the President or by a joint resolution of Congress."

Today's decision casts a cloud upon the meaning of all federal legislation the impact of which depends upon the existence of "peace" or "war". Hitherto legislation of this sort has been construed according to well-defined principles, the Court looking to "treaty or legislation or Presidential Proclamation," Ludecke v. Watkins, 335 US at 168, to ascertain whether a "state of war" exists. The Court in an effort to make a "more particularized and discriminating analysis," has apparently jettisoned these principles. It is far from clear to me just what has taken their place.

The Court does not reach petitioners contention that he could not constitutionally be tried by court-martial because he was not a member of the armed forces at the time this offense was committed. It is sufficient to say that this contention is also squarely foreclosed by Kahn v. Anderson, 255 US 1, 65 L ed 469, 41 S Ct 224, supra and that in my opinion nothing in United States ex rel. Toth v. Quarles, 350 US 11, 100 L ed 8, 76 S Ct 1, or in Reid v. Covert, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1122, impairs the authority of Kahn on this score.

I would affirm.

THE NEED OF . . . (*Continued from page 77*)

common man, of the perpetually adolescent common man, of the common man unskilled in the art of living, (who), untaught in the wisdom of the race, is incompetent either to rule or to be ruled; is blatantly vulgar, ill-mannered, boorish, unsure of himself, hungry for happiness, not a man so much as a boy who has outgrown his britches." And for this, our writer said, the common man is not to blame. "The blame rests on his schoolmasters." The Department has adopted a program towards the improvement of the present teaching staff and the careful choice of the future mentors of our youth, both in public and private schools.

It is with some such similar thoughts, it is in a kind of concern for some such indictment, that we in the Department of Education have of late likewise turned our gaze upon the youth out of school — upon that segment of our "flaming youth" which all too often has become a "flaming question." In true deliberate care, we have made the schools, with whatever facilities they may have available, include in their program of activities the active cooperation — if not the outright participation — of these out-of-school youth. And then, too, in frank earnestness, we have solicited and enlisted the interest in this regard of the local committees of the Board of National Education, the local barrio councils, and the parent-teacher associations as well as of such organization as the local chambers of commerce or agriculture, or industries, the Women's Club, the Jaycees, Lions, Rotarians, Knights of Columbus, Daughters of Isabella, the Inner-Wheelers, organizations of all colors and creeds, the local trade or labor unions, or possibly the local associations of lawyers. Our goal is the same: to help these youth-out-of-school not only to get into profitable employment but also to see that they employ their leisure time pleasurably, to the end that, in Providence's good and generous time, they may all rise to the ranks of a model citizenry in the many far-flung communities of our country.

My friends, I must say now, in concluding this message, that where there appears an obvious need to revise our Constitution, such as possibly in the cases mentioned by His Excellency, the President, in his State-of-the-Nation address before the joint session of our Congress on January 26, let's proceed to do so. But where there is no such imminent need, where we are tempted to offer a change in this fundamental law merely for the sake of change, let's make haste slowly — let's raise the restraining hand of prudence. If we had not disturbed the balance in the original Constitution by adopting hasty amendments in 1941 and 1947, changing the tenure of office of the executive and the composition of the legislative body, there would be no need of devising new ways of synchronizing our national elections. Indeed, rather than fritter away our time in any controversial, albeit unnecessary, attempts to amend the Constitution, let's re-read it, re-study it, re-examine it, and from the process gather the stimulus and guidance that could indicate for us possible ways and means of grappling with the pressing needs and problems of today. After all, these problems are not new, and all that is needed perhaps towards their solution is a fresh perspective, vital approach, a renewed spirit of dedication, and this — especially through education — we can well do within the framework of the Constitution.

Again, from the process of re-reading, re-studying, or re-examining the Constitution, let us acquire added conviction that our passion is not for expedients, "which are for the hour," "but for principles," "which are for the ages." Product that it is of the best minds of our land, the result that it is of the aspirations of our people in the exercise of their sovereign authority, this Constitution contains precisely the lasting principles I have alluded to. To know them, to appreciate them, to apply them in their integrity — that is to say, to implement what the Constitution already contains rather than revise or add to it — that will be to us, I submit, the more profound duty, the more ennobling task.

SEPARATION OF POWERS UNDER THE MALOLOS CONSTITUTION

"While I proclaimed the principle of the separation of powers, I conferred upon the legislature such ample powers in the Constitution that in reality had the power of supervision over the executive and judicial branches and in order to make this supervision more effective, in imitation of the Constitution of Costa Rica, I established what is known as the permanent commission, i.e., a committee composed of members of Congress who are to assume all the powers of the same while not in session, with sufficient powers to adopt any urgent measures in case of emergency; in a word, it can be said that the Congress of the Republic was the supreme power (poder omnimodod) in the whole nation... Having in mind that, should we become independent, we would have for a long time an oligarchical republic in which the military element, which is ignorant as a whole, would predominate, in order to check this oligarchy, I preferred to neutralize it by an intellectual oligarchy, since the Congress was composed of the most intellectual classes of our country. This is the reason why I conferred upon the legislature such ample powers not only in the field of legislation, but also in the supervision of the executive and judicial branches. In a word, between the two oligarchies, I preferred the intellectual oligarchy of the many to the ignorant oligarchy." — Dr. Felipe Calderon, in his *Mis Memorias sobre la Revolucion Filipina*, pp. 239-241.

SUPREME COURT DECISIONS

I

Julieta Tambunting de Tengco, Petitioner, vs. Hon. Ramon R. San Jose, as Judge of First Instance of Manila, Salvador Barrios, Jose S. Sarte and Eduardo Gutierrez, Respondents, G. R. No. L-8162, August 30, 1955, Montemayor, J.

1. ORDERS GRANTING ATTORNEYS FEES INTERLOCUTORY; CASE AT BAR.—In its order of April 9, 1952, the Probate Court allowed each of the three attorneys, Barrios, Sarte and Gutierrez, an additional fee of ₱70,000.00, and that the sum of ₱17,500.00 be paid to each attorney. Another order was issued by the Court on November 26, 1952, authorizing the administrators to pay Atty. Gutierrez the sum of ₱30,000.00 for drawing up the will of the deceased Clara Tambunting.

On August 14, 1953, one of the legatees asked the Court to set aside these two orders, which the Court denied on the ground that it was filed out of time, well beyond the period fixed by Rule 38 of the Rules of Court relative to petitions for relief. The complaining legatee appealed from said order.

Held: The two orders in question granting attorney's fees are merely incidental to the probate proceedings and may be regarded as interlocutory in nature, subject to modification or setting aside by the probate court until the proceedings are terminated and the case definitely closed, after which said orders become final and executory.

2. PROBATE COURT CONTROL OVER INCIDENTS OF PROCEEDINGS.—As a rule, during the pendency of special proceedings, the probate court retains control and jurisdiction over incidents connected with it, including its orders not affecting third parties who may by such orders, have acquired vested rights. This control and jurisdiction is particularly extensive to and effective against its own officers, such as administrators appointed by it, and attorneys representing them or representing parties included in the proceedings.

3. ORDER FIXING FEES OF ADMINISTRATOR INTERLOCUTORY.—Just as the probate court may increase as it had increased the fees of the attorneys in the present case, it could equally and with the same authority decrease said attorney's fees when so warranted, as for instance, if it is found that the value of the estate is much less than what was originally assessed, and on which erroneous assessment the original fees were awarded. The same thing is true with regard to fees to be allowed administrators.

4. WHEN ORDER OVER INCIDENTS IN PROBATE PROCEEDINGS BECOMES FINAL.—An order fixing the fees of an administrator or of an attorney rendering professional services to an administrator, continues to be under the control of the probate court until the case is closed, and until then, the court may modify or set it aside in the sense that it may decrease or increase the same according to the facts and circumstances as they develop and unfold in the course of the probate proceedings; and even if said fees have already been partially or fully paid, they may yet be ordered returned or reimbursed to the estate, or a bond may be required of the court officer receiving them, to guarantee the return or reimbursement if later found to be necessary. Once the proceedings are terminated and the case definitely closed, the order becomes final and executory.

5. INTERLOCUTORY ORDERS IN PROBATE PROCEEDINGS APPEALABLE.—Although an order of the probate court is merely interlocutory, the same is appealable because Rule 41, Section 2, of the Rules of Court is not applicable to probate proceedings. So the appeal filed in August, 1953, from the orders of April 9, 1952 and November 26, 1952 must be given due course although the motion to set those orders aside was filed beyond the reglementary period for appeal.

6. PROBATE COURT ACTS AS TRUSTEE.—In probate proceedings, the Probate Court acts as a trustee of the estate, and as such trustee, it should zealously guard the estate in its administration and see to it that it is wisely and economically administered and not dissipated.

7. PROBATE PROCEEDINGS; WHEN SEPARATE ACTIONS WILL LIE.—After a probate case is definitely closed, then is the time to consider a separate action to set aside an order or judgment of the probate court, this, in order not to reopen the probate proceedings already terminated. But while the probate proceedings are still open, then the logical tribunal called upon to consider and grant the remedy is the probate court itself.

Ozaeta, Lichauco & Picazo, for petitioner.
Jose S. Sarte, in his own behalf.
Eduardo D. Gutierrez, in his own behalf.
Salvador Barrios, in his own behalf.

DECISION

Clara Tambunting died on April 2, 1950, leaving properties, real and personal of great value. Her will was probated on August 21, 1950. Survived by her husband Vicente L. Legarda, she left as sole and direct heir her grandson Vcente Legarda Price, an only child of her only child and daughter Clarita Tambunting married to Walter Scott Price. Clarita died during the Liberation in 1945; her surviving spouse Walter Scott Price later remarried and returned to the United States. His sister Pacifica Price de Barrios married to a brother of Atty. Salvador Barrios was later appointed guardian of the minor Vicente Legarda Price who by now must be around ten or eleven years old. Clara's will disposed of her estate in the following manner:

1. 4/6 to her grandson Vicente Legarda Price;
2. 1/6 to her husband Vicente L. Legarda (who later married a daughter of Atty. Jose S. Sarte); and
3. 1/6 to her nephews and nieces named Benjamin, Augusto, Romeo and Julieta, all surnamed TAMBUNTING, children of her brother Manuel Tambunting.

Three co-administrators were appointed — Vicente L. Legarda, represented by his father-in-law Atty. Sarte; Pacifica Price de Barrios, represented by her brother-in-law Atty. Barrios; and Augusto Tambunting, represented by Atty. Eduardo D. Gutierrez. Each co-administrator filed a bond in the sum of ₱10,000.00. At the time the estate was valued at ₱200,000.00.

By order of the probate court of October 14, 1950, for payment of the fees of said three attorneys Barrios, Sarte and Gutierrez, Judge Pecson authorized them to collect from the estate ₱50,000.00, ₱25,000.00 and ₱25,000.00, respectively. This order was based on an omnibus petition filed by all the heirs, co-administrators and their attorneys asking for said payment and informing the court that the estate was actually worth ₱3,000,000.00.

Walter Scott Price, father of the miner Vicente Legarda Price was also given a legacy in the sum of ₱25,000.00 on condition that he relinquished the administration of the estate. He evidently accepted the condition and he was paid the amount of the legacy. It should be stated in this connection that each of the co-administrators was awarded by the court a fee of ₱30,000.00 and the total award of ₱90,000.00 seems to have also been paid to said co-administrators.

On June 15, 1951, Attys. Sarte and Gutierrez filed a joint petition asking the probate court that their authorized attorney's fees of ₱25,000.00 each be equalized to that of Atty. Barrios which was ₱50,000.00. Pacifica Price, co-administrator and her counsel Atty. Barrios opposed the petition but later withdrew their opposition provided that the additional fees of ₱25,000.00 each sought by Attys. Sarte and Gutierrez be paid from the share of their

clients, namely, Benjamin, Augusto, Romeo and Julieta, represented by Atty. Gutierrez and Vicente L. Legarda represented by Atty. Sarte. Because of the conformity of the parties this petition for increase was granted by the probate court, and to be paid from the estate, but with the understanding that the fee of P50,000.00 given to Atty. Barrios and the fees of Attys. Sarte and Gutierrez of P25,000.00 each plus the additional P25,000.00 to each should be the limit to the amounts of attorney's fees chargeable to the estate, and that any additional attorney's fees sought and awarded should come from the estate of their respective clients and with the consent of the latter.

The probate court was informed that the estate had around P1,000,000.00 in cash deposited in Philippine and United States Banks from which the attorney's fees already mentioned could be paid, and cash advances to the heirs and legatees could be made. From the record we gather that these funds were withdrawn from the banks and were presumably distributed and paid out roughly as follows:

Partial distribution:

To Vicente Legarda Price, minor	P250,000.00
To Vicente Legarda, surviving spouse	225,000.00
To children of Manuel Tambunting, named Benjamin, Augusto, Romeo and Julieta	185,000.00
To legatees enumerated in the will in different amounts	49,000.00
Legacy to Walter Scott Price, father of minor Vicente Legarda Price provided he relinquished administration of the estate	25,000.00
Paid to various creditors	7,168.95
Administration fees, 3% of value of estate, or 1% to each co-administrator, per order of October 6, 1950. (Certainty of payment does not appear in the record.)	90,000.00
Attorney's Fees, P50,000.00 to each attorney of each co-administrator, as of the order of February 3, 1951	150,000.00
TOTAL	P981,168.95

On January 16, 1951, Atty. Gutierrez filed a proof of claim for P30,000.00 "for study, preparation and drawing of the last will and testament" of Clara Tambunting which will is said to consist of only three pages. The amount claimed was based on the alleged value of the estate, namely, P3,000,000.00, that is to say, 1% thereof.

On February 6, 1952, an omnibus petition was filed by all the heirs, principal legatees and co-administrators and their attorneys asking the court to fix and approve the cash value of the usufruct of the surviving spouse Vicente L. Legarda in the amount of P50,000.00; to pay an additional attorney's fees to the three lawyers Sarte, Barrios and Gutierrez in the amount of P100,000.00 each; to pay on account of said additional attorney's fees the sum of P20,000.00 to each attorney and that in order to pay said amounts of P50,000.00, cash value of the usufruct, P60,000.00 advance to the attorneys and P50,000.00 as partial payment of the taxes to the Government, the three co-administrators be authorized to pressure a loan from the trust funds deposited in the name of Vicente Legarda Price in the amount of P160,000.00.

In an order dated February 29, 1952, Judge San Jose denied the prayer for authority to secure a loan; denied the prayer for the payment of additional attorney's fees in the amount of P100,000.00 each, but approved the agreement of the parties fixing the cash value of the usufruct of Vicente L. Legarda in the sum of P50,000.00. This amount was paid to Vicente Legarda and is included in the P225,000.00 paid to him according to the partial distribution already stated. In the same order Judge San Jose directed the administrators to wind up the probate proceedings within 30 days.

In an omnibus petition dated March 20, 1952 filed by the heirs, co-administrators and their attorneys, the reconsideration of the order of Judge San Jose of February 29, 1952, was asked, alleging as an important ground for said reconsideration the assertion and claim that the estate may be conservatively valued at P7,000,000.00.

By order of April 9, 1952 Judge Ibañez, apparently acting as vacation Judge in the sala of Judge San Jose, granted in part the motion for reconsideration and allowed each of the three attorneys an additional fee of P70,000.00 instead of P100,000.00 as previously sought, and that instead of the P20,000.00 desired to be advanced to each attorney on account of the P70,000.00 increase in fees, only P17,500.00 be paid each attorney. *This order of April* 9, 1952, granting the petition for the payment of P70,000.00 additional fee to each attorney is one of the orders involved in the present case before this Court.

In a petition dated November 25, 1952, Atty. Gutierrez reminded the probate court of his previous petition of January 15, 1951 claiming the sum of P30,000.00 for drawing up the will of Clara Tambunting and of the omnibus petition filed by the heirs, administrators and their attorneys agreeing to said claim. In an order dated *September* 26, 1952, Judge San Jose granted said claim for P30,000.00. This is the other order involved in the present petition for mandamus.

On December 2, 1952 Julieta Tambunting dismissed Atty. Gutierrez as her lawyer and employed the law firm of Ozaeta, Roxas, Lichauco & Picazo who filed their appearance on the same date.

Presumably, because of the claim and representations made by the three attorneys Sarte, Barrios and Gutierrez that the estate had a conservative value of P7,000,000.00, the Government on April 27, 1953, filed a claim for taxes, estate and inheritance, including surcharges, in the amount of P1,581,671.80, based apparently on the value of the estate as stated in the petition for increase of attorney's fees dated January 31, 1952. Subsequently, however, this claim of the Government for taxes was reconsidered presumably upon representation of the co-administrators and their attorneys that the estate was worth much less than P7,000,000.00 and the Government accordingly reduced its claim for taxes from P1,581,671.80 to P493,734.26, and from this latter amount one may estimate the actual value of the estate at between two and two and a half million pesos.

On August 14, 1953, Julieta Tambunting thru her new attorneys petitioned the probate court to set aside its order of April 9, 1952 granting to each of the three respondent attorneys P70,000.00 as additional attorney's fees and its order of November 26, 1952, granting to Atty. Gutierrez a separate fee of P30,000.00 for preparing the will of Clara Tambunting, all on the ground that the said fees were procured thru fraudulent misrepresentation that the value of the estate was P7,000,000.00 when in fact said attorneys knew it to be only two million pesos, this, with the collusion of the administrators and their respective attorneys, to the prejudice of the estate especially of the minor Vicente Legarda Price under the guardianship of one of the co-administrators. In its order of December 28, 1953 Judge San Jose denied said petition apparently on the ground that it was filed out of time, well beyond the period fixed by Rule 38 of the Rules of Court relative to petitions for relief, he also denied a motion for reconsideration of this order of denial.

On April 20, 1954, petitioner Julieta Tambunting filed a notice of appeal and an appeal bond and the record on appeal, but respondent Judge San Jose in his order of August 27, 1954, denied the appeal. Because of that order denying the appeal, Julieta Tambunting filed the present petition for mandamus against Judge San Jose and Attorneys Barrios, Sarte and Gutierrez, to compel the former to approve and certify to this Court the record on appeal presented by petitioner on April 20, 1954.

The reason given by respondent Judge in his order of August 27, 1954 refusing to give due course to the appeal is that his order of December 28, 1953 sought to be appealed did not constitute a final determination of the rights of petitioner Julieta Tambunting with respect to the orders of April 9, 1952 and December 26, 1952 for

the reason that she had an adequate remedy granted to her by law, namely, a separate action to annul said two orders on the ground of fraud, if filed within four years after the discovery of the fraud. We believe that the order of December 28, 1953, denying the petition of August 14, 1953 on the ground that it was filed beyond the period required by Rule 38, is appealable (Paner vs. Yatco, G. R. No. L-2042, 48 O.G. No. 1, p. 61). Being appealable, the lower court may not deny the appeal if perfected on time as apparently it was so perfected. Even assuming for a moment that it was a mere interlocutory order, as claimed by respondents and so not appealable under Rule 41, Sec. 2 of the Rules of Court, nevertheless, it has been held in the case of Dais vs. Carduño, 49 Phil. 169, that this rule is not applicable to probate proceedings.

But the lower court says that the order sought to be appealed did not constitute a final determination of the rights of petitioner with respect to the two orders sought to be set aside. We do not agree. If not appealed, then there was nothing to stop or prevent the probate court from enforcing and carrying out the terms of the two orders in question and paying out the large sums involved in them. In other words, within the probate proceedings, the order of December 28, 1953, would constitute a final determination of the rights of appellant-petitioner with respect to the payment of said sums, thereby coming within the purview of Rule 105, Section (e) which provides that an interested person may appeal in special proceedings from an order or judgment rendered by a Court of First Instance, where such order or judgment:

> "Constitutes, in proceedings relating to the settlement of the estate of a deceased person, or the administration of a trustee or guardian, a final determination in the lower court of the rights of the party appealing, except that no appeal shall be allowed from the appointment of a special administrator."

The lower court further claims that appellant had another adequate remedy granted to her by law, namely, a separate action to annul said two orders on the ground of fraud. But why compel appellant to resort to another remedy, assuming that it was available, when the remedy by appeal which she is now invoking is not only adequate but the most speedy, convenient and least expensive? Moreover, the adequate remedy referred to by the probate court meant filing a separate action not before the same probate court but before the regular Court of First Instance, perhaps presided over by another judge who would have no knowledge whatsoever of the facts and circumstances involved in the probate proceedings, particularly those surrounding the issuance of the two orders in question. Aside from the pleadings required in said separate action, evidence would have to be presented, and by the time that the separate action is finally terminated, not excluding appeal by the party dissatisfied with the decision of the lower court, the remedy sought may prove to be too late and empty because the sums whose disbursement was sought to be stopped and prevented, may in the meantime have been paid, and spent by the payees, thereby rendering recovery difficult, if not impossible.

After a probate case is definitely closed, then is the time to consider a separate action to set aside an order or judgment of the probate court, this, in order not to reopen the probate proceedings already terminated. But while the probate proceedings are still open, then the logical tribunal called upon to consider and grant the remedy is the probate court itself.

One would naturally inquire into and it is necessary to ascertain the nature and status of the two orders in question dated April 9, 1952 and November 26, 1952, granting attorney's fees, and whether or not they were such orders or judgments which were covered by Rule 38 of the Rules of Court regarding petitions for relief. Rule 38, particularly sections 2 and 3 thereof refer to orders and judgments which have become final or executory. Do the two orders aforementioned come under this category?

We believe and hold that the two orders in question granting attorney's fees are merely incidental to the probate proceedings and may be regarded as interlocutory in nature, subject to modification or setting aside by the probate court until the proceedings are terminated and the case definitely closed, after which said orders become final and executory. As a rule, during the pendency of special proceedings, the probate court retains control and jurisdiction over incidents connected with it, including its orders not affecting third parties who may by such orders, have acquired vested rights. This control and jurisdiction is particularly extensive to and effective against its own officers, such as administrators appointed by it, and attorneys representing them or representing parties included in the proceedings. As this Court has said in the case of Oñas v. Javille, 54 Phil 604, "In probate proceedings considerable latitude is allowed a Court of First Instance in modifying or revoking its own orders as long as the proceedings are pending in the same Court and timely application or actions for such modifications or revocations are made by the interested parties." Just as the probate court may increase as it had increased the fees of the attorneys in the present case, it could equally and with the same authority decrease said attorney's fees when so warranted, as for instance, if it is found that the value of the estate is much less than what was originally assessed, and on which erroneous assessment, the original fees were awarded. The same thing is true with regard to fees to be allowed administrators. In other words, an order fixing the fees of an administrator or of an attorney rendering professional services to an administrator, continues to be under the control of the probate court until the case is closed, and until then, the court may modify or set it aside in the sense that it may decrease or increase the same according to the facts and circumstances as they develop and unfold in the course of the probate proceedings; and even if said fees have already been partially or fully paid, they may yet be ordered returned or reimbursed to the estate, or a bond may be required of the court officer receiving them, to guarantee the return or reimbursement if later found to be necessary (Dais vs. Carduño, 49 Phil. 165). Respondent Judge therefore erred in denying the petition of Julieta Tambunting dated August 14, 1953 to set aside the two orders of April 9, 1952 and November 26, 1952, in the mistaken belief that said orders had become final and executory and so came under the provisions of Rule 38, and because the petition for relief was filed beyond the period prescribed by said Rule 38.

In this connection, it may be stated that we have carefully gone over the record, particularly the different fees awarded to the rather numerous court officers intervening in these probate proceedings, and we cannot get away from the impression that the estate cannot be said to have been administered economically. For instance, we are not convinced that it was necessary to have three co-administrators to administer the estate, and each of them being paid P30,000.00, and on top of that to have each co-administrator represented by a separate attorney who, excluding the P70,000.00 additional fees now in question, have already been granted and paid P50,000.00 each. This does not seem to be a case involving much of any litigation, or of numerous claims or complicated accounts. So far, the amount paid to creditors is only about seven thousand pesos. There are no children or heirs of several marriages, with conflicting and adverse interests which should be represented and protected by perhaps separate administrators and counsel. There is only one forced and direct heir and a minor at that. The rest are legatees whose rights and interests can have no possible, much less serious conflict with those of the direct heir. True, most of the awards and grants of fees to the court officers intervening were based on omnibus petitions and bolstered by the conformity of the co-administrators, the heirs, legatees, and the attorneys themselves, but one might consider the special relationship between the heirs, legatees, co-administrators and their attorneys. As already stated, as co-administrator Vicente Legarda is represented by Atty. Sarte, his father-in-law; co-administratrix Pacifica Price-Barrios is represented by Atty. Barrios, her brother-in-law; and as to the minor Vicente

Legarda Price now about 10 or 11 years old, he could have been represented by his own father Walter Scott Price his natural guardian but said father after being given a legacy of ₱25,000.00 had left the Islands and remarried. The minor could also have been under the guardianship of his grandfather Vicente Legarda but the latter has also remarried and as already said, in his capacity as co-administrator, has engaged as his lawyer his father-in-law. So, the minor is now under the guardianship of his aunt Pacifica Price Barrios but she is also married and in her capacity as co-administratrx, has engaged as her counsel her brother-in-law Atty. Barrios. Considering these special relationships above referred to, which may have the effect of divided loyalty, the omnibus petitions agreed to by the legatees, heirs, co-adminstrators and their attorneys would appear not to have the weight and merit usually accorded such petitions, especially when we bear in mind that the conformity to such omnibus petitions on the part of the minor Vicente Legarda Price, was given not by him personally for he was only about nine or ten years old, but by guardian Pacifica Price de Barrios. Another point not to be lost sight of is that inasmuch as the minor is entitled to 4/6 or 2/3 of the whole estate, naturally, for every amount disbursed as attorney's fees and co-administrators fees, he would have to bear 2/3 of the same. By these observations, it is neither our intention nor our desire to prejudge the merits of the case as regards the propriety or reasonableness of the two orders of April 9, 1952 and November 26, 1952, granting attorney's fees, which will eventually and in due time, be considered and passed upon by the proper court.

We may add that in probate proceedings the probate court acts as a trustee of the estate and as such trustee it should jealously guard the estate under administration (Dariano v. Pidalgo, 14 Phil. 67) and see to it that it is wisely and economically administered and not dissipated. In the case of Mendoza v. Pacheco, 64 Phil. 142, this Court said:

> "x x x the State fails wretchedly in its duty to its citzens if the machinery furnished by it for the division and distribution of the property of a decedent is so cumbersome, unwieldy and expensive that a considerable portion of the estate is absorbed in the process of such division. Where administration is necessary, it ought to be accomplished quickly and at very small expense; and a system which consumes any considerable portion of the property which it was designated to distribute is a failure. x x x (McMicking vs. Sy Conbieng, 21 Phil., 211, 220.)"

Here, although the estate was originally valued at ₱200,000.00 the assessment was later raised to ₱3,000,000.00 and still later to ₱7,000,000.00, and it seems that the fees of the court officials intervening here were based on this apparently inflated valuation. The three lawyers would appear to have already been paid a total of ₱202,500.00, and under existing orders of the probate court, they still have ₱187,500.00 coming to them or a total of ₱390,000.00. This does not include the ₱90,000.00 already paid to the three co-administrators, all of which would give a grand total of ₱480,000.00. And yet the probate court proceedings are not yet terminated. Another thing, up to the present, it seems that nothing has been paid for taxes; and although the tax assessment of the Bureau of Internal Revenue has been reduced from ₱1,581,671.80 to ₱33,734,26, the latter sum includes surcharges and penalties which otherwise would not have been incurred had the taxes been paid on time. We repeat that it is the duty of the probate court to jealously guard the estate and see to it that it is administered wisely and economically and also to see to it that the expense incurred in the administration, including the fees of the administrators and the attorneys are commensurate with the actual value of the estate and the extent and value of the services rendered, so that at the end of the proceedings the bulk and the greater portion of the estate will remain, to be distributed among those entitled to the same.

As already stated, the present petition for mandamus was presented for the purpose of compelling the respondent Judge to give due course to the appeal of petitioner. We agree with petitioner that she has a right to appeal from the order denying her petition to set aside the orders of April 9, 1952 and November 26, 1952. By merely granting the petition for mandamus, the appeal would be given due course and when the case is elevated to us on appeal, the question or questions to be submitted and discussed would revolve around the nature of said two orders of April 9th and November 26th, — whether they had become final and executory and therefore beyond the power of the probate court to amend or to set aside, even under a petition for relief under Rule 38, for the reason that said petition was filed beyond the period prescribed by said rule, or whether said two orders may be considered as merely incidental in the special proceedings and consequently, interlocutory in nature, subject to the control of the probate court until the case is finally closed, during which time they may be amended or set aside. These same questions were exhaustively presented and discussed by counsel for both parties and we have carefully considered and passed upon them, our opinion and ruling being that said orders are interlocutory in character and may be modified or even set aside by the probate court when so warranted. For this reason, we have decided in December 28, 1953 denying the petition to set aside the two orders in question, solely on the ground that it was filed out of time.

In view of the foregoing, not only the order of the probate court dated August 27, 1954 denying the appeal is set aside but also its order of December 28, 1953, and respondent Judge is directed to consider and pass upon the petition of August 14, 1953, anew and on its merits. It is also suggested that respondent Judge examine and review the whole proceedings from the beginning to determine whether the expenses incurred in the administration, including the awards of the different amounts to the co-administrators and the attorneys were warranted, and if not, to fix the amounts which in its opinion are reasonable and proper considering the real and actual value of the estate, the extent and value of the services rendered, etc. and take whatever action is necessary. No costs.

Bengzon, Padilla, A. Reyes, Jugo, Bautista Angelo, Labrador, Concepcion and J. B. L. Reyes, JJ., concur.

II

Price Stabilization Corporation, Petitioner vs. Prisco Workers' Union, et al., Respondents, G. R. No. L-9288, December 29, 1958, Bautista Angelo, J.

1. LABOR LAWS; EIGHT HOUR LABOR LAW (COMMONWEALTH ACT NO. 444) APPLICABLE TO PRICE STABILIZATION CORPORATION.—The provisions of the Eight Hour Labor Law (Commonwealth Act No. 444) are applicable to the Price Stabilization Corporation which is an instrumentality of the government with a distinct and separate personality, and, therefore, its employees and workers are entitled to be paid additional compensation for overtime work or work rendered on Sundays and other legal holidays.

2. ID.; EXTENT OF POWER OF COURT OF INDUSTRIAL RELATIONS OVER ITS DECISION.—Under Sections 7 and 17 of Commonwealth Act No. 103, as amended, the Court of Industrial Relations has power to correct, amend or waive any error either in substance or form it may find in its proceedings and may alter or modify or set aside during its effectiveness, any award, order or decision it may render. In the case at bar, said court has authority to modify its partial decision rendered on August 25, 1953 by extending its benefits to other workers of the petitioner corporation.

Government Corporate Counsel Ambrosio Padilla & Lorenzo R. Masqueda, for the petitioner.
Vicente T. Ocampo, for the respondents.

D E C I S I O N

On August 25, 1953, the Court of Industrial Relations rendered a partial decision in Case No. 840-V entitled PRISCO Workers' Union, et al. v. Price Stabilization Corporation ordering the latter to pay all the employees and workers involved therein 25% additional compensation for unpaid overtime and for Sundays and legal holidays' service rendered from June 8, 1951. In addition, the Chief Examiner of the court was directed to proceed to the office of respondent corporation to examine the books of accounts, payrolls, vouchers, papers and any other record in its possession with a view to determining the amount involved in said overtime pay and additional compensation.

After the examination had been accomplished, the court ordered the execution of its decision, and, pursuant thereto, respondent paid to the petitioners whose names appear listed in the case the overtime pay and additional compensation fixed in the report of the Chief Examiner. Acting upon the motion of PRISCO Workers' Union of which said petitioners were members, the court clarified its decision of August 25, 1953 by stating that the same only embraces the fifty-eight (58) workers whose names appear in the petition and does not extend to other members of the union. On June 8, 1954, the union filed a petition docketed as Case No. 840-V (4) seeking to extend the benefits of the decision to other workers of the PRISCO for the reason that they are similarly situated as the workers who filed the original position, to which motion the PRISCO filed its opposition alleging that the same cannot be extended to other workers because it was intended exclusively for the benefit of the fifty-eight workers who initiated the proceedings, and that with the enactment of Republic Act No. 875 on June 17, 1953, otherwise known as the Magna Carta of Labor, the Court of Industrial Relations has no jurisdiction over the new petition it not appearing that it was one of those cases pending before said court at the time of the passage of the Act. But despite this opposition, the court ordered its Chief Examiner to conduct an examination of the record of the corporation to determine the overtime pay and additional compensation of the workers appearing in the petition and thereafter submit his report. And in compliance with the order, on February 11, 1955, the Chief Examiner submitted his report stating that the total amount of salary differential due the additional laborers was ₱54,439.85.

On March 4, 1955, upon order of the industrial court, the PRISCO filed its answer to the new petition alleging as special defense that the overtime pay and additional compensation demanded by the new petitioners have already been paid in accordance with the rates authorized by Commonwealth Act No. 246, known as the Budget Act, and that Commonwealth Act No. 444, otherwise known as the Eight Hour Labor Law, is not applicable to the corporation. On May 9, 1955, the industrial court issued an order extending the benefits of its partial decision of August 25, 1953 to the workers appearing in the new petition and holding that Commonwealth Act No. 444 is applicable to the PRISCO and so it has power and authority to act on the matter. On May 13, 1955, the corporation filed a motion for reconsideration on the ground that the last order of the court was contrary to law and the evidence, but the legality of said order was upheld by the court *en banc* in a resolution issued on June 9, 1955. Hence the present petition for review.

The issues posed in this petition are: (a) Is Commonwealth Act No. 444 applicable to the Price Stabilization Corporation?; and (b) Does the industrial court have authority to modify its partial decision rendered on August 25, 1953 by extending its benefits to other workers of said corporation?

The Price Stabilization Corporation was created by the President through the promulgation of Executive Order No. 350 on October 3, 1950 endowing it with powers, duties and functions to undertake the prevention of scarcity, monopolization, hoarding, injurious speculation and profiteering affecting the supply, distribution and movement of articles and other commodities of prime necessity; to aid in the promotion of the rice and corn industry; to foster, encourage and promote cooperative movement and mutual aid enterprises in the Philippines; to study, formulate and carry out measures for the promotion of home industries; and to act as agency and representative of the Philippine Republic in carrying out barter or other international economic agreements. And section 10 of said Executive Order provides that "All officers and employees of the PRISCO shall be subject to the Civil Service Law, rules and regulations, except those whose positions may, upon recommendations of the Board of Directors and the Secretary of Economic Coordination, be declared by the President of the Philippines policy determining, primarily confidential or technical in nature."

On the other hand, section 566 of the Revised Administrative Code, as amended, provides that "When the interests of the public service so require, the head of any Department, Bureau or Office may extend daily hours of labor, x x x for any or all of the employees under him, and may likewise require any or all of them to do overtime work not only on workdays but also on holidays"; and section 259 of the same Code likewise provides that, "*In the absence of special provisions*, persons regularly and permanently appointed under the Civil Service Law or whose salary, wages, or emoluments are fixed by law or regulations *shall not*, for any service rendered or labor done by them on holidays or for other overtime work, *receive or be paid any additional compensation*." (Underlining supplied). In view of the foregoing provisions of Executive Order No. 350 as well as in the Revised Administrative Code as amended, it is now contended for the corporation that even if the workers herein involved had worked overtime or rendered service on Sundays or other legal holidays, they are not entitled to any additional compensation and hence their petition must fall on its own weight.

This contention overlooks the fact that even if the employees and workers of the PRISCO are subject to the Civil Service rules and regulations, they may however be paid additional compensations for overtime work or work rendered on Sundays and other legal holidays *if there is a special legal provision authorizing payment of such additional compensation*, and here there is such provision as found in the Eight Hour Labor Law (Commonwealth Act No. 444). Thus, section 2 of said Act provides: "This Act shall apply to all persons employed in any industry or occupation, whether public or private", and there is no doubt that the PRISCO is engaged in an industry or occupation within the purview of said Act considering the nature of its organization and functions. It appears that, in exercising such functions, the PRISCO acts independently of the national government, for under the charter creating it it was vested with all the powers of a corporation including that of acting as a juridical entity [Executive Order No. 330, section 2 (9)]. It is at most an instrumentality of the government with a distinct and separate personality.

It is true that under Commonwealth Act No. 246, paragraph 32, known as the Budget Act, the officers and employees of the national government, except executive secretaries and under-secretaries of the departments, chiefs of bureaus and officers and others occupying positions of similar category, when working overtime, may be paid additional compensation at the rates and limitations fixed therein, *which differ in nature and amounts from those fixed by the Eight Hour Labor Law*, but said Act only applies to officers and employees of the national government, and not to instrumentalities thereof which have a different juridical personality like the PRISCO; and this is so because said officers and employees are paid under a budget prepared by the Commissioner of the Budget and approved by Congress, while the PRISCO was created with a capital of ₱30,000,000.00 fully subscribed by the Republic of the Philippines (Executive Order No. 350, section 3). We are therefore persuaded to conclude that the provisions of the Eight Hour Labor Law apply to the employees and workers of the PRISCO as found by the industrial court.

The second contention of PRISCO is that the industrial court erred in extending the benefits of its decision of August 25, 1953 to the other workers not included in the original petition for the reason that said decision had long become final and was

already duly executed when the PRISCO paid the workers the amount of P29,432.23. It is contended that said decision can no longer be modified or extended in any material respect except for mere clerical errors under the principle of estoppel by judgment or *res judicata*.

To meet this contention, suffice it to quote what we stated on the matter in a similar case:

"We hold that the respondent court possesses that power in the light of the provisions of sections 7 and 17 of Commonwealth Act No. 103, as amended. Under section 7, the Court of Industrial Relations has the power, among others, to correct, amend, or waive any error, defect, or irregularity, whether in substance or in form, that it may find in its proceedings, or to give all such direction as it may deem necessary or expedient in the determination of any dispute before it; and under section 17, the same court may alter, modify or set aside, during its effectiveness, any award, order, or decision it may render, upon application of any of the parties and after due hearing, and under the same section 17, an award, order, or decision is deemed effective for at least three years unless a shorter period is fixed by the court. The clear object of these provisions is undoubtedly to give to the court a continuing control over the case, in the interest of management and labor, as long as it remains under its control and jurisdiction, in order to accord substantial justice to the parties x x x in line with the liberal policy of the law which enjoins that the court shall act according to justice and equity and the substantial merits of the case, without regard to technicality or legal forms and shall not be bound by any technical rules of legal evidence but may inform its mind in such manner as it may deem just and equitable." (Church v. La Union Labor Union, G.R. No. L-4393 April 28, 1952).[1]

The following authorities also answer the contention of counsel for the PRISCO:

"Criticism is addressed to the extension of the increases and other benefits in question to employees and laborers who were not made parties hereto and who did not join the seventy-six drivers and conductors who had made corresponding demands upon and declared a strike against the petitioner. Aside from the fact that the Court of Industrial Relations is authorized to act according to justice and equity without regard to technicalities or legal forms (Commonwealth Act No. 103, section 20), the criticism is answered in the decision of this Court in Parsons Hardware Co., Inc. vs. Court of Industrial Relations, G.R. No. 48215, wherein it was held: 'Even assuming that the eighteen laborers were not members of the union at the time its petition for a general increase in salaries was admitted, we are of the opinion and so hold that as they are laborers of the company, they are entitled to the increase. x x x It has to be so, because to accord such increases only to members of the union would constitute an unjust and unwarranted discrimination against non-members.'" (Leyte Land Transportation Company, Inc. v. Leyte Farmers' & Laborers' Union, G.R. No. L-1377, May 12, 1948).

"The petitioner takes the point that only members of a labor union who made demands, struck, picketed or otherwise made common cause with the strikers, are entitled to the benefits won in a labor dispute.

"Section 4 of Commonwealth Act No. 103 relied upon by the petitioner does not support its proposition. The requirement of the Section invoked that 'the number of employees, laborers, x x x involved' shall be more than 30, means, in our opinion, nothing more than that a lesser number may not set the machinery of the Court of Industrial Relations in motion. It does not mean that the court's decision, once the court has legally taken cognizance of a case, may not comprise employees and workers other than those who signed the demands or were identified with the walkout. It has been held that workers involved in a dispute include other workers, unionists or not, who are presumed to be interested in the outcome of the demands or strike one way or another. (Parsons Hardware Inc. vs. Court of Industrial Relations and Parsons Workers and Employees Union, G.R. No. 48215; Leyte Land Transportation Company Inc. vs. Leyte Farmers and Laborers' Union, G.R. No. L-1377.)" (Land Settlement & Development Corporation v. Caledonia Pile Workers' Union, et al., G.R. No. L-4877, February 26, 1952).

Wherefore the orders subject of this petition are hereby affirmed, without pronouncement as to costs.

Paras, C. J., Bengzon, Padilla, Concepcion, J. B. L. Reyes and Endencia, JJ., concur.

Montemayor, J., reserves his vote.

III

Bienvenido Lim, Plaintiff-Appellant vs. Dee Hao Kim (alias Mariano Mabasa), et al., Defendants-Appellees, G. R. No. L-8663, October 31, 1957, Bengzon, J.

1. CIVIL LAW; SUCCESSION; ARTICLE 1081 OLD CIVIL CODE CONSTRUED.—Under Article 1081 of the old Civil Code, a partition which includes persons who are not heirs although void is not non-existent but merely voidable in so far as it concerns strangers, and so long as it was not avoided, it produces its effects.
2. ID.; ID.; WHEN ACTION BY HUSBAND TO RECOVER FRUITS OF PARAPHERNAL PROPERTY WILL NOT PROSPER.—Unless the identity, value or amount of the paraphernal property is previously established, the action by the husband to recover the fruits of said property will not prosper.
3. ID.; ID.; LIQUIDATION ESSENTIAL BEFORE HUSBAND CAN CLAIM FRUITS OF PARAPHERNAL PROPERTY.—The husband as administrator of the conjugal property may only claim the fruits of his wife's paraphernal property after the liquidation she has made charging such fruits with the necessary and indispensable expenses incurred in the administration and preservation of her property.
4. ID.; ID.; CAPACITY OF HUSBAND TO RECOVER PARAPHERNAL PROPERTY.—Where the wife repudiates her inheritance, the husband has no legal capacity to bring the action to recover said inheritance which is paraphernal in character.

Cipriano P. Primicias for plaintiff-appellant.

Angel B. Cruz & Cipriano Azada for defendants-appellees.

DECISION

The plaintiff has appealed from the order of the Manila Court of First Instance dismissing, upon motion and without trial, his complaint to recover his wife's share (and its fruits) in the estate left by her deceased father. He included his wife as co-defendant, because she was unwilling to sue with him.

According to the undenied allegations of such complaint and of other pleadings, Dee Chian Hong died intestate in Manila on February 1, 1945 leaving valuable stock in the China Banking Corporation and other financial and commercial institutions. Crispina Dee was one of his legitimate children and the other fourteen defendants were other heirs. In March 1946 these other heirs of the deceased executed an extrajudicial settlement of the estate, dividing it among themselves, and in fraud of Crispina, awarded nothing to her.

In April 1948 plaintiff Bienvenido Lim married Crispina; and in March 1954 he filed his action demanding a new parti-

[1] *See also* Pasumil Workers Union v. Court of Industrial Relations, 40 O.G., 6th Sup., p. 71; Osseco v. Court of Industrial Relations, G.R. No. 46673; APO Workers' Union v. Judge Modesto Castillo, et al., G.R. No. L-7480; Hotel and Restaurant Free Workers v. Kim San Cafe and Restaurant, G.R. No. L-8100.

tion of the properties of Dee Chien Hong, delivery of Crispina's inheritance together with its income, and attorney's fees.

The defendants filed a motion to dismiss, on the grounds of lack of personality and prescription, to wit:

1. The hereditary share which the plaintiff seeks to regain is paraphernal in character, and therefore he has no legal capacity to bring the action. Even if plaintiff's theory (the fruits of her paraphernal property belong to the conjugal property of which he is the administrator) is followed, still such fruits must be liquidated before he could claim them as manager of the conjugal estate.

2. The action is barred under section 4, Rule 74, the partition having been executed on March 30, 1946, approved by the court on April 21, 1946 and filed with the Register of Deeds on April 5, 1946, whereas the marriage occurred on April 16, 1946. The action is also barred by section 43, par. 3 of the Code of Civil Procedure which prescribes a period of 4 years within which to bring an action based on fraud. Furthermore, acquisitive prescription has already run in favor of the defendants over the shares of stock, which are personal property.

On her part Crispina Lee submitted a motion to dismiss, alleging that plaintiff's complaint asserted and usurped a cause of action completely belonging to her, and that she had never authorized him to institute any action concerning the estate of her deceased father.

After hearing the parties, the Hon. Magno S. Gatmaitan, Judge, dismissed the action, declined to annul the partition and ruled that plaintiff had no right to complain, the real party in interest being Crispina Dee Lim who had refused to dispute such partition or prosecute the action.

Regarding the partition, appellant here insists it was void *ab initio*, not only because Crispina had been excluded therefrom but principally because persons who were not heirs had been included therein — as he had alleged in his amended complaint. Under Article 1081 of the Civil Code he insists his wife's right to her lawful share was never interrupted by such partition, inasmuch as it was void and non-existent, her other co-heirs holding her share in trust for her. Therefore, he concludes, when they married she had paraphernal property, the fruits of which formed part of the conjugal assets under his management, fruits which consequently are retrievable by his legal action.

The argument must be held to be without foundation because although article 1081 calls the contract void, it was not non-existent and was merely voidable in so far as it concerns the strangers who had mistakenly been included in the partition. In fact the New Civil Code provides that it shall be void "only with respect to the" person who was mistakenly considered as an heir (Art. 1105).

This new Civil Code provision reflects the authoritative view of well-known Spanish commentators on the meaning of article 1081 (See for instance Manresa Codigo Civil, 6th Ed. (1943) Vol. 7 pp. 777, 778). Scaevola is more to the point. He does not consider such contract to be non-existent.

> "Laurent exprese que le parece ir demasiado lejos juagar como inexistante una partición en la que se admitio por error una persona que no era heredero, puesto que en especie los herederos han consentido; por lo qual no cabe decir que is particion no exista por razon del consentimiento, nunquo sen cierto que en lo que respecta el estraño, al que se ha atribuido una parte de la herencia, no haya particion. x x x No hay razon para considerar con primera particion como inexistente por lo que no refiere a los verdaderos herederos; ellos han consentido; por tanto, solo renta que sean completados sus lotes." (Scaevola, Codigo Civil Vol. 18 pp. 471, 471)

Consequently if the contract under 1081 was existing although voidable, so long as it was not avoided it had its effects; and when Crispina Dee married this plaintiff in 1946 such partition agreement was existing. Wherefore, to all intents and purposes there was no inheritance brought by her to the marriage. Such being the case, her husband acquired no rights thereto.

We declared in Cook v. McNicking (27 Phil. 10): "nullity of a deed or contract may be taken advantage of only by persons who bear such relation to the parties to the contract that it interferes with their rights and interests." Hence nullity of the extrajudicial partition may only be invoked by Crispina Dee — not by plaintiff.

Not only does plaintiff have no rights, but the person affected directly (his wife) objects to such action to recover. She has even filed a complaint against herein plaintiff, in a different proceeding, for separation of properties (1) on the grounds of abandonment, personal assaults and fraudulent conveyances of conjugal assets. Equity would not under the circumstances permit the husband to reach his wife's assets. And the law provides that the husband may not "maintain actions of any kind whatsoever with respect to the paraphernal property without the intervention or consent of the wife" (Art. 1083 Civil Code).

It is fallacious to assert that plaintiff's action does not refer to paraphernal property of his wife but to fruits of such property, which are conjugal. Obviously there can be no recovery of fruits, unless the identity, value or amount of the paraphernal property is previously established, and this may only be accomplished in an action involving the paraphernal property of the wife — action which, as stated, can not be instituted without her consent (2).

Invoking the provisions of Article 1412 of the Civil Code, plaintiff argues that as administrator of the conjugal partnership he has the obligation to "protect" the interest of the conjugal partnership, and that herein action aims to obtain the fruits of the paraphernal property accruing to the partnership automatically upon and after celebration of their marriage.

Remember in this connection what we explained in People's Bank & Trust Co. v. Register of Deeds of Manila, 60 Phil. 171:

> "To the wife belongs the management of the fruits of her paraphernal property, which has not been delivered to her husband under the formalities prescribed by the law, while such fruits remain unliquidated, on the ground that they answer for the necessary and indispensable expenses incurred in the administration and preservation of the property. *Not till then does the husband acquire* the right to claim them for the conjugal partnership of which he is the sole administrator. Applying this principle to the case under consideration, it becomes evident that the grantor's husband cannot claim the fruits in question for their conjugal partnership until a liquidation thereof has been made by her." (Underscoring ours.)

In other words, the husband may only reach the fruits of his wife's paraphernal property *after the liquidation* she has made charging such fruits with the necessary and indspensable expenses incurred in the administration and preservation of her property. Before that liquidation there is nothing he can lay his hands on — nothing automatically added to conjugal assets. (See also Agapito v. Molo, 50 Phil. 779) In addition it should be emphasized that when the marriage was celebrated, the partition of the estate excluding Crispina was outstanding — and therefore she did not or should not bring any share to the marriage.

Anyway, her conduct during these proceedings, practically amounting to a desire to let the partition remain undisturbed could be construed as a renunciation or disposition of her share of paraphernal property, which she could do under Act No. 3922 amending Article 1387 of the Civil Code. (See also Article 140 New Civil Code)

Even under the New Civil Code "a married woman of age may repudiate an inheritance without the consent of her husband"

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(1) Judicial separation entails a waiver or termination of the effects of conjugal partnership. (Art. 1394 Civil Code; Art. 1417 New Civil Code)

(2) See Jacinto v. Salvador, 22 Phil. 376).

(Art. 1047) which repudiation "shall always retroact to the moment of the death of the decedent" (Art. 1042). Crispina's repudiation of her share *now*, deprives her of the inheritance *as of* 1945. Hence in the eyes of the law when she married plaintiff in 1946 she did not carry such share with her into the conjugal partnership, which commences "precisely on the date of the celebration of the marriage." (Art. 145 New Civil Code; Art. 1391 Civil Code)

Wherefore, in view of the above considerations we think the lower court properly acted in sustaining the lack-of-personality defense interposed by defendants. We are inclined to regard the defense of prescription as meritorious; but we do not find it necessary to go into the matter, inasmuch as enough has been stated to justify approval of the appealed order of dismissal. Judgment affirmed, with costs against appellant. So ordered.

Paras, C. J., Padilla, Montemayor, A. Reyes, Bautista Angelo, Labrador, Concepcion, J. B. L. Reyes, Endencia and Felix, JJ., concur.

IV.

Rafael Monterey, Plaintiff-Appellant vs. Alfredo R. Gomez and Narciso Ramirez, Defendants-Appellees, G. R. No. L-11082 October 31, 1958, Concepcion, J.

CIVIL LAW; NULLITY OF CONTRACTS; ARTICLE 1411 NEW CIVIL CODE CONSTRUED.—Where the basis of plaintiff's cause of action was the agreement to pay a sum of money by the defendants in order that the criminal action against the latter would be dismissed, the cause of the obligation assumed by the defendants is unlawful and the agreement is void *ab initio* and no cause of action can be predicated thereon under Article 1411 of the New Civil Code.

Punzalan, Yabut & Eusebio, for plaintiff-appellant.
Vedasto V. Gesmundo, for defendants-appellees.

D E C I S I O N

This is an appeal, taken by plaintiff Rafael Monterey, from a decision of the Court of First Instance of Manila, presided over by Hon. Magno S. Gatmaitan, dismissing the complaint in the case at bar.

The facts, about which there is no dispute, are set forth in said decision, from which we quote:

"Sometime in 1951 there was filed a criminal case for physical injuries through reckless imprudence in the Municipal Court of Manila against Narciso Ramirez; the offended party was Virginia Hofileña; upon request of accused, Virginia consented to provisional dismissal but under the condition that her damages of ₱470.00 he paid; both Narciso and his attorney, Mr. Alfredo R. Gomez, agreed to the condition, and there was signed by them on June 18, 1951, Exhibit 'B', reading:

'Manila, Philippines
June 18, 1951

Miss Virginia G. Hofileña
c/o Macapagal, Punsalan & Yabut Law Firm,
M a n i l a

Dear Miss Hofileña:

In consideration of your willingness to agree for a provisional dismissal of the case of People vs. Ramirez, Case No. IV-43907, the undersigned counsel personally guarantees that Ramirez pays you the full amount of ₱470.00 representing your damages sustained in connection with the said case.

Yours very sincerely,
ALFREDO R. GOMEZ
Counsel for the Accused
402 Garcia Bldg.
624 Rizal Avenue

I hereby confirm the above guarantee and promises to faithfully pay the amount of ₱40.00 monthly until the above-mentioned amount is fully paid.

(Sgd.) NARCISO RAMIREZ
1060 B. P. Muñoz'

The case against Narciso was thereupon dismissed, and Narciso paid the monthly sum of ₱40.00 two times, or a total of ₱80.00; thus leaving a balance unpaid of ₱390.00; as this was not paid after it had become overdue, it was assigned by Virginia to plaintiff Rafael Monterey on June 2, 1952, and on June 7, 1952, Rafael filed the action on the Municipal Court; there was judgment against both defendants. The judgment against Alfredo R. Gomez being conditioned upon the execution against Ramirez being returned unsatisfied; and defendants appealed to this Court. Here plaintiff declared for himself; and Alfredo Gomez testified in his behalf. He says that he was the attorney not of Narciso but of another defendant in the same case named Fortunato; but that it was true that he signed Exhibit 'B' because he had been prevailed upon to do so by Atty. Yabut, private prosecutor there; and he did so to help him collect the amount due to Virginia; but that he had never been notified of the assignment by Virginia to Rafael."

The main issue is whether the contract set forth in the above quoted Exhibit B is, in the language of Article 1409 of our Civil Code, "inexistent and void from the beginning" by reason of illegality of its cause. The affirmative answer given by the lower court is, in our opinion, correct.

The contract involved in Arroyo vs. Berwin (36 Phil., 386) was declared void because the defendant assumed the obligations stipulated therein "provided that the plaintiff would ask the prosecuting attorney to dismiss x x x the proceedings filed against Marcela Juaneza and Alejandro Castro for the crime of theft. Identical conclusion was reached in Velez vs. Ramas (40 Phil., 787), in connection with a contract whereby the defendant undertook to pay a sum of money illegally abstracted by one Restituta Quirante from the plaintiffs. The latter having agreed "to suspend the action they intend to bring against" her, the Court deduced "that the purpose of the contracting parties was to prevent a prosecution from crime" and that the consideration for the agreement was, therefore, "clearly illicit." In the case of Reyes vs. Gonzales (45 Off. Gaz., 831) the issue was the legality of a deed of mortgage to guarantee the refund of a sum of money stolen by relatives of the mortgagor. This question was decided in the negative, it appearing that the consideration for the executon of said deed of mortgage was illegal, namely, the release of the guilty parties and the dismissal of the criminal complaint filed against them.

In the case before us, the contract Exhibit B, which is the basis of plaintiff's cause of action, declares categorically that it was executed by the defendants "in consideration of" the "willingness" of Miss Hofileña to agree to "a provisional dismissal of the case of People vs. (Narciso) Ramirez, Case No. IV-43907" of the Municipal Court of Manila, in which Ramirez was charged with physical injuries, upon said Miss Hofileña, thru reckless imprudence. It is obvious that the object of the undertaking contained in Exhibit B, was to stifle the prosecution of Ramirez, and that the cause of the obligation thus assumed by the defendants is unlawful, for which reason said contract is void *ab initio* and no cause of action may be predicated thereon (Art. 1411, Civil Code of the Philippines).

The taint in the purpose and cause of said contract is not cured by the term "provisional" qualifying the "dismissal" referred to in Exhibit B, it appearing, from the very evidence of plaintiff-appellant, particularly from Exhibit A, the deed of assignment of Exhibit B in his favor, and the allegations in the complaint, that payment of the sum stated in said Exhibit B was intended to be in "full settlement" of the claim of Miss Hofileña against Narciso Ramirez. In other words, it was understood, by the parties to the undertaking, that Miss Hofileña would no longer press the prosecution of Narciso Ramirez. The "provisional" nature of the "dismissal" to which said complainant had agreed was, evidently, a weapon with which she merely expected to compel the defendants herein to pay the sum above mentioned.

The case of Hibberd vs. Rhode and McMillian (32 Phil., 476),

(*Continued on page 98*)

SUMMER ASSIGNMENT OF JUDGES

The Department of Justice released recently the names of judges it has authorized to hold court during the vacation sessions from April 1 to May 31 this year.

The judges assigned were:

Judge Wenceslao Ortega of Ilocos Norte, to hold sessions in his own court, from April 1 to 12 and from May 1 to 31;

Judge Jose Bautista of Ilocos Sur, to hold sessions in his own court and to take charge of the first branch during April.

Judge Felix Domingo of Abra, to hold sessions in the court of Pasig, Rizal, during April and May;

Judge Juan Enriquez of Manila, to hold sessions in the court of first instance of Baguio City in May;

Judge Jaime de los Angeles of Pangasinan, to hold sessions in his own court during April and May;

Judge Arsenio Santos of Pampanga, to hold sessions in his own court from May 1 to 15;

Judge Jose B. Jimenez of Cavite to hold sessions in his court during April and May;

Judge Perfecto Quicho of Albay to hold sessions in his own court during April;

Judge Vicente del Rosario of Quezon, to hold sessions in his court during April.

Judge Mateo Alcasid of Albay, to hold sessions in his own court during May;

Judge Cesareo Golez of Capiz, to hold sessions in his own court during April and May;

Judge Wenceslao Fernan of Iloilo, to hold sessions in his own court from April 1 to May 25;

Judge Jose Mendoza of Cebu, to hold sessions in his own court from April 1 to 15 and from May 16 to 31;

Judge Teofilo Buslon of Surigao, to hold sessions in his own court during April and May;

Judge Patricio Ceniza of Misamis Occidental, to hold sessions in his own court during April;

Judge Onofre Sison Abalos of Zamboanga del Norte, to hold sessions in his own court during May;

Judge Gregorio Montejo of Zamboanga City and Basilan City, to hold sessions in his own court during April;

Judge Geronimo Marave of Sulu, to hold sessions in his own court during May;

Judge Bernardino Quitoriano of Cagayan, to hold sessions in his own court during May;

Judge Roberto Zurbano of Cagayan, to hold sessions in his own court during April;

Judge Manuel Arranz of Isabela, to hold sessions in his own court during May;

Judge Pedro C. Quinto of Isabela, to hold sessions in his own court during April;

Judge Jose R. de Venecia of Nueva Vizcaya, to hold sessions in his own court during April;

Judge Honorato B. Masakayan of Nueva Vizcaya, to hold sessions in his own court from April 1 to 5 and from May 1 to 31;

Judge Deifin Flores of Ilocos Norte, to hold sessions in his own court during April;

Judge Jesus de Veyra of Baguio City, to hold sessions in his own court during April;

Judge Juan O. Reyes of La Union, to hold sessions in his own court during April and May;

Judge Jose Flores, of La Union, to hold sessions in his own court during May;

Judge Eloy Bello of Pangasinan, to hold sessions in his own court during April and May;

Judge Jesus P. Morfe of Pangasinan, to hold sessions in his own court during April and May;

Judge Lourdes P. San Diego of Pangasinan, to hold sessions in her own court during May;

Judge Emmanuel Muñoz of Pangasinan, to hold sessions in his own court during April;

Judge Amado Santiago of Pangasinan to hold sessions in his own court during April;

Judge Javier Pabalan of Pangasinan, to hold sessions in his own court during April and May;

Judge Lucas Lacson of Zambales, to hold sessions in his own court from April 1 to May 3;

Judge Jose N. Leuterio of Nueva Ecija, to hold sessions in his own court from April 1 to 5 and from April 26 to May 31;

Judge Genaro Tan Torres of Nueva Ecija, to hold sessions in his own court from April 1 to 19 and from May 1 to 31;

Judge Bernabe de Aquino of Tarlac, to hold sessions in his own court during April;

Judge Zoilo Hilario of Tarlac, to hold sessions in his own court during May;

Judge Ambrosio Dollete of Bataan, on temporary detail in Oriental Mindoro up to April 15, will resume holding sessions in his own court from May 16 to 31;

Judge Manuel Mejia of Bulacan, to hold sessions in his own court during April,

Judge Agustin P. Montesa of Bulacan, to hold sessions in his own court during May.

MANILA JUDGES

Judge Francisco E. Jose of Manila, to hold sessions in his own court during May;

Judge Jesus Perez of Manila, to hold sessions in his own court from April 16 to May 31;

Judge Antonio Cañizares of Manila, to hold sessions in his own court from April 1 to 15 and from May 1 to 31;

Judge Gregorio Narvasa of Manila, to hold sessions in his own court during May,

Judge Gustavo Victoriano of Manila, to hold sessions in his own court during May;

Judge Gregorio Lantin of Manila, to hold sessions in his own court during April;

Judge Ramon Nolasco of Manila, to hold sessions in his own court during April;

Judge Higinio Macadaeg of Manila, to hold sessions in his own court during April;

Judge Antonio Lucero of Manila to hold sessions in his own court during April;

Judge Bonifacio Ysip of Manila, to hold sessions in his own court from April 16 to May 31;

Judge Bienvenido Tan of Manila, to hold sessions in his own court during April and May;

Judge Magno Gatmaitan of Manila, to hold session in his own court during April;

Judge Carmelino Alvendia of Manila, to hold sessions in his own court during April and May;

Judge Arsenio Solidum of Manila, to hold sessions in his own court from April 1 to May 17;

Judge Ruperto Kapunan of Manila, to hold sessions in his own court during April;

Judge Luis B. Reyes of Manila, to hold sessions in his own court from April 1 to May 10;

Judge Cecilia Muñoz-Palma of Rizal, to hold sessions in her own court during May;

Judge Eulogio Mencias of Rizal, to hold sessions in his own court during May;

Judge Emilio Rilloraza of Rizal, to hold sessions in his own court during April and May;

Judge Hermogenes Caluag of Rizal, to hold sessions in his own court during May;

Judge Nicasio Yatco, to hold sessions in his own court during April;

Judge Andres Reyes of Rizal, to hold sessions in his own court during April;

Judge Angel Mojica of Rizal, to hold sessions in his own court during April;

Judge Francisco Geronimo of Cavite, to hold sessions in his own court during April and May;

SOUTH LUZON JUDGES

Judge Federico Alikpala of Laguna, to hold sessions in his own court from April 1 to 15;

Judge Francisco Arca of Laguna, to hold sessions in his own court during May;

Judge Hilarion Jarencio of Laguna, to hold sessions in his own court during April;

Judge Manuel P. Barcelona of Batangas, to hold sessions in his own court during April;

Judge Damaso Tengco of Batangas, to hold sessions in his own court during May;

Judge Conrado M. Vasquez of Batangas, to hold sessions in his own court from April 1 to May 10;

Judge Eusebio Ramos of Mindoro Occidental and Oriental and Marinduque, to hold sessions in his own court from April 1 to 30 and from May 16 to 31;

Judge Enrique Maglanoc of Quezon, to hold sessions in his own court during May;

Judge Perfecto Palacio of Camarines Sur, to hold sessions in his own court during April;

Judge Jose T. Surtida of Camarines Sur, to hold sessions in his own court from April 8 to May 7;

Judge Jose L. Moya of Camarines Sur, to hold sessions in his own court from April 1 to 7 and from May 8 to 31;

Judge Manuel Calleja, of Sorsogon, to hold sessions in his own court during April and May;

VISAYAS JUDGES

Judge Ramon Avanceña of Aklan to hold sessions in his own court during April;

Judge Raymundo Villacete of Romblon to hold sessions in his own court during April;

Judge F. Imperial-Reyes of Iloilo, to hold sessions in his own court during April and May;

Judge Pantaleon Pelayo of Iloilo, to hold sessions in his own court during May;

Judge Juan de Borja of Antique to hold sessions in his own court during May;

Judge Francisco Arellano of Negros Occidental, to hold sessions in his own court during May;

Judge Jose Querubin of Negros Occidental, to hold sessions in his own court during April and May;

Judge Eduardo D. Enriquez of Negros Occidental, to hold sessions in his own court during May;

Judge Jose de la Cruz, of Negros Occidental, to hold sessions in his own court during April and May;

Judge Jose Fernandez of Negros Occidental, to hold sessions in his own court from April 26 to May 31;

Judge Macario Santos of Negros Oriental, to hold sessions in his own court during April and May;

Judge Inocencio Rosal of Negros Oriental to hold sessions in his own court during April and May;

Judge Fidel Fernandez of Samar, to hold sessions in his own court during April;

Judge Emilio Benitez of Samar, to hold sessions in his own court during May;

Judge Felix Marfori of Samar, to hold sessions in his own court during April;

Judge Olegario Lastrilla of Samar, to hold sessions in his own court from April 16 to May 31;

Judge Segundo Moscoso of Leyte, to hold sessions in his own court during April;

Judge Lorenzo Garlitos of Leyte, to hold sessions in his own court during April;

Judge Gaudencio Cloribel of Leyte, to held sessions in his own court from April 1 to 4 and from May 6 to 26;

Judge Filomeno Ybañez of Leyte, to hold sessions in his own court during April and May;

Judge Numeriano Estenzo of Leyte, to hold sessions in his own court during April;

Judge Emigdio Nietes of Leyte to hold sessions in his own court during May;

Judge Clementino V. Diaz of Cebu, to hold sessions in his own court from April 12 to May 31;

Judge Amador Gomez of Cebu, to hold sessions in his own court during April;

Judge Mateo Canonoy of Cebu, to hold sessions in his own court during May;

Judge Jose Rodriguez of Cebu, to hold sessions in his own court during April;

Judge Modesto Ramolete of Cebu, to hold sessions in his own court during April;

Judge Hipolito Alo of Bohol, to hold sessions in his own court from April 16 to May 31;

Judge Montano Ortiz of Agusan, to hold sessions in his own court during April;

Judge Benjamin Gorospe of Misamis Oriental and Bukidnon, to hold sessions in his own court during April;

Judge Abundio Arrieta of Misamis Oriental and Bukidnon, to hold sessions in his own court during May;

Judge Felix Macalalag of Lanao, to hold sessions in his own court during April;

Judge Manuel Estipona of Lanao, to hold sessions in his own court during May;

Judge Vicente Cusi, Jr. of Davao, to hold sessions in his own court during April;

Judge Macapanton Abbas of Davao, to hold sessions in his own court during May;

Judge Honorio Romero of Davao, to hold sessions in his own court during May;

Judge Juan Sarenas of Cotabato, to hold sessions in his own court during April and May;

Judge Jose G. Borromeo of Cotabato, to hold sessions in his own court during May; and

Judge Tito V. Tizon of Zamboanga del Sur, to hold sessions in his own court during April.

SUPREME CCURT . . . (*Continued from page* 96)

relied upon by appellant, is not in point. The amount of the note involved in that case represented the value of merchandise admittedly received by one McMillian from Brand & Hibberd. The latter claimed that McMillian was a mere depository of said goods and that he had misappropriated the same. Even prior, therefore, to this alleged misappropriation, McMillian was *civilly* liable for the full amount of said note, there being no allegation that the goods had been lost or destroyed thru force majeure. In the case under consideration, the liability of Ramirez is based *exclusively* upon an alleged *criminal* act — although the same gave rise to two (2) liabilities, one criminal and another civil, which were enforceable separately, and independently of each other (Articles 30 and 33, Civil Code of the Philippines) — and the consideration for Exhibit B was the dismissal of the corresponding criminal action against him, thus seeking to defeat the administration of justice. In the Hibberd case, this Court specifically found that there had been "no agreement to interfere with the due administration of the criminal justice."

Being predicated upon the assumption that Exhibit B is valid and legal, the other assignments of error made by appellant herein need not be discussed.

WHEREFORE, the decision appealed from is hereby affirmed, with costs against plaintiff-appellant.

IT IS SO ORDERED.

Paras, C.J., Bengzon, Padilla, Montemayor, J. B. L. Reyes and Endencia, JJ., concur.

Bautista Angelo and Labrador, JJ., reserve their votes.

THE CASE OF LEOPOLD AND LOEB

THE PLEA OF CLARENCE DARROW

(Last Installment)

You remember that I asked Dr. Church about these religious cases and he said, "Yes, many people go to the insane asylum on account of them," that "they place a literal meaning on parables and believe them thoroughly." I asked Dr. Church, whom I again say I believe to be an honest man, and an intelligent man—I asked him whether the same thing might be done or might come from a philosophical belief, and he said, "if one believed it strongly enough."

And I asked him about Nietzsche. He said he knew something of Nietzsche, something of his responsibility for the war, for which he perhaps was not responsible. He said he knew something about his doctrines. I asked him what became of him, and he said he was insane for fifteen years just before the time of his death. His very doctrine is a species of insanity.

Here is a man, a wise man—perhaps not wise, but brillant—a thoughtful man who has made his impress upon the world. Every student of philosophy knows him. His own doctrines made him a maniac. And here is a young boy, in the adolescent age, harassed by everything that harasses children, who takes this philosophy and believes it literally. It is a part of his life. It is his life. Do you suppose this mad act could have been done by him in any other way?" What could he have to win from this homicide?

A boy with a beautiful home, with automobiles, a graduate of college, going to Europe, and then to study law at Harvard; as brilliant in intellect as any boy that you could find; a boy with every prospect that life might hold out to him; and yet he goes out and commits this weird, strange, wild, mad act, that he may die on the gallows or live in a prison cell until he dies of old age or disease.

He did it, obsessed of an idea, perhaps to some extent influenced by what has not been developed publicly in this case—perversions that were present in the boy. Both signs of insanity, both, together with this act, proving a diseased mind.

Is there any question about what was responsible for him?

What else could be? A boy in his youth, with every promise that the world could hold out before him—wealth and position and intellect, yes, genius, scholarship, nothing that he could not obtain, and he throws it away, and mounts the gallows or goes into a cell for life. It is too foolish to talk about. Can your honor imagine a sane brain doing it? Can you imagine it is any part of normality? And yet, your honor, you are asked to hang a boy of his age, abnormal, obsessed of dreams and visions, a philosophy that destroyed his life, when there is no sort of question in the world as to what caused his downfall.

Now, I have said that, as to Loeb, if there is anybody to blame it is back of him. Your honor, lots of things happen in this world that nobody is to blame for. In fact, I am not very much for settling blame myself. If I could settle the blame on somebody else for this special act, I would wonder why that somebody else did it, and I know if I could find that out, I would move it back still another peg.

I know, your honor, that every atom of life in all this universe is bound up together. I know that a pebble cannot be thrown into the ocean without disturbing every drop of water in the sea. I know that every life is inextricably mixed and woven with every other life. I know that every influence, conscious and unconscious, acts and reacts on every living organism, and that no one can fix the blame. I know that all life is a series of infinite chances, which sometimes result one way and sometimes another. I have not the infinite wisdom that can fathom it, neither has any other human brain. But I do know that if back of it is a power that made it, that power alone can

THE ARGUMENT OF THE STATE'S ATTORNEYS

(Last Installment)

"The reason I talk to you on the question of crime, its cause and cure, is because I really do not believe the least in crime. There is no such a thing as a crime, as the word is generally understood. I do not believe that there is any sort of distinction between the real moral condition in and out of jail. One is just as good as the other. The people here can no more help being here than the people outside can avoid being outside. I do not believe that people are in jail because they deserve to be. They are in jail simply because they cannot avoid it, on account of circumstances which are entirely beyond their control and for which they are in no way responsible.

.. ..

"I believe that progress is purely a question of the pleasurable units that we get out of life. The pleasures and pain theory is the only correct theory of morality and the only way of judging life."

That is the doctrine of Leopold. That is the doctrine expounded last Sunday in the press of Chicago by Clarence Darrow.

I want to tell you the real defense in this case, your honor.

It is Clarence Darrow's dangerous philosophy of life.

He said to your honor that he was not pleading alone for these two young men. He said he was looking to the future, that he was thinking of the ten thousand young boys that in the future would fill the chairs his clients filled, and he wants to soften the law.

He wants them treated not with the severity that the law of this State prescribes, but it wants them treated with kindness and consideration.

I want to tell your honor that it would be much better if God had not caused this crime to be disclosed. It would have been much better if it went unsolved and these men went unwhipped of justice. It would not have done near the harm to this community as will be done if your honor, as chief justice of this great court, puts your official seal of approval upon the doctrines of anarchy preached by Clarence Darrow as a defense in this case.

Society can endure, the law can endure, and criminals escape, but if a court such as this court should say that he believes in the doctrine of Darrow, that you ought not to hang when the law says you should, a greater blow has been struck to our institutions than by a hundred, yea, a thousand murders.

Mr. Darrow has preached in this case that one of the handicaps the defendants are under is that they are rich, the sons of multimillionaires. I have already stated to your honor that if it was not for their wealth Darrow would not be here and the Bachrachs would not be here.

If it was not for their wealth we would not have been regaled by all this tommy-rot by the three wise men from the East.

I don't want to refer to this any more than Mr. Darrow did, but he referred to it and it is in evidence, and he tried to make your honor believe that somebody lied, that Gortland lied when he talked about a friendly judge.

On June 10th, 1924, in the Chicago *Herald-Examiner*—that was before this case had been assigned to anybody; that was when Darrow was announcing and he did announce in this same article, that they were going to plead not guilty—there was an article written by Mr. Slattery, sitting back there, on June 10th:

"The friendly judge resort suggested for the defense will be of no avail. It was mentioned as a possibility that a plea of guilty might be entered on the understanding it would result in life sentence. If this becomes an absolute probability, Crowe announced that he will nolle prosse the case and reindict the slayers."

Did Gortland lie?

tell, and if there is no power, then it is an infinite chance, which man cannot solve.

Why should this boy's life be bound up with Frederick Nietzsche, who died thirty years ago, insane, in Germany? I don't know.

I only know it is. I know that no man who ever wrote a line that I read failed to influence me to some extent. I know that every life I ever touched influenced me, and I influenced it; and that it is not given to me to unravel the infinite causes and say, "this is I, and this is you." I am responsible for so much; and you are responsible for so much. I know—I know that in the infinite universe everything has its place and that the smallest particle is a part of all. Tell me that you can visit the wrath of fate and chance and life and eternity upon a nineteen-year-old-boy! If you could, justice would be a travesty and mercy a fraud.

I might say further about Nathan Leopold—where did he get this philosophy?—at college? He did not make it, your honor. He did not write these books, and I will venture to say there are at least ten thousand books on Nietzsche and his philosophy. I never counted them, but I will venture to say that there are that many in the libraries of the world.

No other philosopher ever caused the discussion that Nietzsche has caused. There is no university in the world where the professors are not familiar with Nietzsche; not one. There is not an intellectual man in the world whose life and feelings run to philosophy, who is not more or less familiar with the Nietzschien philosophy. Some believe it, and some do not believe it. Some read it as I do, and take it as a theory, a dream, a vision, mixed with good and bad, but not in any way related to human life. Some take it seriously. The universities perhaps do not all teach it, for perhaps some teach nothing in philosophy; but they give the boys the books of the masters, and tell them what they taught, and discuss the doctrines.

There is not a university in the world of any high standing where the professors do not tell you about Nietzsche, and discuss it, or where the books can not be found.

I will guarantee that you can go down to the University of Chicago today—into its big library—and find over a thousand volumes on Nietzsche, and I am sure I speak moderately. If this boy is to blame for this, where did he get it? Is there any blame attaches because somebody took Nietzsche's philosophy seriously and fashioned his life on it? And there is no question in this case but what it is true. Then who is to blame? The university would be more to blame than he is. The scholars of the world would be more to blame than he is. The publishers of the world—and Nietzsche's books are published by one of the biggest publishers in the world—are more to blame than he. Your honor, it is hardly fair to hang a nineteen-year-old boy for the philosophy that was taught him at the university.

Now, I do not want to be misunderstood about this. Even for the sake of saving the lives of my clients, I do not want to be dishonest and tell the court something that I do not honestly think in this case. I do not believe that the universities are to blame. I do not think they should be held responsible. I do think, however, that they are too large; and that they should keep a closer watch, if possible, upon the individual. But, you cannot destroy thought because, forsooth, some brain may be deranged by thought. It is the duty of the university, as I conceive it, to be the great storehouse of the wisdom of the ages, and to let students go there, and learn, and choose. I have no doubt but that it has meant the death of many; that we cannot help. Every changed idea in the world has had its consequences. Every new religious doctrine has created its victims. Every new philosophy has caused suffering and death. Every new machine has carved up men while it served the world. No railroad can be built without the destruction of human life. No great building can be erected but that unfortunate workmen fall to the earth and die. No great movement that does not bear its toll of life and death; no great ideal but does good and harm, and we cannot stop because it may do harm.

He gave the name of witness after witness that he told the same story to, as he told it to Slattery, before the case was even assigned.

He said it was told to him by Leopold. I don't know whether your honor believes that officer or not, but I want to tell you, if you have observed these two defendants during the trial, if you have observed the conduct of their attorneys and their families with one honorable exception, and that is the old man who sits in sackcloth and ashes and who is entitled to the sympathy of everybody, old Mr. Leopold, with that one honorable exception, everybody connected with the case have laughed and sneered and jeered and if the defendant, Leopold, did not say that he would plead guilty before a friendly judge, his actions demonstrated that he thinks he has got one.

You have listened with a great deal of patience and kindness and consideration to the state and the defense. I am not going to unduly trespass upon your honor's time, and I am going to close for the State.

I believe that the facts and circumstances proven in this case demonstrate that a crime has been committed by these two defendants and that no other punishment except the extreme penalty of the law will fit, and I leave the case with you on behalf of the State of Illinois, and I ask your honor in the language of Holy Writ to "Execute justice and righteousness in the land."

(The End)

I have no idea in this case that this act would ever have been committed or participated in by him excepting for the philosophy which he had taken literally, which belonged to older boys and older men, and which no one can take literally and practice literally and live. So, your honor, I do not mean to unload this act on that man or this man, or this organization or that organization. I am trying to trace causes. I am trying to trace them honestly. I am trying to trace them with the light I have. I am trying to say to this court that these boys are not responsible for this; and that their act was due to this and this, and this and this; and asking this court not to visit the judgment of its wrath upon them for things for which they are not to blame.

There is something else in this case, your honor, that is stronger still. There is a large element of chance in life. I know I will die. I don't know when; I don't know how; I don't know where; and I don't want to know. I know it will come. I know that it depends on infinite chances. Do I live to myself? Did I make myself? And control my fate? Can I fix my death unless I suicide—and I cannot do that because the will to live is too strong; I know it depends on infinite chances.

Take the rabbit running through the woods; a fox meets him at a certain fence. If the rabbit had not started when it did, it would not have met the fox and would have lived longer. If the fox had started later or earlier it would not have met the rabbit and its fate would have been different.

My death will depend upon chances. It may be by the taking in of a germ; it may be a pistol; it may be the decaying of my faculties, and all that makes life; it may be a cancer; it may be any one of an indefinite number of things, and where I am at a certain time, and whether I take in that germ, and the condition of my system when I breathe is an accident which is sealed up in the book of fate and which no human being can open.

These boys, neither one of them, could possibly have committed this act excepting by coming together. It was not the act of one; it was the act of two. It was the act of their planning, their conniving, their believing in each other; their thinking themselves supermen. Without it they could not have done it. It would not have happened. Their parents happened to meet, these boys happened to meet; some sort of chemical alchemy operated so that they cared for each other; and poor Bobby Franks' dead body was found in the culvert as a result. Neither of them could have done it alone.

I want to call your attention, your honor, to the two letters in this case which settle this matter to my mind conclusively; not only the condition of these boys' minds, but the terrible fate that overtook them.

Your honor, I am sorry for poor Bobby Franks, and I think anybody who knows me knows that I am not saying it simply to talk. I am sorry for the bereaved father and the bereaved mother, and I would like to know what they would do with these poor unfortunate lads who are here in this court today. I know something of them, of their lives, of their charity, of their ideas, and nobody here sympathizes with them more than I.

On the 21st day of May poor Bobby Franks, stripped and naked, was left in a culvert down near the Indiana line. I know it came through the mad act of mad boys. Mr. Savage told us that Franks, if he had lived, would have been a great man and have accomplished much. I want to leave this thought with your honor now. I do not know what Bobby Franks would have been had he grown to be a man. I do not know the laws that control one's growth. Sometimes, your honor, a boy of great promise is cut off in his early youth. Sometimes he dies and is placed in a culvert. Sometimes a boy of great promise stands on a trap-door and is hanged by the neck until dead. Sometimes he dies of diphtheria. Death somehow pays no attention to age, sex, prospects, wealth or intellect.

It comes, and perhaps, I can only say perhaps, for I never professed to unravel the mysteries of fate, and I cannot tell; but I can say—perhaps, the boy who died at fourteen did as much as if he had died at seventy, and perhaps the boy who died as a babe did as much as if he had lived longer. Perhaps, somewhere in fate and chance, it might be that he lived as long as he should.

And I want to say this, that the death of poor little Bobby Franks should not be in vain. Would it mean anything if on account of that death, these two boys were taken out and a rope tied around their necks and they died felons? Would that show that Bobby Franks had a purpose in his life and a purpose in his death? No, your honor, the unfortunate and tragic death of this weak young lad should mean something. It should mean an appeal to the fathers and the mothers, an appeal to the teachers, to the religious guides, to society at large. It should mean an appeal to all of them to appraise children, to understand the emotions that control them, to understand the ideas that possess them, to teach them to avoid the pitfalls of life.

Society, too, should assume its share of the burdens of this case, and not make two more tragedies, but use this calamity as best it can to make life safer, to make childhood easier, and more secure, to do something to cure the cruelty, the hatred, the chance, and the willfulness of life.

I have discussed somewhat in detail these two boys separately. Their coming together was the means of their undoing. Your honor is familiar with the facts in reference to their association. They had a weird, almost impossible relationship. Leopold, with his obsession of the superman, had repeatedly said that Loeb was his idea of the superman. He had the attitude toward him that one has to his most devoted friend, or that a man has to a lover. Without the combination of these two, nothing of this sort probably could have happened. It is not necessary for us, your honor, to rely upon words to prove the condition of these boys' minds, and to prove the effect of this strange and fatal relationship between these two boys.

It is mostly told in a letter which the State itself introduced in this case. Not the whole story, but enough of it is shown, so that I take it that no intelligent, thoughtful person could fail to realize what was the relation between them and how they had played upon each other to effect their downfall and their ruin. I want to read this letter once more, a letter which was introduced by the State, a letter dated October 9th, a month and three days before their trip to Ann Arbor, and I want the court to say in his own mind whether this letter was anything but the product of a diseased mind, and if it does not show a relationship that was responsible for this terrible homicide. This was written by Leopold to Loeb. They lived close together, only a few blocks from each other; saw each other every day; but Leopold wrote him this letter:

October 9, 1923

Dear Dick:

In view of our former relations, I take it for granted that it is unnecessary to make any excuse for writing you at this time, and still I am going to state my reason for so doing, as this may turn out to be a long letter, and I don't want to cause you the inconvenience of reading it all to find out what it contains if you are not interested in the subjects dealt with.

First, I am enclosing the document which I mentioned to you today, and which I will explain later. Second, I am going to tell you of a new fact which has come up since our discussion. And third, I am going to put in writing what my attitude toward our present relations, with a view of avoiding future possible misunderstandings, and in the hope (though I think it rather vain) that possibly we may have misunderstood each other, and can yet clear this matter up.

Now, as to the first, I wanted you this afternoon, and still want you, to feel that we are on an equal footing legally and therefore, I purposely committed the same tort of which you were guilty, the only difference being that in your case the facts would be harder to prove than in mine, should I deny them. The enclosed document should secure you against changing my mind in admitting the facts, if the matter should come up, as it would prove to any court that they were true.

As to the second. On your suggestion I immediately phoned Dick Rubel, and speaking from a paper prepared beforehand (to be sure of the exact wording) said:

"Dick, when we were together yesterday, did I tell you that Dick (Loeb) had told me the things which I then told you, or that it was merely my opinion that I believed them to be so?"

I asked this twice to be sure he understood, and on the same answer both times (which I took down as he spoke) felt that he did understand.

He replied:

"No, you did not tell me that Dick told you these things, but said that they were in your opinion true."

He further denied telling you subsequently that I had said that they were gleaned from conversation with you, and I then told him that he was quite right, that you never had told me. I further told him that this was merely your suggestion of how to settle a question of fact, that he was in no way implicated, and that neither of us would be angry with him at his reply. (I imply your assent to this.)

This of course proves that you were mistaken this afternoon in the question of my having actually and technically broken confidence, and voids my apology, which I made contingent on proof of this matter.

Now, as to the third, last, and most important question. When you came to my home this afternoon I expected either to break friendship with you or attempt to kill you unless you told me why you acted as you did yesterday.

You did, however, tell me, and hence the question shifted to the fact that I would act as before if you persisted in thinking me treacherous, either in act (which you waived if Dick's opinion went with mine) or in intention.

Now, I apprehend, though here I am not quite sure, that you said that you did not think me treacherous in intent, nor ever have, but that you considered me in the wrong and expected such a statement from me. This statement I unconditionally refuse to make until such time as I may become convinced of its truth.

However, the question of our relation I think must be in your hands (unless the above conceptions are mistaken), inasmuch as you have satisfied first one and then the other requirement, upon which I agreed to refrain from attempting to kill you or refusing to continue our friendship. Hence I have no reason not to continue to be on friendly terms with you, and would under ordinary conditions continue as before.

The only question, then, is with you. You demand me to per-

form an act, namely, state that I acted wrongly. This I refuse. Now it is up to you to inflict the penalty for this refusal—at your discretion, to break friendship, inflict physical punishment, or anything else you like, or on the other hand to continue as before.

The decision, therefore, must rest with you. This is all of my opinion on the right and wrong of the matter.

Now comes a practical question. I think that I would ordinarily be expected to, and in fact do expect to continue my attitude toward you, as before, until I learn either by direct words or by conduct on your part which way your decision has been formed. This I shall do.

Now a word of advice. I do not wish to influence your decision either way, but I do want to warn you that in case you deem it advisable to discontinue our friendship, that in both our interests extreme care must be had. The motif of "A falling out of ———" would be sure to be popular, which is patently undesirable and forms an irksome but unavoidable bond between us.

Therefore, it is, in my humble opinion, expedient, though our breach need be no less real in fact, yet to observe the conventionalities, such as salutation on the street and a general appearance of at least not unfriendly relations on all occasions when we may be thrown together in public.

Now, Dick, I am going to make a request to which I have perhaps no right, and yet which I dare to make also for "Auld Lang Syne." Will you, if not too inconvenient, let me know your answer (before I leave tomorrow) on the last count? This, to which I have no right, would greatly help my peace of mind in the next few days when it is most necessary to me. You can if you will merely call up my home before 12 noon and leave a message saying, "Dick says yes," if you wish our relations to continue as before, and "Dick says no," if not.

It is unnecessary to add that your decision will of course have no effect on my keeping to myself our confidences of the past, and that I regret the whole affair more than I can say.

Hoping not to have caused you too much trouble in reading this, I am (for the present), as ever

"BABE"

Now, I undertake to say that under any interpretation of this case, taking into account all the things your honor knows, that have not been made public, or leaving them out, nobody can interpret that letter excepting on the theory of a diseased mind, and with it goes this strange document which was referred to in the letter.

"I, Nathan F. Leopold, Jr., being under no duress or compulsion, do hereby affirm and declare that on this, the 9th day of October, 1923, I for reasons of my own locked the door of the room in which I was with one Richard A. Loeb, with the intent of blocking his only feasible mode of egress, and that I further indicated my intention of applying physical force upon the person of the said Richard A. Loeb if necessary to carry out my design, to-wit, to block his only feasible mode of egress."

There is nothing in this case, whether heard alone by the court or heard in public that can explain these documents, on the theory that the defendants were normal human beings.

I want to call your attention to them to an extract from another letter by Babe, if I may be permitted to call him Babe, until you hang him.

On October 10th, this is written by Leopold on the 20th Century train, the day after the other letter was written, and in it he says:

"...now, that is all that is in point to our controversy.

"But I am going to add a little more in an effort to explain my system of the Nietzschian philosophy with regard to you.

"It may not have occurred to you why a mere mistake in judgment on your part should be treated as a crime when on the part of another it should not be so considered. Here are the reasons. In formulating a superman he is, on account of certain superior qualities inherent in him, exempted from the ordinary laws which govern ordinary men. He is not liable for anything he may do, whereas others would be, except for the one crime that it is possible for him to commit—to make a mistake.

"Now obviously any code which conferred upon an individual or upon a group extraordinary privileges without also putting on him extraordinary responsibility, would be unfair and bad. Therefore, the superman is held to have committed a crime every time he errs in judgment—a mistake excusable in others. But you may say that you have previously made mistakes which I did not treat as crimes. This is true. To cite an example, the other night you expressed the opinion, and insisted, that Marcus Aurelius Antonius was practically the founder of Stoicism. In so doing you committed a crime. But it was a slight crime, and I chose to forgive it. I have, and had before that, forgiven the crime which you committed in committing the error in judgment which caused the whole train of events. I did not and do not wish to charge you with crime, but I feel justified in using any of the consequences of your crime for which you are held responsible, to my advantage. This and only this I did, so you see how careful you must be."

Is that the letter of a normal eighteen-year-old boy, or is it the letter of a diseased brain?

Is that the letter of boys acting as boys should, and thinking as boys should, or is it the letter of one whose philosophy has taken possession of him, who understands that what the world calls a crime is something that the superman may do—who believes that the only crime the superman can commit is to make a mistake? He believed it. He was immature. It possessed him. It was manifest in the strange compact that the court already knows about between these two boys by which each was to yield something and each was to give something. Out of that compact and out of these diseased minds grew this terrible crime.

Tell me, was this compact the act of normal boys, of boys who think and feel as boys should—boys who have the thoughts and emotions and physical life that boys should have? There is nothing in all of it that corresponds with normal life. There is a weird, strange, unnatural disease in all of it which is responsible for this deed.

I submit the facts do not rest on the evidence of these boys alone. It is proven by the writings; it is proven by every act. It is proven by their companions, and there can be no question about it.

We brought into this courtroom a number of their boy friends, whom they had known day by day, who had associated with them in the clubhouse, were their constant companions, and they tell the same stories. They tell the story that neither of these two boys was responsible for his conduct.

Maremont, whom the State first called, one of the oldest of the boys, said that Leopold had never had any judgment of any sort. They talked about the superman. Leopold argued his philosophy. It was a religion with him. But as to judgment of things in life he had none. He was developed intellectually, wanting emotionally, developed in those things which a boy does not need and should not have at his age, but absolutely void of the healthy feelings, of the healthy instincts of practical life that are necessary to the child.

We called not less than ten or twelve of their companions and all of them testified the same: Dickie Loeb was not allowed by his companions the privileges of his class because of his childishness and his lack of judgment. Nobody denies it, and yet the State's Attorney makes a play here on account of this girl whose testimony was so important, Miss Nathan. What did the State's Attorney do in this matter? Before we ever got to these defendants these witnesses were called in by subpoenas of th Grand Jury, and then taken into the office of the State's Attorney; they were young boys and girls, taken just when this story broke. Without any friends, without any counsel, they were questioned in the State's Attorney's office, and they were asked to say whether they had seen anything strange or insane about these boys. Several of them said no. Not one of them had any warning, not one of them had any chance to think, not one of them knew what it meant, not one of them had a chance to recall the lives of both

and they were in the presence of lawyers and policemen and officers, and still they seek to bind these young people by those statements.

Miss Nathan is quoted as saying that she never noticed any mental disease in them, and yet she said the lawyers refused to put down all she said and directed the reporter not to take all she said; that she came in there from a sickbed without any notice; she had no time to think about it; and then she told this court of her association with Dickie Loeb, and the strange, weird, childish things he did.

One other witness, a young man, and only one other, was called in and examined by the State's Attorney on the day that this confession was made; and we placed him on the stand and he practically tells the same story; that he was called to the State's Attorney's office; he had no chance to think about it; he had no chance to consider the conduct of these boys; he was called in immediately and the questions were put to him; and when he was called by us and had an opportunity to consider it and know what it meant he related to this court what has been related by every other witness in this case.

As to the standing of these boys amongst their fellows—that they were irresponsible, that they had no judgment, that they were childish, that their acts were strange, that their beliefs were impossible for boys—is beyond question in this case.

And what did they do on the other side?

It was given out that they had a vast army of witnesses. They called three. A professor who talked with Leopold only upon his law studies, and two others who admitted all that we said, on cross-examination, and the rest were dismissed. So it leaves all of this beyond dispute and admitted in this case.

Now both sides have called alienists and I will refer to that for a few moments. I shall only take a little time with the alienists

The facts here are plain; when these boys had made the confession on Sunday afternoon before their counsel or their friends had any chance to see them, Mr. Crowe sent out for four men. He sent out Dr. Patrick, who is an alienist; Dr. Church, who is an alienist; Dr. Krohn, who is a witness, a testifier; and Dr. Singer, who is pretty good—I would not criticize him but I would not class him with Patrick and with Church.

I have said to your honor that in my opinion he sent for the two ablest men in Chicago as far as the public knows them, Dr. Church and Dr. Patrick, I have said to your honor that if Judge Crowe had not got to them first I would have tried to get them. I not only say I would have tried, but I say I would have succeeded. You heard Dr Church's testimony. Dr. Church is an honest man though an alienist. Under cross-examination he admiitted every position which I took. He admitted the failure of emotional life in these boys; he admitted its importance; he admitted the importance of beliefs strongly held in human conduct; he said himself that if he could get at all the facts he would understand what was back of this strange murder. Every single position that we have claimed in this case Dr. Church admitted.

Dr. Singer did the same. The only difference between them was this, it took but one question to get Dr. Church to admit it, and it took ten to a dozen to get Dr. Singer. He objected and hedged and ran and quibbled. There could be no mistake about it, and your honor heard it in this courtroom.

He sought every way he could to avoid the truth, and when it came to the point that he could not dodge any longer, he admitted every proposition just exactly the same as Dr. Church admitted them: The value of emotional life; its effect on conduct; that it was the ruling thing in conduct, as every person knows who is familiar with psychology and who is familiar with the human system.

Could there be any doubt, your honor, but what both those witnesses, Church and Singer, or any doubt but what Patrick, would have testified for us? Now what did they do in their examination? What kind of a chance did these alienists have? It is perfectly obvious that they had none. Church, Patrick, Krohn, went into a room with these two boys who had been in the possession of the State's Attorney's office for sixty hours; they were surrounded by policemen, were surrounded by guards and detectives and State's Attorneys, twelve or fifteen of them, and here they told their story. Of course this audience had a friendly attitude toward them. I know my friend Judge Crowe had a friendly attitude because I saw divers, various and sundry pictures of Prosecutor Crowe taken with these boys.

When I first saw them I believed it showed friendship for the boys, but now I am inclined to think that he had them taken just as a lawyer who goes up in the country fishing has his picture taken with his catch.

The boys had been led doubtless to believe that these people were friends. They were taken there, in the presence of all this crowd. What was done? The boys told their story, and that was all.

Of course, Krohn remembered a lot that did not take place—and we would expect that of him; and he forgot much that did take place—and we would expect that of him, too. So far as the honest witnesses were concerned, they said that not a word was spoken excepting a little conversation upon birds and the relations of the story that they had already given to the State's Attorney; and from that, and nothing else, both Patrick and Church said they showed no reaction as ordinary persons should show it, and intimated clearly that the commission of the crime itself would put them on inquiry as to whether these boys were mentally right; both admitted that the conditions surrounding them made the right kind of examination impossible; both admitted that they needed a better chance to form a reliable opinion.

The most they said was that at this time they saw no evidence of insanity.

Now, your honor, no experts, and no alienists with any chance to examine, have testified that these boys were normal.

Singer did a thing more marvelous still. He never saw these boys until he came into this court, excepting when they were brought down in violation of their constitutional rights to the office of Judge Crowe, after they had been turned over to the jailer, and there various questions were asked them, and to all of these the boys replied that they respectfully refused to answer on advice of counsel. And yet that was enough for Singer.

Your honor, if these boys had gone to the office of any one of these eminent gentlemen, had been taken by their parents or gone by themselves, and the doctors had seriously tried to find out whether there was anything wrong about their minds, how would they have done it? They would have taken them patiently and carefully. They would have sought to get their confidence. They would have listened to their story. They would have listened to it in the attitude of a father listening to his child. You know it. Every doctor knows it. In no other way could they find out their mental condition. And the men who are honest with this question have admitted it.

And yet Dr. Krohn will testify that they had the best chance in the world, when his own associates, sitting where they were, said that they did not.

Your honor, nobody's life or liberty or property should be taken from them upon an examination like that. It was not an examination. It was simply an effort to get witnesses, regardless of facts, who might at some time come into court and give their testimony, to take these boys' lives.

Now, I imagine that in closing this case Judge Crowe will say that our witnesses mainly came from the East. That is true. And he is responsible for it. I am not blaming him, but he is responsible for it. There are other alienists in Chicago, and the evidence shows that we had the boys examined by numerous ones in Chicago. We wanted to get the best. Did we get them?

Your honor knows that the place where a man lives does not affect his truthfulness or his ability. We brought the man who stands probably above all of them, and who certainly is far superior to anybody called upon the other side. First of all, we called Dr. William A. White. And who is he? For many

years he has been superintendent of the Government Hospital for the insane in Washington; a man who has written more books, delivered more lectures and had more honors and knows this subject better than all of their alienists put together; a man who plainly came here not for money, and who receives for his testimony the same per diem as is paid by the other side; a man who knows his subject, and whose ability and truthfulness must have impressed this court.

It will not do, your honor, to say that because Dr. White is not a resident of Chicago that he lies. No man stands higher in the United States, no man is better known than Dr. White; his learning and intelligence was obvious from his evidence in this case.

Who else did we get? Do I need to say anything about Dr. Healy? Is there any question about his integrity? A man who seldom goes into court except upon the order of the court.

Your honor was connected with the Municipal Court. You know that Dr. Healy was the first man who operated with the courts in the city of Chicago to give aid to the unfortunate youths whose minds were afflicted and who were the victims of the law.

No man stands higher in Chicago than Dr. Healy. No man has done as much work in the study of adolescence. No man has either read or written or thought or worked as much with the young. No man knows the adolescent boy as well as Dr. Healy.

Dr. Healy began his research and his practice in the city of Chicago, and was the first psychiatrist of the boys' court. He was then made a director of the Baker Foundation of Boston and is now carrying on his work in connection with the courts of Boston.

His books are known wherever men study boys. His reputation is known all over the United States and in Europe. Compare him and his reputation with Dr. Krohn. Compare it with any other witness that the state called in this case.

Dr. Glueck, who was for years the alienist at Sing Sing, and connected with the penal institutions in the State of New York; a man of eminent attainments and ripe scholarship. No one is his superior.

And Dr. Hulbert, a young man who spent nineteen days in the examination of these boys, together with Dr. Bowman, an eminent doctor in his line from Boston. These two physicians spent all this time getting every detail of these boys' lives, and structures; each one of these alienists took all the time they needed for a thorough examination, without the presence of lawyers, detectives and policemen. Each one of these psychiatrists tells this court the story, the sad, pitiful story, of the unfortunate minds of these two young lads.

I submit, your honor, that there can be no question about the relative value of these two sets of alienists; there can be no question of their means of understanding; there can be no question but that White, Glueck, Hulbert and Healy knew what they were talking about, for they had every chance to find out. They are either lying to this court, or their opinion is good.

On the other hand, not one single man called by the State had any chance to know. He was called in to see these boys, the same as the state would call a hangman: "Here are the boys; officer, do your duty." And that is all there was of it.

Now, your honor, I shall pass that subject. I think all of the facts of this extraordinary case, all of the testimony of the alienists, all that your honor has seen and heard, all their friends and acquaintances who have come here to enlighten this court—I think all of it shows that this terrible act was the act of immature and diseased brains, the act of children.

Nobody can explain it in any other way.

No one can imagine it in any other way.

It is not possible that it could have happened in any other way. And, I submit, your honor, that by every law of humanity, by every law of justice, by every feeling of righteousness, by every instinct of pity, mercy and charity, your honor should say that because of the condition of these boys' minds, it would be monstrous to visit upon them the vengeance that is asked by the State.

I want to discuss now another thing which this court must consider and which to my mind is absolutely conclusive in this case. That is, the age of these boys.

I shall discuss it more in detail than I have discussed it before and I submit, your honor, that it is not possible for any court to hang these two boys if he pays any attention whatever to the modern attitude toward the young, if he pays any attention whatever to the precedents in this country, if he pays any attention to the humane instincts which move ordinary men.

I have a list of executions in Cook County beginning in 1840, which I presume covers the first one, because I asked to have it go to the beginning. Ninety poor unfortunate men have given up their lives to stop murder in Chicago. Ninety men have been hanged by the neck until dead, because of the ancient superstition that in some way hanging one man keeps another from committing a crime. The ancient superstition, I say, because I defy the state to point to a criminologist, a scientist, a student, who has ever said it. Still we go on, as if human conduct was not influenced and controlled by natural laws the same as all the rest of the Universe in the subject of law. We treat crime as if it had no cause. We go on saying, "Hang the unfortunates, and it will end." Was there ever a murder without a cause? Was there ever a crime without a cause? And yet all punishment proceeds upon the theory that there is no cause; and the only way to treat crime is to intimidate everyone into goodness and obedience to law. We lawyers are a long way behind.

Crime has its cause. Perhaps all crimes do not have the same cause, but they all have some cause. And people today are seeking to find out the cause. We lawyers never try to find out. Scientists are studying it; criminologists are investigating it; but we lawyers go on and on and on, punishing and hanging and thinking that by general terror we can stamp out crime.

It never occurs to the lawyer that crime has a cause as certainly as disease, and that the way to rationally treat any abnormal condition is to remove the cause.

If a doctor were called on to treat typhoid fever he would probably try to find what kind of milk or water the patient drank, and perhaps clean out the well so that no one else could get typhoid from the same source. But, if a lawyer was called on to treat a typhoid patient, he would give him thirty days in jail, and then he would think that nobody else would ever dare to take it. If the patient got well in fifteen days, he would be kept until his time was up; if the disease was worse at the end of thirty days, the patient would be released because his time was out.

As a rule lawyers are not scientists. They have learned the doctrine of hate and fear, and they think that there is only one way to make men good, and that is to put them in such terror that they do not dare to be bad. They act unmindful of history, and science, and all the experience of the pasts.

Still, we are making some progress. Courts give attention to some things that they did not give attention to before.

Once in England they hanged children seven years of age; not necessarily hanged them, because hanging was never meant for punishment; it was meant for an exhibition. If somebody committed crime, he would be hanged by the head or the heels, it didn't matter much which, at the four cross roads, so that everybody could look at him until his bones were bare, and so that people would be good because they had seen the gruesome results of crime and hate.

Hanging was not necessarily meant for punishment. The culprit might be killed in any other way, and then hanged—yes. Hanging was an exhibition. They were hanged on the highest hill, and hanged at the cross-ways, and hanged in public places, so that all men could see. If there is any virtue in hanging, that was the logical way, because you cannot awe men into goodness unless they know about the hanging. We have not grown better than the ancients. We have grown more squeamish; we do not like to look at it; that is all. They hanged them

at seven years; they hanged them again at eleven and fourteen.

We have raised the age of hanging. We have raised it by the humanity of courts, by the understanding of courts, by the progress in science which at last is reaching the law; and in ninety men hanged in Illinois from its beginning, not one single person under twenty-three was ever hanged upon a plea of guilty—not one. If your honor should do this, you would violate every precedent that had been set in Illinois for almost a century. There can be no excuse for it; and no justification for it, because this is the policy of the law which is rooted in the feelings of humanity, which are deep in every human being that thinks and feels. There have been two or three cases where juries have convicted boys younger than this, and where courts on convictions have refused to set aside the sentence because a jury had found it.

First, I want to call your attention, your honor, to the cases on pleas of guilty in the State of Illinois. Back of the year 1896 the record does not show ages. After that, which is the large part, probably sixty out of ninety—all show the age. Not the age at which they were hanged, as my friend Marshall thought, but the age at the time of the verdict or sentence as is found today.

In all the history of Illinois—I am not absolutely certain of it back in 1896, but there are so many of them that I know about from the books and otherwise, that I feel I am safe in saying there is no exception to the rule—but since 1896 everyone is recorded. The first hanging in Illinois—on a plea of guilty, was May 15, 1896, when a young colored man, 24 years old, was sentenced to death by Judge Baker.

Judge Baker I knew very well; a man of ability, a fine fellow, but a man of moods. I do not know whether the court remembers him; but that was the first hanging on a plea of guilty to the credit of any man in Illinois—I mean in Chicago. I have not obtained the statistics from the rest of the state, but I am satisfied they are the same, and that boy was colored, and twenty-four, either one of which should have saved him from death, but the color probably had something to do with compassing his destruction.

The next was Julius Mannow. Now, he really was not hanged on a plea of guilty, though the records so show. I will state to your honor just what the facts are. Joseph Windreth and Julius Mannow were tried together in 1896 on a charge of murder with robbery. When the trial was finished, Julius Mannow withdrew his plea of guilty. He was defended by Elliot, whom I remember very well, and probably your honor does. And under what he supposed was an agreement with the court he pleaded this man guilty, after the case was nearly finished.

Now, I am not here to discuss whether there was an agreement or not. Judge Horton, who tried this case, did not sentence him, but he waited for the jury's verdict on Windreth, and they found him guilty and sentenced him to death, and Judge Horton followed that sentence. Had this case come into that court on a plea of guilty, it probably would have been different; perhaps not; but it really was not a question of a plea of guilty; and he was twenty-eight or thirty years old.

I might say in passing as to Judge Horton—he is dead. I knew him very well. In some ways I liked him. I tried a case for him after he had left the bench. But I will say this: He was never noted in Chicago for his kindness and his mercy, and anybody who remembers knows that I am stating the truth.

The next man who was hanged on a plea of guilty was Daniel McCarthy, twenty-nine years old, in 1897, by Judge Stein. Well, he is dead. I am very careful about being kind to the dead, so I will say that he never knew what mercy was, at least while he lived. Whether he does now, I cannot say. Still he was a good lawyer. That was in 1897.

It was twenty-two years, your honor, before anybody else was hanged in Cook County on a plea of guilty, old or young, twenty-two years before a judge had either the old or young walk into his court and throw himself on the mercy of the court and get the rope for it; and a great many men have been tried for murder, and a great many men have been executed, and a great many men have plead guilty and have been sentenced, either to a term of years or life imprisonment, over three hundred in that twenty-two years, and no man, old or young was executed.

But twenty-two years later, in 1990, Thomas Fitzgerald, a man about forty years old, was sentenced for killing a little girl, plead guilty before my friend Judge Crowe, and he was put to death. And that is all. In the history of Cook County that is all that have been put to death on a plea of guilty. That is all.

Your honor, what excuses could you possibly have for putting these boys to death? You would have to turn your back on every precedent of the past. You would have to turn your back on the progress of the world. You would have to ignore all human sentiment and feeling, of which I know the court has his full share. You would have to do all this if you would hang boys of eighteen and nineteen years of age who have come into this court and thrown themselves upon your mercy.

I might do it, but I would want good reason for it, which does not and cannot exist in this case, unless publicity, worked-up feeling, and mad hate, is a reason, and I know it is not.

Since that time one other man has been sentenced to death on a plea of guilty. That was James H. Smith, twenty-eight years old, sentenced by Judge Kavanagh. But we were spared his hanging. That was in January 1923. I could tell you why it was, and I will tell you later. It is due to the cruelty that has paralyzed the hearts of men growing out of the war. We are accustomed to blood, your honor. It used to look mussy, and make us feel squeamish. But we have not only seen it shed in buckets full, we have seen it shed in rivers, lakes and oceans, and we have delighted in it; we have preached it, we have worked for it, we have advised it, we have taught it to the young, encouraged the old, until the world has been drenched in blood, and it has left its stains upon every human heart and upon every human mind, and has almost stifled the feelings of pity and charity that have their natural home in the human breast.

I do not believe that Judge Kavanagh would ever have done this except for the great war which has left its mark on all of us, one of the terrible by-products of those wretched years.

This man was reprieved, but James Smith was twenty-eight years old; he was old enough to vote, he was old enough to make contracts, he needed no guardiian, he was old enough to do all the things that an older man can do. He was not a boy; a boy that is the special ward of the state, and the special ward of the court, and who cannot act except in special ways because he is not mature. He was twenty-eight and he is not dead and will not die. His life was saved, and you may go over every hanging, and if your honor shall decorate the gallows with these two boys, your honor will be the first in Chicago who has ever done such a deed. And, I know you will not.

Your honor, I must hasten along, for I will close tonight. I know I should have closed before. Still there seems so much that I would like to say. I will spend a few more minutes on this record of hangings. There was one boy nineteen years old, Thomas Schultz, who was convicted by a jury and executed. There was one boy who has been referred to here, eighteen, Nicholas Vianni, who was convicted by a jury and executed. No one else under twenty-one, your honor, has been convicted by a jury and sentenced to death. Now, let me speak a word about these. Schultz was convicted in 1912. Vianni was convicted in 1920. Of course, I believe it should not have happened, but your honor knows the difference between a plea of guilty and a verdict. It is easy enough for a jury to divide the responsibility by twelve. They have not the age and the experience and the charity which comes from age and experience. It is easy for some state's attorneys to influence some juries. I don't know who defended the poor boy, but I guarantee that it was not the best lawyers at the bar—but doubtless a good lawyer prosecuted him, and when he was convicted the court said that he had rested his fate with the jury, and he would not disturb the verdict.

I do not know whether your honor, humane and considerate

as I believe you to be, would have disturbed a jury's verdict in this case, but I know that no judge in Cook County ever himself upon a plea of guilty passed judgment of death in a case below the age of twenty-three, and only one at the age of twenty-three was ever hanged on a plea of guilty.

Vianni I have looked up, and I don't care who did it or how it was done, it was a shame and a disgrace that an eighteen-year old boy should be hanged, in 1920, and I am assuming it is all right to hang somebody, which it is not. I have looked up the Vianni case because my friend Marshall read a part where it said that Vianni pleaded guilty. He did not say it positively, because he is honest, and he knew there might be a reason. Vianni was tried and convicted—I don't remember the name of the judge—in 1920.

There were various things working against him. It was in 1920, after the war. Most anything might have happened after the war, which I will speak of later, and not much later, for I am to close tonight. He was convicted in 1920. There was a band of Italian desperadoes, so-called. I don't know. Sam Cardinelli was the leader, a man forty years of age. But their records were very bad.

This boy should have been singled out from the rest. If I had been defending him, and he had not been, I never would have come into court again. But he was not. He was tried with the rest. I have looked up the records, and I find that he was in the position of most of these unfortunates; he did not have a lawyer.

Your honor, the question of whether a man is convicted or acquitted does not always depend on the evidence or entirely on the judge or entirely on the jury. The lawyer has something to do with it. And the State always has—always has at least moderately good lawyers. And the defendants have, if they can get the money; and if they cannot, they have nobody. Vianni, who was on trial with others for his life, had a lawyer appointed by the court. Ed Raber, if I am rightly informed, prosecuted. He had a fine chance, this poor Italian boy, tried with three or four others. And prosecuted by one of the most relentless prosecutors Chicago has ever known. This boy was defended by somebody whose name I never heard, who was appointed by the court.

Your honor, if in this court a boy of eighteen and a boy of nineteen should be hanged on a plea of guilty, in violation of every precedent of the past, in violation of the policy of the law to take care of the young, in violation of all the progress that has been made and of the humanity that has been shown in the care of the young; in violation of the law that places boys in reformatories instead of prison—if your honor in violation of all that and in the face of all the past should stand here in Chicago alone to hang a boy on a plea of guilty; then we are turning our faces backward toward the barbarism which once possessed the world. If your honor can hang a boy at eighteen, some other judge can hang him at seventeen, or sixteen, or fourteen. Some day, if there is any spirit of humanity that is working in the hearts of men, some day men would look back upon this as a barbarous age which deliberately set itself in the way of progress, humanity and sympathy, and committed an unforgivable act.

Yet your honor has been asked to hang, and I must refer here for a minute to something which I dislike to discuss. I hesitated whether to pass it by unnoticed or to speak of it, but feel that I must say something about it, and that was the testimony of Gortland, the policeman. He came into this court, the only witness who said that young Leopold told him that he might get into the hands of a friendly judge and succeed. Your honor, that is a blow below the belt. There isn't a word of truth in his statement, as I can easily prove to your honor. It was carved out of the air, to awe and influence the court, and place him in a position where if he saved life someone might be malicious enough to say that he was a friendly judge, and, if he took it, the fear might invade the community that he did not dare to be merciful.

I am sure that your honor knows there is only one way to do in this case, and I know you will do it. You will take this case, with your judgment and your conscience, and settle it as you think it should be settled. I may approve or I may disapprove, or Robert Crowe may approve or disapprove, or the public may approve or disapprove, but you must satisfy yourself and you will.

Now, let me take Gortland's testimony for a minute; and I am not going over the record. It is all here. He swore that on the night after the arrest of these two boys, Nathan Leopold told him, in discussing the case, that a friendly judge might save him. He is the first man who testified for the State that any of us cross-examined, if you remember. They called witness after witness to prove something that did not need to be proved after a plea of guilty. Then this came, which to me was a poisoned piece of perjury, with a purpose, and I cross-examined him:

"Did you make any record?"
"Yes, I think I did."
"Where is it?"
"I think I have it."
"Let me see it."
"Yes."
There was not a word or syllable upon that paper.
"Did you make any other?"
"Yes."
"When did you make it?"
"Within two or three days of the occurrence."
"Let me see that."
He said he would bring it back later.
"Did you make another?"
"Yes."
"What was it?"
"A complete report to the chief of police."
"Is it in there?"
"I think so."
"Will you bring that?"
"Yes."

He brought them both into this court. They contained, all these reports, a complete or almost a complete copy of everything that happened, but not one word on this subject. He deliberately said that he made that record within a few days of the time it occurred, and that he told the office about it within a few days of the time it occured. And then what did he say? Then he came back in answer to my cross-examination, and said that he never told Judge Crowe about it until the night before Judge Crowe made his opening statement in this case. Six weeks after he heard it, long after the time he said that he made a record of it, and there was not a single word or syllable about this matter in any report he made.

I am sorry to discuss it; I am sorry to embarrass this court, but what can I do? I want your honor to know that if in your judgment you think these boys should hang, we will know it is your judgment. It is hard enough for a court to sit where you sit, with the eyes of the world upon you, in the fierce heat of public opinion, for and against. It is hard enough, without any lawyer making it harder. I assure you it is with deep regret that I even mention the evidence, and I will say no more about it, excepting that this statement was a deliberate lie, made out of whole cloth, and his own evidence shows it.

Now, your honor, I have spoken about the war. I believed in it. I don't know whether I was crazy or not. Sometimes I think perhaps I was. I approved of it; I joined in the general cry of madness and despair. I urged men to fight. I was safe because I was too old to go. I was like the rest. What did they do? Right or wrong, justifiable or unjustifiable—which I need not discuss today—it changed the world. For four long years the civilized world was engaged in killing men. Christian against Christian, barbarians, uniting with Christians to kill Christians; anything to kill. It was taught in every school, aye in the Sunday schools. The little children played at war. The toddling children on the street. Do you suppose this world has ever been the same since then? How long, your honor, will it take for the world to get back the humane emotions that were daily growing before the war? How

long will it take the calloused hearts of men before the scars of hatred and cruelty shall be removed?

We read of killing one hundred thousand men in a day. We read about it and rejoiced in it—if it was the other fellows who were killed. We were fed on flesh and drank blood. Even down to the prattling babe. I need not tell your honor this, because you know; I need not tell you how many upright, honorable young boys have come into this court charged with murder, some saved and some sent to their death, boys who fought in this war and learned to place a cheap value on human life. You know it and I know it. These boys were brought up in it. The tales of death were in their homes, their playgrounds their schools; they were in the newspapers that they read; it was a part of the common frenzy—what was a life? It was nothing. It was the least sacred thing in existence and these boys were trained to this cruelty.

It will take fifty years to wipe it out of the human heart, if ever. I know this, that after the Civil War in 1865, crimes of this sort increased, marvelously. No one needs to tell me that crime has no cause. It has as definite a cause as any other disease, and I know that out of the hatred and bitterness of the Civil War crime increased as America had never known it before. I know that Europe is going through the same experience today; I know it has followed every war; and I know it has influenced these boys so that life was not the same to them as it would have been if the world had not been made red with blood. I protest against the crimes and mistakes of society being visited upon them. All of us have our share in it. I have mine. I cannot tell and I shall never know how many words of mine might have given birth to cruelty in place of love and kindness and charity.

Your honor knows that in this very court crimes of violence have increased growing out of the war. Not necessarily by those who fought but by those that learned that blood was cheap, and human life was cheap, and if the State could take it lightly why not the boy? There are causes for this terrible crime. There are causes, as I have said, for everything that happens in the world. War is a part of it; education is a part of it; birth is a part of it; money is a part of it—all these conspired to compass the destruction of these two poor boys.

Has the court any right to consider anything but these two boys? The State says that your honor has a right to consider the welfare of the community, as you have. If the welfare of the community would be benefited by taking these lives, well and good. I think it would work evil that no one could measure. Has your honor a right to consider the families of these two defendants? I have been sorry, and I am sorry for the bereavement of Mr. and Mrs. Franks, for those broken ties that cannot be healed. All I can hope and wish is that some good may come from it all. But as compared with the families of Leopold and Loeb, the Franks are to be envied—and everyone knows it.

I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but what your honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind. To spend the balance of their days in prison is mighty little to look forward to, if anything. Is it anything? They may have the hope that as the years roll around they might be released. I do not know. I do not know. I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large. I believe they will not be until they pass through the next stage of life, at forty-five or fifty. Whether they will be then, I cannot tell. I am sure of this; that I will not be here to help them. So far as I am concerned, it is over.

I would not tell this court that I do not hope that some time, when life and age has changed their bodies, as it does, and has changed their emotions, as it does—that they may once more return to life. I would be the last person on earth to close the door of hope to any human being that lives, and least of all to my clients. But what have they to look forward to? Nothing. And I think here of the stanzas of Housman:

Now hollow fires burn out to black,
And light are fluttering low:
Square your shoulders, lift your pack
And leave your friends and go.
O never fear, lads, naught's to dread,
Look not left nor right:
In all the endless road you tread
There's nothing but the night.

I care not, your honor, whether the march begins at the gallows or when the gates of Joliet close upon them, there is nothing but the night, and that is little for any human being to expect.

But there are others to be considered. Here are these two families, who have led honest lives, who will bear the name that they bear, and future generations must carry it on.

Here is Leopold's father—and this boy was the pride of his life. He watched him, he cared for him, he worked for him; the boy was brilliant and accomplished, he educated him, and he thought that fame and position awaited him, as it should have awaited. It is a hard thing for a father to see his life's hopes crumble into dust.

Should he be considered? Should his brothers be considered? Will it do society any good or make your life safer, or any human being's life safer, if it should be handed down from generation to generation, that this boy, their kin, died upon the scaffold?

And Loeb's, the same. Here is the faithful uncle and brother, who have watched here day by day, while Dickie's father and his mother are too ill to stand this terrific strain, and shall be waiting for a message which means more to them than it can mean to you or me. Shall these be taken into account in this bereavement?

Have they any rights? Is there any reason, your honor, why their proud names and all the future generations that bear them shall have this bar sinister written across them? How many boys and girls, how many unborn children, will feel it? It is bad enough as it is, God knows. It is bad enough, however it is. But it's not yet death on the scaffold. It's not that. And I ask your honor, in addition to all that I have said, to save two honorable families from a disgrace that never ends, and which could be of no avail to help any human being that lives.

Now, I must say a word more and then I will leave this with you where I should have left it long ago. None of us are unmindful of the public; courts are not, and juries are not. We placed our fate in the hands of a trained court, thinking that he would be more mindful and considerate than a jury. I can not say how people feel. I have stood here for three months as one might stand at the ocean trying to sweep back the tide. I hope the seas are subsiding and the wind is falling, and I believe they are, but I wish to make no false pretense to this court. The easy thing and the popular thing to do is to hang my clients. I know it. Men and women who do not think will applaud. The cruel and the thoughtless will approve. It will be easy today; but in Chicago, and reaching out over the length and breadth of the land, more and more fathers and mothers, the humane, the kind and the hopeful, who are gaining an understanding and asking questions not only about these poor boys, but about their own—these will join in no acclaim at the death of my clients. These would ask that the shedding of blood be stopped, and that the normal feelings of man resume their sway. And as the days and the months and the years go on, they will ask it more and more. But, your honor, what they shall ask may not count. I know the easy way. I know your honor stands between the future and the past. I know the future is with me, and that I stand for here; not merely for the lives of these two unfortunate lads, but for all boys and all girls; for all of the young, and as far as possible, for all of the old. I am pleading for life, understanding, charity, kindness, and the infinite mercy that considers all. I am pleading that we overcome cruelty with kindness and hatred with love. I know the future is on my side. Your honor stands between the past and the future. You may hang these boys; you may hang

DIGEST OF CIR DECISIONS

INDUSTRIAL PEACE ACT; SECTION 11; EMPLOYEES IN GOVERNMENT CAN ORGANIZE THEMSELVES INTO LABOR UNION; LIMITATIONS.—It must be noted that, pursuant to Section 11 of Republic Act No. 875, entitled "Prohibition against strikes in the Government", the right to self-organization is extensive to all employees of the Government, without any distinction whatsoever, whether performing governmental functions or proprietary functions. They can organize themselves into a labor union, operate the same and exercise the right of such union, except the right to strike or join in strike. *NAMARCO Employees & Workers Association (CLUGG), vs. National Marketing Corporation, Case No.* 1852-*ULP, Pres. Judge Jose S. Bautista.*

ID.; ID.; ID.; ID.; REFUSAL OF EMPLOYER PERFORMING GOVERNMENTAL FUNCTIONS TO BARGAIN COLLECTIVELY CONSTITUTES UNFAIR LABOR PRACTICE.—This limitation, however, does not exempt the employer from his duty to bargain collectively in accordance with the provisions of the Act. Since "any individual employee or group of employees shall have the right at any time to present grievances to their employer" [Section 12 (a)], the employer's duty to bargain exists, although the union cannot resort to coercive measure to compel the management to bargain. The employees' right may become ineffective, perhaps useless, but we should never let the employees be placed entirely at the mercy of the employer. If there is duty to bargain, any refusal to bargain constitutes an unfair labor practice. Such unfair labor practice is alleged in the complaint in the case at bar. *Ibid.*

LABOR LAWS; INDUSTRIAL PEACE ACT; CASES WHERE STRIKE OR LOCKOUT IS PROHIBITED.—It will be noted that the declaration of a strike is prohibited in those cases specified by the statute. Strike or lockout, as the case may be, is prohibited in the following cases: (1) Within a period of thirty days prior to the date of expiration of a collective bargaining agreement or from the time a party has served a written notice upon the other party of the proposed termination or modification of an existing agreement; (2) Within thirty days from the time either party has filed with the conciliation service of the Department of Labor a notice of intention to strike or lockout, a requirement with which he must comply; (3) Employees of the Government performing governmental functions are at all times prohibited from striking; and (4) The Court of Industrial Relations may issue a restraining order forbidding the employees during the pendency of an industrial dispute certified to this Court by the President because it involves an industry indispensable to the national interest. (Secs. 10, 11, 13, 14 (d), Republic Act No. 875). Outside of the prohibitions just mentioned, workers are free to strike, the legality or illegality of such concerted action to depend, as a general rule, upon the legality of the purpose or the means employed by the strikers. However, as indicated above, thirty days prior thereto, the party concerned must file with the Conciliation Service a notice of his intention to strike or lockout the employees. *National Labor Union vs. Hale Shoe Company Inc., and Esco Security Council, Case No.* 556—*ULP, Martinez, J.*

TERMINATION PAY LAW; MERE ACCEPTANCE OF SEPARATION PAY DOES NOT DEPRIVE LABORER THE RIGHT TO PROSECUTE HIS EMPLOYER; REASON FOR THE RULE.—Again another question arose whether the acceptance of separation pay bars a laborer from prosecuting the employer for unfair labor practice acts. In the instant case, the Court believes that mere acceptance of separation pay does not deprive or divest the laborer of his right to prosecute his employer for unfair labor practices, because to tolerate the divesting of the right to prosecute on the mere acceptance of a separation pay would be giving the employer the chance to devise a legal bar which is a booby-trap serving the interests and caprice of the employer alone to the prejudice of the laborer. In other words, the law treating on separation pay should not be used as a smoke-screen to promote the uplift of the employer over the shattered cadaver of the *way laid* right of the laborer. *National Union of Printing Workers (PLUM), Ideal Press Local Chapter, vs. Ideal Press Company, Inc., and/or Manager, Enrique Uy, Case No.* 529-*ULP, Tabigne, J.*

THE PLEA OF . . .

them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy who in ignorance and darkness must grope his way through the mazes which only childhood knows. In doing it you will make it harder for unborn children. You may save them and make it easier for every child that some time may stand where these boys stand. You will make it easier for every human being with an aspiration and a vision and a hope and a fate. I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.

I feel that I should apologize for the length of time I have taken. This case may not be as important as I think it is, and I am sure I do not need to tell this court, or to tell my friends, that I would fight just as hard for the poor as for the rich. If I should succeed in saving these boys' lives and do nothing for the progress of law, I should feel sad, indeed. If I can succeed, my greatest reward and my greatest hope will be that I have done something for the tens of thousands of other boys, for the countless unfortunates who must tread the same road in blind childhood that these poor boys have trod—that I have done something to help human understanding, to temper justice with mercy, to overcome hate with love.

I was reading last night of the aspiration of the old Persian poet, Omar Khayyam. It appealed to me as the highest that I can vision. I wish it was in my heart, and I wish it was in the hearts of all.

So I be written in the Book of Love,
I do not care about that Book above.
Erase my name or write it as you will,
So I be written in the Book of Love.

[*The End*]

JUST PEACE . . . (*Continued from page* 83)

tions of the Communist bloc. "Those nations should be made to feel the weights of public disapproval... Unless the U.N. becomes, for all, an instrumentality of peace through justice and law, then some alternative must be found."

Intensify within the U.N. General Assembly the quest—"in my view, sometimes overlooked"—for genuine moral judgments rather than "feudal" voting by "blocs," geographical regions or "haves versus havenots."

Spread rule of law inside the free world by greater use of the International Court of Justice. "We are closely examining the question of our own relationship to the International Court with the view of seeing whether ways and means can be found to assure a greater use of that court by ourselves and through our example by others.

"To accomplish peace through law will take patience and perseverance. It will require us at times to prove an example by accepting for ourselves standards of conduct more advance than those generally accepted. We shall be misunderstood for our motives, misinterpreted by others who have had no such training as we in doctrine of law.

"There is no nobler mission that our nation could perform."—*TIME, February* 9, 1959.

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