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OUR SECRETARY OF JUSTICE PEDRO TUASON

Notorious in the pre-constitution days was the politics inspired "rigodon de jueces" or shuffling of judges. The public denounced it, the press ridiculed it, and the Supreme Court condemned it time and again. Nobody like it except the politicians and the politicians liked it because it served their sinister purpose well. For their part, many district judges accepted it as a necessary evil. For one thing it enabled them to fatten on per diems; for another, it offered them a chance to prove their loyalty and servility to the powers-that-be and hasten their promotion.

So vocal had public criticism become that when the Constituent Assembly began to draft the Constitution in 1934, the delegates decided to do away with the "rigodon." It was, they argued, a flagrant violation of the democratic doctrine of separation of powers. The Secretary of Justice, an extension of the Chief Executive, has no business encroaching on the judiciary. An attempt was made to let the President himself do the shuffling, but it was frustrated. Thus the Constitution now provides: "No judge appointed for a particular district shall be designated or transferred to another district without the approval of the Supreme Court."

Strangely enough, when some jurists who have frowned upon the "rigodon" find themselves occupying the post of secretary of justice, they change their attitude. They begin to wonder whether it is not better, after all, that they should be permitted to wield the power they used to deprecate, not for the sake of politics, but, so they say, in the interest of the public and for the benefit of justice itself.

Because he had been reported as saying that "with or without the consent of the Supreme Court, the power of the Secretary of Justice to assign a judge from one district to another should be enlarged and made more adequate; otherwise the Department of Justice would be crippled," it would seem that the former Supreme Court Justice Pedro Tuason, concurrently Secretary of Justice, is no exception. Actually, however, this is not so. When queried further on this point, the present Secretary of Justice said: "I have not changed my attitude towards the so-called 'rigodon de jueces' and I should wish this made clear. I said that I would be inclined to favor modified or slightly modified 'rigodon', with or without the consent of the Supreme Court, only if the positions of judges-at-large and cadastral judges are abolished, and all judges are made district judges — a change which is being advocated in Congress and to which I concur."

In other words, Secretary Tuason believes that when a judicial district has its dockets clogged the Secretary of Justice should be able to assign another district judge to assist in clearing them in the interest of justice itself. But, it may be asked: Can't the judge-at-large or a cadastral judge do the work?

There would be no such judge if the current move in Congress for the abolition of the present classification of judges is adopted. Under this Congressional plan, to which Justice Tuason has expressed his conformity, the position of judge-at-large and cadastral judge would be abolished, every judge being classified as a district judge, earning the same proposed salary of at least ₱12,000.00 a year. Under such a setup, surely the powers of the Secretary of Justice should be enlarged so that he can assign a judge from one district to another in cases of emergency.

The Secretary of Justice, Justice Tuason insists, must naturally be "one who will not prostitute justice for the benefit of a man or a group of men." So upright and so honorable must he be that whenever he feels that he is being used as a tool for this or that party in power, he should immediately resign. But would a man less rigid and resolute than Justice Tuason be able to emulate so noble an example? Would he be able to resist the temptation of compromising, confronted as he would be with the exigencies of politics?

Secretary Tuason admits that the present Department of Justice needs revamping and that the provinces should be regrouped into judicial districts. The judiciary, too, should be reorganized because, in his opinion, "at present there are judges who are a disgrace to the judiciary." He believes, however, that it will be well-nigh impossible to weed out undesirable judges for the simple reason that it is not so easy as the public thinks to prove charges. One thing is to allege; another, to prove the allegation by competent evidence. It is not enough, as many laymen think, to say that a person is bad; one must prove it to the satisfaction of the court.

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The trouble today, Justice Tuason notices with regret, is that people who allege that a certain judge or official is venal or rotten to the core do not even bother to testify on oath that he is really that bad. And yet, they are so quick to suspect or impute evil motives. To make matters worse, the laws, Justice Tuason finds, confer many privileges on judges, privileges which constitute, according to him, "one of the prices we have to pay for our constitutional form of government and for the advantages with which the independence of the judiciary was conceived." The remedy, he thinks, is in the final analysis "to get good men." But how long will a good man last when he is tempted or when he stands under a terrific political pressure?

A province-mate of the late eminent jurist, Cayetano Arellano, onetime Chief Justice of the Supreme Court, Pedro Tuason was born in Balanga, Bataan, on September 15, 1884. He first studied in a public school; but when the American Army opened a school in his town, he immediately enrolled. He wanted to master the new language and learn the tenets of democracy and freedom. Such aptitude he displayed that in no time he was appointed teacher. His salary was eight pesos a month, barely enough for his immediate needs. For five years he taught, then took an examination for government scholarship. He passed it and was sent to the United States.

To New Jersey he went and attended the State Normal School at Trenton. From there he proceeded to the Georgetown University Law School. By 1908. he had his LL. B. He rushed to Yale for a post-graduate course. A year later, he returned to the Philippines. To his disappointment, he was given an assignment in the Bureau of Education: a classroom teacher. Probably to console him, the bureau promoted him to supervising teacher in his own home-town. There he fell in love with a charming townmate, Concepcion de Leon, for whom he gladly gave up his freedom.

Certain that he was a better lawyer than teacher, he transferred to the then Executive Bureau where he knew he could apply his knowledge of law. Not fully satisfied, he moved to the Bureau of Justice where in time he became private secretary to the Attorney General. There he remembered that a rolling stone gathers no moss. So in 1912, he took the bar examination. For his pains, he was named provincial fiscal of Misamis, Surigao,

(*Continued on page* 107)

MODERN TREND OF CRIMINAL JUSTICE

As incorporated in the proposed
CODE OF CRIMES

By GUILLERMO B. GUEVARA *

As we all know, crimes and criminals have pre-eminently engaged the attention of rulers and jurists since the early dawn of history. Some 4,000 years ago, King Hammurabi through his "lex taliones" tried to solve the vexing problem of crimes and criminals with the application of the famous formula of "an eye for an eye and a tooth for a tooth."

I believe that all of us agree that the formula did not work, for we know that crimes and criminals have increased in geometrical progression with the population of the world.

Since the "lex taliones" of Hammurabi up to the present, plenty of water passed under the bridge. Scores of theories regarding the justification and purpose of penal laws have been expounded and put into practice; but so far, society as a whole, feels that it is not sufficiently protected against the perennial onslaught of criminals.

It would be too presumptuous of me to engage your attention on the discussion of the merits or demerits of absolute, relative and mixed theories. I shall confine myself to expound, as briefly as possible, the characteristics of the leading schools which now prevail in the juridical world, namely, the Classical School, the Positivist School and the Criminal Politic.

Briefly speaking, the first school or the Classical School, is eminently philosophical, juristic and dogmatic. It attaches more importance to the crime, or to the act, than to the criminal or to the actor itself. For this reason penalty under this theory, should be inflicted in proportion to the magnitude of the damage caused by the criminal.

On the other hand, the Positivist School is eminently realistic and experimental. It considers the crime, not as a mere juridical entity or creation of the law, but rather a social or natural phenomenon. This being the case, the man-criminal, or the delinquent, and not the crime or the act, should be the main concern of the criminal law, under the tenets of this school.

The classicist has chiefly in mind the attainment of retributive justice, through the infliction of punishment or penalty, which they consider as a payment due to society by whomsoever violates the penal law.

The positivist on the other hand, has as principal aim, the social defense, or the defense of society. It is not concerned whether the offense is avenged, or whether the offender receives its due punishment. For the positivists the whole question boils down to whether or not the offender is dangerous or, very likely, will be a menace to society. That is why, instead of the classical penalty or retribution, the positivists have the *security measure.*

The third school or the Criminal Politic, is a happy medium between the above two opposing camps. It believes in short detentive penalty, without prejudice to imposing security measures upon dreadful criminals or socially dangerous persons.

As we all know, the present Revised Penal Code of 1930 is patterned after the classical Spanish Code of 1870, a school of thought conceived originally by Cesare Bonesa, better known as Marquis de Bacarria in 1764, and elevated to the highest degree of scientific perfection by that genial professor of Pissa, the eminent Dr. Francisco Carrara. The essence of this school, as we know, is that crime is a pure and simple fiction of law. In other words, there is no crime unless there is some law defining and punishing it; that criminal responsibility can only be demanded or exacted, so long as the element of imputability exists; and finally, that penalty which is inflicted upon the perpetrators of a crime by way of retribution and moral coercion, must be *proportionate* to the harm or crime committed, not only *quantitatively,* but also *qualitatively.*

When Professor Carrara bewildered the juridical world in 1850 with his scientific classification of penalties into graduated scales, and into different grades and periods, so that one particular kind of crime may only be punished with one specific set of penalties, mathematically measured in terms of years, months and days, very few thought then, perhaps, not even the most stubborn iconoclast,

* Former Member of the Code Commission.

AN APPRAISAL OF THE PROPOSED CODE OF CRIMES

By AMBROSIO PADILLA *

Fellow members of the Bar,

By Executive Order No. 48, the Code Commission was created for the purpose of "revising all existing substantive laws of the Philippines and of codifying them in conformity with the customs, traditions and idiosyncracies of the Filipino people and with modern trends in legislation and the progressive principles of law." The Code Commission submitted a Civil Code project, which, with slight modifications, was approved by Congress as Republic Act No. 386 known as the Civil Code of the Philippines. The same Code Commission submitted its second project — the proposed Code of Crimes, which is intended to substitute for the Revised Penal Code.

It is not my purpose today to discuss our Civil Code, whose provisions I have attempted to expound and clarify in my work on Civil Law. But I intend, with your indulgence, to discuss with you the merits or demerits of the proposed criminal code. The members of the Code Commission, particularly its Chairman, have earnestly advocated for the prompt passage of this new Code, but no legislative action has been taken thereon up to the present. It is, therefore, proper, that the members of the Bar should interest themselves in appraising this new codification, because its enactment into law will vitally affect, favorably or adversely, the peace and order conditions in our country and the apprehension, prosecution and punishment of violators of our penal laws.

Our Revised Penal Code, Act No. 3815 as amended, was revised in 1930 based on the Spanish Penal Code of 1870 and took effect on January 1st, 1932. Our jurisprudence is rich in court decisions applying the provisions of our Revised Penal Code, which seem fully adequate to cope with the various forms of crime and all types of criminals. Dean Roscoe Pound once said: "Law must be stable, but it cannot stand still." We should, therefore, welcome every improvement or advance towards more effective legislation. But any change should be for the *better,* for the Code Commission itself admits that the proposed changes should not be "merely for the sake of innovation." (p. 43 of report). We do not have to stress originality, for the concept of crime, which arises from the evil nature of man, is as old as humanity itself. We need not adopt new "trends and objectives" merely for the sake of being modern, unless they are sound and are in conformity with our own customs and traditions as a people. The Code Commission was entrusted with the duty to *revise* existing laws and codify them, not necessarily *create* new crimes. At the same time, we should not remain stagnant, for adherence to the static may mean not only a refusal to advance but an actual step backwards.

I invite you, therefore, fellow members of the Bar, to discuss with me the *pros* and *cons* of the proposed Code of Crimes to help crystalize legal opinion as to the wisdom of its adoption into, or rejection from, our penal system.

The shift from the classical to the positivist —

The first basic departure from the Revised Penal Code is the shift from the classical or juristic theory of penology to the positivist or realistic theory. Following the classical principle in our present Code, criminal responsibility is founded on the actor's knowledge and free will. The positivist school, however, denies or minimizes the exercise of free volition and considers the criminal as a victim of circumstances which predispose him to crime, for the Code Commission states that "criminality depends mostly on social factors, environment, education, economic conditions, and the inborn or hereditary character of the criminal himself." (p. 22 of report) The classical theory stresses the *objective* standard of crime and imposes a proportionate punishment therefor, but the positivist school considers the deed as secondary and the offender as primary, and provides for means of repression to protect society from the actor — to "forestall the social danger and to achieve social defense" (p. 3 of report), because it takes the view that "crime is essentially a social and natural phenomenon" (p. 3 of report). In other words, the classical view imposes responsibility for an act maliciously perpetrated or negligently performed ,while positivists view the criminal not so much an object

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that there could be any better system than the classical school. Among the confirmed believers in the virtue of the Classical School, were Spanish and Filipino jurists, who, for the last 70 years, have been laboring under the impression that penalty, being retributive in nature, must be exactly proportionate to the harm done, and for that reason, must be prefixed, determined and specific.

But the scientific reputation which the classical school gained was soon shaken in the early 1800 with the publication of a book entitled "Crimes, its Causes and Remedies," written by an Italian physician, Dr. Ceasare Lambrose, wherein, for the first time, the attention of the juridical world was arrested to the existence of a criminal type or delinquent man. It is not my purpose here to make a lenghty exposition and analysis of Dr. Lambrose's book. Suffice it to say, that his ideas kindled the fertile minds of two other Italian masters, Professors Rafael Garofalo and Enrico Ferri, and eventually gave rise to the birth of a new, vigorous and realistic school of thought in criminal science, what is known as the Positivist or experimental school. Thanks to the books of Lambrose on criminal type; to "Criminology" of Professor Garofalo, and to "Criminal Sociology" of Professor Ferri, the juridical world has fallen heir to a precious legacy in the matter of treatment and approach to the eternal problem of crime and criminals. Thanks to these three evangelists of the gospel of Positivism, the juridical world has finally realized that society cannot be defended against the continuous onslaught of criminals by the machine-like applications of pre-fixed penalties, and the excessive use of abstract legal principles. What matters, in our fight against crime and criminals, is the study of the man-criminal himself, the selection of ways and means whereby a criminal would be deprived of an opportunity to commit crime, or if he has already committed any, that he may not be given a chance to repeat his anti-social activities.

Since the gospel of Positivism is now widely spread over Europe and South American countries, and its tenets found expression in the Penal Codes of the majority of the countries in both Continents, the Code Commission felt that it would be recreant of its duties, should it fail to open its eyes to reality, and accept obligingly the benefit of the experience of Europe and America. It is in this thought and spirit that our proposed Code of Crimes has been conceived.

The proposed Code of Crimes does not belong exclusively to any of the two opposing schools. If at all, it belongs to the third school, or to Criminal Politic, being the result of a compromise between the two fundamental and conflicting criteria.

The Code Commission still believes that free will should be the basis of criminal responsibility, instead of the dreadfulness of the offender, as vigorously maintained by the Positivists. For this reason, the proposed Code, like the present Classical Code, declares in Articles 22 and 23, exempt from criminal liability those persons who are deprived of freedom, intelligence or intention. As a necessary consequence of the declaration, the proposed Code had to recognize in Article 24, as sufficient cause for diminishing or mitigating criminal responsibility, any circumstances which can or may hinder the exercise of the free will of the doer.

With regard to the concept of penalty, the Commission has adopted a happy medium between the criterion that penalty is a *punishment* or *retribution* for the wrong done, and the idea that it is a social defense.

The proposed Code, for this reason, represses, with either fine or deprivation of liberty in the form of confinement or imprisonment, the commission of crimes. Death sentence may also be inflicted in extreme cases, as a means of eliminating hopelessly dangerous persons.

To erase as much as possible all traces of punishment, the period of repression, which, will take the place of the penalties of the present Code, has been greatly shortened. The longest period of imprisonment, which is heavy imprisonment, is from 9 to 15 years, while the shortest (the confinement) is from 1 to 14 days.

But, as I have stated, the repressions, be they confinement or imprisonment, are imposed for the sole purpose of satisfying the ends of justice, that is, for ethical reasons. Such repressions surely

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of punishment or retribution but as a patient deserving of social consideration for reformation, to the end that society may be protected. The Code Commission has practically abandoned the classical concept of retributive justice providing for punishment for crime freely executed, and has adopted instead the new theory that repression of crime is "applied for social defense, to forstall social danger, to rehabilitate, cure or educate" the transgressors of criminal law (Art. 34). Should such a shift from the classical to the positivist theory of criminal law be adopted as a sound step forward and as being more in harmony with Filipino customs and traditions? It would be a dangerous theory — to minimize, if not negate, the exercise of free will based on knowledge of the actor that the act committed is a transgression of our penal law. In fact, such a theory would conflict with the stubborn fact of our own experience that a criminal is not a desperate instrument of evil compelled by forces or circumstances beyond his control, but rather that he strays beyond the strict and narrow path of good conduct knowingly and voluntarily. For without knowledge or without free will an actor must be exempt from criminal liability (Art. 12, Revised Penal Code).

Mala in se or mala prohibita —

The proposed Code of Crimes contains 951 articles, as compared with the 367 articles of the Revised Penal Code. The increase in size is due to the considerable number of additional offenses. It has included offenses now punishable under special laws. For example, Title VII dealing with "Crimes Against The People's Will" is covered by our Revised Election Code. The new Code has penalized unfair labor practices (Arts. 506-507) which are covered under Republic Act No. 875, otherwise referred to as the Magna Carta of Labor. It has included "Motor Vehicle Crimes" (Arts. 712-718) which fall under the Revised Motor Vehicle Law (Act No. 3992 as amended). The inquiry arises: Should the penal code include in its provisions all reprehensible acts that should be punished or repressed, or rather should they be limited to inherently wrongful acts which are commonly known as *mala per se*, as distinguished from *mala prohibita?*

The penal code is the basic and fundamental law on crimes. It must, therefore, be stable and should not vary with every changing circumstances, because the acts penalized therein should be limited to evil acts which are such by the very nature of man as decreed by Divine Law and reflected to human reason as the Natural Law. Thus, to kill or to steal are *mala per se* — expressly prohibited by the Ten Commandments. They are inherently wrong at all times, in any place, and under every circumstance. No advance of civilization, no vestige of modernity, can ever justify such inherently evil acts. The proposed Code of Crimes, however, considers that an act, criminal when committed, may subsequently lose "its dangerous or criminal character by reason of a change in the criminal law, or the alteration of the social or political situation" (Art. 15). The reason is that the proposed Code seeks to include offenses subject to special penal laws, for some acts, in themselves colorless, become transgressions of the law because of the peculiar purpose to be attained, dependent on certain prevailing circumstances. Thus, the possession of firearms is regulated by special laws (Sec. 2692, Amd. Code; Com. Act No. 56; Rep. Act No. 4), and penalizes as a crime the illegal possession thereof, to control loose firearms and discourage irresponsible gun-wielders. Similarly, our election law forbids any person to enter a polling precinct with arms, regardless of the intention of the actor — whether or not the arm is intended to be used to coerce or intimidate voters. Likewise, the Motor Vehicle Law penalizes a person who drives without a license. Obviously, however, the act of possessing a firearm, of entering a precinct with arms, or driving a car without a license, as the case may be, do not render said acts intrinsically or inherently wrong. They are only prohibited acts, and such prohibitions will continue as long as the law has an objective to achieve, but such purpose or objective may be lost by a change of circumstances. In such case, the prohibited act would cease to be criminal. The Code Commission should not have included in the proposed Code of Crimes — the basic or fundamental law on crimes — violations of special laws, which are not *mala in se* but only *mala prohibita*.

The proposed Code of Crimes has included many misdemeanors which should be the proper subjects of municipal ordinances. Thus,

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will not protect the community from the nefarious and anti-social activities of certain types of criminals whom the Code classifies as "socially dangerous person." For this type of offenders, the proposed Code reserves, in addition to the conventional repression, the security measures, which consist in the internment of the offender for an indefinite period, in some agricultural colony or labor establishment.

Under the provisions of Article 109 of the proposed Code of Crimes, the above-described security measure may be imposed in two instances: firstly, upon any person who has been sentenced to medium imprisonment or longer (from 3 years up); and secondly, upon any offender, even though sentenced to a shorter term, provided the Court finds in the offender, a "certain morbid disposition, congenital or acquired by habit, which by destroying or enervating the inhibitory control, favors the inclination to commit a crime." (Art. 107).

Under the provisions of the proposed Code, the internment of socially dangerous persons shall not terminate until the courts, upon report of a competent board of psychiatrists and technicians in penology shall be fully convinced that the internee is no longer socially dangerous.

It is believed that an indeterminate security imposed upon hardened or professional criminals will be a far better safeguard to society than the present pre-fixed penalties of our present classical code. With an indefinite internment in a labor establishment or agricultural colony, criminals of the type of Parulan, Dick-a-do, and others, could not have caused havoc to society. It is the considered opinion of the Commission that the security measures of the proposed Code of Crimes, if rightly enforced, will reduce to the minimum the risk of the community from anti-social activities of professional and dangerous criminals.

Another innovation of decidedly Positivistic tendency is the provision of Article 17, in connection with Article 62 of the proposed Code, which confers upon the Court the power to repress, either with the repression one degree lower, or the same repression intended for the *consummated offense*, any frustrated, or attempted crime, proposal to commit an offense, bearing in mind the nature of the crime, the means and ways of the perpetration thereof, the intensity of the criminal intent, the extent of the resulting injury, and the personal antecedents of the actor.

The present criterion of the classical school of *lowering* always by one or two degrees the penalty for the frustrated or attempted crime, without any regard to the personal antecedents of the doer, the nature of the offense, the intensity of criminal intent, etc., does not seem to be sound. Few, if ever, will be convinced, that a hardened and professional criminal who has put into execution all means within his command to rob and murder his victim, but only out of sheer luck of the victim, the bullet missed him, should deserve less condemnation or less repressive measure, than an occasional criminal who happens to consummate the same offense. The right and sensible criterion, therefore, is not to base necessarily upon the degree of the consummation of the offense or the harm done, the repression to be imposed upon a doer, but rather upon the circumstances already mentioned.

Another striking innovation in your proposed Code is the conversion of accessoryship after the fact (*encumbrimiento* in Spanish), into the category of an independent and separate crime. Under our present classical code, as we all know, an accessory after the fact is one who helps in the flight of a murderer, or conceals the body or instrument of a crime, or knowingly hides or receives stolen property. Under the present set-up, the responsibility of an accessory after the fact is subordinated to that of the principal; so that, if the principal is acquitted or not prosecuted, the accessory after the fact, no matter how conclusive is the evidence against him, cannot be punished. The flaw of our present system is self-evident. If the proposed Code of Crimes is finally approved by Congress, the hiding, concealing or receiving of stolen property shall be one kind of crime against property and the abetting in the escape of a criminal, destroying the body or the instruments of the crime, or the wiping out of traces of the same, shall be another kind of crime against the administration of justice. These crimes can be prosecuted independently, and without regard to the prosecution or conviction of the thief, in the case of stolen property, nor of the criminal to whom help was given, in the latter cases.

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social gatherings between 2:00 and 5:00 in the morning (Art. 756), dancing or music (Art. 757), or sale of liquor (Art. 900) between said hours, should be covered by municipal ordinances. Even smoking in a first-class theatre (Art. 921) should not be declared a misdemeanor under the penal code.

The proposed Code of Crimes also penalizes violations of Civil Law provisions which should remain within the realm of Civil Law. In seeking greater protection for family solidarity, it would penalize alienation of affection between the husband and the wife (Art. 616), the disturbance of family relations by any intrigue (Art. 617), collusion for legal separation or annulment of marriage (Art. 619), deprivation of the legitime of compulsory heirs (Art. 626), or refusal to discuss compromise of a civil litigation among members of a family (Art. 635). But not every act which involves a violation or infringement of a civil right should give rise to criminal prosecution, since liability for civil damages would be adequate relief. Art. 624 penalizes a lessor who fails to cancel a lease of his house or building after knowing that the building is being used for prostitution. Art. 852 punishes a lessor who wilfully violates the terms of a lease by refusing or failing to furnish a service or facility agreed upon. Likewise, a lessee who wilfully abandons the premises without first having settled his rental indebtedness to the lessor commits a misdemeanor under Art. 853 which would amount to sanctioning imprisonment for debt. These are purely civil matters which affect the private rights of the contracting parties. Neither the violation by the lessor nor by the lessee should give rise to a criminal offense, unless such violation would constitute a specific crime by itself.

Similar provisions —

There are some provisions which are presented as new, but are essentially a reiteration of the prevailing rule. Thus, when a criminal act is perpetrated by a legal entity which, as a juridical person, can not commit a crime, the persons responsible therefor are the president, manager or director, either as principals or for criminal negligence (Art. 30). Article 178 imposes special subsidiary liability upon employers engaged in any kind of business or industry for the payment of the fine imposed on their employees. This is similar to the subsidiary liability now provided in Art. 103 of the Revised Penal Code. Article 180 imposes solidary liability on principal and accomplices. The same rule is prescribed in Article 110 of the Revised Code. The proposed Code considers accessoryship as a separate crime (p. 13 of report), but the legal effect is the same because the accessory receives a penalty two degrees lower than the principal in a consummated offense. The proposed Code has abolished the concept of quasi-offense, or a crime committed thru negligence. The abolition, however, is more apparent than real, because the same concept remains and is called culpable or without criminal intent, when the injurious or dangerous result takes place in consequence of neglipence, recklessness or lack of skill (Art. 14). Moreover, crime thru negligence is repressed lower by one or two categories prescribed for the intentional crime (p. 28 of report).

Good innovations —

There are, however, some new provisions in the proposed Code which deserve favorable study and adoption.

Art. 445 is a provision against dishonest accumulation of wealth, so that property grossly in excess of the normal and probable earnings of a public official will be forfeited to, and declared property of, the State. This will be an effective deterrent against so much graft and corruption in government and its subsidiary corporations, where public service and the general welfare have been sacrificed for personal material advantages. Art. 823 penalizes nepotism and Art. 824 the evasion of the law against nepotism, which are good provisions in view of the prevalent custom of our officialdom.

Art. 446 limits the provision against self-incrimination and demands the testimony or production of books and papers in an investigation and trial. The same rule is provided in Art. 342 where a person, duly summoned to testify before any court or congressional committee, shall not be excused from testifying or producing documents, although he shall not be prosecuted for any statement or admission he might make or because of such document.

Art. 194 subjects a person who attempts to commit suicide to curative security measures, including detention in a hospital for treatment. This is a reform to Art. 253 of the Revised Penal Code,

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The mechanism of application of penalty or repression has been greatly simplified. The principal repressions consist, as I have already stated, of deprivation of liberty and fine. Death penalty has been preserved, but it can only be imposed in extreme cases. With the limitations imposed by the proposed Code, it can be safely stated that death penalty has been practically abolished.

The deprivation of liberty is classified into: life imprisonment which at most lasts 25 years; heavy imprisonment, from 9 to 15 years; medium imprisonment from 3 to 9 years; light imprisonment from 6 months to 3 years; confinement from 15 days to 6 months; and restraint from 1 to 14 days.

According to the provisions of Article 57, the repression prescribed by the Code shall be imposed upon the principal of the crime. The presence of modifying circumstances in the commission of the crime will have the effect of imposing the repression either in the lower half, or in the upper half, depending upon whether circumstances are mitigating or aggravating. Thus, if the penalty prescribed for the crime is heavy imprisonment (from 9 to 15 years), and there is or there are one or two mitigating circumstances, the judge will have full power to impose any penalty ranging from 9 years and one day to 12 years; and conversely, if there is or there are only one or two aggravating circumstances, the judge can impose anywhere between 12 years and one day to 15 years. If there are no modifying circumstances, or the existing one offsets each other, the court would be justified in imposing the penalty in the neighborhood of 12 years. Moreover, under Article 73 "every divisible repression shall be divided into the upper half and the lower half. Within either half, the Court shall impose that repression which in its sound discretion shall best accomplish the purposes of repression as enunciated in Article 34 of this Code, after considering the nature and number, if any, of the mitigating or aggravating circumstances, and the actor's social and family environment, education, previous conduct, habits, economic condition and other personal factors."

It is thus seen that rather than mathematical sub-division and fractions which characterize the mechanism of the classical school, what the judge will need in the application of the proposed Code, if finally approved, would be profound knowledge of human nature and psychology.

The conditional sentence is another step forward in the proposed Code. Under it, a judge has ample discretion to suspend a sentence of conviction when the accused is a first offender, and the term of the sentence does not exceed one year, provided the accused fully indemnifies the damage, if any, inflicted upon the victim. Should the convict observe good conduct during 5 months, if he does not commit any offense during said period, the sentence shall totally prescribe; otherwise it will be enforced.

If the proposed Code is approved, fines shall have the same effect upon the rich and the poor. It will be truly democratic; unlike what happens under the present set-up, when fine is painless, nay, insensible, as far as the moneyed class is concerned. Fine shall be imposed, not in terms of pesos, but in terms of days of earning. An executive, for instance, with an income of ₱300 a day, who is sentenced, side by side with a laborer earning ₱5 a day, to suffer 5 days of earning each, will suffer exactly the same pinch or burden as the latter; for this ₱1,500 which is the equivalent of his 5 days, has the same weight or value of the ₱25 to the laborer.

In line with the criterion that repression is more of a sanction and social defense than a punishment, the proposed Code has provided for pre-delictual security measure. Under the provision of Article 108, a person may be judicially declared dangerous, and then be subjected to security measures described even if he has not been prosecuted for any specific crime when he shows any symptoms, evidences or manifestations of habitual rowdism and ruffianism. With this provision it is expected that many holdups, kidnappings, and murders can be prevented. The police records and investigations of holdups, kidnappings, and murders invariably show that they have been committed by professional ruffians, police characters or "butañgeros" in local parlance. Because of the absence of a provision regarding predelictual security measures in the present Code, our law enforcement agencies have been absolutely helpless to neutralize the anti-social activities of professional rowdies or "butañgeros," unless they are surprised "infragranti."

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which penalizes a person who assists another to commit suicide but does not prescribe a penalty for the person so attempting.

In view of the difficulty in prosecuting arson suspects, Art. 689 raises a *prima facie* presumption of guilt in some prosecutions for arson. This good provision is not in violation of the presumption of innocence because the Revised Penal Code itself contains *prima facie* presumptions of guilt.

Art. 667 provides for special or additional aggravating circumstances in theft. This is much more satisfactory than the present provision on qualified theft, which limits the enumeration of property to "motor vehicle, mail matter, large cattle, coconuts taken from a plantation or fish taken from a fishpond" (Art. 310, Revised Penal Code).

Innovations subject to criticisms —

There are, however, many new provisions in the proposed Code of Crimes, or changes advocated, which deserve careful study and scrutiny.

(a) *Attemptcd vs. Frustrated —*

The new Code proposes to abolish the distinction between attempted and frustrated crimes (Art. 6, Revised Penal Code). On the other hand, it imposes repression upon the principal of an attempted crime, or upon the conspirators, or upon the proponent of a crime (Art. 62). Under the Revised Penal Code conspiracy and proposal to commit a felony are not punishable, except in specific cases where the law specially provides a penalty (Art. 8, R.P.C.). There seems to be no valid reason for the elimination of the different stages of execution, for the differences between consummated, frustrated and attempted (Art. 6, R.P.C.) are clear and real. It is true that in crimes like bribery, which is consummated by mere agreement, there is no frustrated stage; and in crimes like abduction, adultery or arson, the distinction between frustrated and attempted is rather difficult. But such difficulty which obtains only in few particular felonies would not justify total abolition, for, certainly, an offender who merely commences the commission of a felony directly by overt acts, and does not perform all the acts of execution should not be held to the same degree or responsibility as the offender who performs all the acts of execution which should produce the felony as a consequence (Art. 6, R.P.C.). Moreover, why should conspiracy and proposal be made punishable when the offenders or offender have not translated their intention into positive acts falling within the purview of the penal law? While the moral law does not wait for external acts and seeks to control man's innermost thoughts as violative of the moral code, the same standard can not be applied to felonies falling under our penal laws. Again, we can not rely on the subjective standard but must apply the objective test. Even the present law on impossible crime (Art. 4, par. 2, R.P.C.) is limited to the performance of an act which would be an offense against persons or property.

(b) *Socially dangerous without committing specific crime —*

Article 561 of the proposed Code is a strange provision. For although a person may not have committed any specific crime, he could be declared socially dangerous and be subject to curative security measures and may therefore be confined or hospitalized until such time as he is no longer dangerous to society (Art. 562). Article 108 likewise provides that a person, even if he has not been prosecuted for a specific crime, may be subjected to detentive security measures (Art. 114), when he shows any symptoms, evidences or manifestations of habitual rowdyism or ruffianism (Art. 209). If the Code Commission recognizes the basic principle of *nulla poena sine lege*, why should a person be deprived of his liberty and subjected to curative or detentive security measures on vague and uncertain manifestations that he may be socially dangerous, if he has not in fact performed an overt act constituting a specific crime?

The proposed Code, following its purpose of repression, which is for social defense, to forestall social danger against possible transgressors of criminal law (Art. 34), considers the "actor's social and family environment, education, previous conduct, habits, economic condition and other personal factors" (Art. 73), and would impose detentive security measures which "shall last until the court has pronounced that the subject is no longer socially dangerous" (Art. 114). Hence, the Code authorizes indefinite detention even for gun-wielders or rowdies (Arts. 108 and 209). And even if a convict has already served the maximum of his term of imprisonment, he may not be

released if the court should declare that he is still socially dangerous. Too much discretion is given the trial court. In fact, in the imposition of the terms of repression, which should really be terms of imprisonment, the proposed Code does not follow the objective, though mathematical, proportion between the felony and its penalty as aggravated or mitigated by circumstances in the Revised Penal Code, but leaves a greater degree of latitude to judicial discretion. If we must curb or lessen judicial abuse of discretion, we should limit the extent of such discretion. If the standards are not objective but more subjective, there can always be an apparent justification for unequal, if not arbitrary, discrimination among accused persons similarly situated.

If an accused, after a first offense, is declared no longer socially dangerous, we find difficulty in explaining the provision on habitual criminal (Art. 67); and more so, a professional criminal (Art. 68) for, if after his first conviction he is not capable of reformation but continues to be a threat to the State and the public, he should then suffer indefinite confinement. But how can judicial discretion determine whether a person has been reformed and is no longer a danger to society, or that he still constitutes a menace to the public, if he remains under confinement?

(c) *Neither hero nor criminal* —

Art. 804 penalizes as a misdemeanor against the public administration the refusal of any person to aid an officer of the law in the arrest of any lawbreaker, or in the maintenance of peace and order. To the same effect is Art. 810, No. 1, which punishes a person who fails to render assistance in case of a calamity or misfortune, like earthquake, fire or inundation. It is praiseworthy to inculcate in our people higher concepts of civic-mindedness. We extol to the heights of heroism a person who, in disregard of his own self, serves the community specially in times of stress. But the vast majority of the people can not be expected to be heroes. And if an ordinary mortal, with feet of clay, can not rise to the extraordinary demands of community service, such as in the arrest of a lawbreaker or in putting out a fire, why should his failure to act, his indifference, or if you wish, his cowardice, be branded as a criminal offense? That was the same error committed by some Filipinos in the United States who were beyond the clutches of the Japanese oppressor, when, after liberation, as self-proclaimed heroes, they accused their brothers in occupied Philippines, particularly the occupation leaders, of treason just because the latter did not defy the Japanese invaders by sacrificing their lives, but rather pretended to cooperate for national survival. One per cent of the population may have been heroic; another per cent may have been inclined to treason by bartering their birthrights for selfish advantages; but ninety-eight per cent were neither heroes nor traitors. They were just plain mortals subject to human weaknesses and frailties. Certainly, a man who can not rise as a hero should not be condemned as a criminal.

(d) *Criticism of the State or civil institution* —

Art. 324 penalizes under sedition any priest or minister who shall utter or write words derogatory to the authority of the State, or shall attack civil marriage, the public school, or any similar civil institution established by the State. Art. 423 penalizes any priest or minister who, in any manner, violates the principles of separation between Church and State. Any school professor or teacher who shall refuse to use textbooks or other books prescribed by the Government (Art. 933) commits a misdemeanor against good customs. These provisions would make of the State and its officials infallible, beyond the scope of free speech and constructive criticism. This would be a step backwards glorifying the erroneous assumption that the "king can do no wrong" and reviving the obnoxious crime then known as *"les majeste"*. It would be contrary to the accepted principle that the State must promote the general welfare, and if it should fail or falter in that sacred trust, it becomes not only the right but the duty of a citizen to protect his inalienable rights, which antedate the State. Likewise, the Church is dedicated to the salvation of human souls and, within the exercise of religious freedom, it can advocate its religious doctrines and principles, even if they contravene some policies of the State. Thus, if the public schools become godless institutions, as, when contrary to the constitutional provision guaranteeing optional religious instruction, the holding of religiouss classes is prevented or discouraged, the priest and ministers would be perfectly justified in their sermons and writings to advocate a change in the conduct of such civil institutions. There must be liberty under the law, and the scope of the exercise of such liberties or speech or of the press can not exclude the State and its political institutions. And such free exercise of the rights of free men should not fall under the penal sanction.

(e) *Misfeasance by judicial officers — appeal by State in criminal cases* —

Similar to the provisions on malfeasance and misfeasance in office by judges and prosecutors (Arts. 204-208, R.P.C.), the proposed Code penalizes a judge who fails, within the time prescribed by law or regulations, to try, hear, or dispose of a case or proceeding (Art. 374); or who shall require a manifestly excessive bail for the temporary release of the accused (Art. 402); a judicial officer who, with abuse of discretion, impairs or denies the rights of the accused (Art. 413); any judge who shall maliciously render an unjust judgment, order or resolution (Art. 454). These provisions are praiseworthy, because they are designed to protect an accused from the arbitrary exercise of judicial power, but like the provisions of the present Penal Code (Arts. 204-208), they are dormant and inert provisions, because it is very hard to prove malice on the part of the judge who renders an unjust judgment or interlocutory order. While members of the Bar should not countenance the continuance in office of a judicial officer who, contrary to his oath, does not render decisions in accordance with the law and the evidence, without fear or favor, still that sad situation exists. And it is more so in criminal cases, where no appeal lies against a judgment of acquittal or dismissal, even on the ground that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. Once the prosecuting fiscal moves for dismissal after the accused has pleaded, and without the latter's consent, or a judgment of acquittal is rendered by the court after judicial proceedings, the State, including the offended party, is rendered powerless to have a review of such judgment, because the judicial interpretation to the double jeopardy clause in the Constitution has rendered such a review by way of appeal impossible. That ruling was based on the majority decision in the case of Kepner vs. U.S., 195 U.S. 100; 11 Phil. 669. Decisions previous to that 5 to 4 decision in the Kepner case had unanimously adhered to the sound view that the provision against double jeopardy (see Art. 414) does not preclude an appeal by the Government from a judgment of acquittal, for while jeopardy may have attached, it has not terminated — the appeal is not a new or separate proceeding. The greatest restraint against arbitrary power by inferior courts is the exposure of their errors on appeal. To give finality to an order of dismissal or acquittal by a trial court is to stamp it with some semblance of infallibility. If the trial had been infected with error adverse to the accused, he has a right to purge the vicious taint. Why should not a reciprocal privilege be granted the State so that the discretion of the trial judge may neither be arbitrary nor oppressive?

(f) *Stricter rules of morality* —

The new Code "advocates more strict rules of morality" and proposes "more severe and more rigid standards of morality and good conduct" (p. 44 of report). It seeks to establish "the single standard of morality" (p.46) among spouses. Thus, Art. 568 provides for adultery not only by a married woman having intercourse with a man not her husband, but also by a married man who has one sexual intercourse with a woman not his wife. Likewise, the three modes of committing concubinage (Art. 334, R.P.C.) are made applicable to a wife (Art. 569, No. 2). A single standard of morality between husband and wife may be desirable in the moral order, but these new provisions are hardly in accord with human experience or human nature. One act of infidelity on the part of the husband can not cause as much havoc as an act of infidelity on the part of the wife.

Art. 572 of the proposed Code considers as a crime the act of any unmarried man and woman of living together under the same roof, regardless of scandal. The birth, therefore, of a natural child would be conclusive proof of the commission of this offense. *A fortiori*, the birth of an illegitimate child would be convincing evidence that his father, as a married man, committed several acts of adultery. And yet, the same Code Commission inserted in the new Civil Code the substantial change of granting illegitimate children successional rights as compulsory heirs.

Art. 871 penalizes a person who marries without obtaining a

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The above provisions are the best answer to the persistent clamor of the community for preventive measures against the imminent and probable onslaught of professional gangsters. After all an ounce of prevention is worth more than a pound of cure.

Another striking innovation of the proposed Code is the extra-territorial effect given to its provisions. Our present concept of criminal law is exceedingly provincial. With the exception of crimes committed on board our ships and men of war, while navigating on high seas or on foreign territory, and crimes committed by public officials abroad in connection with the performance of their official duties, or falsification and forgery of our securities and coins, the provisions of our present Code are effective only within the Philippine Republic. Under the proposed Code, any serious crime committed abroad by nationals or even by foreigners when the victim is a national or the State, may be prosecuted here under certain conditions.

These are the salient features of the ground work of the new Code. The catalog of specific crimes has been greatly enriched so as to cover all conceivable forms of criminality and immorality. Suffice it to say that the proposed Code is 3 times longer than the present one.

It would be too presumptuous of anybody to claim that an ideal or perfect code can be drafted. As I said from the beginning, the civilized world has been trying to produce for the last four thousand years some penal code which would deal a death blow to crime and criminals. But little or no progress at all has been achieved to obtain the desired goal.

I do not, I cannot claim, that the proposed Code would serve the purpose of a miraculous panacea to all of our social and moral ills. But I venture to say in all modesty that it tries to embody the most progressive principles of the penal science.

The bill of rights in our Constitution as well as in the Federal Constitution of the United States; and even the Magna Carta of the human rights, the famous Declaration of the Rights of Men proclaimed by the French Revolution, are all wonderful, but onesided, documents. The authors and framers of these immortal documents have only specialized and endeavored to undertake the defense of the rights of men, the rights of individual persons; but none of them has given serious thought to the defense of the rights of society. The proposed Code of Crimes, submitted to your consideration, is an endeavor to fill the gap.

The Committee, I am sure, will find, after a mature consideration of the Book I of the proposed Code, that, if the same is approved, society will in the future find itself on an equal footing with the individual person, as far as protection of the rights are concerned.

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certificate from the health authorities that he is not suffering from any of the diseases therein mentioned, such as tuberculosis, cholera or dysentery. This article makes marriage not only difficult but also as constituting an offense. The previous article (Art. 572) makes cohabitation without marriage likewise an offense. Although eugenics may justify the postponement of marriage when one of the parties is not physically fit, a marriage ceremony should never be made a penal offense, because marriage is not only a social institution but a divine sacrament, which the State may perhaps regulate but can not control, much less penalize.

(g) *Death by spouse under exceptional circumstances* —

Art. 247 of the Revised Penal Code is practically an exempting circumstance for any spouse who surprises the other in the act of committing sexual intercourse with another. Art. 185 of the proposed Code would change the principle and provide for a repression with imprisonment, on the ground that "only God, and in extreme cases the State, may dispose of human life" (p. 59 of report). Verily, no man but only God has the right over life and death, but when an offender commits a grievous act of aggression, such as an attack on one's life or against family honor, the killing of the aggressor is justified, because the offender has thus forfeited his right to his own life. Otherwise, we would have no basis for the justifying circumstances of self-defense, defense of relative and of stranger (Art. 11, pars. 1, 2 and 3, R.P.C.). The new Code wants to give greater protection to family solidarity and yet it would deprive the spouse of his or her right, under exceptional circumstances, to kill the very intruder who has assaulted and undermined the sacred foundation of family solidarity.

The sacred respect for human life which the proposed Code professes is not found in Art. 193 on mercy killing, which practically allows a person to cause the death of another at the latter's request through mercy or pity. Neither is human life or personality upheld under Art. 203, which allows abortion of the foetus to save the life of the mother.

The proposed Code has made the penal law so strict that it has risen to the level of a *moral* code. And yet, some of its provisions have relaxed the present rules. Thus, malversation (Art. 217, R.P.C.) includes under the concept of public funds Red Cross, Anti-Tuberculosis and Boy Scout funds, and such funds are extended to property attached, seized or deposited by public authority even if such property belongs to a private individual (Art. 222, R.P.C.). Art. 444 of the proposed Code, however, provides that money or property collected or raised by public voluntary contribution for any civic, charitable, religious, educational, political, or recreational purpose is not deemed or included as public funds or property. Why the change? Likewise, the law on treason (Art. 114, R.P.C.) requires evidence based on the testimony of at least two witnesses to the same overt act. The new Code proposes to relax the rule by inserting the phrase "or different overt acts", and the reason given is that the present rule makes it difficult for the prosecution to secure a conviction for treason difficult.

Art. 435, which prohibits any public officer from accepting the construction of any monument in his honor or the naming of any public street or building, would render many of our political leaders subject to confinement.

R e s u m e —

I have attempted to bring to your attention some meritorious provisions of the proposed Code of Crimes which could be adopted under special laws or by way of amendatory acts to the present Revised Penal Code. I have likewise invited attention to many provisions which may be unsatisfactory, if not totally objectionable. The good features may be adopted without enacting the proposed Code into statute, but its deleterious provisions can hardly be avoided without positive action to reject its enactment into law.

The enactment of Republic Act No. 386 as the New Civil Code of the Philippines has not met with the universal approbation of the Bench and the Bar. In fact, it has met with some serious criticisms. If the proposed Code of Crimes be recommended for enactment into law greater criticism will ensue, for it constitutes a drastic departure from the basic philosophy of our penal law and its new trends and objectives are hardly in consonance with the customs and traditions of the Filipino people.

Recommendations —

This appraisal of the proposed Code of Crimes would remain academic if no suggestions or recommendations are advanced. Hence, I take the liberty of submitting the following:

1. The Code Commission should now be abolished, for no person or group of persons can claim such mastery of all branches of substantive law as to constitute a *permanent* body to codify various laws, such as civil, penal, commercial, labor, taxation, and other branches of the law. Congress may always avail itself of the help and services of tried men in their respective fields. Thus, if a tax code be recommended, experts on taxation should form the commission to draft such legislation. If a labor code is advisable, another group of labor experts coming from management and labor, and other economic factors, should be considered in the composition of such committee.

2. Remedial measures should be studied to allow the State, including the offended party, to appeal from a judgment of acquittal or dismissal in a criminal case, for such appellate review in meritorious cases would constitute the most effective restraint against erroneous or arbitrary actuations of inferior courts, and such appeal would not strictly violate the constitutional provision against double jeopardy.

3. Some good provisions in the proposed Code of Crimes should be adopted under special laws or as amendments to the Revised Penal Code.

4. The new codification would not be a decisive step forward towards a more stable and satisfactory Penal Code, and accordingly Congress should *not* be persuaded to enact into law this project of the Code of Crimes as our new Penal Code.

DOUBLE JEOPARDY UNDER THE ARTICLES OF WAR

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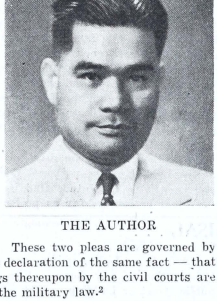

THE AUTHOR

One of the most controversial matters in the administration of military justice today is the plea of double jeopardy under Article 44 (a) of the Uniform Code of Military Justice (U.S.A.) and AW 39, PA, viz: — "No person shall, without his consent, be tried a second time for the same offense."[1]

As a general rule, in the criminal procedure the accused invokes the principle of jeopardy by means of one of the two pleas of former acquittal (*autrefois acquit*), or former conviction (*autrefois convict*), according as he has been acquitted or convicted at the former trial. These two pleas are governed by the same rules and each is but the declaration of the same fact — that a trial has been had. The rulings thereupon by the civil courts are applicable to similar cases under the military law.[2]

It is an ancient maxim of the common law and of the civil law that no man shall be "put twice in jeopardy" for the same offense. The significance of this clause is so important that it has been since incorporated not only in the constitution of the United States but also in the Constitution of the Philippines.[3]

The prohibition on double jeopardy contained in the Fifth Amendment to the Constitution of the United States has, however, provoked conflicting issues brought about by unusual circumstances arising mostly from the exigencies of World War II. The leading case on the matter is the recent case of *Wade v. Hunter*,[4] which has elicited considerable attention among jurists and legal writers.

In the *Hunter case*, petitioner, an American soldier, was charged with rape alleged to have been committed in Germany. He was placed on trial by a general court-martial. After hearing evidence and arguments of counsel, the court-martial closed to consider the case. Later that day, however, the court reopened and granted a continuance to enable the prosecution to present additional witnesses, then absent due to illness. Before the trial could be resumed, the 76th Infantry Division to which petitioner was attached moved to a distant town. The case was then withdrawn from the original court-martial and referred for trial to a court-martial convened by the Commanding General of the Third Army. The trial was not, however, concluded due to the tactical situation of the Third Army and the distance to the assistance of witnesses, in which case the trial could not be completed within a reasonable time. Accordingly, the Commanding General of the Third Army transmitted the charges to the Fifteenth Army stating that the action was necessary to carry out the policy of the United States Army in Europe to accelerate prompt trials "in the immediate vicinity of the alleged offenses." Pursuant to this transmittal, a court-martial was convened. Petitioner represented by counsel, filed a plea in bar alleging that he had been put in jeopardy by the first court-martial proceedings and could not be tried again. His plea was overruled, the case was tried, and a conviction followed. On petition for writ of habeas corpus, the Federal District Court ordered his release, holding that his plea of former jeopardy should have been sustained. The court further held that the proceedings of the second court-martial were void as

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1 Article 44 (a) Uniform Code of Military Justcie USA; AW 39, PA.
2 Winthrop's Military Law and Precedents, (2d ed., 1920), p. 259.
3 Fifth Amendment to the U.S. Constitution; Constitution of the Phil, Art. III, Sec. 1, Clause 20.
4 Wade v. Hunter, 69 S. Ct. 834 (1949).

THE NATURAL LAW THEORY AND THE PHILIPPINE SUPREME COURT

By CRISOLITO PASCUAL *

(Continued from the last issue)

2. *Application of Natural Law in the Legal Order.*

In applying the continuing protective postulates of natural law to the Rutter Case, the Supreme Court expressed its position in this way: "Laws altering existing contracts will constitute an impairment of the contract clause of the Constitution only if they are unreasonable and unjustified in the light of the circumstances occasioning their enactment." After examining the satisfactory situation and condition prevailing in the country from 1948 to 1952,[38] the Supreme Court proceeded without hesitation to declare the period provided in Republic Act No. 342 as contrary to the continuing protective postulates of justice fairness, righteousness, and equity. Said the Court:

"This period seems to us unreasonable . . . the relief accorded works injustice to creditors who are practically left at the mercy of the debtors. Their hope to effect collection become extremely remote, more so if the credits are unsecured. And the injustice is more patent when, under the law, the debtor is not even required to pay interest during the operation of the relief . . ."

"In the face of the foregoing observations, and consistent with what we believe to be as the only course dictated by justice, fairness and righteousness, we feel that the only way open to us under the present circumstances is to declare that the continued operation and enforcement of Republic Act No. 342 at the present time is unreasonable and oppressive, and should not be prolonged a minute longer, and, therefore, the same should be declared null and void and without effect. And what we say here with respect to said Act also holds true as regards Executive Order Nos. 25 and 32, perhaps with greater force and reason as to the latter, considering that said Orders contain no limitation whatsoever in point of time as regards the suspension of the enforcement and effectivity of monetary obligations."

3. *Useful Role and Function of Natural Law in the Legal Order.*

The protective postulates of natural law are ever present in all men everywhere. While it may be said different peoples may not have the same ideas about the continuing protective postulates of natural law on the ground that different peoples do not have the same level of intelligence and ethical concepts and hence the same comprehension of their contents and degree of award, the postulates of natural law are nonetheless present in all peoples at all times as the dictates of their moral nature. As such, they are authoritative and paramount to all.[39] Consequently, right reason dictates their recognition and validation in the legal order because obedience to natural law and its continuing protective postulates brings advantage while disregard brings disadvantage. Natural law, therefore, holds an exalted position in the heirarchy of norms. Failure then to heed the

38—Said the Supreme Court on this point: "We do not need to go far to appreciate this situation. We can see it and feel it as we gaze around to observe the wave of reconstruction and rehabilitation that has swept the country since liberation thanks to the aid of America and the innate progressive spirit of our people. This aid and this spirit have worked wonders in so short a time that it can now be safely stated that in the main the financial condition of our country and our people, individually and collectively, has practically returned to normal, notwithstanding occasional reverses caused by local dissidence and the sporadic disturbance of peace and order in our midst. Business, industry and agriculture have picked up and developed at such stride that we can say that we are now well on the road to recovery and progress. This is so not only as far as our observation and knowledge are capable to take note and comprehend but also because of the official pronouncements made by our Chief Executive in public addresses and in several messages he submitted to Congress on the general state of the nation."

To bear this out, the Court quoted at length from the public statements of the President which the Court deemed to be most expressive and representative of the general situation. The Court quoted from the "State of the Nation" message to the Joint Session of Congress of January 24, 1949 (45 O.G. Jan. '49) and from the address given on the occasion of the celebration of the sixth anniversary of the Independence of the Philippines, July 4, 1952 (48 O.G. 3287-3289).

39—Declaration of Human Right approval on December 10, 1948 by the United lization illustrates this point rather well.

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constituting double jeopardy since no "urgent necessity" existed for the removal of the case from the first court-martial.[5]

In interpreting the Fifth Amendment, federal courts have held that jeopardy attaches when any evidence has been heard in either a jury[6] or non-jury[7] trial. Despite this attachment of jeopardy, however, a second trial is not barred if an urgent necessity caused the stopping of the first trial before conviction or acquittal.[8] For that reason, a court considering a plea of double jeopardy must weigh the alleged necessity against the dangers that approval of such an exception to the general rule may result in loss of the fresh evidence available in a prompt prosecution, or in repeated harassment of the accused in the endeavor to assure conviction.[9] The necessity has been found to override these considerations in the following situations: (1) when the term of court ends before a decision is reached; (2) when the jury is unable to agree within a reasonable time; (3) when a biased judgment is feared; and (4) when persons essential to the proper completion of the trial are excusably absent.[10]

In the *Hunter case*, the question that arises is whether the Constitution of the United States protects a member of the armed forces against double jeopardy. It has been argued that only such statutory safeguards as Congress enacts may control the conduct of military tribunals, and that the governing provision is AW 40, USA (now Article 44-a) which makes a plea of double jeopardy available only where a finding was previously reached.[11] However, the fact that military personnel are expressly excepted from the application of a separate provision of the Fifth Amendment, implying their inclusion under its other protection, and the fact that there is no equivalent of AW 40 in legislation for the naval forces indicate the applicability of the double jeopardy clause upon courts-martial.[12] And yet the Supreme Court of the United States in the final determination of the *Hunter case* said that "the interpretation and application of the Fifth Amendment's double jeopardy provision have been considered chiefly in civil rather than military court proceedings."[13] The U.S. Supreme Court is further of the opinion that justice requires that a particular trial may be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.[14] From this opinion Mr. Justice Murphy, with whom Mr. Justice Douglas and Mr. Justice Rutledge joined, dissented. Said Mr. Justice Murphy:

> "I agree with the court below that in the military courts, as in the civil, jeopardy within the meaning of the Fifth Amendment attaches when the court begins the hearing of evidence. x x x
>
> "There is no doubt that Wade was placed in jeopardy by his first trial. The Court now holds that the decision of his commanding officer, assessing the tactical military situation, is sufficient to deprive him of his right under the Constitution to be free from being twice subjected to trial for the same offense. x x x
>
> "The harassment to the defendant from being repeatedly tried is not less because the Army is advancing. The guarantee of the Constitution against double jeopardy is not to be eroded away by a tide of plausible-appearing exceptions. The command of the Fifth Amendment does not allow temporizing with the basic rights it declares. Adaptions of military justice to the exigencies of tactical situations is the prerogative of the commander in the field, but the price of such expediency is compliance with the Constitution."[15]

Doubtless, different holdings exist due to different phrasing of the constitutional prohibition against placing a person twice in jeopardy for the same offense. Ignoring these holdings, however, great uncertainty exists as to (1) the stage of the proceedings at which jeopardy attaches; (2) the rules to determine the identity of the offenses; (3) the grade of offense for which a defendant may be tried when a new trial has been granted at his request.[16]

5 Id., 72 F. Supp 755 (D. Kansas, 1947).
6 US v. Kraut, 2 F Supp 16 (S.D.N.Y.) (1932).
7 Clawans v. Rives, 104, F. 2d 240 (App. DC 1939).
8 48 Columbia Law Rev. 299 (1948).
9 Id.
10 Id. at 300
11 Id.
12 Id.; Courts-Martial and the Constitution, 33 Marquette L. Rev. 15 (1949).
13 Wade v. Hunter, 69 S. Ct. 834, 837 (1949).
14 Id.
15 Id. at 840
16 3 The Am-Law Institute Proceedings 470 (1925)

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summons and constrain of the continuing protective postulates of natural law is a derogation or perversion of natural law and the legal order. Accordingly, positive law should conform to the postulates of natural law in order to be valid and binding. The great authority of Cicero is focused on this point. For him, natural law has definitely this useful function. "It is not allowable," posited Cicero; "to alter this law nor deviate from it, nor can it be abrogated. Nor can we be released from this law either by the Senate or by the people."[40]

Thus, any provision of positive law that is at variance with or in derogation of the postulates of natural law is not a law but an invalidation or corruption of the law. In other words, natural law can be employed as a juristic basis or criterion for testing the validity of positive law. An enactment of the legislature of a State is not therefore valid if and when it deflects from the continuing protective postulates of natural law. The view advanced by some writers that a law passed with constitutional authority or a law passed in accordance with the provisions of the Constitution remains valid even though it violates the continuing protective postulates of natural law is rather incorrect and fraught with danger.

There are at least two reasons why this is so. In the first place, no positive or human law could flagrantly violate the summons and constrain of natural and its continuing protective postulates without producing or arousing a decidedly adverse reaction from the members of the community themselves. It is unthinkable that the people would have "yielded power" to the legislators to make or pass such kind of laws. There are many provisions of Philippine positive law itself, some of which are given here, that support this ground. Article 10 of the Civil Code of the Philippines provides for the presumption that the lawmaking body itself intended right and justice to prevail whenever it acts. Article 19 of the same code provides that in the exercise of one's rights or in the performance of one's obligation every person must act with justice, honesty, and good faith and give everyone his just due. Article 1379 of the same code appeals to the principles contained in sections 58 to 67 of Rule 123 of the Rules of Court in the Philippines in the construction and interpretation of contracts, where it is provided that construction and interpretation in favor of natural rights is to be adopted. Thus, pursuing this point further with a concrete illustration, in a sale of real property to two different vendees, although a preference is expressed or created by law for the title of ownership first recorded, this positive rule must be understood to be based on natural good faith as it is inconceivable that the people would have yielded authority to their lawmakers to do away with good faith and sanction bad faith by requiring compliance only with the formality of registration.[41]

The second reason is as significant and imperative as the first one, if not more so. The members of a community may have, in a solemn compact, secured for themselves and their posterity a regime of justice, liberty, equality, and democracy. In such a situation there is no question that there is a clear and present, not a doubted and remote, appeal to natural law itself.[42] It is a solemn pronouncement or declaration of the volksgeist or diwa. Indeed, it is an articulation of the soul and spirit of the people making a direct appeal to natural law for such concepts as justice, liberty, equality, and democracy or

40—Republica, Book III, chap. xxii. Keyes translation. G. P. Putman's Sons New York.

41—See Section 50, Act No. 496, as amended. See also Government of the Philippines vs. Abuel et al., 45 O.G. 2405.

42—The Preamble of the Constitution of the Philippines provides: "We the Filipino people, imploring the aid of Divine Providence, in order to establish a government that shall embody their ideals, conserve and develop the patrimony of the nation, promote the general welfare, and secure to themselves and their posterity the blessings of independence under a regime of justice, liberty and democracy, do ordain and promulgate this constitution." It may be said that the Preamble, strictly speaking, is not part of the Constitution. But it serves, nevertheless, three very important end. Professors Tanada and Fernando in their Constitution of the Philippines, 4th Ed., Vol. I, p. 33, give the first two: 1) it indicates that the people is the source of the Constitution and form which it derives its claim to obedience, and 2) it sets forth the ends that the Constitution and the Government established by it are intended to promote. The third is that it states unequivocally that the legal ordering to effect the promotion of the avowed ends should always be under a regime of justice, liberty, equality, and democracy. Thus, the Preamble has value for purposes of construction and interpretation and legal ordering. At the least, it is co-equal with the principles enumerated in the Declaration of Principles, Article II of the Constitution.

DOUBLE JEOPARDY . . .

Some states hold that the accused is twice put in jeopardy when the jury was impaneled and sworn, and, consequently, if the jury fails to agree, even if it appears that there is no reasonable expectation that they ever can agree, the accused cannot, on the discharge of the jury be again placed on trial. However, other courts allow a second trial in such cases.[17]

On the constitutional prohibition against double jeopardy for the same offense, much diversity of decision exists in regard to the identity of offenses.

> "Different legal tests are employed in different states to determine whether the 'offense' for which the accused is being tried is the 'same offense' as that for which he has already been tried. In some cases two different tests, bringing the same results, are applied in the same state in different cases. There are all sorts of variants of the question. A simple illustration is the case where one by the same act injures or kills two or more persons. Having been acquitted or convicted of assault or murder of one of these persons, can he be tried for assault or murder of the other? This question is answered in the negative in some states and in the affirmative in others."[18]

As to the grade of offense, in some states, if a new trial is granted an accused, he cannot, on the second trial, be prosecuted for higher degree or grade of the offense than that of which he was convicted on the first trial. Thus, if an accused has been indicted for murder, convicted of manslaughter and appeals, he cannot, if a new trial is granted, be tried again for murder, but only for manslaughter. In the Federal Courts and in other states, the contrary rule prevails.[19]

Persuasive arguments abound — that the protection afforded by the Federal Constitution and many of the constitutions of the states reaffirms the old common law pleas of former acquittal and former conviction. But it is now the great weight of authority in the United States that "jeopardy attaches if it attaches at all in a given case, when a trial jury has been impaneled and sworn, although not before. x x x."[20]

Sound opinion dictates that in a plea of double jeopardy, no judgment or sentence is requisite to complete the trial.[21] This was the view of Justice Story,[22] from which the decided weight of modern authority emanated. The traditional military plea of former acquittal (autrefois acquit) is completely inadequate to safeguard the constitutional rights of a soldier or a sailor who has been exposed to successive trials, none of which resulted in judgments. In passing, it is a matter of common knowledge that due to military necessity, the greatly increased possibility of witnesses becoming unavailable, the probability of defense counsel being assigned elsewhere, and the absence of the right to bail operate against the accused in a court-martial concept of jeopardy.[23] In an inconvenient situation such as that, the dignity of the individual and his right to due process should not be subordinated to mere legal technicalities.

The much broader meaning of the phrase "twice in jeopardy," given by the courts today is a product of the practical administration of the law. The modern trend on the subject seems to imply that the doctrine of double jeopardy is "not a rule of law at all, nor can it be enforced by hard and fast rules without, in many cases, working injustices almost as great as that which the doctrine itself was designed to prevent."[24] As can be seen the doctrine is nothing more than a "declaration of an ancient and well-established policy, and that when some overruling consideration of policy intervenes the doctrine is frequently disregarded." Thus, there are cases in which a new trial is allowed although there has already been a justified discharge of the jury; cases permitting a second prosecution after there has already been a conviction or acquittal obtained through fraud; and cases allowing a trial for murder where the injured person dies after his assailant has been prosecuted for assault. These are instances where, notwithstanding the

(*Continued on page* 108)

17 Id.
18 Id.
19 Id.
20 24 Minnesota L. Rev. 522 (1940).
21 Winthrop, p. 260
22 U.S. v. Gibert, 2 Summer 19 (1834).
23 33 Marquette L. Rev. 25 (1949),
24 24 Minn. L. Rev. 522, 561 (1940).
25 Id. at 528

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public weal, are but other terms for the continuing protective postulates of natural law.

Natural law is thus not merely an ideal to which positive law ought to conform without otherwise affecting its legal validity. The everlasting and protective postulates of natural law are genuine and real basis for testing the validity of positive law. This means that it is down. This is the well-known tool of unconstitutionality. A statute can likewise be struck down as null and void when and if it is not only when positive law is unconstitutional that it can be struck against the continuing protective postulates of natural law though there be no constitutional prohibition which it transgresses or to which it is contrary. This is the tool of natural law.

4. *Conclusion.*

It is fortunate that at a time when legal positivism for all its strength is failing man the Philippine Supreme Court has, with confidence and belief and reason, utilized the natural law in the manner it did in the Rutter Case. It has demonstrated quite well that age-old concept of the natural law is capable indeed of a modern content or application. Even the cynical legal realist would find here the realization and validation of the natural law in the legal ordering. As for the Rutter Case itself, the writer takes it as indicative of the renaissance of the natural law in Philippine jurisprudence.

The case of De la Cruz vs. Sosing et al,[43] promulgated by the Supreme Court of the Philippines on November 27, 1953, came to the writer's attention too late for inclusion in the main text. But the Sosing Case is yet another indicium of the present detectable trend in the Court's thinking on natural law. In this case, the Court, with coherence, logic and reason, sacrificed legal positivism to the continuing protective postulates of natural law.

Perhaps the "pure theory of law" attack of Hans Kelsen on the natural lawdoctrine is unwarranted after all. Even in Germany today, German scholars headed by the late great legal philosopher Gustav Radbruch, have recognized the utter helplessness of German jurisprudence in resisting Hitler's demand for the unqualified abandonment of the individual to the German Reich. All because of legal positivism. Radbruch stressed the necessity of recognizing the continuing protective postulates of natural law "in the light of which the arbitrary and inhuman features of Nazi legislation would retroactively be regarded as never possessing the force of law."[44] Professor Heinz Guradze, in his cited work, stated that Radbruch's proposition is by no means of mere theoretical significance. Quoting Radbruch, Guradze said that "Jurisprudence ought to remember the age-old wisdom . . . that there is a natural law under which wrong remains even though it assumes the form of a law."[45]

At present, i.e., from 1947, at least one law school, the College of Law of the University of Notre Dame, has conducted a series of Annual Natural Law Institutes designed to provide a center where the best minds of the world — philosophers, lawyers, judges, jurists, and laymen — can re-examine the history and development of the natural law and its practical application to modern legal orders.[46] Raymond Moley, Professor of Public Law at Columbia University and widely known as one of the Editors of Newsweek Magazine, stated in a book review of the 1950 proceedings of the Natural Law Institute: "I am bold to say that we are witnessing another renaissance in thought, based, as was the former one, on a rediscovery of the past. A nation almost blinded and partially drugged by false philosophy and treacherous politics may yet find its way through the inspiration of Natural Law." How true this is in every politically organized society especially in the intellection of the great social interests, particularly the social interest with reference to the maintenance of human life, personality and dignity.[47] Only through the natural law can the uniqueness of the infinite worth of human life, personality and dignity be asserted. It needs no dialectics to show how legal positivism has

43—G. R. No. L-4875.

44—Radbruch, Vorschule der Dechtsphilosophie, 108 (1947), quoted in Heinz Curadre's The Epistemological Background of Natural Law, 27 Notre Dame, Lawyer, No. 3, 360)1952).

45—Radbruch, Die Erneurung des Rechts, 8 (1947) loc. cit.

46—Our own Carlos P. Romulo read a paper entitled The Natural Law and International Law during the 1949 proceedings of that Institute.

47—This social interest is now expressly recognized in Chapter 2 of the Preliminary Title of the Civil Code of the Philippines.

(*Continued on page* 106)

I

Jose T. Valenzuela, etc., Plaintiff-Appellant, vs. Jose I. Bakani, Defendant-Appellee G. R. No. L-4689, August 31, 1953.

CIVIL CODE; CONSIGNATION BY THE OBLIGOR OF THE THING DUE.—J sold to B eight parcels of land for the sum of ₱13,490 but reserving to himself (J) the right to repurchase them within seven years for the same consideration and to remain in the land as leasee. Later on J and B executed another agreement extending the period of repurchase to ten years and reducing the annual rental. J then transferred his rights over the land to A binding himself at the same time to obtain the cancellation of the sale in favor of B. J through his attorney wrote a letter to B offering the sum of ₱13,490 as payment of repurchase price and warned that if no answer was received in ten days B would be considered as having refused to receive said payment and to reconvey the property in which case J would institute the proper action. This was followed by another letter stating that if there is no answer, B rejected the payment offered and refused to reconvey the property to J. Whereupon J instituted an action compelling B to execute the proper deed of resale. In the complaint it is alleged that J was depositing with the Clerk of Court the sum of ₱15,372.50 to cover the amount of the repurchase price and the unpaid rentals. The lower court ruled that there was no valid consignation on the ground that B did not give previous notice of the judicial consignation in conformity with Article 1177 of the old Code. It was argued by the appellant on the other hand, that the service of the summons and a copy of the complaint upon the creditor constitute a sufficient notice. *HELD*: The latter's contention is correct. In the case of Alejandro Andres, et al. vs. Court of Appeals, et al., December 29, 1949, 47 O.G. 2876, this Court made the following applicable pronouncement: "The petitioners also question the validity and regularity of the consignation in court made by respondents of the sum of ₱5,500.00. Suffice it to say on this point that after the rejection by the petitioner of the valid tender made by the respondents, the latter filed the corresponding complaint in court accompanying the filing of the suit with the consignation of the money in court and alleging and mentioning said consignation in the complaint. This was sufficient notice to the petitioners of the consignation so that if they wanted to receive that money from the court in return for a reconveyance of the property in question, they could have done so." Again, in Duñgao, et al. v. Roque, et al., G. R. Nos. L-4140 and L-4141, decided on December 29, 1951, this Court held: "How the second notice is to be effected is not specified. The usual method is, when the consignation is followed by the filing of a suit, through service to the defendant of the summons accompanied by a copy of the complaint." The consignation being thus valid, Valenzuela was released from any further obligation regarding the repurchase price, and it consequently became the duty of the appellee to execute the necessary deed of reconveyance in favor of Valenzuela, now subrogated by Florencio H. Araullo.

Francisco M. Ramos for intervenor-appellant
Valeriano Silva for plaintiff-appellant
Ed. Gutierrez David for defendant-appellee

DECISION

PARAS, C. J.:

On May 6, 1938, Jose T. Valenzuela sold to Jose I. Bakani, for the sum of ₱13,490.00 eight parcels of land situated in the municipalities of Guagua and Lubao, province of Pampanga, and covered by original certificates of title Nos. 21839, 21840, 21848 and 21850 of the Registry of Deeds of Pampanga, Valenzuela reserving to himself the right to repurchase within seven years for the same consideration, and to remain on the land as lessee at an annual rental of ₱1,100.00 beginning May 1939. On May 22, 1943, Valenzuela and Bakani executed another agreement extending the period of repurchase to ten years from May 16, 1943, and reducing the annual rental to ₱867.00. On February 16, 1944, Valenzuela transferred his rights to the land to Florencio H. Araullo, binding himself at the same time to obtain the cancellation of the sale in favor of Bakani. On March 3, 1944, Valenzuela, thru Atty. Valeriano Silva, addressed a letter to Bakani, offering the sum of ₱13,490.00 as payment of the repurchase price, and warning that if no answer was received in ten days, Bakani would be considered as having refused to receive said payment and to reconvey the property, in which case Valenzuela would institute the proper action. This was followed by another letter, dated March 21, 1944, sent to Bakani by Valenzuela through Atty. Silva, calling attention to the previous letter and admonishing that if no answer was received from Bakani in five days, the corresponding action would be filed. In his answer dated March 24, 1944, Bakani rejected the payment offered and refused to reconvey the property to Valenzuela. Whereupon, on March 31, 1944, Valenzuela instituted the present action in the Court of First Instance of Pampanga, to compel Bakani to execute the proper deed of resale. In paragraph 7 of the complaint, it is alleged that the plaintiff was depositing with the clerk of court the sum of ₱15,372.50 to cover the amount of the repurchase price (₱13,490.00), the unpaid rentals up to March, 1944 (₱1,882.50), and the expenses in connection with the contract (₱200.00), and that the said amount was at the disposal of Bakani. Subsequently Florencio H. Araullo, who had already acquired the rights of Valenzuela, was allowed to intervene in the case. In his decision dated May 10, 1950, the trial judge held that there was no valid consignation on the part of Valenzuela, and accordingly gave the following judgment:

> "WHEREOF, as prayed for by the intervenor, the defendant is hereby ordered to execute a deed of resale in favor of the intervenor FLORENCIO H. ARAULLO over the eight parcels of land in question and now described in, and recorded under Transfer Certificates of Title Nos. 74, 75, 76 and 77 of the Registry of Deeds of Pampanga, upon payment by said intervenor to the defendant of the sum of THIRTEEN THOUSAND FOUR HUNDRED NINETY (₱13,490.00) PESOS, in actual currency; and the intervenor is ordered to pay the defendant the sum of ₱960.00 as part of the rentals due on May 16, 1943; plus the yearly rentals of ₱867.00 from May 15, 1944 until the repurchase of the properties be accomplished, with legal interests thereon from their respective dates of mtaurity (May 15 of every year) until fully paid, without pronouncement as to costs."

The plaintiff Jose T. Valenzuela and the intervenor Florencio H. Araullo have appealed. After the death of Valenzuela he was in due time substituted by the administratrix of his estate, Feliza Malicsi Vda. de Valenzuela.

As pointed out in the appealed decision, the defendant-appellee, Jose I. Bakani, contended that the amount offered and consigned in court by the plaintiff-appellant was not the price of the sale with *pacto de retro*, that the consignation was not in accordance with law, and that by virtue of the second agreement of May 22, 1943, the original contract of sale with right of repurchase was converted into an absolute deed. The first and second points were overruled by the trial judge. As to the first, it was correctly ruled that the Japanese military notes were legal tender in the Philippines during the Japanese occupation. As to the third, the agreement of May 22, 1943, expressly stipulated that "se extienda el plazo del referido retracto a diez (10) años contados desde el May 16, 1943."

The important issue that arises, as the appellants so emphasize, is whether or not the trial court erred in holding that there was no valid consignation. Its ruling was based on the premise that Valenzuela did not give previous notice of the judicial consignation in conformity with article 1177 of the old Civil Code providing that, "In order that the consignation of the thing due may release the obligator, previous notice thereof must be given to the persons interested in the performance of the obligation." Upon the other hand, it is argued for the appellants that the service of the summons and copy of the complaint upon the appellee constituted sufficient notice. The latter's contention is correct. In the case of Alejandro Andres, et al. vs. Court of Appeals, et al., December 29, 1949, 49 O. G. 2876, this Court made the following applicable pronouncement: "The petitioners also question the validity and regularity of the consignation in court made by respondents of the sum

of ₱5,500.00. Suffice it to say on this point that after the rejection by the petitioners of the valid tender made by the respondents, the latter filed the corresponding complaint in court accompanying the filing of the suit with the consignation of the money in court and alleging and mentioning said consignation in the complaint. This was sufficient notice to the petitioners of the consignation so that if they wanted to receive that money from the court in return for a reconveyance of the property in question, they could have done so." Again, in Duñgao ,et al. v. Roque, et al., G. R. Nos. L-4140 and L-4141, decided on December 29, 1951, this Court held: "How the second notice is to be effected is not specified. The usual method is, when the consignation is followed by the filing of a suit, through service to the defendant of the summons accompanied by a copy of the complaint."

The consignation being thus valid, Valenzuela was released from any further obligation regarding the repurchase price, and it consequently became the duty of the appellee to execute the necessary deed of reconveyance in favor of Valenzuela, now subrogated by Florencio H. Araullo. It is noteworthy that the amount deposited in court covered not only the repurchase price but also the rentals due up to the date of the consignation, plus the necessary expenses.

Wherefore, the appealed judgment is reversed and the appellee, Jose I. Bakani, is hereby ordered to execute, within ninety days from the finality of this decision, the proper deed of reconveyance covering the properties herein involved, in favor of Florencio H. Araullo. So ordered without pronouncement as to costs.

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

PABLO, M., disidente:

Yo opino que la decision del Juzgado de Primera Instancia debe confirmarse, y no ordenar al demandado Bakani a otorgar la escritura de reventa sin recibir nada, considerando buena y legitima la consignacion verificada por Valenzuela en 31 de marzo de 1944 al presentar la demanda.

La escritura otorgada por las partes en 6 de mayo de 1938, decia que la recompra seria en la suma de ₱13,490.00 pesos filipinos, y no en papel moneda japonesa; al tiempo de otorgarse la escritura, a nadie se le ocurria que vendrian los japoneses a ocupar las Islas; por lo tanto, el demandado Bakani tiene derecho a exigir que la recompra se haga con moneda filipina, y no con otra, de acuerdo con el articulo 1090 del Codigo Civil.

En la escritura otorgada en 22 de mayo de 1943 (Exh. B) no se estipulo sobre el precio de la recompra, ni en su cantidad, ni en su calidad. El parrafo que enmendo la primera escritura dice asi:

> "Que yo el VENDEDOR Y COMPRADOR A RETRO convenimos por el presente en que: (1.o) SE EXTIENDA EL PLAZO DEL REFERIDO RETRACTO A DIEZ (10) AÑOS CONTADOS DESDE EL MAYO 16, 1943; (2.o) SE REDUZCA EL PAGO DEL CANON A ₱867.00 ANUAL EN VEZ DE ₱1,100.00; (3.o) PARA EL CASO DE QUE DENTRO DEL REFERIDO PLAZO DICHO VENDEDOR A RETRO NO PUDIERA RETRAER AUN LAS REFERIDAS FINCAS LA EXPRESADA VENTA A RETRO ADQUIRIRA EL CARACTER DE ABSOLUTA E IRREVOCABLEMENTE CONSUMADA."

No hubo novacion en cuan a la calidad del precio de recompra; solamente hubo novacion en cuanto al plazo del retracto.

Puesto que la cantidad consignada no era la moneda convenida —pesos filipinos, sino papel moneda japonesa, — la consignacion entonces no es buena, no se ha hecho de acuerdo con la ley.

PADILLA, J., dissenting:

I dissent from the pronouncement that the Japanese military or war notes were legal tender and that the consignation of the repurchase price and stipulated annual rentals was valid, for the same reasons stated in my dissent in La Orden de P. Benedictinos vs. Philippine Trust Company, 47 Off. Gaz. 2894, 2897. That part of the judgment appealed from requiring the vendor's assignee to pay in the present currency the redemption price of the parcels of land sold under a *pacto de retro,* together with the annual rentals due and unpaid, should be affirmed.

II

JACINTO R. BOHOL, PETITIONER VS. MAURO ROSARIO, AS PROVINCIAL AUDITOR OF SAMAR, AND JOSE C. ORTEZA, AS PROVINCIAL TREASURER OF SAMAR, RESPONDENTS, G. R. NO. L-5057, JULY 31, 1953.

1. SALARY LAW; OPINION OF THE SECRETARY OF FINANCE AS TO ITS APPLICATION AND ENFORCEMENT.—The claim that the position of secretary to the provincial governor of a first class A province comes within Grades 1-8, inclusive, is at best highly controversial. But granting again, for the purpose of this case, that by a very liberal interpretation petitioner could qualify under any of these grades as well as Grades 12 to 15, the opinion of the Secretary of Finance, nevertheless, should be entitled to respect and preference in case of overlapping of grades and their definitions and of divergence of views, this official being the instrumentality charged with supervising the allocation of salaries in local governments. He is to judge the kind and degree of ability, experience, training and other circumstances needed to discharge the duties of each position.
2. ID; UNIFORMITY IN THE EMOLUMENTS OF OFFICERS.—It is a manifest policy of Congress that there be a central authority to establish uniformity in the emoluments of officers and employees of equal ranks in the numerous provinces and other local entities. Determination of the rates of compensation of such officers and employees cannot be left to the will and discretion of each provincial board or city or municipal council if there is to be "standardization of salaries," "equal distribution of funds for salary expenses among the different provincial offices," or security of "the financial solvency and stability of the provinces," as provided by Executive Order No. 167, series of 1938.
3. CONSTITUTION; LEGITIMATE EXERCISE OF THE POWER OF SUPERVISION VESTED IN THE PRESIDENT.—Classification through the President of government positions is a legislative prerogative, and the President's designation by executive order of his chief financial officer to see that the classification and the Salary Law are observed by local governments, is a legitimate exercise of the power of supervision vested in the Chief Executive by Section 10(1), Article VII, of the Constitution.

Jacinto Bohol for appellant Sol. Gen. Pompeyo Diaz and Solicitor Emilio Lumontad for respondents.

D E C I S I O N

TUAZON J.:

This was a proceeding for mandamus instituted in the Court of First Instance of Samar against Mauro Rosario, as provincial auditor, and Jose C. Orteza, as provincial treasurer, both of that province. By order of the court the petition was amended by including the Secretary of Finance as party respondent. Upon trial of the case, the application was denied, and the petitioner appealed.

Petitioner Jacinto R. Bohol is Secretary to the Provincial Governor of Samar. On July 19, 1950, his salary was raised from ₱3,120 to ₱3,600 a year "as an exceptional case under Section 256 of the Revised Administrative Code," and on July 20, the raise was approved by the provincial board by appropriate resolution. But the Secretary of Finance, acting on the annual budget of the province, disapproved the petitioner's promotion with this comment: "The standard rate of salary fixed by this Department for same position in a first class A province like Samar is ₱2,760 per annum. However, as it appears that the incumbent of this position is already receiving ₱3,120 per annum, this rate may be reduced to ₱2,760 per annum, only upon vacancy of the position." On account of this disapproval, the provincial auditor refused to pass in audit, and the provincial treasurer to pay, the petitioner's voucher on the differential between the old and the new rates of compensation corresponding to the second half of July.

Commonwealth Act No. 78, approved October 26, 1936, transferred to the Secretary of Finance the power and administrative supervision theretofore exercised by the Secretary of Interior over the assessment of real property, appropriation, and other financial affairs of provincial, municipal and city governments, and over the offices of provincial, municipal and city treasurers and provincial and city assessors. In pursuance of this Act, Executive Order No. 167, series of 1938, was promulgated designating "the Secretary of Finance as the agency of the National Government for the supervi-

sion and control of the financial affairs of the provincial, city and municipal governments," and providing, among other matters, for the submission to the said Secretary, through the Secretary of the Interior, of the local budgets which are "to contain the plantilla of personnel."

Petitioner contends that Republic Act No. 528, approved on June 16, 1950, abrogated Executive Order No. 167 and that, moreover, that executive order is unconstitutional in that thereby the Chief Executive assumes control as well as supervision of local governments, whereas by Section 10(1) of Article VII of the Constitution the President only has "general supervision" over such governments.

Republic Act No. 528 amended Section 2081 of the Revised Administrative Code so as to read as follows:

"Section. 2081. *Employment of subordinates.*— The Provincial Board shall fix the number of assistants, deputies, clerks, and other employees for the various branches of the provincial government and in accordance with the Salary Law to fix the rates of salary or wage they shall receive.

"After their number and compensation shall have been thus determined, the Provincial Governor shall, any provision of existing law to the contrary notwithstanding, appoint, upon recommendation of the chief provincial official concerned, all the subordinate officers and employees in the various branches of the provincial government whose salaries, compensation or wages are paid, wholly from provincial funds, in conformity with the provisions of the Civil Service Law, except those whose appointments are now or may hereafter be vested in the President or proper Department Head, teachers and other school employees and transient officials or employees who shall, as heretofore, be appointed by the proper chief of provincial office with the approval of the Department Head concerned x x x"

Assuming, without deciding, that this Act has superseded previous enactments and executive orders inconsistent therewith, yet, it will be noticed, the powers conferred on local entities by the statute are subject to the condition that they be exercised in accordance with the Salary Law and the Civil Service Law. Upon this assumption the question then arises, is petitioner's new salary of ₱3,600 yearly in conformity to the Salary Law? No question is raised as to the petitioner's civil service eligibility.

Executive Order No. 94, series of 1947, "reorganizing the different departments, bureaus, offices, and agencies of the Government of the Republic of the Philippines, etc." and issued by virtue of Republic Act No. 51, entitled "An act authorizing the President of the Philippines to reorganize within one year the different executive departments, bureaus, offices, agencies and other instrumentalities of the Government, including the corporations owned or controlled by it," amended Commonwealth Act No. 402, The Salary Law, and classifies into 15 grades, with salaries ranging from ₱2,400 to ₱6,000 per annum, chiefs of divisions, chiefs of sections, supervisory positions and positions of equal ranks, the rates of compensation being based on the nature of work performed, "latitude for the exercise of independent judgment," the importance and size of divisions or sections, on the technical, professional and experience of the incumbents, and the like.

Petitioner alleges in his petition that his position as secretary to the provincial governor "requires and imposes on him the exercise and performance of judgment and functions falling under Grade 1 which prescribes a salary of ₱6,000 per annum." He stated in his memorandum in the court below that he is "the administrative head or chief of the Office of the Governor," "required to perform the administrative direction and with a very wide latitude for the exercise of independent judgment." And in his brief filed in this instance the claim is made that he "supervises the personnel of such (Governor's) office and the provincial jail," "is also the head of the local and municipal divisions in Samar," and "carries out confidential measures required of him by the Governor." He says in addition that "he is a lawyer of long experience in practice."

On the other side, it is asserted that the petitioner's position comes under Grade 13 for which the compensation authorized is ₱2,760 per annum.

The classification of positions by Executive Order No. 94, series of 1947, is loose and the demarcation lines between the grades quite indefinite. But it is fairly certain that, giving petitioner the full extent and benefit of his description of his job, the Secretary of Finance has not departed from the standard set by the schedules of salaries laid down in the executive order just mentioned, in placing petitioner's position within Grade 12-15. Actually, it has been seen, he is allowed the salary provided for Grade 11, which we believe calls for a latitude of independent judgment, technical training and experience, and supervisory work and ability well above those demonstrated by the allegations.

The claim that the position of secretary to the provincial governor of a first class A province comes within 1-8, inclusive, is at best highly controversial. But granting again, for the purpose of this case, that by a very liberal interpretation petitioner could qualify under any of these grades as well as Grades 12 to 15, the opinion of the Secretary of Finance, nevertheless, should be entitled to respect and preference in case of overlapping of grades and their definitions and of divergence of views, this official being the instrumentlity charged with supervising the allocation of salaries in local governments. He is to judge the kind and degree of ability, experience, training and other circumstances needed to discharge the duties of each position. It is a manifest policy of Congress that there be a central authority to establish uniformity in the emoluments of officers and employees of equal ranks in the numerous provinces and other local entities. Determination of the rates of compensation of such officers and employees cannot be left to the will and discretion of each provincial board or city or municipal council, if there is to be "standardization of salaries," "equal distribution of funds for salary expenses among the different provincial offices," or security of "the financial solvency and stability of the provinces," as provided by Executive Order No. 167, series of 1938.

From the standpoint of the Constitution to which the petitioner would cast this case, we perceive no valid objection to the intervention by the Secretary of Finance in the application and enforcement of the Salary Law. Classification through the President of government positions is a legislative prerogative, and the President's designation by executive order of his chief financial officer to see that the classification and the Salary Law are observed by local governments, is a legitimate exercise of the power of supervision vested in the Chief Executive by Section 10 (1), Article VII, of the Constitution.

Finding no reversible error in the dismissal of the proceeding by the court below, the appealed decision is hereby affirmed, with costs against appellant.

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

III

MARCELINO BUSACAY, PLAINTIFF AND APPELLANT VS. ANTONIO F. BUENAVENTURA, AS PROVINCIAL TREASURER OF PANGASINAN & ALFREDO MURAO, DEFENDANTS AND APPELLEES, G. R. No. L-5856, SEPTEMBER 23, 1953.

PUBLIC OFFICERS; WHEN A POSITION MAY BE DEEMED ABOLISHED. — A was the toll collector of a bridge which was destroyed by flood; hence he and two other toll collectors were laid off. When the bridge was reconstructed and reopened to traffic A notified the provincial treasurer of his intention and readiness to resume his duties as toll collector but the treasurer refused to reinstate or reappoint him. *Held*: (1) The collapse of said bridge did not destroy but only suspended A's position; therefore, upon the bridge's rehabilitation and reoperation as a toll bridge A's right to the position was similarly and automatically restored. (2) To consider an office abolished there must have been an intention to do away with it wholly and permanently, as the word "abolish" denotes. (3) The position of toll collector is temporary, transitory, or precarious only in the sense that its life is co-extensive with that of the bridge as a toll bridge. For that matter, all offices created by statutes are more or less temporary, transitory or precarious in

that they are subject to the power of the legislature to abolish them.

Primicias, Abad, Mencias & Castillo for appellant. First Asst. Sol. Gen. Ruperto Kapunan Jr. & Sol. Jesus A. Avanceña for appellee.

DECISION

TUAZON, J.:

This is an appeal from a decision of the Court of First Instance of Pangasinan dismissing, for lack of merit, an application for mandamus and quo warranto with a demand for back pay and/or damages.

The cause was submitted upon the pleadings and an agreed statement of facts, the relative portions of which are condensed below.

The plaintiff was a duly appointed and qualified pre-war toll collector in the office of the provincial treasurer of Pangasinan with station at the Bued toll bridge in Sison, Pangasinan. His appointment was classified by the Commissioner of Civil Service as permanent. On October 18, 1945, after liberation, he was reappointed to that position with compensation at the rate of ₱720.00 per annum. On March 21, 1946, he resigned but on April 16 he was reappointed, and had continuously served up to November of 1947, when the bridge was destroyed by flood, by reason of which, he and two other toll collectors were laid off. Previously, from July to September 10, 1946, the bridge had been temporarily closed to traffic due to minor repairs and during that period he and his fellow toll collectors had not been paid salaries because they had not rendered any service, but upon the reopening of the bridge to traffic after the repairs, he and his companions resumed work without new appointments and continued working until the bridge was washed away by flood in 1947.

When the bridge was reconstructed and reopened to traffic about the end of November, 1950, the plaintiff notified the respondent Provincial Treasurer of his intention and readiness to resume his duties as toll collector but said respondent refused to reinstate or reappoint him. Respondent Alfredo Murao, also a civil service eligible, was appointed instead of him in February, 1951, and has been discharging the duties of the position ever since. The position now carries a salary of ₱1,440.00 a year.

The Bued toll bridge is a portion of a national road and is a national toll bridge under Act No. 3932. The salaries of toll collectors thereon are paid from toll collections. In 1948, 1949 and 1950, no appropriation was set aside for these salaries, when the bridge was being rehabilitated. On September 15, 1950, the board on toll bridges approved the Bued river bridge as a toll bridge, authorized the collection of fees thereon, and prescribed corresponding rules and regulations.

Main ground for denial of the petition by the lower court is that the position in dispute is temporary and its functions transitory and precarious. The Solicitor General in this instance simplifies the issue by confining the point of discussion to whether or not by the total destruction of the bridge in 1947 the position of toll collectors provided therefor were abolished. He opines that they were.

We agree with the Solicitor General's approach of the case but are constrained to disagree with his conclusions. To consider an office abolished there must have been an intention to do away with it wholly and permanently, as the word "abolish" denotes. Here there was never any thought, avowed or apparent, of not rebuilding the aforementioned bridge. Rather the contrary was taken for granted, so indispensable was that bridge to span vital highways in northern Luzon and to Baguio.

This being so, the collapse of said bridge did not, in our opinion, work to destroy but only to suspend the plaintiff's position, and that upon the bridge's rehabilitation and its reoperation as a toll bridge, his right to the position was similarly and automatically restored.

This position is temporary, transitory or precarious only in the sense that its life is co-extensive with that of the bridge as a toll bridge. For that matter, all offices created by statute are more or less temporary, transitory or precarious in that they are subject to the power of the legislature to abolish them. But this is not saying that the rights of the incumbents of such positions may be impaired while the offices exist, except for cause.

The fact that the destruction of the bridge in question was total and not partial as in 1945, the length of time it took to reconstruct it, and the hypothetical supposition that the new structure could have been built across another part of the river, are mere matters of detail and do not alter the proposition that the positions of toll collector were not eliminated. We believe that the cases of pre-war officers and employees whose employments were not considered forfeited notwithstanding the Japanese invasion and occupation of the Philippines and who were allowed to reoccupy them after liberation without the formality of new appointments are pertinent authority for the views here expressed. Some of such cases came up before this Court and we specially refer to Abaya v. Alvear, G. R. No. L-1793, Garces v. Bello, G. R. No. L-1363, and Tavora v. Gaviña et al., G. R. No. L-1257.

Our judgment then is that the appellant should be reinstated to the position he held before the destruction of the Bued river bridge.

The claim for back salary and/or damages may not be granted, however. Without deciding the merit of this claim, it is our opinion that the respondent Provincial Treasurer is not personally liable therefor nor is he authorized to pay it out of public funds without proper authorization by the Provincial Board, which is not a party to the suit.

The decision of the trial court is reversed in so far as it denies the petitioner's reinstatement, which is hereby decreed, and affirmed with respect to the suit for back salary and damages, without special finding as to costs.

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

IV

Lucia Javier, Petitioner vs. J. Antonio Araneta et al., Respondents, G. R. No. L-4369, August 31, 1953.

CIVIL PROCEDURE; CLAIM FOR DAMAGES AFTER CASE HAD BEEN DECIDED BY SUPREME COURT; DEATH OF DEFENDANT. —While the trial court was in the process of receiving evidence on damages incident to the issuance of the writ of preliminary injunction, J the defendant, died and because of this event the trial court entertained the view that the claim for damages should be denied because the claim should be filed against the estate of the deceased. *HELD*: The finding of the trial court that the claim for damages of respondents should be denied because of the death of the deceased and that the claim should be filed against the estate of the latter is not well taken. This result only obtains if the claim is for recovery of money, debt or interest thereon, and the defendant dies before final judgment in the Court of First Instance, (Rule 3, Section 21, Rules of Court), but not when the claim is for damages for an injury to person or property, (Rule 88, Section 1 idem). In the present proceeding, the claim for damages had arisen, not while the action was pending in the Court of First Instance, but after the case had been decided by the Supreme Court. Moreover, the claim of respondent is not merely for money or debt but for damages to said respondent.

Alberto de Joya for petitioner, Araneta and *Araneta for respondent.*

RESOLUTION

BAUTISTA ANGELO, J.:

On October 30, 1951, this Court dismissed the petition for certiorari interposed by Lucia Javier and dissolved the preliminary injunction issued as prayed for in said petition. Before this decision has become final, a petition was filed in this Court praying that the damages suffered by respondent resulting from the issuance of the writ be assessed either by the Supreme Court or by the court of origin. On November 21, 1951, acting favorably on said petition, this Court directed the trial court to make a finding of the damages allegedly suffered by respondent, and on August 13, 1953, this Court was furnished with a copy of the order entered by the trial court on August 12, 1953, wherein it denied the motion of respondent to assess the damages as directed by this Court

and ordered that the record be forwarded to the latter Court for whatever action it may deem proper to take in the premises.

It appears that while the trial court was in the process of receiving evidence on the damages incident to the issuance of the writ of preliminary injunction, Lucia Javier, the defendant, died and because of this supervening event, the trial court entertained the view that the claim for damages should be denied because that claim should be filed against the estate of the deceased. It also appears that, when respondent pressed for action on his motion for assessment of damages, counsel for the bonding party, Alto Surety Company, opposed said move on the ground that the action contemplated is too late because the order of the trial court denying respondent's motion for reconsideration and cancelling the bond filed by the surety has already become final and unappealable; and considering that a petition for damages holding the surety liable should be filed before judgment becomes final, the court sustained the opposition and denied the motion to assess damages. The incident is now before this Court for the corresponding appropriate action.

The finding of the trial court that the claim for damages of respondent should be denied because of the death of the debtor, Lucia Javier, and the claim should be filed against the estate of the latter, is not well taken. This result only obtains if the claim is for recovery of money, debt or interest thereon, and the defendant dies before final judgment in the Court of First Instance, (Rule 3, Section 21, Rules of Court), but not when the claim is for damages for an injury to person or property, (Rule 68, Section 1, *Idem*). In the present proceeding, the claim for damages had arisen, not while the action was pending in the Court of First Instance, but after the case had been decided by the Supreme Court. Moreover, the claim of respondent is not merely for money or debt but for damages to said respondent. Thus, Chief Justice Moran, commenting on Section 1, Rule 3, says: "The above section has now removed all doubts by expressly providing that the action should be discontinued upon defendant's death if it is for the recovery of money, debt, or interest thereon, while, on the other hand, in Rule 88, Section 1, it is provided that *actions to recover damages for injury to person or property*, real or personal, many be maintained against the executor or administrator of the deceased." (Moran, Comments on the Rules of Court, Vol. 1, 1952 ed., p. 109.)

On the other hand, under Rule 3, Section 17, Rules of Court, when a party dies and the claim is not thereby extinguished, the court shall order the legal representative of the deceased, or the heirs to be substituted for him within a period of 30 days, or within such time as may be granted. Here, it appears that no step has so far been taken relative to the settlement of the estate, nor an executor or administrator of the estate has been appointed. This deficiency may be obviated by making the heirs take the place of the deceased.

The claim that the move of respondent to have the damages assessed against Lucia Javier has come late because the order of the court denying the motion for reconsideration of respondent and cancelling the bond filed by the surety has already become final and unappealable, is not also well taken, it appearing that the motion of respondent pressing for action on the motion to assess damages was filed only five days after said order has been entered. It should be noted that the original order entered by the court on April 7, 1953, was not a denial of the claim but merely a statement of its view that no action thereon can be taken in view of the death of Lucia Javier because in its opinion the claim should be filed against her estate, and the order which ordered the cancellation of the bond was entered only on May 27, 1953.

It appearing that the trial court has refrained from assessing the damages which it was directed to assess in the resolution of this Court issued on November 21, 1951, for reasons which, in the opinion of the court, are not well founded, it is the sense of this Court that the record should be remanded to the trial court for it to act as directed in said resolution.

Paras, Bengzon, Tuazon, Reyes, Padilla, Montemayor, Jugo, and *Labrador,* concur. *Pablo, J.* took no part.

V

TEODULO T. ORIAS, ET AL., VS. MAMERTO S. RIBO ET. AL., G.R. No. L-4945, October 28, 1953.

ADMINISTRATIVE CODE; TEMPORARY APPOINTMENT WITHOUT EXAMINATION AND CERTIFICATION BY THE CIVIL SERVICE.—Appointments under Sec. 682 of the Revised Administrative Code, as amended by Com. Acts Nos. 177 and 281 are temporary, when the public interests so require and only upon the prior authorization of the Commissioner of Civil Service, not to exceed three months and in no case shall extend beyond thirty days from receipt by the chief of the bureau or office of the Commissioner's certification of eligibles.

Id., Id. — The fact that the petitioners who were appointed under Sec. 682 of the Revised Administrative Code as amended by Com. Acts Nos. 177 and 281 held the positions for more than three months does not make them civil service eligibles.

Id., Id. — The fact that the acting Commissioner of Civil Service authorized their appointments "under section 682 of the Revised Administrative Code to continue only until replaced by an eligible" does not make them eligibles.

Id., Id. — The holding of a position by a temporary appointee until replaced by an eligible in disregard of the time limitation of three months is unauthorized and illegal.

Id., Id. — The temporary appointment of other non-eligibles to replace those whose term have expired is not prohibited.

Prisco M. Bitos for respondents-appellants and Gonzales and Acasio for respondents-appellees, Provincial Guards. Filemon Saavedra for petitioners-appellants.

DECISION

PADILLA, J.:

This is a petition for a writ of *quo warranto* to test the legality of the appointments of Isidro Magallanes as deputy provincial warden, Pedro Flores as corporal of the provincial guards, and Crisanto Cab, Dalmacio Cortel, Rafael Galleon, Bienvenido Gonzales, Filomeno Adobas, Francisco Tavera, Jacinto Barro, Constancio Acasio, Tereso Caindoy, Narciso Ravago and Arcadio Maglines, as provincial guards of Leyte, with station at Maasin; and of *mandamus* to compel the respondent Mamerto S. Ribo in his capacity as provincial governor to reinstate the petitioners in the positions held by his co-respondents named above, and him (Ribo) and Melecio Palma, the latter in his capacity as provincial treasurer of Leyte, to pay the unpaid salaries allegedly due the petitioners from 1 November 1950 up to the final disposition of this case, and Francisco P. Lopez, in his capacity as clerk of the Court of First Instance of Leyte, to turn over to the petitioners all the prisoners in the provincial jail.

Simultaneously on 12 April 1951 the parties entered into the following stipulations of facts, the first reading as follows—

The petitioners and the respondents Provincial Governor Mamerto S. Ribo and Provincial Treasurer Melecio Palma assisted by their respective counsels have come to the following:

AGREED STATEMENTS OF FACTS

1. That residences of petitioners and respondents are admitted to be that of Leyte as well as of their respective capacities;

2. That the respondents admit the appointment and commissions of the petitioners per Exhibits A, A-1 to A-14. In each and every appointment of said petitions appear the following authorization by the Acting Commissioner of Civil Service:

"AUTHORIZED under Sec. 682 of the Revised Administrative Code to continue only until replaced by an eligible, but not beyond thirty (30) days from the date of receipt of the certification of eligibles, provided, there is no qualified employee from the ranks who may be promoted to the positions involved.

(Sgd.) Acting Commissioner
of Civil Service"

3. That the respondent Governor Ribo addressed a communication to petitioners informing the latter that their services were ordered terminated as of the last working hours of October 31, 1950;

4. That the petitioners are all married and have their children except Felipe Enelo, Vedasto Cabales and Teotimo Mullet who are still single;

5. That the petitioners have not received their salaries cor-

responding to the period from October 16 to October 31, 1950 except on January 26, 1951, already;

6. That until now said petitioners have not been given their salaries corresponding to the period from November 1, 1950 up to the present;

7. That the petitioners despite the termination order issued by the Provincial Governor remained in their posts and occupied still the Provincial Jail proper in the court house of the Court of First Instance, Maasin, Leyte, until January 8, 1951, pursuant to their contention that their case is covered by Rep. Act No. 557 as per telegram dated November 1, 1950 by Orais addressed to Governor Ribo as Exhibit H. That respondents Isidro Magallanes, Narciso Ravago, Bienvenido Gonzales, Constancio Acasio, Francisco Tavera, Dalmacio Cortel, Tereso Caindoy, Pedro Flores, Arcadio Maglines, Filomeno Adobas, Rafael Galeon, Crisanto Cab, Jacinto Barro, have been holding their offices in the upper story of the said court house, Court of First Instance, Maasin, Leyte, from November 1, 1950, to January 8, 1951;

8. Said respondents admit the following documents:

(a) Telegram by the Hon. Secretary of Justice to Provincial Fiscal Lardizabal dated November 14, 1950, Exhibit C;

(b) The communication addressed by Governor Mamerto S. Ribo to the Provincial Fiscal of Leyte, dated November 2, 1950, Exhibit D;

(c) Respondents also admit the communication addressed by the Provincial Fiscal Jose O. Lardizabal to the Provincial Governor dated November 13, 1950, marked Exhibit E;

(c-1) Both counsels in this stipulation of facts agreed that Teodulo Orais was appointed on September 1, 1949 instead of September 1, 1950 in paragraph 1 of Exhibit E;

(d) Communication addressed by Provincial Fiscal Lardizabal to petitioners Teodulo Orais dated November 3, 1950, as Exhibit I;

(e) The communication addressed by Acting Provincial Warden Isidro P. Magallanes to petitioners herein dated December 7, 1950, Exhibit J;

(f) The telegram addressed by Fiscal Veloso to petitioner Teodulo Orais dated November 29, 1950 as Exhibit K;

(g) The telegram addressed by the Auditor General to the Provincial Auditor, Tacloban, Leyte, dated November 1, 1950, Exhibit F.

9. That said respondents admit the genuineness and due execution but not the legality and conclusion of the following: Letter by the Commissioner of Civil Service Jose Gil addressed to Speaker Domingo Veloso dated February 15, 1951, Exhibit B, and the additional papers: Honorable Discharge of Alfredo Lucin, Exhibit B-1; Honorable Discharge of Felipe Enelo, Exhibit B-2; Honorable Discharge of Manuel Kangleon, Exhibit B-3; and Honorable Discharge of Luis Marte, Exhibit B-4.

WHEREFORE, the parties to this Honorable Court, most respectfully submit the foregoing stipulation of facts with the reservation to submit such additional evidence as each party deems necessary.

Maasin, Leyte, April 12, 1951.

The second reads thus—

COME now the parties hereto duly assisted by their respective counsels and to this Honorable Court respectfully submit stipulation of facts, as follows:

1. That the parties, petitioners and respondents, are residents of the Province of Leyte within the jurisdiction of this Court;

2. That the positions of provincial guard stationed in Maasin Provincial Jail, subject matter of this petition, were duly created by law;

3. That the petitioners were duly appointed members of the Provincial Guard Corps stationed at Maasin, Leyte, on the dates indicated after their respective names, and they duly qualified and assumed office, discharged their duties as such provincial guards on the dates hereinbelow indicated, to wit:

Name of Petitioner	Date of Appointment	Date Assumed	Position
1. Teodulo T. Orais	Sept. 1, 1949	Sept. 2, 1949	Sgt., P. G.
2. Eulalio Bernades	Sept. 1, 1949	Sept. 2, 1949	P. G.
3. Dominador Cordoves	Sept. 1, 1949	Sept. 2, 1949	P. G.
4. Domingo Saligo	Sept. 1, 1949	Sept. 2, 1949	P. G.
5. Teotimo Mullet	Sept. 1, 1949	Sept. 2, 1949	P. G.
6. Ramon Kadavere	Sept. 1, 1949	Sept. 2, 1949	P. G.
7. David Lim			
8. Nicomedes Conejos	Sept. 1, 1949	Sept. 2, 1949	P. G.
9. Vedasto Cabales	Sept. 1, 1949	Sept. 2, 1949	P. G.
10. Meliton de Garcia	Sept. 1, 1949	Sept. 2, 1949	P. G.
11. Margarito Basuga	Sept. 1, 1949	Sept. 2, 1949	P. G.
12. Felipe Enelo	Sept. 1, 1949	Sept. 2, 1949	P. G.
13. Luis Marte	Sept. 1, 1949	Sept. 2, 1949	P. G.
14. Alfredo Lucin	Sept. 1, 1949	Sept. 2, 1949	Actg. Cpl.
15. Manuel Kangleon	Sept. 1, 1949	Sept. 2, 1949	P. G.

as shown by Exhibits A, A-1 to A-14;

4. That petitioners Manuel Kangleon, Alfredo Lucin, Felipe Enelo and Luis Marte are veterans pursuant to Republic Act No. 65, as amended by Republic Act No. 154, but are not civil service eligibles (See Communication of Commissioner of Civil Service to Speaker Protempore Veloso, dated February 15, 1951, marked Exhibit B and additional papers as Exhibits B-1, B-2, B-3, and B-4); and the rest of the petitioners are not veterans and have not qualified in any civil service examination for the classified civil service.

5. That from the respective dates of petitioners' assumption of office and the termination of their services, as hereinbelow indicated, to wit:

Name of Petitioner	Assumption	Termination
1. Teodulo T. Orais	Sept. 2, 1949	Oct. 31, 1950
2. Eulalio Bernades	Sept. 2, 1949	Oct. 31, 1950
3. Dominador Cordoves	Sept. 2, 1949	Oct. 31, 1950
4. Domingo Saligo	Sept. 2, 1949	Oct. 31, 1950
5. Timoteo Muule	Sept. 2, 1949	Oct. 31, 1950
6. Ramon Kadavero	Sept. 2, 1949	Oct. 31, 1950
7. David Lim	Sept. 2, 1949	Oct. 31, 1950
8. Nicomedes Conejos	Sept. 2, 1949	Oct. 31, 1950
9. Vedasto Cabales	Sept. 2, 1949	Oct. 31, 1950
10. Meliton de Garcia	Sept. 2, 1949	Oct. 31, 1950
11. Margarito Basuga	Sept. 2, 1949	Oct. 31, 1950
12. Felipe Enelo	Sept. 2, 1949	Oct. 31, 1950
13. Luis Marte	Sept. 2, 1949	Oct. 31, 1950
14. Alfredo Lucin	Sept. 2, 1949	Oct. 31, 1950
15. Manuel Kangleon	Sept. 2, 1949	Oct. 31, 1950

the said petitioners have continuously performed the duties of their office regularly and without interruption;

6. That the respondent Provincial Governor, Hon. Mamerto S. Ribo, ordered the services of each and everyone of the petitioners terminated effective as of October 31, 1950; and appointed in their stead the respondent provincial guards who qualified and assumed their respective positions and discharged the duties as such provincial guards on the dates opposite their names up to present time as indicated below, to wit:

Respondents	Date of Appointments	Assumed Office
1. Isidro Magallanes	Oct. 31, 1950	Nov. 1, 1950
2. Pedro Flores	Oct. 31, 1950	Nov. 1, 1950
3. Francisco Tavera	Oct. 31, 1950	Nov. 1, 1950
4. Narciso Ravago	Oct. 31, 1950	Nov. 1, 1950
5. Crisanto Cab	Oct. 31, 1950	Nov. 1, 1950
6. Dalmacio Cortel	Oct. 31, 1950	Nov. 1, 1950
7. Rafael Galleon	Oct. 31, 1950	Nov. 1, 1950
8. Bienvenido Gonzales	Oct. 31, 1950	Nov. 1, 1950
9. Filomeno Adobas	Oct. 31, 1950	Nov. 1, 1950
10. Jacinto Barro	Oct. 31, 1950	Nov. 1, 1950
11. Constancio Acasio	Oct. 31, 1950	Nov. 1, 1950
12. Tereso Kaindoy	Oct. 31, 1950	Nov. 1, 1950
13. Arcadio Maglines	Oct. 31, 1950	Nov. 1, 1950

as shown by Exhibits 1, 2, 2(a), 3, 4, 4(a), 5, 6, 6(a), 7, 7(a), 8, 8(a), 9, 9(a), 10, 10(a), 11, 11(a), 12, 12(a), 13, and 13(a);

7. That the petitioners declined or refused to vacate their respective positions as provincial guards at Maasin, Leyte, in favor of respondent provincial guards, notwithstanding the order of respondent Provincial Governor, Hon. Mamerto S. Ribo, terminating their services effective as of October 31, 1950, and continued to hold their respective positions until January 8, 1951, when they turned over their quarters and jail facilities to the respondent provincial guards;

8. That respondent Isidro Magallanes, a civil service eligible, replaced petitioner Teodulo T. Orais, a non-eligible; respondent Pedro Flores, a civil service eligible, replaced petitioner David Lim, a non-eligible; respondent Francisco Tavera, a civil service eligible, replaced petitioner Domingo Saligo, a non-eligible; respondent Narciso Ravago, a civil service eligible, replaced petitioner Eulalio Bernades, a non-eligible; respondent Crisanto Cab, a non-eligible, replaced petitioner Nicomedes Conejos, a non-eligible; respondent Dalmacio Cortel, a non-eligible, replaced petitioner Ramon Kadavero, a non-eligible; respondent Rafael Galleon, a non-eligible, replaced petitioner Vedasto Cabales, a non-eligible; respondent Bienvenido Gonzales, a non-eligible, replaced petitioner Felipe Enelo, a non-eligible; respondent Filomeno Adobas, a

non-eligible, replaced petitioner Meliton de Gracia, a non-eligible; respondent Jacinto Barro, a non-eligible, replaced petitioner Margarito Basuga, a non-eligible; respondent Constancio Acasio, a non-eligible, replaced petitioner Luis Marte, a non-eligible; respondent Tereso Kaindoy, a non-eligible, replaced petitioner Dominador Cordoves, a non-eligible; and respondent Arcadio Maglines, a non-eligible, replaced petitioner Teotimo Mullet, a non-eligible, as shown by Exhibits 1 to 13;

9. That since the aforesaid petitioners have been duly appointed and qualified and assumed the performance of their respective offices up to the time their services were ordered terminated effective as of October 31, 1950, they did not resign nor have they been removed either for misconduct, incompetency, disloyalty to the Philippine Government, neither have they ever committed any irregularity in the performance of their duties nor have they violated any law or duty or committed any act that may cause abandonment of their duties nor have they been investigated for cause.

10. That until the present, the respondents, Governor, Treasurer and Guards, have refused and continue to refuse the petitioners their respective positions above mentioned and they have not been paid their salaries from the time of the termination of their services or removal from their offices until the present;

11. That the respondent provincial guards were paid their salaries as such provincial guards, the first salary payment having been made on December 26, 1950, after their respective appointments have been duly authorized by the Commissioner of Civil Service and approved by the Secretary of the Interior;

12. Respondents and petitioners admit the authenticity and due execution of Exhibits A, A-1 to A-14, B, B-1 to B-4, C, D, E, F, G, H, I, J, K, L, L-1, L-2, L-3 of petitioners and of Exhibits 1, 1(a), 1(b), 2, 2(a), 3, 4, 4(a), 4(b), 4(c), 4(d), 4(e), 4(f), 4(g), 5, 6, 6(a), 7, 7(a), 8, 8(a), 9, 9(a), 10, 10(a), 11, 11(a), 12, 12(a), 13, 13(a), 14, 16, 16 (2 pages), 17 (2 pages), 17(a), 17(b), 17(c), 17(d), 17(e), and 17(f) for respondents, respectively, without necessarily admitting their validity, legality nor the conclusions therein contained.

WHEREFORE, the parties to this Honorable Court most respectfully submit the foregoing stipulation of facts for approval with the reservation to sumbit such additional evidence as each party may deem necessary.

Maasin, Leyte, April 12, 1951.

Upon the above quoted stipulations of facts, the Court of First Instance of Leyte rendered judgment, the dispositive part of which is —

(a) Declarado a los recurrentes Teodulo Orais, Eulalio Bernades, Dominador Cadavero, David Lim, Nicomedes Conejos, Vedasto Cabales, Meliton de Gracia, y Margarito Basuga sin derecho a los cargos de sargento de la guardia provincial y guardias provinciales ocupados por los recurridos Isidro Magallanes, Pedro Flores, Francisco Tavera, Narciso Ravago, Crisanto Cab, Dalmacio Cortel, Rafael Galleon, Filomeno Adobas, Jacinto Barro. Tereso Caindoy y Arcadio Maglines, y sobreseyendo su accion.

(b) Declarando a los recurrentes Felipe Enelo y Luis Marte con derecho de continuar en sus cargos como guardias provinciales y que los nombramientos extendidos a favor de los recurridos Bienvenido Gonzales y Constancio Acasio son contrarios a la lay, y ordenando a estos dos ultimos que entreguen sus puestos a los referidos recurrentes Felipe Enelo y Luis Marte.

(c) Ordenando al tesorero provincial Sr. Melecio Palma, o a su sucesor que pague los sueldos de los recurrentes Felipe Enelo y Luis Marte desde el primero de Noviembre de 1950 y mientras dichos recurrentes continuen desempeñando sus cargos legalmente.

(d) Sobreseyendo la accion de los recurrentes Manuel Kangleon y Alfredo Lucin.

(e) Absolviendo libremente de la demanda a los recurridos Mamerto S. Ribo y Francisco P. Lopez; y

(f) Condenando a los recurrentes, excepcion de Felipe Enelo y Luis Marte, a pagar las costas del juicio.

From this judgment the petitioners, with the exception of Felipe Enelo and Luis Marte, appealed. Respondents Bienvenido Gonzales and Constancio Acasion appealed from the decision in so far as the trial court found them not entitled to the positions claimed by them.

The respondents Isidro Magallanes, Pedro Flores, Francisco Tavera and Narciso Ravago, all civil service eligibles, replaced the petitioners Teodulo T. Orais, David Lim, Domingo Saligo and Eulalio Bernades, respectively, who are not civil service eligibles. The rest of the respondents, all not civil service eligibles, replaced the rest of the petitioners, except Manuel Kangleon and Alfredo Lucin, who are also not civil service eligibles. Respondents Bienvenido Gonzales and Constancio Acasio, not civil service eligibles, replaced Felipe Enelo and Luis Marte who though not civil service eligibles are veterans.

Petitioners invoke in support of their claim section 682 of the Revised Administrative Code, as amended by Com. Acts Nos. 177 and 281. Said section provides:

> Temporary appointment without examination and certification by the Commissioner of Civil Service or his local representative shall not be made to a competitive position in any case, except when the public interests so require, and then only upon the prior authorization of the Commissioner of Civil Service; and any temporary appointment so authorized shall continue only for such period not exceeding three months as may be necessary to make appointment through certification of eligibles, and in no case shall extend beyond thirty days from receipt by the chief of the bureau or office of the Commissioner's certification of eligibles; x x x.

Appointments made under the section are temporary, when the public interests so require and only upon the prior authorization of the Commissioner of Civil Service, not to exceed three months and in no case shall extend beyond thirty days from receipt by the chief of the bureau or office of the Commissioner's certification of eligibles. The fact that the petitioners held the positions for more than three months does not make them civil service eligibles. Also the fact that the acting Commissioner of Civil Service authorized their appointments "under section 682 of the Revised Administrative Code to continue only until replaced by an eligible" does not make them eligibles. The holding of a position by a temporary appointee until replaced by an eligible in disregard of the time limitation of three months is unauthorized and illegal. The temporary appointment of other non-eligibles to replace those whose term have expired is not prohibited. Hence the replacement of Teodulo T. Orais, David Lim, Domingo Saligo and Eulalio Bernades, who are non-eligibles, by Isidro Magallanes, Pedro Flores, Francisco Tavera and Narciso Ravago, who are eligibles, is in accordance with law. The replacement of non-eligibles by non-eligibles is lawful under and pursuant to section 682 of the Revised Administrative Code. The replacement of Felipe Enelo and Luis Marte, non-eligibles but veterans, by Bienvenido Gonzales and Constancio Acasio, who are non-eligibles, is unlawful The former are preferred under Rep. Act No. 65, as amended by Rep. Act No. 154, they have been appointed within the term provided for in said Republic Acts. If the preference of a veteran is to be confined to appointment and promotion only and does not include the right to continue to hold the position to which he was appointed until an eligible is certified by the Commissioner of Civil Service, then he would be in no better situation than a non-eligible who is not a veteran. The appointment of a veteran, however, is subject to cancellation or his removal from office or employment must be made by competent authority when the Commissioner of Civil certifies that there is an eligible.

There is no averment in the petition that the positions held by Manuel Kangleon and Alfredo Lucin were usurped or that they were replaced by others in their positions as provincial guards. Hence the petition in so far as it concerns them must be dismissed.

Republic Act No. 557 is also invoked by the appellants Bienvenido Gonzales and Constancio Acasio. The act guarantees the tenure of office of provincial guards and members of city and municipal police who are eligibles. Non-eligibles like the two appellants do not come under the protection of the act invoked by them.

The judgment appealed from is affirmed, without costs.

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

VI

The Leyte-Samar Sales Co. and Raymond Tomassi, versus Sulpicio V. Cea, in his capacity as Judge of the Court of First Instance of Leyte; and Atty. Olegario Lastrilla, G. R. No. L-5963, May 20, 1953.

CIVIL PROCEDURE; EXECUTION; WHERE PROPERTY SOLD AT PUBLIC AUCTION IS CLAIMED BY THIRD PERSON.—In a suit for damages by S Co. and RT against L Co., AH FB and JR, judgment against defendants, jointly and severally, for the amount of ₱31,589.14 was rendered. On June 9, 1951 the

sheriff sold at auction to RD and PA "All the rights, interests, titles and participations" of the defendant in certain properties. But on June 4, 1951 OL filed in the case a motion in which he claimed to be the owner by purchase on September 29, 1949, of all the "shares and interests" of FB in L Co., and requested "under the law of preference of credits" that the sheriff be required to retain in his possession so much of the proceeds of the auction sale as may be necessary "to pay his right." The court granted OL's motion, which was later modified to the effect that it merely declared that OL was entitled to 17% of the properties sold. *HELD*: The judge's action on OL's motion should be declared as in excess of jurisdiction, considering specially that RD and PA, and the defendants themselves, had undoubtedly *the right to be heard — but were not notified*, and it was necessary to hear them on the merits of OL's motion because RD and PA might be unwilling to recognize the validity of OL's purchase, or, if valid, they may want him not to forsake the partnership that might have some obligations in connection with the partnership properties. And what is more important, if the motion is granted, when the time for redemption comes, RD and PA will receive from redemptioners seventeen per cent (17%) *less than the amount* they had paid for the same properties. AH and JR, eyeing OL's financial assets, might also oppose the substitution by OL of FB, the judgment against them being *joint and several*. They might entertain misgivings about FB's slipping out of their common predicament thru the disposal of his shares. Lastly, all the defendants would have reasonable motives to object to the delivery of 17% of the proceeds to OL, because it is so much money deducted, and for which the plaintiffs *might ask another levy* on their other holdings or resources on the assumption that there was no fraudulent collusion among them.

Assuming that OL's shares have been actually — but unlawfully — sold by the sheriff to RD and PA the remedy can be found in Sec. 15, Rule 39.

Filemon Montejo and Ramon T. Jimenez for petitioners.
Olegario Lastrilla in his own behalf.

DECISION

Bengzon, J.

Labeled "Certiorari and Prohibition with Preliminary Injunction" this petition actually prays for the additional writ of mandamus to compel the respondent judge to give due course to petitioners' appeal from his order taxing costs. However, inasmuch as according to the answer, petitioners thru their attorney withdrew their cash appeal bond of ₱60.00 after the record on appeal had been rejected, the matter of mandamus may summarily be dropped without further comment.

From the pleadings it appears that,

In Civil Case *No. 193* of the Court of First Instance of Leyte, which is a suit for damages by the Leyte Samar Sales Co. (hereinafter called LESSCO) and Raymond Tomassi against the Far Eastern Lumber & Commercial Co. (unregistered commercial partnership hereinafter called FELCO), Arnold Hall, Fred Brown and Jean Roxas, judgment against defendants jointly and severally for the amount of ₱31,589.14 plus costs was rendered on *October 29, 1948*. The Court of Appeals confirmed the award in November, 1950, minus ₱2,000.00 representing attorneys' fees mistakenly included. The decision having become final, the sheriff sold at auction on *June 9, 1951* to Robert Dorfe and Pepito Asturias "all the rights, interests, titles and participation" of the defendants in certain buildings and properties described in the certificate, for a total price of eight thousand and one hundred pesos. *But on June 4, 1951* Olegario Lastrilla filed in the case a motion, wherein he claimed to be the owner by purchase on September 29, 1949, of all the "shares and interests" of defendant Fred Brown in the FELCO, and requested "*under the law of preference of credits*" that the sheriff be required to retain in his possession so much of the proceeds of the auction sale as may be necessary "to pay his right". Over the plaintiffs' objection the judge in his order of June 13, 1951, granted Lastrilla's motion by requiring the sheriff to retain 17% of the money "for delivery to the assignee, administrator or receiver" of the FELCO. And on motion of Lastrilla, the court on August 14, 1951, modified its orders of delivery and merely declared that Lastrilla was entitled to 17% of the properties sold, saying in part

"x x x el Juzgado ha encontrado *que no se* ha respetado los derechos del Sr. Lastrilla en lo que se refiere a su adquisicion de las acciones de C. Arnold Hall (Fred Brown) en la Far Eastern Lumber & Commercial Co. porque las mismas han sido incluidas en la subasta.

"Es verdad que las acciones adquiridas por el Sr. Lastrilla representan el 17% del capital de la sociedad 'Far Eastern Lumber & Commercial Co., Inc., et al' pero esto no quiere decir que su valor no esta sujeto a las fluctuaciones del negocio donde las invertio.

"Se vendieron propiedades de la corporacion 'Far Eastern Lumber & Commercial Co. Inc.,' y de la venta solamente se obtuvo la cantidad de ₱8,100.00.

"EN SU VIRTUD, se declara que el 17% de las propiedades vendidas en publica subasta pertenece al Sr. O. Lastrilla y este tiene derecho a dicha porcion pero con la obligacion de pagar el 17% de los gastos por la conservacion de dichas propiedades por parte del Sheriff; x x x." (Annex K)

It is from this declaration and the subsequent orders to enforce it (1) that the petitioners seek relief by certiorari, their position being that such orders were null and void for lack of jurisdiction. At their request a writ of preliminary injunction was issued here.

The record is not very clear, but there are indications and we shall assume for the moment, that Fred Brown (like Arnold Hall and Jean Roxas) was a partner of the FELCO, was defendant in Civil Case No. 193 *as such partner*, and that the properties sold at auction actually belonging to the FELCO partnership and the partners. We shall also assume that the sale made to Lastrilla on September 29, 1949, of all the shares of Fred Brown in the FELCO was valid. (Remember that judgment in this case was entered in the court of first instance a year before.)

The result then, is that on June 9, 1951 when the sale was effected of the properties of FELCO to Roberto Dorfe and Pepito Asturias, Lastrilla was already a partner of FELCO.

Now, does Lastrilla have any proper claim to the proceeds of the sale? If he was a creditor of the FELCO, perhaps or maybe. But he was not. The partner of a partnership is not a creditor of such partnership for the amount of his shares. That is too elementary to need elaboration.

Lastrilla's theory, and the lower court's, seems to be: inasmuch as Lastrilla had acquired the shares of Brown in September 1949, i.e., before the auction sale, and he was not a party to the litigation, such shares could not have been transferred to Dorfe and Asturias.

Granting, *arguendo* that the auction sale did not include the interest or portion of the F9LCO properties corresponding to the shares of Lastrilla in the same partnership (17%), the resulting situation would be — at most — that the purchasers Dorfe and Asturias will have to recognize dominion of Lastrilla over 17% of the properties awarded to them.[2] So Lastrilla acquired no right to demand any part of the money paid by Dorfe and Asturias to the sheriff for the benefit of LESSCO and Tomassi, the plaintiffs in that case, for the reason that, as he says, his shares (acquired from Brown) could not have been and were not auctioned off to Dorfe and Asturias.

Supposing however that Lastrilla's shares have been actually (but unlawfully) sold by the sheriff (at the instance of plaintiffs) to Dorfe and Asturias, what is his remedy? Section 15, Rule 39 furnishes the answer.

Precisely, respondents argue, Lastrilla vindicated his claim by proper action, i.e., motion in the case. We ruled once that "action" in this section means action as defined in section 1, Rule 2.[3] Anyway his remedy is to claim "the property", not the proceeds of the sale, which the sheriff is directed by section 14, Rule 39 to deliver unto the judgment creditors.

In other words, the owner of property wrongfully sold may not voluntarily come to court, and insist, "I approve the sale, therefore give me the proceeds because I am the owner". The reason is that the sale was made for the judgment creditor (who paid for the fees and notices), and not for anybody else.

(1) Requiring sheriff to turn over 17% of the proceeds to Lastrilla.
(2) This is a feature to be discussed between the three of them at the proper time — and this statement does not attempt to settle their respective rights.
(3) Cf. Manila Herald Publishing Co. v. Judge Ramos, L-4268, January 18, 1951, Moran, Comments, 1952 Ed. Vol. 2, p. 46.

On this score the respondent judge's action on Lastrilla's motion should be declared as in excess of jurisdiction, which even amounted to want of jurisdiction, considering specially that Dorfe and Asturias, and the defendants themselves, had undoubtedly *the right to be heard — but they were not notified.*[4]

Why was it necessary to hear them on the merits of Lastrilla's motion?

Because Dorfe and Asturias might be unwilling to recognize the validity of Lastrilla's purchase, or, if valid, they may want him not to forsake the partnership that might have some obligations in connection with the partnership properties. And what is more important, if the motion is granted, when the time for redemption comes, Dorfe and Asturias will receive from redemptioners seventeen per cent (17%) *less than the amount* they had paid for the same properties.

The defendants Arnold Hall and Jean Roxas, eyeing Lastrilla's financial assets, might also oppose the substitution by Lastrilla of Fred Brown, the judgment against them being *joint and several.* They might entertain misgivings about Brown's slipping out of their common predicament thru the disposal of his shares.

Lastly, all the defendants would have reasonable motives to object to the delivery of 17% of the proceeds to Lastrilla, because it is so much money deducted, and for which the plaintiffs *might ask another levy* on their other holdings or resources. Supposing of course, there was no fraudulent collusion among them.

Now, these varied interests of necessity make Dorfe, Asturias and the defendants *indispensable parties* to the motion of Lastrilla — granting it was a step allowable under our regulations on execution. Yet these parties were not notified, and obviously took no part in the proceedings on the motion.

"A valid judgment cannot be rendered where there is a want of necessary parties, and a court cannot properly adjudicate matters involved in a suit when necessary and indispensable parties to the proceedings are not before it." (49 C. J. S. 67.)

"Indispensable parties are those without whom the action cannot be finally determined. In a case for recovery of real property, the defendant alleged in his answer that he was occupying the property as a tenant of a third person. This third person is an indispensable party, for, without him, any judgment which the plaintiff might obtain against the tenant *would have no effectiveness,* for it would not be binding upon, and cannot be executed against, the defendant's landlord, against whom the plaintiff has to file another action if he desires to recover the property effectively. In an action for partition of property, each co-owner is an indispensable party, for without him *no valid judgment for partition* may be rendered." (Moran, Comments, 1952 9d. Vol. I, p. 56.) (Underscoring supplied.)

Wherefore, the orders of the court recognizing Lastrilla's right and ordering payment to him of a part of the proceeds were patently erroneous, because they were promulgated in excess or outside of its jurisdiction. For this reason the respondents' argument resting on plaintiffs' failure to appeal from the orders on time, although ordinarily decisive, carries no persuasive force in this instance.

For as the former Chief Justice Moran has summarized in his Comments, 1952 9d. Vol. II, p. 168 —

"x x x And in those instances wherein the lower court has acted without jurisdiction over the subject-matter, or where the order or judgment complained of is a patent nullity, courts have gone even as far as to disregard completely the question of petitioner's fault, the reason being, undoubtedly, that acts performed with absolute want of jurisdiction over the subject-matter are void *ab initio* and cannot be validated by consent, express or implied, of the parties. Thus, the Supreme Court granted a petition for certiorari and set aside an order reopening a cadastral case five years after the judgment rendered therein had become final. In another case, the Court set aside an order amending a judgment six years after such judgment acquired a definitive character. And still in another case, an order granting a review of a decree of registration issued more than a year ago had been declared null and void. In all these cases the existence of the right to appeal has been disregarded. In a probate case, a judgment according to its own recitals was rendered without any trial or hearing, and the Supreme Court, in granting certiorari, said that the judgment was by its own recitals a patent nullity, which should be set aside though an appeal was available but was not availed of. x x x"

Invoking our ruling in Melocotones v. Court of First Instance, 57 Phil. 144, wherein we applied the theory of laches to petitioners' 3-year delay in requesting certiorari, the respondents point out that whereas the orders complained of herein were issued in June 13, 1951 and August 14, 1951 this special civil action was not filed until August 1952. It should be observed that the order of June 13 was superseded by that of August 14, 1951. The last order merely declared "que el 17% de las propiedades vendidas en publica subasta pertenece al Sr. Lastrilla y este tiene derecho a dicha porcion." This does not necessarily mean that 17% of *the money had to be delivered to him.* It could mean, as hereinbefore indicated, that the purchasers of the property (Dorfe and Asturias) had to recognize Lastrilla's ownership. It was only on *April 16, 1952* (Annex N) that the court issued an order directing the sheriff "to turn over" to Lastrilla "17% of the total proceeds of the auction sale". There is the order that actually prejudiced the petitioners herein, and they fought it until the last order of July 10, 1952 (Annex Q). Surely a month's delay may not be regarded as laches.

In view of the foregoing, it is our opinion, and we so hold that all orders of the respondent judge requiring delivery of 17% of the proceeds of the auction sale to respondent Olegario Lastrilla are null and void; and the costs of this suit shall be taxed against the latter. The preliminary injunction heretofore issued is made permanent. So ordered.

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

(4) True, Lastrilla was attorney for defendants, but he was careful in all his motions on the matter to sign "in his own representation" or "for himself and in his behalf."

VII

Tomasa V. Bulos Vda. de Tecson, as administratrix of the testate estate of the deceased Pablo Tecson Ocampo, versus Benjamin, et al., all surnamed Tecson, G. R. No. L-5233, September 30, 1953.

CIVIL PROCEDURE; PETITION FOR RELIEF FROM JUDGMENTS. — While a petition for relief as a rule is addressed to the sound discretion of the court, however, when it appears that a party has a good and meritorious defense and it would be unjust and unfair to deny him his day in court, equity demands that the exercise of judicial discretion be reconsidered if there are good reasons that warrant it.

Castillo and Guevara and Lc-O, Feria and Manglapus for appellants.
Claro M. Recto for appellee.

DECISION

BAUTISTA ANGELO, J.:

The incident involved in this appeal stems from an action for forcible entry originally commenced on June 12, 1941 in the Justice of the Peace Court of San Antonio, Nueva Ecija, by Tomasa V. Bulos Vda. de Tecson in her capacity as administratrix of the estate of the deceased Pablo Tecson Ocampo against defendants-appellants.

In that case, defendants filed a written answer. After trial, the court dismissed the case. From the decision plaintiff appealed to the Court of First Instance of Nueva Ecija, and the case was docketed as Civil Case No. 8889.

Having failed to answer the complaint within the time prescribed in Section 1, Rule 15, of the Rules of Court, defendants, on motion of plaintiff, were declared in default and thereafter plaintiff presented her evidence. On October 9, 1941, a judgment by default was rendered against defendants, and on October 10, 1941, copy of the decision was served on defendants' counsel.

Three days after receipt of copy of the decision, or on October 13, 1941, counsel for defendants filed a written manifestation stating that he would file a petition to set aside the decision by default but that he needed more time to do so to enable him to gather evidence

and prepare the necessary affidavits of merit in support of the petition. This was done on October 16, 1941. Plaintiff filed an opposition to the petition for relief. Then war broke out and no action was taken on the petition.

After liberation, counsel for defendants took steps to have the petition for relief acted upon by the court. The petition was set for hearing several times, but before action thereon could be taken, both parties agreed in a joint action to have the hearing cancelled as they would merely file a memoranda in support of their contentions. These memoranda having been submitted, the court issued an order denying the petition. From this order defendants took the case directly to this Court stating that their appeal "is based merely on questions of law."

The preliminary question which should be threshed out before we come to the main issue is whether this appeal should be determined considering merely the findings of fact of the lower court in the order subject of appeal. Counsel for appellee sustains the affirmative view because, he contends, appellants have stated in their notice of appeal that their "appeal is based merely on questions of law" which means that they cannot discuss any fact or circumstance other than those found by the lower court. Counsel for appellants sustain the contrary view contending that the facts brought out in their pleadings and affidavits of merit stand undisputed and so they can now be considered.

It appears that on October 13, 1941, or three days from receipt of copy of the decision by default, counsel for defendants filed an urgent manifestation stating that he would presently file a petition for relief but that he wanted more time to gather data and prepare the requisite affidavits of merit in support of the petition, and in effect he filed the petition three days thereafter attaching thereto four affidavits of merit. Said petition shows the following facts: The notice intended for defendants requiring them to answer was received by one Mariano Linao, an employee of a business firm named Lawyers' Printers. The office of defendants' counsel was located in the same room occupied in part by said firm, whose manager was one Marcos Suñiga. The personnel of the law office of counsel for defendants merely consisted of three, namely, Atty. Gaudencio B. Talahib, one typist and a messenger. When the notice of the court reached the office of counsel, only Mariano Linao was present, who signed the return card and placed the letter on a table. The messenger of defendants' counsel was out to attend to some errand but when he returned Linao left without calling his attention to the letter. Both Atty. Castillo, defendants' counsel, as well as his assistant, Atty. Talahib, were also out attending to some professional engagement. The notice never came to the knowledge of defendants' counsel until he received, to his surprise, copy of the decision by default. Immediately he took steps to file a petition for relief. This petition was set for hearing several times, but the hearing was never held, as the parties agreed to submit memoranda in support of their contentions. And one of the points stressed in the petition was that defendants had a good and meritorious defense.

Considering that the petition for relief did not go thru the process of a hearing, because both parties agreed to submit memoranda in support of their contentions, which implies that they waived their privilege to submit evidence, the logical consequence is that plaintiff, or her counsel, is deemed to have admitted the truth of all material and relevant allegations appearing in the petition, as well as in the affidavits of merit, and to have submitted the case upon those allegations. As this court aptly said, "One who prays for judgment on the pleadings without offering proof as to the truth of his own allegations, and without giving the opposing party an opportunity to introduce evidence, must be understood to admit the truth of all the material and relevant allegations of the opposing party, and rest his motion for judgment on those allegations taken together with such of his own as are admitted in the pleadings." (Evangelista v. De la Rosa, 42 O. G. 2100; Aquino v. Blanco, 45 O. G. 2080.)

The facts concerning the petition for relief not being disputed, we are inclined to sustain the view of appellants' counsel that for purposes of this appeal we may take into account not only the findings of fact made by the lower court but all other relevant and material facts appearing in the pleadings to determine if said findings are proper, just and warranted.

The lower court found, among other things, that the facts contained in the petition give a picture of a law office poorly organized and directed; a law office with one assistant, one messenger and one typist, still court notices are received by a stranger who signs for them; the allegation of counsel for the defendants that during or around the period he was very busy at the trial of many cases, as correctly answered by the plaintiff, is no excuse for the default entered in this case," and after stating that "plaintiff is as entitled as the defendants for the speedy termination of the case," the court, based on said findings, denied the petition for relief.

While a petition for relief as a rule is addressed to the sound discretion of the court, however, when it appears that a party has a good and meritorious defense and it would be unjust and unfair to deny him his day in court, equity demands that the exercise of judicial discretion be reconsidered if there are good reasons that warrant it. Here these reasons exist if only all the facts are considered. Note that counsel did not lose time in putting things aright when he came to note that something was wrong. Upon receipt of copy of the decision of the court, which came to him as a surprise, he immediately gave notice of his desire to file a petition for relief, which he did in no time, attaching to his petition four affidavits of merit. These documents show that defendants had a good and meritorious defense and outline the circumstances which resulted in the failure of their counsel to answer within the reglamentary period. They show that counsel was sharing office with a business firm and that because of an unfortunate coincidence the notice to answer was served on an employee of the firm. That such coincidence can happen cannot be denied. It is one of these things that can happen in the ordinary course of business. It may be an act of negligence for Mariano Linao not to give the notice to the messenger of defendants' counsel, or an act of negligence for the messenger to leave the office without leaving a substitute, but it cannot be denied that that negligence is excusable because there was no deliberate intent on their part to cause inconvenience to the court, or delay the administration of justice. On the other hand, there is no showing that counsel is guilty of any attempt to delay the proceedings, or of any act of bad faith or inexcusable negligence which may warrant disciplinary action; on the contrary, it is the first time that he has been placed in a predicament where his client has been declared in default. These considerations warrant that the case be reopened and defendants be given one more opportunity to answer and present their evidence.

Wherefore, the order appealed from is hereby set aside. The petition for relief of defendants is granted and defendants are given ten (10) days from notice to answer the complaint, without pronouncement as to costs.

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

Pablo, J., took no part.

VIII

Hernando Pabilonia and Romeo Pabilonia, Petitioners, vs. Hon. Vicente Santiago, Judge Court of First Instance of Quezon Province, Branch II; Antonia Abas and Panfilo Nagar, Respondents; G. R. No. L-5110; July 29, 1953;

Court of Industrial Relations; it has no power to modify an award confirmed by Supreme Court.—While Sec. 17 of Commonwealth Act No. 103 as amended apparently authorizes the Court of Industrial Relations to modify an award at any time during its effectiveness, there is nothing in the wording to suggest that the Court of Industrial Relations may modify an award that has been affirmed by the Supreme Court after an order for the execution of that award has already become final.

Potenciano A. Magtibay for petitioners.

G. N. Trinidad for respondents.

DECISION

REYES, *J.*:

The petitioners in these two cases challenge the validity and seek the annulment of an order of the Court of Industrial Relations by which that court gave to a motion for modification of a judgment that had already become final. Though differing in form — one (G. R. No. L-6265) an appeal by certiorari — the two cases are but one in substance and purpose, and should be adjudicated together. This decision is, therefore, rendered for the adjudication of both.

It appears that, on November 23, 1946, the Court of Industrial Relations awarded wage increases to the laborers of Dee C. Chuan & Sons, Inc., a Philippine corporation in the lumber business, the laborers being then represented by the Kaisahan ng Manggagawa sa

Kahoy sa Filipinas and the CLO. On July 23, 1948, following a strike staged by the laborers, that court again awarded them wage increases coupled with vacation and sick leave with pay. Taken to the Supreme Court by a writ of certiorari, this latter award was affirmed *in toto* on January 28, 1950. The company, however, filed a motion for reconsideration, and pending determination of this motion in the Supreme Court, the company filed another motion, dated March 31, 1950, in the Court of Industrial Relations asking for a modification of both the award of November 23, 1946 and that of July 23, 1948, on the grounds that conditions had changed since those awards were amde due to losses suffered by the company in 1948 and 1949, the down trend in the cost of living, and the reduction of wages in other lumber companies. This motion for modification was docketed as case No. 71-V(6), but consideration thereof was suspended pending the resolution of the motion for reconsideration in the Supreme Court.

On July 3, 1950, the Supreme Court denied the motion for reconsideration, and its decision having been declared final and executory on July 6, the present petitioners filed a motion in the Court of Industrial Relations asking for the execution of the judgment. The company agreed to the execution with respect to the wage increases for 1947 but objected with respect to the wage increases for 1948, 1949 and 1950 for reasons already alleged in its motion for modification.

The motion for execution and the motion for modification were heard together — each being considered a reply to the other — and thereafter the Court of Industrial Relations, under date of Nov. 24, 1950, rendered an order declaring itself without authority to modify an award for an increase of wages "for the period of the pendency of the appeal in the Supreme Court" and ordering the corresponding writ of execution to be issued "in accordance with the decision of July 23, 1948 x x x." Reconsideration of this order having been denied, the company petitioned the Supreme Court for a writ of certiorari (G.R. No. L-4680) to have the order annulled. But the petition was dismissed for lack of merit, and the dismissal became final on May 25, 1951.

That was the status of the case when the Court of Industrial Relations, at the instance of the Company, issued the order of May 29, 1952, by which that court gave course to the motion for modification of the award that had already become final by ordering an examination of the company's books of account and other pertinent record to ascertain "its financial condition for the years 1948, 1949 and 1950" so as "to enable the Court to determine the justice, equity and substantial merits of the case concerning the modification of the award of July 23, 1948 x x x." It is this order that the laborers brought to this Court for review after the court below, with two of its judges dissenting, had refused to reconsider it.

At the time the order was issued, the award was already on its way to being executed as the amounts due the laborers thereunder had already been computed by the court examiner and were then being discussed in court. The laborers, therefore, maintain that the award could no longer be modified so that the order giving course to the motion for modification was a nullity.

Brushing aside all technicalities, the broad question presented for determination is whether the Court of Industrial Relations may modify an award that has been affirmed by the Supreme Court after a order for the execution of that award has already become final.

Section 17 of Commonwealth Act No. 103, as amended reads:

> "Sec. 17. *Limit of effectiveness of award.* — An award, order or decision of the Court shall be valid and effective during the time therein specified. In the absence of such specification, any party or both parties to a controversy may terminate the effectiveness of an award, order or decision after three years have elapsed from the date of said award, order or decision by giving notice to that effect to the Court: *Provided, however*, that any time during the effectiveness of an award, order or decision, the Court may, on application of an interested party, and after due hearing, alter, modify in whole or in part, or set aside any such award, order or decision, or reopen any question involved therein."

While the above section apparently authorizes the modification of an award at any time during its effectiveness, there is nothing in its wording to suggest that such modification may be authorized even after the order for the execution of the award has already become final — with respect, of course, to the period that had already elapsed at the time the order was issued. To read such authority into the law would make of litigations between capital and labor an endless affair, with the Industrial Court acting like a modern Penelope, who puts off her suitors by unraveling every night what she has woven by day. Such a result could not have been contemplated by the Act creating said court.

Conformably to the above, the order complained of is annulled and set aside insofar as it affects or retards the execution of the award of July 23, 1948 for the years 1948, 1949 and 1950. So ordered.

Ricardo Paras, Guillermo F. Pablo, Cesar Bengzon, Sabino Padilla, Pedro Tuason, Marceliano R. Montemayor, Fernando Jugo, Felix Bautista Angelo, Alejo Labrador, concur.

IX

Ner J. Lopez, versus Lucia Y. Matias Vda. de Tinio and the Hon. Judge Guillermo R. Cabrera, of the Municipal Court of Manila, Branch III, G. R. No. L-6005, promulgated on December 29, 1953.

APPEAL; DENIAL OF MOTION TO DISMISS NOT APPEALABLE. — A denial of a motion to dismiss a complaint is an interlocutory order and as such not appealable nor can be the subject of certiorari. After an adverse judgment of a municipal court, the defendant may appeal. This is his remedy.

Jover, Ledesma and Puno for petitioner-appellant.
Reyes and Nuñez for respondents.

D E C I S I O N

PADILLA, J.:

In a detainer action Lucia Y. Matias Vda de Tinio sought to dispossess Ner J. Lopez of a lot located on Evangelista street, Manila, for failure to pay the stipulated rentals. A motion to dismiss the complaint on the ground that it states no cause of action was denied. Whereupon, the defendant in the detainer case filed in the Court of First Instance a petition for a writ of certiorari with preliminary injunction. The Court denied the petition and from the order denying it he has appealed.

That the municipal court of Manila has jurisdiction to try and decide the action for detainer brought by the appellee Lucia Y. Matias Vda. de Tinio against the appellant cannot be disputed. It does not appear that the appellee attached to her complaint the conract of lease, upon which the appellant relies to ask for the dismissal of the complaint. Jurisdiction is conferred by law and whether a court has jurisdiction over an action brought to it is ascertained from and determined upon the ultimate material facts pleaded in the complaint. Matters of defense such as the one raised by the appellant may be pleaded in his answer. After issues have been joined the court must proceed to hear the evidence of both parties and render judgment. It is well-settled in this jurisdiction that a denial of a motion to dismiss a complaint is an interlocutory order and not appealable. As heretofore stated, there is no question that the municipal court of Manila has jurisdiction over an action for detainer, and if the denial of a motion to dismiss cannot be appealed because it is interlocutory, much less would a petition for a writ of certiorari lie. After an adverse judgment by the municipal court the defendant may appeal. That is his remedy and not the extraordinary one for a writ of certiorari.

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

Paras, C.J., Bengzon, Jugo, Pablo, Tuason, Bautista Angelo, and Labrador, concur.
Montemayor, J., took no part.

X

Leonor Vogel, alias Sister Angelica of the S. Heart, and Angela Vogel, alias Sister Marie Du Rosaire, versus Saturnino Moldero, G. R. No. L-4972, September 25, 1953.

LAND REGISTRATION; REGISTER OF DEEDS; RECOURSE WHEN DEED OF SALE IS REFUSED INSCRIPTION AND

ISSUANCE OF NEW TRANSFER CERTIFICATE OF TITLE. — When the register of deeds refused the inscription of a deed of sale and the issuance of a new transfer certificate of title, the petition of the interested party for an order of the court to reverse the decision of the register of deeds must be filed in the original case in which the decree of registration of the land sold was entered and it should bear the same title. This is necessary to make it clear that the petition invoking the provisions of the Land Registration Act, particularly Section 112 thereof, is not an ordinary civil action.

Josefino de Alban for appellants.

Mauro Verzosa for appellee.

D E C I S I O N

MONTEMAYOR, J.:

Pursuant to a decree of August 24, 1917, FRANZ VOGEL was declared the owner of about 865 hectares of land called "HACIENDA SAN FERNANDO" in the municipality of Tumauini, Isabela, and Original Certificate of Title (O.C.T.- No. A-84 was issued in his name. After his death, ELIAS OCAMPO NAVARRO was appointed Special Administrator of his estate in Special Proceedings No. 87. Pursuant to a court order dated June 13, 1925, authorizing him to sell at public auction the properties of the estate, Navarro on January 4, 1926, sold the Hacienda San Fernando to JOH LOHMAN, as the highest bidder, for the sum of ₱25,000.00. On March 9, 1926, Navarro issued the corresponding certificate of sale (Exh. C), and by virtue thereof, Transfer Certificate of Title (T.C.T.) No. 127 was issued to Joh. Lohman on the same date. On June 18, 1948 Joh. Lohman thru a Deed of Absolute Sale (Exhibit D) sold the same hacienda or estate to petitioner-appellee SATURNINO MOLDERO for the sum of ₱85,000.00.

When appellee Moldero presented his deed of sale at the Office of the Register of Deeds of Isabela, the Register apparently entertained doubts about the property of accepting the deed for record and issuing a new Transfer Certificate of Title, because of the fact that despite the sale of the hacienda in 1926 in favor of Lohman by the Special Administrator of the estate of Vogel, O.C.T. No. A-84 remained uncancelled; neither was the sale in favor of Lohman noted at the back of said original certificate of title. Furthermore, T.C.T. No. 127 in favor of Lohman was not entered in the Book of Certificates of Title in the Office of the Register of Deeds. So, the Register of Deeds elevated the case to the VIIth Branch of the Court of First Instance of Manila in *consulta*. After a study of the case the Judge of said branch rendered an opinion informing the Register of Deeds of Isabela that the deed of sale in favor of Moldero cannot be accepted for record without an order of the Isabela court.

Mr. Moldero then filed a petition in said court, entitled: "Peticion sobre la cancelacion de un certificado de titulo y de la expedicion de un nuevo certificado de transferencia de un titulo de un terreno. SATURNINO MOLDERO, Solicitante." In said petition he asked the court to order the cancellation of O.C.T. No. A-84, the entry of T.C.T. No. 127 in the Book of Transfer Certificates of Title, its cancellation and the issuance of a new Transfer Certificate of Title in his favor. After trial during which Moldero presented evidence in support of his petition, the Court of Isabela found that the failure to cancel Original Certificate of Title No. A-84 was a mere oversight on the part of the Register of Deeds, and that as a matter of fact, the corresponding annotation —

> "Cancelado: Vease Certificado No. 127 del Tomo 5 del Libro de Certificados de Transferencia."

in long hand appeared on the left margin of said O.C.T. No. A-84, already initialed by the Clerk, only that the Register of Deeds failed to sign said annotation. The court further found that the failure to annotate the deed of sale (Exhibit C) at the back of O.C.T. No. A-84 was also an oversight on the part of the Register of Deeds, and finding that Joh. Lohman was the registered owner of the land covered by T.C.T. No. 127, and that he had sold the property to Saturnino Moldero on June 18, 1948 by virtue of a deed of sale (Exhibit D) which in the opinion of the court was registerable, said court ordered the Register of Deeds to cancel O.C.T. No. A-84; to annotate the deed of sale at the back of T.C.T. No. 127, cancel said Transfer Certificate and issue in lieu thereof another Transfer Certificate of Title in the name of Moldero. This order was dated March 30, 1950.

On September 30, 1950, Leonor Vogel *alias* Sister Angelica of the S. Heart, and Angela Vogel, *alias* Sister Marie du Rosaire, filed a petition for relief from the said order of the court, alleging that they were two of the four children of Franz Vogel, the other two being Florencio Vogel and Luisa Vogel; that because of the failure of petitioner Moldero to notify them personally, or to publish notice of his petition and of the hearing thereof in the Official Gazette or in some newspaper of general circulation, they had no knowledge of said petition and of the hearing, until after March 30, 1950; that they had a substantial cause of action against the petition of Moldero because O.C.T. No. A-84 in favor of their father Franz Vogel was never cancelled, and that since its issuance their father had had no legal transaction with Joh. Lohman warranting the issuance of T.C.T. No. 127, and so they prayed that the order of the Court of March 30, 1950, be set aside. Acting upon said petition, the Isabela court in its order of November 11, 1950, denied it. We are reproducing the pertinent portion of the order which sets forth the views of the lower court.

> "It was fully proven during the hearing of Moldero's petition that Elias Ocampo Navarro as administrator of the estate of the deceased Franz Vogel, in Special Proceeding No. 87, on January 4, 1926, sold the land covered by Original Certificate of Title No. A-84, in favor of Joh. Lohman, who secured Transfer Certificate of Title No. T-127. The Register of Deeds of Isabela, through inadvertance, issued Certificate of Title No. T-127 in the name of Joh. Lohman. Parenthetically, herein movants Leonor Vogel and Angela Vogel did not object to the sale executed by the Judicial Administrator of the estate of their deceased father. On June 18, 1948, Joh. Lohman sold the land to Saturnino Moldero, but when the corresponding papers were presented to the Register of Deeds of Isabela for registration and corresponding cancellation of Original Certificate of Title No. A-84 and Transfer Certificate of Title No. T-127 in the name of Joh. Lohman, said official refused to act on the matter because the original certificate was still uncancelled and the original of the transfer certificate was missing.
>
> "The petition of Saturnino Moldero was filed pursuant to an opinion of the Executive Judge of the Court of First Instance of Manila with whom the Register of Deeds of Isabela made proper consultation. The outcome thereof is stated in the order of this Court of March 30, 1950.
>
> "It will be observed, therefore, that the herein petitioners Leonor Vogel and Angela Vogel have never been parties to the present proceeding. They cannot assert their right to notice when they were not parties to the case. As to the lack of publication of the petition of Saturnino Moldero or of the notice of hearing thereof, the contention merits no serious consideration. The order sought to be reconsidered or set aside was issued merely to correct an omission of the office of the Register of Deeds. The publication contemplated is not necessary nor required.
>
> "It may be stated that the claim asserted by Leonor Vogel and Angela Vogel cannot be well substantiated in this case but in a separate action wherein all rights of parties may be fully determined."

From that order of denial of their petition for relief, Leonor Vogel and Angela Vogel appealed to this Tribunal. From all that has been stated, based on the record of the case, there is ground to believe and to find that by virtue of an order of the probate court authorizing the sale of the properties of the estate of Franz Vogel way back in 1925, the following year the Special Administrator sold the Hacienda San Fernando, the land now involved in this case, to Joh. Lohman as the highest bidder; that T.C.T. No. 127 was issued in the name of Lohman but through oversight on the part of the Register of Deeds, O.C.T. No. A-84 was not cancelled; neither was the certificate of sale by the special administrator entered at the back thereof; neither was Transfer Certificate of Title No. 127 entered in the Book of Transfer Certificates of Title in the Office of the Register of Deeds. We agree with the Isabela court that these were involuntary omissions of the Register of Deeds which can be corrected by court order without notifying the heirs of Franz Vogel, two of whom are the herein appellants. The order denying the peti-

tion for relief of the appellants was therefore warranted.

As far as the record of this case is concerned, there seems to be no ground for doubting the regularity of the sale of the estate in favor of Lohman in 1926. The appellants do not question and they even indirectly admit that since 1926 when the estate was sold to Lohman, the latter had taken possession and had held it until 1948 when he sold it to petitioner-appellee Moldero. It was not shown that the heirs of Franz Vogel ever opposed or objected to the sale of the estate of their father by the special administrator to Lohman. It is not explained why since 1926 up to the present time, a period of about twenty-seven years, appellants had allowed the said hacienda to be occupied and enjoyed by Lohman and later by Moldero. However, the two other children of Franz Vogel named Florencio and Luisa were not included in the petition for relief or in this appeal. On the contrary, Luisa made an affidavit (Exhibit 2) saying that as daughter and heir of Franz Vogel she acknowledges the sale of the hacienda to Lohman whom she recognizes as the registered owner, and that she renounces all claim over the estate. These facts and circumstances do not favor the contention of the appellants. However, should they believe that they have a good cause of action and feel that they can prove that the sales made to Lohman and to Moldero were illegal and void, they could file a separate and independent action as suggested by the trial court.

But there is one point raised by appellants, which tho not decisive, merits consideration, were it only for the correction of the record and for the guidance of petitioners under Sec. 112 and other sections of the Land Registration Act. Appellants contend that the trial court had no jurisdiction over the petition of appellee Moldero because said petition was not filed and entitled in the original case in which the decree of registration was entered. The contention is correct. The petition should have been filed in the original case in which the decree of registration of August 24, 1917 was entered, and it should bear the same title. The appellee, however, answers that the reason for not filing the petition in the original registration case was that the records of said case have been lost, presumably during the last Pacific War. The explanation is satisfactory, but at least the petition could and should have been entitled in said original case, this to make it clear that the present petition invoking the provisions of the Land Registration Act, particularly Sec. 112 thereof, is not an ordinary civil action. (Cavan vs. Mislizenus, 48 Phil. 632).

In view of the foregoing, and with the understanding that petitioner-appellee Moldero will be directed to entitle his original petition and his motions, in the original registration case where the decree of registration of Hacienda San Fernando was entered, the order appealed from is hereby affirmed. No costs.

Paras, Pablo, Bengzon, Padilla, Tuason, Reyes, Jugo, Angelo; Labrador concur.

XI

In the matter of the petition for naturalization of Leoncio Ho Benluy, petitioner-appellant, vs. Republic of the Philippines, oppositor-appellee, G. R. No. L-5522, Dec. 21, 1953.

1. NATURALIZATION: APPLICANT GUILTY OF VIOLATION OF THE REVISED ELECTION CODE. — A foreigner who violates Sec. 56 of the Revised Election Code which prohibits foreigners from actively participating in any election is forever barred from becoming a Filipino citizen.

D E C I S I O N

MONTEMAYOR, J.:

The appellant LEONCIO HO BENLUY, a Chinese citizen, filed an application for naturalization in 1951. There was no opposition to the application on the part of the Government. At the hearing the applicant presented evidence in support of his application, including two character witnesses, one of them Atty. Marcial M. Anastacio, a resident of Obando, Bulacan. With one exception Benluy proved that he possessed all the qualifications for Philippine citizenship and none of the disqualifications, and the trial court so found. The exception is that Atty. Anastacio, one of his witnesses, in his endeavor, even enthusiasm to prove that the applicant had identified himself with the Filipinos, helped them when asked and was very congenial and friendly, said that Benluy even took part in two electoral campaigns in Bulacan, not only persuading some voters connected with his business but also contributing to the campaign fund of the Liberal Party. Said the trial court on this point:

> "To prove that the applicant is a strong believer in our constitution and in what is called 'free enterprise,' this witness emphasized this affirmation by stating that the applicant even went to the extent of taking active part during the election, so much so that he (applicant) gave financial contribution to be spent in the election campaign to this witness who, during the elections of 1947 and 1949, was the Campaign Manager of the Liberal Party in the municipality of Obando, Bulacan; that the applicant, aside from giving financial help during the said elections of 1947 and 1949 which amounted to ₱200.00 and ₱500.00 on two occassions, went with the witness to Obondo to talk personally with his sub-agents in said municipality, and due to this intervention of the applicant said sub-agents supported the party of Mr. Anastacio."

This evidence about the part played by the applicant in the past elections alerted the representative of the Solicitor General and after the trial he filed a strong written opposition to the granting of the application, resulting in the trial court denying the application for naturalization. Benluy is now appealing from that decision.

Considering the circumstances under which the evidence of applicant's political activities was presented, namely, that it did not come from the opposition or any other party but himself and through his own witness, we were at the beginning inclined not to attach much importance to that phase of his residence in the Philippines and association with the Filipinos. He was never prosecuted for that violation of the Election Code and even if the Government were now inclined to prosecute him, the offense has already prescribed. Furthermore, as already stated, in all other respects the applicant has established his qualifications and the absence of any disqualifications. However, the law is clear. Section 56 of the Revised Election Code reads —

> "Section 56. Active intervention of foreigners. — No foreigner shall aid any candidate, directly or indirectly, or take part in or to influence in any manner any election."

Under section 183 of the same Code, the violation is considered a serious election offense and under section 185 it is penalized with imprisonment of not less than one year and one day but not more than five years and in case of a foreigner, shall in addition be sentenced to deportation for not less than five years but not more than ten years, to be enforced after the prison term has been served. These provisions of the Revised Election Code may not be taken lightly, much less ignored. They were intended to discourage foreigners from taking active part in or otherwise interfering with our elections, under penalty not only of imprisonment but also deportation. It might well be that as already stated, the evidence about this violation of the election law was given by his own witness who in all likelihood gave it in good faith and in all friendship to the applicant to bolster the latter's application for naturalization, without realizing that by said declaration he was forever closing the door to Benluy's ever becoming a Filipino citizen. But the law must be applied and enforced. It is merely a piece of bad luck for him. From the standpoint of the Government however, it was fortunate that said evidence was brought up, thereby preventing the granting of Philippine citizenship to a foreigner who tho even in his ignorance of the law and at the instance of his Filipino friend, violated one of the important provisions of our election law. The decision appealed from is hereby affirmed, with costs.

Paras, C.J., Pablo, Bengson, Padilla, Tuason, Reyes, Jugo, Bautista Angelo, and Labrador, concur.

XII

Victoriano Capio, petitioner-appellee, vs. Fernando Capio, oppositor-appellant, G. R. No. L-5761, Dec. 21, 1953.

1. LAND REGISTRATION; WHEN JUDGMENT THEREOF BECOMES FINAL AND INCONTROVERTIBLE. — In numerous decisions, some of the latest being Afallo and Pinaroc v. Rosauro, 60 Phil. 622 and Valmonte v. Nable, G. R. No. L-2842, December 29, 1949, 47 O. G. 2917, we have held that the ajudication of land

in a registration or cadastral case does not become final and incontrovertible until the expiration of one year after the entry of the final decree; that as long as the final decree is not issued and the period of one year within which it may be reviewed has not elapsed, the decision remains under the control and sound discretion of the court rendering the decree, which court after hearing, may set aside the decision or decree and adjudicate the land to another party.

Jose C. Colayco for oppositor-appellant.
Jesus V. Arboleda and Ildefonso M. Bleza for petitioner-appellee.

D E C I S I O N

MONTEMAYOR, J.

The Court of First Instance of Mindoro acting as cadastral court and after hearing Cadastral Case No. 2 G.L.R.O. Cad. Record No. 216, rendered a decision dated April 29, 1921, adjudicating cadastral lots to those entitled thereto. Lot No. 768 with its improvements was adjudicated to the brothers, Victoriano, Felix and Agustin, all surnamed CAPIO, in equal parts.

On January 7, 1947, about twenty-six years later, Victoriano Capio, one of the three brothers filed in the Mindoro court a petition asking for the reopening of the cadastral case and the setting aside of that part of the decision adjucating Lot No. 768 to him and to this two brothers Felix and Agustin for the reason that according to him, said lot was, during the cadastral hearing, claimed only by himself and by no others, not even by his two brothers; that the lot really belonged to him and his wife exclusively and that the adjudication made by the cadastral court was through an error. After considering said petition as well as the opposition thereto filed by Fernando Capio, the only heir of petitioner's brother, Felix and inasmuch the trial court found that the decree for said lot 768 was not issued until November 1, 1949, and also because the oppositor did not deny the allegations of the petition for the reopening of the case, the lower court, according to it, to avoid the miscarriage of justice, ordered the reopening of the case at the same time declaring null and void the decision of April 29, 1921, with respect to lot No. 768. It set the hearing on said lot during the May calendar. All this was contained in the court order dated February 28, 1950.

Oppositor Fernando Capio filed a motion for reconsideration of the order. Acting upon said motion and the answer thereto filed by Victoriano, the Mindoro court set the said motion for reconsideration for hearing stating that at the hearing evidence may be presented in order to properly establish the issues and also for the parties to support their allegations.

On September 2, 1950, the lower court issued an order which we reproduce below.

"O R D E R

"This is a motion for the reconsideration of the order of this Court dated February 28, 1950.

"This motion was set for hearing in order to receive any evidence which the parties might present in support of their contentions. The movant did not appear while the oppositor was allowed to present his evidence.

"Considering the motion for reconsideration and the opposition thereto together with the evidence presented by the oppositors, the court finds no justification in reconsidering its order of February 28, 1950 and therefore denies the same for lack of sufficient merits.

"IT IS ORDERED."

The order of February 28, 1950, above referred to is the order declaring null and void the decision of the cadastral court dated April 29, 1921, as regards lot No. 768 and setting said lot for hearing. Later, on October 20, 1950, the trial court finally issued the following order.

"O R D E R

"Petition for postponement of the hearing of this case set for the 28th instant is hereby granted. The court, however, believes that there is no necessity of having this case set for hearing anew because the records of this case clearly show that on September 2, 1950, when the motion for reconsideration was called for hearing in order to receive any evidence which the parties might present in support of their contentions, the petitioner did not appear while the oppositor was allowed to present his evidence.

"The Court after considering the motion for reconsideration and the opposition thereto together with the evidence presented by the oppositor, finds no justification in reconsidering its order of February 28, 1950 and therefore denied the same for lack of sufficient merits.

"WHEREFORE, the order of this Court dated September 2, 1950, denying the motion for reconsideration of the order of this court dated February 28, 1950, is hereby affirmed and maintained.

"IT IS SO ORDERED."

Appellant Fernando Capio is now appealing from this last order of October 20, 1950.

In numerous decisions, some of the latest being Afallo and Pinaroc v. Rosauro, 60 Phil. 622 and Valmonte v. Nable, G. R. No. L-2842, December 29, 1949, 47 O. G. 2917, we have held that the adjudication of land in a registration or cadastral case does not become final and incontrovertible until the expiration of one year after the entry of the final decree; that as long as the final decree is not issued and the period of one year within which it may be reviewed has not elapsed, the decision remains under the control and sound discretion of the court rendering the decree, which court after hearing, may set aside the decision or decree and adjudicate the land to another party.

In the present case, at the time the petition for review was filed, the decree had not yet been issued. It is, therefore, clear that the petition was filed well within the period prescribed by law (Section 38, Land Registration Act). As to the merits of the petition, it would appear that during the hearing of the motion for reconsideration at which the oppositor did not appear and where petitioner Victoriano presented evidence, Victoriano testified and presented documents to show that this lot No. 768 was previously bought by Pedro Capio, father of the three brothers Victoriano, Felix and Agustin from one Mamerta Atienza who, before the sale had held it for about thirty years; that on April 26, 1920, his father Pedro sold the same land to one Alejandro Dris for ₱800.00; that on May 5, 1920, Victoriano Capio purchased from the vendee Dris 3/4 of the land for ₱600.00; and on October 29 of the same year Victoriano again bought the remainder from Dris for ₱350.00; that Victoriano was the only one who filed his claim in the cadastral proceedings for lot No. 768, and that at the hearing he was the only one who appeared and claimed the land. Furthermore, the petition for reopening of the case filed by Victoriano on January 7, 1947, bears the written conformity of his brother Agustin Capio, so that the only one opposing this petition is Fernando Capio, the only heir of his brother Felix Capio.

Finding the order appealed from to be in conformity with law, the same is hereby affirmed with costs against the appellant. We notice however from the order of the trial court of October 20, 1950, which we have reproduced above that it entertained the belief that there was no further need for a hearing as to the ownership of the lot No. 768, because said hearing had already been held and presumably the court was convinced that the lot properly belonged to petitioner Victoriano Capio. The record, however, shows that this hearing was held in connection with the motion for reconsideration. Moreover, said hearing was held in the absence of oppositor Fernando Capio, he perhaps believing that it was not a trial on the merits of the case. The trial court is therefore directed to hold a regular and formal hearing of the case with notice to both parties where evidence as to the ownership, possession, etc. of the lot and its improvements may be presented and thereafter a decision shall be rendered.

Paras, C.J., Pablo, Bengzon, Pudilla, Tuason, Reyes, Jugo, Bautista Angelo and Labrador, J.J., concur.

XIII

Flaviana Acuña and Eusebia Diaz, plaintiffs-appellants, vs. Furukawa Plantation Company, dependant-appellee, G. R. No. L-5833, October 22, 1953

1. CIVIL PROCEDURE; DECLARATORY RELIEF; IMPROPER ACTION. — F company is the registered owner of a large tract of land in the province of Davao. This tract of land was turned over to the NAFCO for administration and disposition. Among those favored with an allocation were A and her daughter, two homesteaders within the area covered by F company's

plantation title. They however turned down their allocation, claiming that they were entitled to the whole area occupied by them — some 31 hectares. When this claim was denied they brought action against the company in the Court of First Instance of Davao. What A and her daughter appear to claim is that while the land occupied by them as homestead is embraced in F company's torrens title the improvements thereon are expressly excluded therefrom, being among those noted down in the Torrens certificate as properties belonging to other persons. HELD: A and daughter are not merely asking for a determination of defendant's certificate of titles. What they want is to have that certificate amended by having their names inscribed thereon as owners of the improvements existing on the homestead occupied by them but registered in defendant's name. This is a remedy that can be granted only under the Land Registration Act and is, therefore, not within the scope and purpose of an action for declaratory relief as contemplated in Rule 66. If plaintiffs' first cause of action is to succeed, it must be formulated by proper petition in the original case where the decree of registration was entered, and with notice to all persons whose rights might be affected by the proposed amendment to the certificate of title.

It may be stated that an amendment of that kind is not barred by the incontestability of defendant's Torren's title, since this contains a special reservation with respect to improvements to the persons.

II. CIVIL CODE; RIGHT OF OWNER OF IMPROVEMENTS MADE IN OTHER'S LAND. — Since A and daughter are asking the defendants be compelled to cede to them the land covered by their homestead it should be noted that Article 361 of the Civil Code (Art. 448) of the new Civil Code gives "the owner of land on which anything has been built, sown, or planted, in good faith," the right "to appropriate the thing so built, sown, or planted, upon paying the compensation mentioned in Articles 453 and 454, or to compel the person who has built or planted to pay him the proper rent therefor." But the article invoked does not give plaintiffs, as owners of the improvements, the right to compel defendant, as registered owner of the land, to cede to them, by sale or otherwise, the land in question. Under the article, it is the owner of the land that has the right to choose between acquiring the improvements and selling the land. An action predicated on the assumption that the option may be exercised by the owner of the improvements is clearly without legal basis.

Quimpo & Kimpo and *Remedios A. Ponferrada* for appelants.
Antonio Habana, Jr. for appellee.

D E C I S I O N

REYES, J.:

The Furukawa Plantation Company, a Philippine corporation, is the registered owner of large tract of land in the province of Davao, as evidenced by Original Certificate of Title No. 2768 (now Transfer Certificate of Title No. 276) of the land records of that province, issued more than 30 years ago. As a result of the last war, this tract of land was turned over to the NAFCO (National Abaca and Other Fibers Corporation) for administration and disposition and, together with other Japanese-owned properties in the province, distributed among war veterans and deserving civilians, each of whom was allocated five hectares pursuant to the directives of the President of the Philippines and the agreement entered into between the Philippine Veterans Legion and the NAFCO.

Among those favored with an allocation were Flaviana Acuña and her daughter Eusebia Diaz, two homesteaders within the area covered by the Furukawa Plantation Company's title, who, however, turned down their allocation, claiming that they were entitled to the whole area occupied by them — some 31 hectares — and, on this claim being denied, brought the present action against the company in the Court of First Instance of Davao. The complaint sets up three causes of action and alleges that plaintiffs are the widow and daughter, respectively of Roman Diaz, deceased, who, as a homestead applicant, was, on August 18, 1914, granted by the Director of Lands a provisional permit to occupy and clear 31.79 hectares of public land in sitio Calanitoi, municipality of Santa Cruz, Davao province; that since then, Roman Diaz and (after his death) plaintiffs themselves have been cultivating and improving the said land, planting it to coconut and other fruit trees and food crops, and building thereon two residential houses; that, through fraud and strategy, defendant was able to include the said land and the improvements thereon in its certificate of title, though acknowledging plaintiffs' right thereto under a general annotation on the certificate which says: "Except those herein expressly noted as belonging to other persons;" that as defendant's certificate of title does not give the names of those "other persons," it is necessary that plaintiffs "be expressly declared and (their names) annotated" as among the persons referred to; and that defendant and its agents have been abetting its overseer and other persons in occupying plaintiffs' coconut plantation and committing depredations thereon to the damage and prejudice of said plaintiffs. Plaintiffs, therefore, pray that they be declared to be "among those persons noted as owners of the improvements included in (defendant's) Transfer Certificate of Title No. 276;" that defendant be made to cede to them the 31.79 hectares of land on which the improvements owned by them stand; and that defendant be made to pay damages and, together with those acting under its authority, enjoined from "committing further acts of dispossession and despoliation" on the homestead.

Before answering the complaint, defendant moved that it be dismissed, and the court granted the motion on the grounds that the complaint did not state a cause of action, that plaintiffs' action had already prescribed, and that the court had no jurisdiction over the subject matter thereof. From the order of dismissal plaintiffs appealed to the Court of Appeals, but that court has certified the case here because of the nature of the questions involved.

For a proper resolution of these questions, it should be stated at the outset that despite the allegation of "fraud and strategy" in the procurement of defendant's title, the validity or incontestability of that title does not appear to be in issue, and in any event the title has already become indefeasible because of the more than 30 years that have elapsed since the decree of registration was entered. What plaintiffs appear to claim is that, while the land occupied by them as homestead is embraced in defendant's Torrens title, the improvements thereon are expressly excluded therefrom, being among those noted down in the Torrens certificate as properties belonging to other persons. On this hypothesis, plaintiffs are asking for three specific remedies, namely: (1) to have their names inscribed in defendant's certificate of title as owners of said improvements; (2) to have defendant cede to them the land on which the improvements stand; and (3) to have defendant pay damages for depredations committed on plaintiffs' coconut plantation by persons acting under defendant's authority and to have a writ issue to enjoin "further acts of dispossession and despoliation."

With respect to the first remedy, which is the subject of the first cause of action and which plaintiffs seek to obtain through an action for declaratory relief under Rule 66 of the Rule of Court, we note that plaintiffs are not merely asking for a determination of their rights through a judicial interpretation of defendant's certificate of title. What they want is to have hat certificate amended by having their names inscribed thereon as owners of the improvements existing on the homestead occupied by them but registered in defendant's name. (1) This is a remedy that can be granted only under the Land Registration Act and is, therefore, not within the scope and purpose of an action for declaratory relief as contemplated in Rule 66. If plaintiffs' first cause of action is to succeed, it must be formulated by proper petition in the original case where the decree of registration was entered, and with notice to all persons whose rights might be affected by the proposed amendment to the certificate of title. (2) It may be stated that an amendment of that kind is not barred by the incontestability of defendant's Torren's title, since this contains a special reservation with respect to improvements belonging to other persons.

The second remedy — which is the objective of plaintiffs' second cause of action — is sought to be attained through an action for "specific performance." But it is obvious that an action of that kind will not lie, since plaintiffs are not seeking the fulfillment of any contract. What they ask for is that defendant be made to cede to them the land covered by their homestead and for that they invoke Article 361 of the old Civil Code (Article 448 of the new) which gives "the owner of land on which anything has been built, sown, or planted, in good faith," the right "to appropriate the thing so built, sown, or planted, upon paying the compensation mentioned in Articles

453 and 454, or to compel the person who has built or planted to pay him the value of the land, and the person who sowed thereon to pay the proper rent therefor." But the article invoked does not give plaintiffs, as owners of the improvements, the right to compel defendant, as registered owner of the land, to cede to them, by sale or otherwise, the land in question. Under the article, it is the owner of the land that has the right to choose between acquiring the improvements and selling the land. An action predicated on the assumption that the option may be exercised by the owner of the improvements is clearly without legal basis.

On the assumption that plaintiffs are the owners of the improvements on the land occupied by them and that defendant's men or those acting under its authority are committing depredations thereon, there can be no question that plaintiffs should be entitled to the remedy sought in their third cause of action, that is, to have the depredations stopped and indemnity paid for damages suffered. We note, however, that the complaint does not identify and delimit the land on which plaintiffs' improvements stand, the complaint being for that reason defective.

To summarize, it is our conclusion that (1) plaintiffs may not in the present case ask for the remedy sought in their first cause of action, for the reason that an amendment to a Torrens certificate of title may be had only in the original case where the decree of registration was entered; (2) plaintiffs' second cause of action is untenable; and (3) plaintiffs' complaint is defective with respect to the property sought to be protected by a writ of injunction.

Wherefore, the order of dismissal is affirmed with respect to the first and second causes of action, and modified as to the third in the sense that this cause of action shall be deemed definitely dismissed if the complaint is not properly amended within ten days from the time this decision becomes final. Without costs.

Paras, Bengzon, Tuazon, Jugo, Pablo, Padilla; Montemayor; Labrador and Bautista Angelo, concur.

XIV

Cebu Portland Cement Company, petitioner, vs. Hon. Vicente Varela et al., respondents, G. R. No. L-5438, September 29, 1953.

CIVIL PROCEDURE; UNLAWFUL DETAINER; EXECUTION OF JUDGMENT PENDING APPEAL FOR FAILURE TO DEPOSIT THE MONTHLY RENTS DUE TO FRAUD, ERROR OR EXCUSABLE NEGLIGENCE. — On November 16, 1950, V, General superintendent of C Co., was dismissed and retired with gratuity by the company's board of directors. The labor union to which he belonged took the case to the CIR which rendered a resolution finding his dismissal unjustifiable and ordering his reinstatement in office with full back pay. The resolution was brought before the Supreme Court for review. Because V refused to leave the company house which as the general superintendent he was entitled to occupy free of charge, the company brought a suit against him for illegal detainer in the JP court which rendered judgment ordering him to vacate the premises and pay a monthly rental of ₱100.00 from November 16 of that year. B appealed to the CFI. In the CFI the company had an order issued for a writ of execution but the order was lifted on October 8, 1951 following the filing of the supersedeas bond for ₱1,500.00 which answered not only the rents already due (₱1,000.00) but also those that were still to become due (*los alquileres devengados y los por devengar*")

On December 7, 1951, the company was again able to secure a writ of execution because of V's failure to make a cash deposit for the rents corresponding to September and October of that year. V moved for a reconsideration, deposited ₱400 to cover four months rental and called attention to the fact that the question of his separation from the company was still pending with the CIR on December 29, 1951. The court issued an order suspending the writ of execution on the grounds that V's right to continue occupying the premises depended upon the result of the case in the CIR which had not yet been decided, that his bond for ₱1,500 was answerable for the rents up to the final determination of the case, and that the deposit of ₱400 to cover rents up to and including December 1951 negatived any intention on his part to enjoy the occupancy of that house without any rent. A motion to lift the order of suspension having been denied, the company petitioned for certiorari and mandamus asking that the said order be annulled as having been issued without jurisdiction and that a writ issue commanding the judge below to lift the stay of execution. HELD: Courts of the first instance in detainer cases are authorized to grant execution upon appellant's failure to deposit the monthly rents on time during the pendency of the appeal. But this Court has already ruled that execution may be denied where the delay in making the deposit was due to fraud, error or excusable negligence. (Bantug vs. Roxas, 73 Phil. 13; Gunaan vs. Rodas, 44 Off. Gaz., 4927; Yu Phi Khim vs. Amparo, 47 Off. Gaz., Supp. 12, 98). In the present case, the deposit was late, but the lower court has excused the delay as being due to an honest belief that the supersedeas bond covered both past and future rents — as therein expressly stipulated — and that, after all, appellant's right to remain in office and enjoy its emoluments, including free quarters, was still pending determination in the Court of Industrial Relations. The lower court, in our opinion, acted with justice and equity and only followed the precedent established in the cases above-cited when it rendered the resolution herein complained of.

Fortunato V. Borromeo and *Jesus N. Borromeo* for petitioner.
Alonso & Alonso and *Emilio Lumontad* for respondents.

D E C I S I O N

REYES, J.:

On November 16, 1950, Felix V. Valencia, general superintendent of the Cebu Portland Cement Company, was dismissed and retired with gratuity by the company's board of directors. Contesting his dismissal, the labor union to which he belonged took the case to the Court of Industrial Relations, and that court, under date of July 8, 1952, rendered its resolution, finding Valencia's dismissal unjustified and ordering his reinstatement in office with full backpay and "with all the privileges and emoluments thereunto attached x x x." That resolution is now before this Court for review, but it is not the subject of the present petition for certiorari and mandamus, and is here mentioned only because of its bearing on the case.

The present case arose as a consequence of the company's attempt to oust Valencia from the company house which as general superintendent he was entitled to occupy free of charge. Because Valencia refused to leave the house despite his removal from office, the company brought suit against him for illegal detainer in the Justice of the Peace Court of Naga, Cebu, and that court, on August 20, 1951, rendered judgment ordering him to vacate the premises and pay a monthly rental of ₱100.00 from November 16 of that year. Valencia appealed to the Court of First Instance, the appeal being perfected on September 12, 1951 with the filing of the appeal bond on that date.

Once the case was in the Court of First Instance, the company had an order issued for a writ of execution, but the order was lifted on October 8, 1951, following the filing of a supersedeas bond for ₱1,500.00. Ordinarily such bond answers only for rents due at the time of the perfection of the appeal. But in the present case the bond, in express terms, guarantees not only the rents already due (₱1,000.00), but also those that were still to become due ("*los alquileres devengados y los por devengar*").

On December 7, 1951, the company was again able to secure a writ of execution because of Valencia's failure to make a cash deposit for the rents corresponding to September and October of that year. Valencia moved for a reconsideration, deposited ₱400.00 to cover four months' rent and called attention to the fact that the question of his separation from the company was still pending in the Court of Industrial Relations. Acting on this motion, the court issued its order of December 29, 1951, suspending the writ of execution on the grounds that Valencia's right to continue occupying the premises depended upon the result of the case in the Industrial Court, which had not yet been decided, that his supersedeas bond for ₱1,500.00 was answerable for the rents up to the final determination of the case, and that the deposit of ₱400.00 to cover rents up to and including December, 1951, negatived any intention on his part to enjoy the occupancy of the house without paying any rent. A motion to lift this order of suspension having been denied, the company brought

the present petition for certiorari and mandamus, asking that the said order be annulled as having been issued without jurisdiction, and that a writ issue commanding the judge below to lift the stay of execution.

Courts of first instance in detainer cases are authorized to grant execution upon appellant's failure to deposit the monthly rents on time during the pendency of the appeal. But this Court has already ruled that execution may be denied where the delay in making the deposit was due to fraud, error or excusable negligence. (Bantug vs. Roxas, 73 Phil. 13; Gunaan vs. Rodas, 44 Off. Gaz., 4927; Yu Phi Khim vs. Amparo, 47 Off. Gaz., Supp. 12, 98). In the present case, the deposit was late, but the lower court had excused the delay as being due to an honest belief that the supersedeas bond covered both past and future rents — as therein expressly stipulated — and that, after all, appellant's right to remain in office and enjoy its emoluments, including free quarters, was still pending determination in the Court of Industrial Relations. The lower court, in our opinion, acted with justice and equity and only followed the precedent established in the cases above cited when it rendered the resolution herein complained of.

Pending decision on this petition for certiorari and mandamus, counsel for the company, on March 18, 1952, filed a supplemental pleading, complaining that on the 3rd of that month the lower court had denied another motion for execution based on Valencia's failure to deposit the rental for January of that year. It appears from the order of denial that the lower court considered the new motion for execution as involving the same question as those which gave rise to the present case and which were denied because of "unique or exceptional circumstances" that, in its opinion, made suspension of execution "more in consonance with justice and equity," for which reason the court again had to deny immediate execution" at least, until Supreme Court has passed upon the questioned orders." Now that a decision has come down from the Court of Industrial Relations ordering Valencia's reinstatement, and with the certiorari case (G. R. No. L-6158) for the review of that decision already heard, we are not disposed to interfere with the exercise of discretion which the lower court has made in the last order complained of for the maintenance of a *status quo*.

Wherefore, the petition for certiorari and mandamus is denied, with costs against the petitioner.

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

XV

Angeles S. Santos, petitioner-appellant vs. Paterio Aquino et al., respondents-appellees, G. R. No. L-5101, November 28, 1953.

1. CIVIL PROCEDURE; DECLARATORY RELIEF; ORDINANCE NOT AMBIGUOUS OR DOUBTFUL.—There can be no action for declaratory relief, where the terms of the ordinances assailed are not ambiguous or of doubtful meaning which require a construction thereof by the Court.
2. IDEM; IDEM; RELIEF MUST BE ASKED BEFORE VIOLATION OF THE ORDINANCE.—Granting that the validity or legality of the ordinance may be drawn in question in action for declaratory relief, such relief must be asked before a violation of the ordinance be committed (Section 2, Rule 66, Rues of Court). When this action was brought on 12 May 1949, payment of the municipal license taxes imposed by both ordinances, the tax rate of the last having been reduced by the Department of Finance, was already due, and the prayer of the petition shows that the petitioner had not paid them. In those circumstances the petitioner cannot bring an action for declaratory relief.
3. IDEM; IDEM; REAL PARTY IN INTEREST.—The petitioner, does not aver nor does he testify that he is the owner or part owner of "Cine Concepcion." He alleges that he is only the manager thereof. For that reason he is not an interested party. He has no interest in the theater known as "Cine Concepcion" which may be affected by the municipal ordinances in question and for that reason he is not entitled to bring this action either for declaratory relief or for prohibition, which apparently is the purpose of the action as may be gleaned from the prayer of the petition. The rule that actions must be brought in the name of the real party in interest (Section 2, Rule 3, Rules of Court) applies to actions brought under Rule 66 for declaratory relief. (1 C.J.S. 1074-1049.) The fact that he is the manager of the theater does not make him a real party in interest.
4. PUBLIC CORPORATIONS; MUNICIPAL COUNCIL EMPOWERED TO ADOPT ORDINANCES IMPOSING TAXES WHICH ARE NOT EXCESSIVE, UNJUST, OPPRESSIVE OR CONFISCATORY.—Under Com. Act No. 472 the Municipal Council of Malabon is authorized and empowered to adopt the ordinances in question, and there being no showing, as the evidence does not show, that the rate of the municipal taxes therein provided is excessive, unjust, oppressive and confiscatory, their validity and legality must be upheld. The rate of the taxes in both ordinances, to wit: ₱1,000 a year for "Class A cinematographs having orchestra, balcony and lodge seats" in Ordinance No. 61, series, of 1946, (Approved by the Department of Finance on 11 June 1947. So the tax for 1947 to be collected was ₱180 plus 50% of the original tax, or ₱90, or a total of ₱270), and ₱2,000 for each theater or cinematograph with gross annual receipts amounting to ₱130,000 or more in Ordinance 10, series of 1947, (Approved by the Department of Finance at a reduced rate on 3 November 1948. So the tax for 1948 was that imposed by Ordinance No. 61, series of 1946, approved on 11 June 1947, as reduced and approved by the Department of Finance on 3 November 1948.) under which the "Cine Concepcion" falls, is not excessive but fair and just.
5. IDEM; IDEM; MUNICIPAL COUNCILS NOT CONSTITUTIONAL BODIES.—Municipal councils are not constitutional bodies but creatures of the Congress. The latter may even abolish or replace them with other government instrumentalities. *Arsenio Paez* for appellant.

Acting Provincial Fiscal of Pasig, Riz[a]l Irineo V. Bernardo for appellees.

DECISION

PADILLA, J.:

This action purports to obtain a declaratory relief but the prayer of the petition seeks to have Ordinance No. 61, series of 1946, and Ordinance No. 10, series of 1947, of the Municipality of Malabon, Province of Rizal, declared null and void; to prevent the collection of surcharges and penalties for failure to pay the taxes imposed by the ordinances referred to, except for such failure from and after the taxpayer shall have been served with the notice of the effectivity of the ordinances; and to enjoin the respondents, their agents and all other persons acting for and in their behalf from enforcing the ordinances referred to and from making any collection thereunder. Further, petitioner prays for such other remedy and relief as may be deemed just and equitable and asks that costs be taxed against the respondents.

The petitioner is the manager of a theater known as "Cine Concepcion," located and operated in the Municipality of Malabon, Province of Rizal, and the respondents are the Municipal Mayor, the Municipal Council and the Municipal Treasurer, of Malabon. The petitioner avers that Ordinance No. 61, series of 1946, adopted by the Municipal Council of Malabon on 8 December 1946, imposes a license tax of ₱1,000 per annum on the said theater in addition to a license tax on all tickets sold in theaters and cinemas in Malabon, pursuant to Ordinance No. 61, the same series; that prior to 8 December 1946 the municipal license tax paid by the petitioner on "Cine Concepcion" was ₱180, pursuant to Ordinance No. 9, series of 1945; that on 6 December 1947, the Municipal Council of Malabon adopted Ordinance No. 10, series of 1947, imposing a graduated municipal license tax on theaters and cinematographs from ₱200 to ₱9,000 per annum; that the ordinance was submitted for approval to the Department of Finance, which reduced the rate of taxes provided therein, and the ordinance with the reduced rate of taxes was approved on 3 November 1948; that notice of reduction of the tax rate and approval by the Department of Finance of said graduated municipal license

tax provided for in said Ordinance No. 10, as reduced, was served on the petitioner on 12 February 1949 when the respondent Municipal Treasurer presented a bill for collection thereof; that Ordinance No. 61, series of 1946, is *ultra vires* and repugnant to the provisions of the Constitution on taxation; that its approval was not in accordance with law; that Ordinance No. 10, series of 1947, is also null and void, because the Department of Finance that approved it acted in excess and against the powers granted it by law, and is unjust, oppressive and confiscatory; and that the adoption of both ordinances was the result of persecution of the petitioner by the respondents because from 20 July 1946 to 8 December 1947, or within a period of less than one and a half years, the Municipal Council of Malabon adopted four ordinances increasing the taxes on cinematographs and theaters and imposing a penalty of 20% surcharge for late payment.

A motion to dismiss was filed by the Assistant Provincial Fiscal of Rizal, but upon suggestion of the Court at the hearing thereof, the respondents were prevailed upon to file their answer.

In their answer the respondents allege that both ordinances adopted by the Municipal Council of Malabon are not *ultra vires*, the same not being under any of the exceptions provided for in section 3 of Com. Act No. 472; that the ordinances were adopted pursuant to the policy enunciated by the Secretary of the Interior in a circular issued on 20 June 1946 which in substance suggested and urged the municipal councils to increase their revenues and not to rely on the National Government which was not in a position to render any help and to make such increase dependent upon the taxpayer's ability to pay; that both ordinances assailed by the petitioner had been submitted to, and approved by, the Department of Finance, as required by section 4 of Com. Act No. 472, and took effect on 1 January 1947 and 1 January 1948, respectively; that the petitioner had filed a protest with the Secretary of Finance against such increase of taxes, as fixed by the municipal ordinances in question but the Department of Finance although reducing the amount of taxes imposed in Ordinance No. 10, series of 1947; and changing the date of effectivity of both ordinances, upheld the legality thereof; and that the petitioner brought this action for declaratory relief with the evident purpose of evading payment of the unpaid balance of taxes due from the "Cine Concepcion." By way of special defense the respondents allege that the petition does not state facts sufficient to constitute a cause of action; that the Court has no jurisdiction over the subject matter of the petition for declaratory relief; that the petitioner should have paid under protest the taxes imposed by the ordinances in question on "Cine Concepcion" and after payment thereof should bring an action under section 1579 of the Revised Administrative Code; that this being an action for declaratory relief, the Provincial Fiscal of Rizal should have been notified thereof but the petitioner failed to do so; that the petition does not join all the necessary parties and, therefore, a judgment rendered in the case will not terminate the uncertainty or the controversy that is sought to be settled and determined.

After hearing the Court rendered judgment holding that the ordinances in question are valid and constitutional and dismissing the petition with costs against the petitioner. The latter has appealed.

This is not an action for declaratory relief, because the terms of the ordinances assailed are not ambiguous or of doubtful meaning which require a construction thereof by the Court. And granting that the validity or legality of an ordinance may be drawn in question in an action for declaratory relief, such relief must be asked before a violation of the ordinance be committed. (1) When this action was brought on 12 May 1949, payment of the municipal license taxes imposed by both ordinances, the tax rate of the last having been reduced by the Department of Finance, was already due, and the prayer of the petition shows that the petitioner had not paid them. In those circumstances the petitioner cannot bring an action for declaratory relief.

Angeles S. Santos, the petitioner, does not aver nor does he testify that he is the owner or part owner of "Cine Concepcion." He alleges that he is only the manager thereof. For that reason he is not an interested party. He has no interest in the theater known as "Cine Concepcion" which may be affected by the municipal ordinances in question and for that reason he is not entitled to bring this action either for declaratory relief or for prohibition, which apparently is the purpose of the action as may be gleaned from the prayer of the petition. The rule that actions must be brought in the name of the real party in interest (2) applies to actions brought under Rule 66 for declaratory relief. (3) The fact that he is the manager of the theatre does not make him a real party in interest. (4)

Nevertheless, laying aside these procedural defects, we are of the opinion and so hold that under Com. Act No. 472 the Municipal Council of Malabon is authorized and empowered to adopt the ordinances in question, and there being no showing, as the evidence does not show, that the rate of the municipal taxes therein provided is excessive, unjust, oppressive and confiscatory, their validity and legality must be upheld. The rate of the taxes in both ordinances, to wit: ₱1,000 a year for "Class A Cinematographs having orchestra, balcony and lodge seats" in Ordinance No. 61, series of 1946, (5) and ₱2,000 for each theater or cinematograph with gross annual receipts amounting to ₱130,000 or more in Ordinance No. 10, series of 1947, (6) under which the "Cine Concepcion" falls, is not excessive but fair and just. It is far from being oppressive and confiscatory. Pursuant to said Commonwealth Act if the increase of the municipal tax is more than 50% over the previous ones already in existence, the Municipal Council adopting such increase must submit it for approval to the Department of Finance which, although it cannot increase it, may reduce it and may approve it as reduced, or may disapprove it. It is contended that as only municipal councils are authorized by law to adopt ordinances, after the reduction by the Department of Finance of the tax rate imposed in Ordinance No. 10, series of 1947, duly adopted by the Municipal Council of Malabon, the latter should adopt another ordinance accepting or fixing the rate tax as reduced by the Department of Finance. The contention is without merit because the rate of taxes imposed on theaters or cinematographs in Ordinance No. 10, series of 1947, was the only one reduced by the Department of Finance and the reduction was for the benefit of the taxpayer as it was very much lower than the rate fixed by the Municipal Council. The authority and discretion to fix the amount of the tax was exercised by the Municipal Council of Malabon when it fixed the same at ₱9,000 a year. Certainly, the Municipal Council of Malabon that fixed the tax at ₱9,000 a year also approved the tax at ₱2,000 a year, this being very much less than that fixed in the ordinance. The power and discretion exercised by the Municipal Council of Malabon when it fixed the tax at ₱9,000 a year must be deemed to have been exercised also by it when the Department of Finance reduced it to ₱2,000 a year, for the greater includes the lesser. The adoption of another ordinance fixing the tax at ₱2,000 a year would be an idle ceremony and waste of time. Moreover, it must be borne in mind that municipal councils are not constitutional bodies but creatures of the Congress. The latter may even abolish or replace them with other government instrumentalities. Commonwealth Act No. 472 grants to the Department of Finance the authority to disapprove, implied in the power to approve, an ordinance imposing a tax which is more than 50% of the existing tax, or to reduce it, also implied in the same power. This, of course, is to forestall abuse of power by the municipal councils. If the Congress has granted to the Department of Finance the power to reduce such tax, implied in the power to approve or disapprove, there seems to be no cogent reason for requiring the municipal council concerned to adopt another ordinance fixing the tax as reduced by the Department of Finance. Therefore, the action of the Department of Finance in approving Ordinance No. 10, series of 1947, at a reduced rate, is not in excess of the powers granted it by law. The evidence does not show that the adoption of the ordinances in question by the Municipal Council of Malabon was the result of persecution of the petitioner.

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

(*Continued on page* 85)

DIGEST OF UNPUBLISHED DECISIONS OF THE SUPREME COURT AND COURT OF APPEALS

I

CRIMINAL LAW; WHERE CRIME IS NOT GRAVE THREAT BUT ATTEMPTED HOMICIDE OR DISCHARGED OF FIREARMS. — Where, while pointing a carbine at B, A said: "confess now your sin because this will be your last," and then the gun exploded, the words spoken cannot be considered as a threat, grave or otherwise, "but as a statement of his intention of carrying out, then and there, his purpose of injuring the offended party; so the crime committed by A "might be either attempted homicide, if coupled with the intention to kill (Arts. 51, 249 or 250, second paragraph, RPC), or mere discharge of firearms (Art. 254), or the light felony of drawing a weapon in a quarrel not in lawful self-defense (Art. 285, No. 1), but never the crime of grave threats charged in the information and defined in said Article 282 of the Revised Penal Code." *People of the Philippines vs. Floro Castrodes, CA-G.R. No.* 93838, *February* 11, 1953, *Felix, J.*

II

CRIMINAL LAW; THEFT; ACCUSED EXEMPT FROM CRIMINAL LIABILITY BECAUSE OF HIS RELATIONSHIP WITH THE OFFENDED PARTY. — Where one is found guilty of the crime of theft committed against his own grandfather he is exempt from criminal liability under the provisions of Article 332, No. 1 of the Revised Penal Code. *People of the Philippines vs. Cesar Patubo, CA-G.R. No.* 10616-*R, August* 15, 1953, *Felix, J.*

III

EVIDENCE; EXTRA-JUDICIAL CONFESSION NOT CORROBORATED BY EVIDENCE OF THE CORPUS DELICTI INSUFFICIENT FOR CONVICTION. — Where the accused, in an extra-judicial confession, confess that they used dynamite for fishing, they can not be convicted of the crime of fishing with dynamite if the said extra-judicial confession is not corroborated by any evidence of the *corpus delicti. People of the Philippines, Plaintiff-Appellee vs. Juan Pambujan, et al., Defendants-Appellants, CA-G.R. No.* 10599-*R. July* 28, 1953, *Concepcion,* J.

IV

CRIMINAL LAW; RECKLESS NEGLIGENCE. — A jeep was parked at right side of a street facing north. On the same side of the street about 6 meters behind the jeepney, likewise facing north a weapon carrier was parked. A truck driven by G came from the south of the street going northward. As it was about to pass the parked weapons carrier, another truck driven by C suddenly appeared from behind, and in trying to overtake G's vehicle either bumped into the latter or caused it to veer into the right and collide with the weapons carrier parked on the side of the street. Because of the force of the impact, the right front tire of G's truck bumped over the left front tire of the weapons carrier and both cars were dragged towards and rammed against the parked jeepney. *Held*: C is criminally liable because his own reckless negligence was the immediate cause of the accident. (1) While the operator of a motor vehicle is not compelled to trail behind another and may overtake and pass to the front of the one that precedes him, he may do so only if the road is clear and when the conditions are such that his attempt to pass would be reasonably safe and prudent (U.S. vs. Knight, 26 Phil. 216; Peo. vs. Pascual, G. R. No. 25677, March 7, 1932 (56 Phil. 842, Unpub.) Peo. vs. Enriquez (CA), 40 O. G. No. 5, 984. (2) C can not shift the blame for the accident on G, for G was suddenly placed in an emergency and compelled to act instantly; and he "is not guilty of negligence if he makes such a choice and that would have been required in the exercise of ordinary care, but for the emergency" (5 Am. Jur. 600-601). (3) Even were G guilty of contributory negligence, such negligence on G's part still would not absolve C from criminal responsibility, since D's own reckless negligence was the immediate cause of the accident. (Peo. vs. Nidoy, 60 Phil. 1023; Peo. vs. Enriquez (CA), supra.

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE VS. CRESCENCIO DE FIESTA, DEFENDANT-APPELLANT, C. A. R. NO. 8769, OCT. 5, 1953, R. Reyes, J.

V

CRIMINAL LAW; MALVERSATION OF PUBLIC FUNDS; CASE AT BAR.—The accused, a duly appointed clerk of the civil registrar in the Office of the Municipal Treasurer of Ubay, Bohol, and temporarily designated as assistant postmaster of the same municipality, had among other duties, to help in postal transactions, such as to sell postage stamps, to issue or cash postal money orders and to receive deposits or pay withdrawals in the Postal Savings Bank. In the morning of June 14, 1948, Dionisio Borlongan presented himself to the accused for the purpose of making a deposit of ₱700.00 in the name of his wife, Estrella Agrosino de Borlongan, a depositor in the Postal Savings Bank. To this end he delivered the amount of ₱700.00 and his wife's deposit book to the accused

(*Continued from page* 84)

Pablo, Montemayor, Bautista Angelo, Tuazon, Jugo and *Labrador,* JJ. concur.

Benzon J., took no part.

REYES, *J.,* dissenting:

I dissent insofar as the majority opinion holds that Ordinance No. 10, series of 1947, of the municipality of Malabon, Rizal, as modified by the Secretary of Finance, is valid and enforceable.

Under the Revised Administrative Code, the legislative power of a municipality is lodged in the municipal council. It is true that the exercise of that power by the council is subject to a certain degree of supervisory control on the part of certain officers of the National Government. And as an instance of this supervisory control, it is provided in section 4 of Commonwealth Act No. 472 that if a municipal ordinance increases the rate of a license tax on business, occupation or privilege in certain cases by more than 50 per cent, "the approval of the Secretary of Finance shall be secured." But having in mind the principle of separation of powers which pervades the system of government ordained by our Constitution, I take it that the veto power thus conferred upon the Secretary of Finance only authorizes that officer to approve or disapprove an ordinance that is submitted to him in accordance with the above-quoted provision of the Commonwealth Act, and that it does not empower him to change, alter or modify the terms of the ordinance, for that would be investing an executive officer with legislative functions. Where a municipal ordinance, therefore, increases or decreases in certain cases the rate of a license tax on business, occupation or privilege by more than 50 per centum and the Secretary of Finance increases or decreases the new rate prescribed in the ordinance, the action of the Secretary of Finance can only be taken as a recommendation, so that the modified ordinance will have no effect until it is repassed by the municipal council, in the same way that a tax bill already approved by the Legislature but returned to that body by the President with a recommendation for an increase or decrease in the rate of tax does not become a law unless repassed by the Legislature with the changes proposed by the Chief Executive.

It is, therefore, my opinion that Ordinance No. 10, series of 1947, of the municipality of Malabon which has been modified by the Secretary of Finance, cannot be enforced unless repassed by the municipal council as so modified. The judgment below should accordingly be modified.

I concur

(Sgd.) RICARDO PARAS

who then recorded the fact of the deposit in the deposit book. Afterwards the accused returned the deposit book to Borlongan and also delivered to him an official receipt the corresponding number of which, as it appears in the deposit book, is No. A-201901. Sometime in July, 1950, when Borlongan and his wife went to the central office of the Postal Savings Bank in Manila to make withdrawal from her deposit, it was discovered that the amount of ₱700.00 which they deposited on June 14, 1948, was not taken up in the postal account because the accused never reported said deposit in his record of collections, nor did he deliver said amount to the postmaster of Ubay, Bohol. It was also discovered that Official receipt No. A-209101 had previously been issued for a deposit of ₱2.00 in the Postal Savings Bank made by the accused himself in his own name on April 3, 1948, according to his pass book, which is the only entry appearing therein. *Held*: "The accused is guilty of the complex crime of malversation through falsification of public or official document committed by a public officer or employee.

"The accused's contention that he cannot be held guilty of malversation because his appointment is merely that of clerk and hence not an accountable officer, and also that the postal savings deposits are not government funds, is entirely without merit. The name of the office occupied by the appellant is of little consequence; the nature of the duties which he performed is the factor which determines whether or not the case falls within the purview of Article 217 of the Revised Penal Code (U.S. vs. Velasquez, 32 Phil. 157), and the fact that as part of his duties, he received public money for which he was bound and failed to account is decisively against him. Article 222 of the Revised Penal Code cited by the defense is of no avail because the purpose of this article is to extend the provisions of the Code on malversation to private individuals without excluding public officers. Moreover, this article expressly includes properties belonging to private individuals that are deposited with the government by public authority. (People vs. Velasquez, 72 Phil. 98; People vs. Castro, 61 Phil. 861; and People vs. Sibulo, G.R. No. 40714).

"The crime of falsification was likewise committed by appellant because he made it appear in the deposit book that Official Receipt No. A-209101 was issued for the deposit of ₱700.00, when that was not and could not be so, because said Official Receipt No. A-209101 had been previously issued to him for his deposit of ₱2.00 in the Postal Savings Bank.

"The crime committed in the case at bar is the complex crime of malversation through falsification of public or official document committed by a public officer or employee, defined and punished in Article 217 of the Revised Penal Code in connection with Article 171, par. 4, of the same legal body. According to Article 48 of the Revised Penal Code, as amended by Act No. 4000 of the Philippine Legislature, the penalty imposable upon appellant in this case is the one attached by law to the most serious crime, the same to be applied in its maximum period. The more serious crime is that of falsification, covered by Article 171, par. 4, of the Revised Penal Code, that is, *prision mayor* and a fine not to exceed five thousand pesos, the maximum period of which, in so far as the penalty of incorporation is concerned, being from 10 years and 1 day to 12 years. The next lower degree of the penalty prescribed in this Article 171, which is also to be imposed in virtue of the Interminate Sentence Act, is *prision correccional* in its full extent, or from 6 months and 1 day to 6 years. Although the trial judge has not divided the maximum period of *prision mayor* into three periods in imposing the maximum of the indeterminate sentence, as he could have done, we are not inclined to increase the maximum of the penalty actually imposed upon the defendant." *People vs. Escalante, CA-G.R. No.* 10141-*R, promulgated July* 22, 1953.

VI

CIVIL PROCEDURE; REDEMPTION OF REAL PROPERTY SOLD TO SATISFY JUDGMENT; CASE AT BAR. — On March 22, 1941, the sheriff of Bulacan, at public auction, sold a parcel of land belonging to judgment debtor, A, for the sum of ₱529.00 to the spouses J and R. Said buyers then conveyed their right and interest in the said land to M. On Oct. 7, 1943, A wrote a letter to the sheriff offering to redeem the property, but this offer was not heeded, upon the ground that the period of redemption had expired on March 22, 1942. A brought action against the sheriff, including J, R and M. After due trial, the Court of First Instance rendered a decision dismissing the case. A appealed, maintaining that the period of redemption, scheduled to expire on March 22, 1942, was suspended by the hostile military occupation of the Philippines; that the courts in Bulacan were not reestablished until after said date, or on May 2, 1942; and that, in view of the conditions prevailing in the Philippines during the occupation, A should have been allowed to redeem the property in question in October, 1943, when he offered to do so. Moreover, according to the stipulation submitted in the lower court, M, who acquired the rights of J and R, as purchasers at the auction sale of the property in dispute, received as products thereof, during the period of redemption, at least, one hundred twenty (120) cavanes of palay per year, at the conservative price of ₱8.00 per cavan, or an aggregate of ₱960.00; hence A maintains that, pursuant to Sec. 30, Rule 39, of the Rules of Court, such sum of ₱960.00 "shall be a credit upon the redemption money to be paid", and that, inasmuch as said amount of ₱960.00 exceeds the sale price of ₱529.00, the land in question should be considered as duly redeemed and A entitled to its possession and enjoyment, as owner thereof. *HELD*: The legal provision granting the judgment debtor a period of one year within which to redeem his property sold at an execution sale, is not in the nature of a statute of limitations of action. It merely gives him an option — which he is free to exercise or not — to redeem said property within the aforementioned period. *Alberto vs. De los Santos et a l., CA-G.R. No.* 5741-*R, promulgated July* 28, 1953.

ID.; NOTICE OF INTENTION TO REDEEM UNNECESSARY.— Section 30, Rule 39 of the Rules of Court — which should be construed liberally in favor of the right of redemption (31 Am. Jur. 521; 35 C.J. 68) — does not specifically require, however, a previous notice of intention to redeem or a previous demand for accounting, as a condition precedent to the crediting of the rents and profits upon the redemption to be paid.

ID.; RENTS AND PROFITS PENDING REDEMPTION. — The right, granted the judgment debtor, to demand, prior to the expiration of the period of redemption, a statement of the rents and profits received by the purchaser of the property, and extending said period for five days, after receipt of said statement, has for its sole purpose to relieve the judgment debtor of the obligation — which, otherwise, he would have — to tender payment of the full amount of the sale price. Should the aforementioned demand be made, he would have to tender payment only of the balance of the price, after deducting the value of the rents and profits received by the purchaser of the property or his successor in interest. *Alberto vs. De los Santos et al., CA-G.R. No.* 5741-*R, promulgated July* 28, 1953.

ID.; ID. — Such tender of payment could be made after the expiration of the period of redemption provided it is not more than five days from receipt of the statement of accounts asked by the judgment debtor from the purchaser. Although not bound to demand this statement before the expiration of said period, it would, however, be unwise for the judgment debtor not to do so, unless he offers to pay the full price of the sale within said period, for the rents and profits received

might not suffice to satisfy this price. When the price is more than covered by the rents and profits, there would appear to be no legal justification to hold that the redemption has not taken place *ipso facto*, the purchaser being already in possession of more than what he is entitled to receive. *Alberto vs. De los Santos et al., CA-G.R. No.* 5741-*R, promulgated July* 28, 1953.

ID.; LAW GOVERNING EXECUTION SALES. — Execution sales are governed, primarily, not by the law on sales incorporated into the Civil Code, but by the Rules of Court, which are based upon the principles, not of the Roman Law (after which the Civil Code is mainly patterned), but of the Common Law. *Alberto vs. De los Santos et al., CA-G.R. No.* 5741-*R, promulgated July* 28, 1953.

ID.; PURCHASER IN EXECUTION SALE DOES NOT ACQUIRE TITLE TO THE PROPERTY NOR RIGHT TO ITS POSSESSION. — The buyer in an ordinary execution sale, unlike a *pacto de retro* purchaser, does not acquire title to the property subject to a resolutory condition — the redemption. Neither does he acquire the right to its possession. The title remains in the judgment debtor, who, likewise, retains the right to continue in possession of the property, if he holds the same, and to receive the rents and/or profits thereof, without any obligation to turn them over, or to account therefor, to the buyer, irrespective of whether the right of redemption is exercised or not. *Alberto vs. De los Santos et al., CA-G.R. No.* 5741-*R, promulgated July* 28, 1953.

ID.; RENTS AND PROFITS PENDING REDEMPTION. — The buyer at the auction sale is not entitled to receive the rents bought, except where the property is held by the tenant. But even then said purchaser is bound to credit such rents and profits "upon the redemption money to be paid." Thus, he becomes a debtor for those rents and profits, in relation to the owner of the property, who, in turn, is his debtor for the amount, either of the judgment (if the buyer is the judgment creditor), or of the price paid at the execution sale, *with interest* thereon at the rate of 1% per month, which, by the way, clearly indicates that buyer does not own the property and *has no right to appropriate the fruits thereof*, prior to the expiration of the period of redemption. *Alberto vs. De los Santos et al., CA-G.R. No.* 5741-*R, promulgated July* 28, 1953.

ID.; EXECUTION SALE; COMPENSATION IN CASE OF REDEMPTION. — The conditions essential to compensation being, accordingly, present (see Articles 1278, 1279 and 1290, Civil Code of the Philippines), the same takes place and the obligations involved are extinguished to the extent of the concurrence thereof. *Alberto vs. De los Santos et al., CA-G.R. No.* 5741-*R, promulgated July* 28, 1953.

ID.; DEMAND FOR ACCOUNTING OR AN OFFER TO REDEEM UNNECESSARY. — The theory of the lower court, to the effect that a demand for accounting or an offer to redeem must be made before the expiration of the period of redemption, as a prerequisite to the compensation, is borne out, neither by the provisions of the Civil Code concerning compensation nor by those of the Rules of Court. What is more, said theory has been impliedly, but, clearly, rejected by the Supreme Court in the case of Syquia vs. Jacinto (60 Phil. 861). *Alberto vs. De los Santos et al., CA-G.R. No.* 5741-*R, promulgated July* 28, 1953.

CORPORATION LAW; WHEN THE JURIDICAL PERSONALITY OF A CORPORATION MAY BE DISREGARDED. — While, normally, courts regard that entity, they disregard it "to prevent injustice, or the distortion or hiding of the truth, or to let in a just defense" (Fletcher, Cyclopedia of Corporations, Permanent Edition, pages 139-140), and also when "the corporation is the mere alter ego or business conduit of a person (Idem, page 136). It is also well-settled that, although a corporation does not lose its entity or sepa-

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DECISION OF THE COURT OF INDUSTRIAL RELATIONS

Pepsi-Cola Bottling Co., versus Almeda et al., Cases Nos. 679-(1) & 679-V (2), *Judge Yanson.*

1. ILLEGAL STRIKE; ITS EFFECTS ON THE EMPLOYMENT STRIKERS. — As of the time the order declaring the strike illegal, has become final, the relationship between management and the strikers, *ipso facto*, is terminated. Since the workers were not dismissed, but, by operation of law, they lost their right to return to work by reason of their own acts, the relationship of the parties may be again renewed if and when a new contract of employment is entered into.
2. IBID; WHO ARE RESPONSIBLE THEREOF. — When a strike is declared illegal because of violence committed by some of the strikers, all the strikers, not only those who committed the illegal acts in furtherance of the strike, must be held responsible thereof.

Atty. Vicente J. Francisco for petitioner. *Attys. Cid, Rafael, Villaluz* for respondents.

RESOLUTION

Both parties filed a motion each for the reconsideration of the order of the trial court, dated June 12, 1953, the dispositive portion of which reads as follows, to wit:

> "WHEREFORE, in order to restore and maintain the status quo provided by Section 19, the Company is hereby ordered to reinstate in the meanwhile the said thirty-two (32) laborers, without back pay, considering that the employer offered re-employment, although temporary in nature: and to submit to this Court the names of the strikers who committed the illegal acts in furtherance of the strike, for proper action."

The facts upon which this order was based are: On March 12, 1953, respondents presented to the company president, J. P. Clarkin, certain labor demands (Exhibit "A"). They were, thereafter, invited to a conference by Management (Exhibit "B") but the parties, however, did not meet until Mr. Clarkin left the Philippines on April 12, 1952. On April 23, 1952, new demands were presented by respondents to Mr. J. Pascual, Treasurer of the Company, giving the Management two (2) days within which to answer them. The workers, assisted by the Union President and counsel, had, however, agreed to wait, until April 28, 1952, when they were made to understand that the President was out for the reply of Mr. Pascual. The matter of collective bargaining and the grant of the demands of the laborers had to be delayed.

In the meanwhile, the company, on April 30, 1952, filed in the Court a petition, requesting the issuance of an order to enjoin the union from declaring a strike. In the conference before the Court the labor leaders made assurance, after they had manifested that the union did not have any intention of declaring a strike, that they will not declare one. The injunction prayed for was not issued in view of this assurance. On May 3, 1952, new demands consisting of five (5) items, which demands are similar to that presented by the union to the company on April 23, 1952, were presented to the company. These demands were transmitted to the company's President by means of a telegranm.

In a general meeting held for the purpose of hearing the report of Mr. Laguian, the members of the union unanimously voted and decided to stage a strike, which, in fact, they declared on May 8, 1952. As a consequence of this strike, the syrup which was already prepared and placed in the tanks of the plant costing ₱2,000.00, among others, was spoiled; and, on the following day, a picket line was maintained and the employees, brokers, distributors and drivers were, by means of threat, prevented from getting into the premises of the Company. Under these facts, the Court after one hearing, in an order issued, declared the strike not only unjustified, but also illegal. The Court says:

> "x x x unjustified because all the strikers know beforehand that Treasurer Pascual had no authority to act on their demands and consequently they should have waited for Clarkin's answer before staging the strike; unjustified, because it was declared after Respondents, through their legitimate representatives, had

promised and assured the Court that they would not go on strike before May 15. The picketing which is the means employed in carrying it on is illegal, because the strikers resorted to threat and intimidation."

This case was brought to the Supreme Court on appeal but same was not given due course.

On May 16, 1952, the officer in charge of the company, knowing as he did the Court's order declaring the strike illegal, invited the workers to work by telling them that they could work if they desire to work, but on a temporary basis. Notice for the laborers to return to work within 48 hours was served them, and a copy thereof, on May 5, 1952, was posted at the company's premises. This notice informed those who desire to go back or to be reinstated to work with the company to see the Officer-in-Charge not later than 4:00 o'clock in the afternoon of May 26, 1952. And 50 workers, out of 82 who staged the strike, returned to work by signing a contract embodying all the terms and conditions of previous work agreement, the difference, however, of the new contract of employment from the contract previous to the strike was that the status under the former is temporary for the reason that the Company President, the only person with authority to hire, was out of the country. Because of the temporary nature of employment of the new contract signed by the workers returning after the strike, 32 workers, the subject of this Incidental Case, did not return to work. This case came to Court as an incident to the main case. In the hearing of this Incidental Case, these workers informed the Court that, so that their status prior to the strike may be maintained, they were willing to resume work under conditions existing prior to May 8, 1952. The trial Court found nothing wrong with the temporary nature of the contract signed by the workers after the strike, as in fact it found the execution thereof justified. It will be noted that, after the expiration of the time given in the notice for the striking workers to return and after the workers, the subject of this Incidental Case, had refused to sign the contract because of the conditions therein provided, the company, in view of the refusal of these workers and the present volume of business at the time, hired new workers to replace these subject workers.

Under these facts, it is believed that the position taken by the trial Court in its order of June 12, 1953, particularly Incidental Case No. 697-V(2) is without basis in fact and in law. After the Court had declared the strike staged by the union on May 8, 1952, not only unjustified but also illegal, and since the strike was unanimously voted upon by the workers, the employer-employee relationship of the parties was, as of May 3, 1952, doubtless, severed. In fact, it is said in one Supreme Court case that the consequence of an illegal strike is the dismissal of the laborers responsible in the illegal strike. As of the time the order declaring the strike illegal, has become final, the relationship between management and the strikers, *ipso facto*, is terminated. Since the workers were not dismissed, but, by operation of law, they lost their right to return to work by reason of their very own acts, the relationship of the parties may be again renewed if and when a new contract of employment is entered into.

We hold that, not only the strikers who committed the illegal acts in the furtherance of the strike but also — and all of them are included because they unanimously voted for the declaration of the strike of May 8, 1952 — the workers are to be held responsible therefor. Since all of them, including the thirty-two (32), the subject of this incidental case, should be made to suffer the adverse consequences of their illegal acts, the beneficent mantle of Section 19 of Commonwealth Act No. 103, as amended, could not extend to them. Since, as of May 8, 1952, when the strike was declared, there was nothing more to maintain, insofar as the employment-relationship between petitioner and the thirty-two (32) employees is concerned because the effect of the strike of May 8, 1952, was complete severance from work of all those responsible are concerned, then the "status quo" which the Trial Judge wanted to preserve does not exist. The declaration of the unjustifiableness and illegality of the strike of May 8, 1952, has to retroact, insofar as its adverse consequences are concerned, from the date of the strike. From that date, there is nothing more to maintain in "status quo" because the relationship of petitioner with the thirty-two (32) workers has already been severed by the illegal strike itself. To hold otherwise would, to our mind, run counter to what the Constitution and the law seek to avoid and give protection to those who, by their voiled conduct, have forfeited their rights thereto (National Labor Union vs. Philippine Match Company 70 Phil. 303).

In view of the foregoing considerations, the order of the Trial Court of June 12, 1953, should be, as it is hereby, reconsidered.

IT IS SO ORDERED.

Manila, Philippines, January 4, 1954.

(SGD.) ARSENIO C. ROLDAN
Presiding Judge
(SGD.) MODESTO CASTILLO
Associate Judge
(SGD.) JUAN L. LANTING
Associate Judge

BAUTISTA, J., dissenting—

The two incidental cases before this Court pertain to the reinstatement of certain unionists (32 workers in Incidental Case No. 1 and 19 workers in Incidental Case No. 2) who were dismissed by respondent company.

The facts in these incidental cases substantially differ from those already adjudicated in the main Case No. 697-V on May 16, 1952, involving the same parties, which declared the strike led by the Pepsi-Cola Labor Organization (respondents) as illegal.

In the first incidental case, the respondents (unionists) filed on May 19, 1952 with both this Court and the company, a notification expressing willingness to resume work immediately pending their appeal of this Court's Order of May 16th. The respondents reiterated their compliance with the *status quo* imposed upon the parties by Commonwealth Act 103, as amended. They notified the Court (Exh. "1", Case No. 697-V) that they have obeyed the order and have dissolved their strike and picket. This order was duly appealed to the Court *en banc* and became final only three months later in August, 1952, when the Supreme Court declined to review the questions of facts.

Meanwhile, between May 19 and May 26, 1952, despite the pending appeal on the strike's legality, the respondent company's acting manager, Mr. Jose Pascual, required all strikers to interview him prior to their reinstatement. Evidence concurrently shows that the company admitted strikers who were non-unionist and independent, but required those with union loyalty to sign certain papers as prerequisite to resumption of work.

Thus, on May 20, 1952, the respondents petitioned this Court for a restraining order against alleged unfair labor practices and urged their return to their permanent jobs. But the company continued hiring newcomers. The company admitted, later, having hired a total of 68 newcomers.

And on May 26, 1952, the unionists filed another petition for contempt against the company for hiring outsiders and for dismissing oldtimers, both without court knowledge and authority. The 32 unionists unaccepted by the company thence entrusted their fate with this court.

On the other hand, the company answered on June 10, 1952 and June 20, 1952, and alleged that this Court's order of May 16, 1952, which declared unjustified the strike led by these unionists on May

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rate juridical personality because the bulk or even the whole of its stock is owned by another corporation (Monongahela Co. vs. Pittsburg Co., 196 Pa., 26; 46 Atl., 99; 79 Am. St. Rep., 685), courts will look beyond the mere artificial personality which incorporation confers, and if necessary to work out equitable ends, will ignore corporate forms (Colonial Trust Co. vs. Montello Brick Works, 172 Fed. 310). In the case of Koppel (Phil.), Inc. vs. Yatco et al., our Supreme Court, applying the principles just stated, ruled that there is every reason to ignore and disregard the corporate entity where the corporation is so organized and controlled and its affairs are so conducted, as to make it merely an instrumentality of another, and the legal fiction will also be completely disregarded when it is invoked or used to defeat public convenience, justify wrong, protect fraud, or defend crime (43 Off. Gaz. No. 11, p. 4604). In the earlier case of Cagayan Fishing Development et al, vs. Sandico, 36 Off. Gaz., p. 1118 the same principles were sustained and applied. *People vs. Dollente, CA-G.R. Nos.* 7723-*R*, 7724-*R*, 7725-*R*, 7726-*R*, 7727-*R*, 7728-*R* & 7729-*R*, *promulgated February* 26, 1953.

8, 1952) automatically gave the company authority to dismiss the strikers and to hire replacements, without any knowledge or application to this Court.

We differ with these uncalled for and dangerous assumptions especially on such sacred and fundamental questions as job security and wholesale punishment without specific individual just causes. This tribunal, indeed, is under obligation to give protection to labor. (Art. XIV, Phil. Constitution). For the ruling of May 16, 1952, merely declared the strike as illegal based on circumstances then exposed by the company. The order could not, and did not, authorize therein that the several hundred strikers would be dismissed at the whim of the company; it did not authorize discrimination against leaders of the Pepsi-Cola Labor Organization. The order was clear—what is not written, is not authorized.

Significantly, the company on May 9, 1952, petitioned this court *for authority not to admit* (or to dismiss) the strikers; it likewise sought *authority to hire new outside laborers as replacements.* This Court refused to grant the requests and found no justification to dislodge these permanent workers most of whom served over five years in their jobs. This Court would not abet with whatever errors individual strikers may have committed nor utilize alleged individual mischiefs as capricious weapons to punish union membership, and indiscriminately against all strikers. But the company went ahead with the firing and hiring without any knowledge or permission from this Court, and despite unfavorable action on its requests of May 9, 1952.

On August 15, 1952, October 20, 1952, and November 7, 1952, the respondents gave supporting evidence in the persons of Eduardo Laguian, Onofre Rivera and Lamberto Ramos. Laquian, as union secretary acting for the union, first applied to Mr. Pascual immediately on May 16, 1952 for reinstatement under *status quo and* reiterated formal application on May 19, 1952 (Exhibit "1" of Case No. 697-V). Rivera testified on the "conditional contracts" imposed upon unionists who presented themselves for reinstatement. Ramos likewise applied to sign any agreement under any condition, but Mr. Pascual refused to accept him because he was one of those black-listed by the company. Ramos asked Pascual the reasons for the black-list but the latter gave none. (p. 45, t.s.n., Nov. 7, 1952). No witnesses testified for the company nor evidence submitted to repudiate these testimonies.

The principal question raised in this case is whether this Court's order of May 16, 1952, automatically authorized the dismissal of striking unionists and likewise authorized the employment of new laborers during the pendency of the Order, and without prior application to and permission from this Court.

We maintain that the order did not authorize the outright dismissal of all the strikers; neither did it authorize any prejudicial move in violation of the due process clause of the Constitution. No law exists that authorizes the automatic dismissal of strikers while the order or illegality is pending appeal. Neither does any statute permit *ipso facto* dismissal of all the strikers irrespective of their individual participation or non-participation in the unwarranted acts during the strike.

Of the several hundred strikers, no showing was exposed to this Court why 32 petitioners were picked out for "automatic discharge" despite their notice and application of May 19, 1952 to resume work. No evidence is on record that each of the 32 petitioners committed individual misconduct to justify their sudden dismissal. The causes of action in the petition to declare the strike illegal is different from the petition for reinstatement due to unjust cause.

This Court on June 12, 1953, finally decided to reinstate the 32 workers concerned, upon evaluation of the facts adduced.

Section 19, Commonwealth Act 103, as amended, says pertinently "that the employer shall refrain from accepting other employees, under the last terms and conditions existing before the dispute arose." Likewise, "during the pendency of an industrial dispute before the Court of Industrial Relations, the employer cannot lay off and much less dismiss the employee without the permission of the Court." (Luzon Marine Department Union vs. Arsenio Roldan, GR L-2660, May 30, 1950). "Permission must have been obtained first before an employer can discharge an employee during the existence of an industrial dispute before the Court of Industrial Relations." (Manila Trading vs. PLU, 40 Off. Gaz. 9th Suppl. p. 57).

It is therefore the duty of this Court to be vigilant when one of the parties is at a disadvantage due to indigence or other handicap. (Art. 24, Civil Code of the Philippines). Moreover, such dismissal of laborers is subject to the supervision of the Government. (Art. 1710, Civil Code of the Philippines). This means that the employer is not vested absolute power as sole arbiter on dismissal of strikers, taking into account that the company through its counsel, Atty. Vicente J. Francisco, brought this question to this Court on May 9, 1952.

The Supreme Court pointed out in the case of National Labor Union versus Philippine Match (70 Phil. 303) that not all the strikers could be punished but only those who commit specific unwarranted acts.

The ruling of this Court on June 12, 1953, considering the facts established, justly ordered the reinstatement of the 32 petitioners who were refused reinstatement by the company since May 19, 1952.

We vote to affirm their reinstatement.

Manila, January 14, 1954.

JIMENEZ YANSON, J., dissenting:

I dissent from the majority opinion of the Court *in banc,* reconsidering the order of the trial court, dated June 12, 1953, issued in Cases Nos. 697-V(1) and 697-V(2).

I agree entirely with the view of Judge Bautista as stated in the order issued on June 12, 1953 in said two cases, but as there seems to be, among the other Judges of this Court, divergence of opinion, with respect to the resolution of Case No. 697-V(1), I understand I should express my points of view therefor.

I agree that the mere declaration by the Court of Industrial Relations that the strike declared by the employees on May 8, 1952 was illegal does not necessarily carry with it the dismissal of all the striking employees. There must be a showing, after proper hearing, who are the ones responsible for such illegal strike before the Court could authorize the dismissal of the employees responsible of such illegal strike.

The real purpose of the law (Section 19 of Commonwealth Act 103, as amended) is "to maintain the parties in *status quo* during the pendency of the dispute in order to safeguard the public interest and to enable the Court to settle such dispute effectively (Manila Trading & Supply Co. vs. Philippine Labor Union, G.R. No. 47233).

And the above view has been reaffirmed in the case of the Luzon Marine Department Union vs. Arsenio C. Roldan, et al., G. R. No. L-2660, when the Supreme Court stated: "Under the law, during the pendency of an industrial dispute before the Court of Industrial Relations, the employer cannot lay off, much less dismiss, the employees without the permission of the Court."

The evident purpose of the law, as above stated, is to place in the hands of the Court of Industrial Relations, and not on the employer, the power to dismiss the employees, who participated in an illegal strike (Republic Steel Corporation vs. National Labor Relations Board, 107 F2d 472, No. 8, 1939) and also Resolution of the Court of Industrial Relations *in banc,* dated January 5, 1952, in Case No. 448-V(2); Filipino Labor Union vs. National City Bank Employees' Union, Case No. 500-V; Manila Oriental Saw Mill Co., National Labor Union; and Case No. 788-V Talisay-Silay Milling Co., Inc., vs. Talisay Employees and Laborers Association, August 12, 1953.

OPINION OF THE SECRETARY OF JUSTICE NO. 217, 1953

The Director
Bureau of Posts
Manila
Sir:

This is with reference to your letter of September 16, 1953, requesting my opinion as to whether or not a fraud order may be issued under the provisions of Sections 1982 and 1983 of the Revised Administrative Code against the San Miguel Brewery for conducting its scheme in which miniature Coca-Cola bottles are distributed in the manner and under the conditions described in your letter as follows:

> "Under the cork disc inside some (not all) of the Coca-Cola crown caps is a special marking consisting of the silhouette of a Coca-Cola bottle in a red circle. Five of these specially marked crowns are exchanged with one miniature Coca-Cola bottle which is an exact replica of the regular Coca-Cola soft drink but is only 2 1/2 inches high. The miniature bottle does not contain Coca-Cola but a harmless colored liquid. Marked crowns can be redeemed with any of the familiar Coca-Cola trucks or at the local Coca-Cola bottling plant."

Sections 1982 and 1983 of the Revised Administrative Code provide in part as follows:

> "SEC. 1982. Fraud orders.— Upon satisfactory evidence that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, x x x, the Director of Posts may instruct any postmaster or other officer or employee of the Bureau to return to the person depositing same in the mails, with the word 'fraudulent' plainly written or stamped upon the outside cover thereof, any mail matter of whatever class mailed by or addressed to any such person or company or the representative or agent of such person or company. x x x."
>
> "SEC. 1983. Deprivation of use of money order system and telegraphic transfer service.— The Director of Posts may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, x x x forbid the issue or payment by any postmaster of any postal money order or telegraphic transfer to said person or company or to the agent of any such person or company, x x x."

The purpose of mail fraud orders issued under the above provisions is to prevent the use of the mails as medium for disseminating printed matter which on grounds of public policy has been declared to be non-mailable (Farley v. Heininger, 1939, 105 F. 2d. 79, 308 U.S. 587, 84 L. ed. 491). The object is not to interfere with any rights of the people, but to refuse the facilities of the post office establishment to mail matters defined as objectionable by Congress or found to be so by the postmaster general after hearing (Acret v. Harwood, D.C. Cal. 1941, 41 F. Supp. 492). And lotteries, gift enterprises and other similar schemes are condemned by the statute because of their tendency to inflame the gambling spirit and to corrupt public morals (Com. v. Lund, 15 A. 2d. 839, 143 Pa. Super. 208).

As above provided, a fraud order may be issued against any person or company engaged in conducting a lottery, gift enterprises, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind. The question, therefore, may first be asked, what is a lottery?

The following definition is found in the decisions of the Supreme Court in the case of El Debate vs. Topacio (44 Phil. 278), thus:

> "The term 'lottery' extends to all schemes for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fair, etc., and various forms of gambling. The three essential elements of lottery are: First, consideration; second, prize; and third, chance." (U.S. vs. Filart and Singson, 30 Phil. 80; U.S. vs. Olsen and Marker, 26 Phil. 395; U.S. vs. Baguio, 39 Phil. 962; Valhalla Hotel Construction Company vs. Carmona, 44 Phil. 233).

I believe it the proper approach to the resolution of this case to address myself first to what you consider as the controversial point — whether the miniature Coca-Cola bottle may be deemed a prize in the lottery sense in this particular scheme where the same is being offered. If in the affirmative, then the inquiry can go deeper to determine whether the elements of chance and consideration are present.

As used in connection with anti-lottery laws, the word "prize" comprehends anything of value gained (or, correspondingly, lost) by the operation of chance, or any inequality in amount or value in a scheme of payment of money or other thing of value as a result of the use of chance. The gain need not be large to constitute a prize. The inequality may not be great, nor in favor of the person selected by chance. It may be against him. He need not lose all or gain all. Partial gain (or lose in the hope of gain) is sufficient to constitute a prize (Equitable Loan & Security Co. v. Waring, 44 SE 320, 326, 117 Ga. 599, 62 L.R.A. 93). It is not essential that the prize, if a money one, be a specific amount (Commonwealth v. Wright, 137 Mass. 250, 50 Am. Dec. 306), or that the prize be money (State v. Hahn, 72 P. 2d. 459, 105 Mont. 270), or have a fixed market value (New York City Alms House v. American Art Union, 7 NY 228), or that the value be previously fixed (Public Clearing House v. Coyne, 121 F. 927, 48 L. ed. 1092). The element of prize may exist in a scheme so arranged as to return to each participant something of value, or even an equivalent for all that he pays in (Fitzimmons v. United States, 156 F. 477, 13 L.R.A. [NS] 1095), so that, the fact that there can be no loss to the participants in a scheme does not prevent it from being a lottery when there may be contingent gains (Ballock v. State, 20 A. 184).

It cannot be gainsaid that the miniature Coca-Cola bottles are things of value. They are not things that come from nowhere but are manufactured at the expense of thousands and thousands of pesos to the Coca-Cola Company. Of course you are right in your observation that the value of these bottles should be considered from the point of view of the general public to whom they are offered as an inducement, and not from the standpoint of the manufacturer. But there cannot be any doubt that those miniatures attract the public and are valued by them, especially the children. The fact that no fixed monetary value can be attributed to them, since they are not regularly sold over the counter, is of no moment for it is not essential that prize in lottery, if other than money, should have a fixed market value (New York City Alms House v. American Art Union, supra).

I am thus led to conclude that the miniature Coca-Cola bottles distributed in the manner and under the conditions described in the quoted portion of your letter are prizes in the statutory sense, which, if coupled with the other elements of chance and consideration, as hereinafter to be discussed, would constitute as a lottery the scheme in which they are being offered.

Let us now turn to the other two elements of a lottery — the elements of chance and consideration. The inquiry would be much more difficult were I to attempt a reconciliation of two apparently conflicting decisions of the Supreme Court relied upon by your Office and the proponents of the Coca-Cola scheme. In the case of U.S. vs. Olsen and Marker (36 Phil. 395), the facts of which are too well-known to require their repetition here in detail, the Supreme Court held that the scheme therein involved was not a lottery for the reason that the purchaser of cigarettes obtains full value for his money, and that there was no consideration for the chance to win the prize which was merely incidental. In the later case of El Debate vs. Topacio (44 Phil. 278), one of the main issues before the Court was the question of consideration. To the plaintiff's contention that there was no consideration as the participant received the full value of his money, the Court emphatically said that while this is true as regards persons who subscribe to the El Debate

regardless of the inducement to win a prize, it "is fallacious as to other persons who subscribe merely to win a prize (and it is to such persons that the scheme is directed), for as to them it means the payment of a sum of money for the consideration of participating a lottery."

But prescinding from the apparent repugnancy between those two decisions, I have decided to pass upon this case in the light of the pronouncements of the Supreme Court in the "El Debate" case, not only because it is the later decision, but more so for the reasons that, as in the instant case, it construes the provisions of our Postal Law, while the "Olsen" case involves the application of the Gambling Law. Besides, this Office has, in previous opinions, already stated that the "El Debate" decision is the controlling case in this jurisdiction on whether or not a given scheme constitutes a lottery, gift enterprise, or similar scheme under the Postal Law (See Ops. Sec. of Justice, Nos. 87 & 184, series of 1950).

The applicable decision having been fixed and ascertained, I would be stressing the obvious were I to discuss and belabor herein the fact that the element of chance enters into this scheme of the San Miguel Brewery in the distribution of its miniature Coca-Cola bottles. It has been maintained in some quarters that chance is absolutely wanting as regards those who purchase Coca-Cola by the case, on the assertion and upon the assumption that five bottles with marked crowns are invariably among the the twenty-four bottles contained in a case. But aside from the obvious answer that could be given — that the purchase of Coca-Cola by the case is merely an exception, purchase by the bottle being the general rule — suffice it to cite the pertinent portion of the decision of the Supreme Court that in lottery under the Postal Law, "the element of chance is present even though it may be accompanied by an element of calculation or even of certainty." (El Debate vs. Topacio, supr.)

Applying, too, the principle enunciated in the "El Debate" decision, I am also of the opinion that the basis of the Supreme Court in concluding that the element of consideration is present in the scheme examined and considered in the said case, may also be applied with equal force in the instant case. Persons who buy Coca-Cola merely for the chance to win a miniature Coca-Cola bottle, not because of their desire for the drink, in effect pay a sum of money for the chance to participate in the scheme. (See also Ops., Sec. of Justice, Nos. 87 & 184, series of 1950). Thus, the practice of a bottler in stamping numbers under some of bottle crowns and redeeming such crowns in cash in amount of numbers, in order to advertise its beverages, constitutes lottery within constitutional and statutory inhibitions. (Try-Me Bottling Co. v. State, 178 So. 231, 235 Ala. 207.)

It is emphatically argued that to constitute a prize within the meaning of the anti-lottery statute, the value of the thing offered as prize must be greater than the value of the consideration paid for the chance of winning the same. And upon this proposition, it is vigorously stressed that a miniature Coca-Cola bottle cannot be deemed a prize on the alleged ground that the value of said bottle is such less than the amount the public has to pay for the chance of obtaining it. The general premise may be right — that prize in lottery must be something of greater value than the amount ventured therefore — but I am unable to subscribe to the conclusion deduced therefrom. Such conclusion appears, to my mind, as basically fallacious and the fallcy stems from the misconception that the public actually risks no less than fifty (P50) centavos — the cost of five (5) bottles of Coca-Cola soft drink — as consideration for the chance of obtaining a miniature Coca-Cola bottle. The Coca-Cola soft drink, it should be remembered, has always been sold, both before and after the scheme in question was undertaken, at ten (P.10) centavos per bottle. Hence, it is evident that the fifty (P.50) centavos referred to by counsel for the San Miguel Brewery represents chiefly the cost of five (5) bottles of the Coca-Cola drink, and only a small portion thereof, uncertain and negligible though it may be, constitutes the consideration hazarded for the chance of winning the prized miniature Coca-Cola bottle.

But assuming, moreover, for the sake of argument, that the scheme in question is not a lottery in the strict legal sense, it is at least a "gift enterprise" as the term is used in the aforecited provisions of the Revised Administrative Code. Again, I find myself in this connection unable to agree with the theory advanced by the proponents of the scheme that a gift enterprise, to fall within the purview of the statute, must be in the form or nature of a lottery with all its essential elements and inherent attributes. It is universally recognized that for a lottery to exist, all three elements of prize, consideration and chance must concur. The statute could have simply mentioned "Lottery" as ground for the issuance of a mail fraud order and that alone would be sufficient to embrace within its scope any and all schemes that involve the generally accepted elements of a lottery. But the law does not confine itself to mere lottery; it goes further and mentions "gift enterprise" and "scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind" as among those that may be administratively dealt with thru the issuance of a mail fraud order. Consequently, to adopt the theory of the counsel for the San Miguel Brewery would be to reduce the above-quoted words to mere superfluities, and would premise the construction of the statute on the unreasonable presumption that the legislature has used those words in vain or left part of its enactment without sense or meaning. It is an elementary rule of construction that effect must be given, if possible to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant (Sutherland, Stat. Const., 3rd Ed, Sec. 4795, p. 339).

A "gift enterprise" in a broad sense is defined as a scheme under which presents are given to purchasers of goods as an inducement to buy (Retail Section of Chamber of Commerce, etc. v. Kieck, 257 NW 493, 128 Neb. 13). In its widest concept, a "gift enterprise" may or may not involve the element of chance. Statutes directed against all gift enterprises whether or not the chance element enters into the scheme, have been held unconstitutional as invading property rights and the freedom to contract (24 Am. Jur., 474). The term, however, is used in our statute in association with the words "lottery" and "scheme for the distribution of x x x by lot, chance, or drawing of any kind", and in consonance with the doctrine of *noscitur a sociis*, that the meaning of particular terms in a statute should be ascertained by reference to words associated therewith (Virginia v. Tenn., 148 U.S. 503. 37 L. ed. 537), the law evidently concerns itself with those species of gift enterprises that involve the lottery element of chance. In this restricted sense, therefore, a "gift enterprise" may be aptly defined as a scheme under which *goods are sold for their market value* but by way of inducement each purchaser is given a *chance* to win a present or prize (Barker v. State, 193 SE 605, 56 G. App. 705). While it may be conceded that prize in strict lottery must be something of greater value than the consideration risked therefor, the rule will not necessarily be true with respect to a gift enterprise where, as may be reasonably inferred from the definition of the term, the thing given as present or prize would ordinarily be of less value than the article bought. The prize may be of insignificant value as compared with the cost of the article purchased, but so long as the distribution of the prize is determined by lot or chance and the prize is offered as an inducement to buy, the scheme is a gift enterprise within the purview of the statute. It has also been held on good authority that, while it is impossible to lay down an absolute rule as to what constitutes the distinction between lotteries and gift enterprises, a plan will be considered within a statute against gift enterprises if it involves an award by chance without the consideration necessary to constitute the scheme a lottery (Crimes v. State, 235 Ala. 192, 178 So 73; Russell v. Equitable Loan & Sec. Co., 129 Ga. 154, 58 SE 88, cited in State v. Fox-Great Falls Theater Corporation, 132 P. 2d. 689, 694). Thus, the operation of a so-called "bank night" by which a theater awarded money, after the showing of a moving picture, by lot and in which the public could participate without paying admission or without entering the theater is, if not a lottery, at least a gift enterprise involving lottery principle within the meaning of constitutional provisions condemning lotteries and gift enterprises (City of Wink v. Griffith Amusement Co., 100 SW 2d. 695; See also Barker v. State, 193 SE 605, 56 Ga. App. 706).

All things considered, it is my opinion that the scheme in question is a lottery, or at least a gift enterprise within the meaning of Sections 1982 and 1983 of the Revised Administrative Code. Your query is therefore answered in the affirmative.

Respectfully,

ROBERTO A. GIANZON
Acting Secretary

(REPUBLIC ACT NO. 900)

AN ACT TO AMEND SECTION TWENTY-EIGHT OF REPUBLIC ACT NUMBERED FOUR HUNDRED NINE, KNOWN AS THE REVISED CHARTER OF THE CITY OF MANILA.

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

SECTION 1. Section twenty-eight of Republic Act Numbered Four hundred nine, known as the Revised Charter of the City of Manila, is hereby amended to read as follows:

SECTION 28. *The Bureau of Public Schools.*—The Director of Public Schools shall exercise the same jurisdiction and powers in the city as elsewhere in the Philippines, and the city superintendent of schools shall have all the powers and duties in respect to the schools of the city as are vested in division superintendents in respect to the schools of their divisions.

"The Municipal Board shall have the same powers in respect to the establishment of schools in Manila as are conferred by law on municipal councils.

"The clerical force and assistants and laborers in the Office of the Superintendent of City Schools shall be paid by the city, as well as the office expenses for supplies and materials incident to carrying on said office. The Municipal Board may provide for additional compensations for the Superintendent of City Schools and for other national school officials, teachers and employees in the Division of City Schools so that the Superintendent of City Schools may have a total salary equal to that of a city Department Head of the same importance and the salaries of all other officials and employees in the Division of City Schools performing similar duties and rendering the same kind and amount of work in the city may be equalized. For purposes of Republic Act Numbered Six hundred sixty, the combined salaries received from the National Government and from the city by the Superintendent of City Schools and other national officials, teachers and employees in his office shall be considered as their base pay."

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

Approved, June 20, 1953

(REPUBLIC ACT NO. 770)

AN ACT TO CREATE A PUBLIC CORPORATION TO BE KNOWN AS THE SCIENCE FOUNDATION OF THE PHILIPPINES, AND TO DEFINE ITS POWERS AND PURPOSES.

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

SECTION 1. This Act shall be known and cited as "The Science Foundation Act of the Philippines".

SEC. 2. The Vice President of the Philippines, the President of the Senate, the Speaker of the House of Representatives, the Majority Floor Leader of the Senate, the Majority Floor Leader of the House of Representatives, the Minority Floor Leader of the Senate, the Minority Floor Leader of the House of Representatives, the Secretary of Health, the Secretary of Education, the President of the Manila Rotary Club, the President of the Manila Lions' Club, the President of the National Federation of Women's Clubs, the President of the Philippine Chamber of Commerce, the President of the Philippine Junior Chamber of Commerce, the President of the American Chamber of Commerce, the President of the Chinese Chamber of Commerce, Manuel V. Arguelles, Conrado Benitez, Agerico B. Sison, Antonio Nubla, Albino Sycip, Jose P. Marcelo, Gumersindo Garcia and Manuel I. Felizardo, all of Manila, Philippines, their associates and successors, are hereby created a body corporate and politic in deed and in law, by the name, style, and title of "The Science Foundation of the Philippines" (hereinafter called the Corporation). Vacancies among the above charter members shall be filled, and their associates and successors, shall be elected upon the sponsorship of any two of the charter members and the two-thirds secret vote of the others thereof. The principal office of the Corporation shall be in the City of Manila, Philippines.

SEC. 3. The said Corporation shall have perpetual succession, with the power to sue and be sued; to hold such real and personal estate as shall be necessary for corporate purposes, and to receive real and personal property by gift, devise, or bequest; to adopt a seal, and to alter or destroy the same at pleasure; to make and adopt the by-laws, rules and regulations not inconsistent with the laws of the Philippines, and generally to do all such acts and things (including the establishment of regulations for the election of associates and successors) as may be necessary to carry into effect the provisions of this Act and promote the purposes of said Corporation.

SEC. 4. The purposes of this Corporation shall be:

(*a*) To initiate, promote, stimulate, solicit, encourage and support basic and applied scientific research in the mathematical, physical, medical, biological, engineering and other sciences, by means of grants, loans, and other forms of assistance to qualified persons and institutions applying for same;

(*b*) To award scholarships and graduate fellowship in the mathematical, physical, medical, biological, engineering and other sciences;

(*c*) To foster interchange of scientific information among scientists here and abroad;

(*d*) To aid in the establishment of adequate scientific laboratories; and

(*e*) To encourage, protect and aid in the organization of science clubs and societies in the schools and colleges of the Philippines.

SEC. 5. The governing body of said Corporation shall consist of a Board of Trustees composed of residents of the Philippines. Juan Salcedo, Jr., Camilo Osias, Raul T. Leuterio, Vidal A. Tan, M. V. Arguelles, Miguel Cuaderno, Sr., Agerico B. Sison, Antonio Nubla, and Jose P. Marcelo, shall consttitute the first Board of Trustees: *Provided*, That at all times the majority of the succeeding members of the Board of Trustees shall be persons holding positions in the Government. The members of the Board of Trustees under this charter shall be divided into two groups by lot. The trustees of the first group shall serve for a term of three years, and those of the second group, for six years. Vacancies that may occur in the Board shall be filled, and successors to the first members of the Board of Trustees, shall be elected, by the sponsorship of two charter members and the two-thirds secret vote of the remaining charter members thereof. The Board of Trustees shall have power to make and to amend the by-laws, and, by a two-thirds vote of the whole Board at a meeting called for this purpose, may authorize and cause to be executed mortgages and liens upon the property of the Corporation. The Board of Trustees may, by resolution passed by a majority of the whole Board, designate five or more of their number to constitute an executive committee of which a majority shall constitute a *quorum*, which committee, to the extent provided in said resolution or in the by-laws of the Corporation, shall have and exercise the powers of the Board of Trustees in the management of the business affairs of the Corporation, and may have power to authorize the seal of the Corporation to be affixed to all papers which may require it. The Board of Trustees, by the affirmative vote of majority of the whole Board, may appoint any other standing committees, and such standing committees shall have and may exercise such powers as shall be conferred or authorized by the by-laws. With the consent in writing and pursuant to an affirmative vote of a majority of the charter members of said Corporation, the Board of Trustees shall have authority to dispose in any manner of the whole property of the Corporation.

SEC. 6. An annual meeting of the charter members, their associates and successors shall be held once in every year after the year of incorporation, at such time and place as shall be prescribed in the by-laws. Special meetings of the Corporation may be called upon such notice as may be prescribed in the by-laws. The number which shall constitute a *quorum* at any annual or special meeting shall be prescribed in the by-laws. The Board of Trustees shall have power to hold their meetings and keep the seal, books, documents, and papers of the Corporation within or without the City of Manila.

SEC. 7. Any donation or contribution which from time to time may be made to the Science Foundation of the Philippines by the Government or any of its subdivisions, branches, offices, agencies, or instrumentalities or from any person or entity, shall be expended by the Board of Trustees in pursuance of this Act.

SEC 8. Any donation or contribution which from time to time may be made to the Science Foundation of the Philippines shall

be considered allowable deductions on the income of the donor or giver for income tax purposes; and other transactions undertaken by it in pursuance of its purposes as provided in section 4 hereof shall be free from any and all taxes.

SEC. 9. From and after the passage of this Act, it shall be unlawful for any person within the jurisdiction of the Philippines to falsely and fraudulently call himself out as, or represent himself to be, a member of or an agent for the Science Foundation of the Philippines; and any person who violates any of the provisions of this Act shall be punished by imprisonment of not to exceed six months or a fine not exceeding five thousand pesos, or both, in the discretion of the court.

S53. 10. This Act shall take effect upon its approval.

Approved, June 20, 1952.

(REPUBLIC ACT NO. 896)

AN ACT TO DECLARE THE POLICY ON ELEMENTARY EDUCATION IN THE PHILIPPINES

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

SECTION 1. This Act shall be known as the "Elementary Education Act of 1953."

SEC. 2. In pursuance of the aim of all schools expressed in section five, Article XIV of the Constitution, and as amplified by subsequent legislation, it shall be the main function of the elementary school to develop healthy citizens of good moral character, equipped with the knowledge, habits, and ideals needed for a happy and useful home and community life.

SEC. 3. To put into effect the educational policy established by this Act, the Department of Education is hereby authorized to revise the elementary-school system on the following basis: The primary course shall be composed of four grades (Grades I to IV) and the intermediate course of three grades (Grades V to VII). Pupils who are in the sixth grade of the time this Act goes into effect will not be required to complete the seventh grade before being eligible to enroll in the first year of the secondary school: *Provided*, That they shall be allowed to elect to enrol in Grade VII if they so desire.

SEC. 4. The Secretary of Education may, with the approval of the President, authorize, in the primary grades, the holding of one class, morning and afternoon, under one teacher. In the intermediate grades, classes may be authorized on the basis of two classes under three teachers or of three classes under five teachers. Where there is not enough number of children to meet the minimum requirements for organizing one-grade or two-grade combined classes, the Secretary of Education may authorize the organization of classes with more than two grades each.

SEC. 5. It shall be compulsory for every parent or guardian or other person having custody of any child to enroll such child in a public school, the next school year following the seventh birthday of such child, and such child shall remain in school until the completion of an elementary education: *Provided, however*, That this *compulsory attendance shall not be required in any of the following* cases: First, when the child enrolls in or transfers to a private school; Second, when the distance from the home of the child to the nearest public school offering the grade to which he belongs exceeds three kilometers or the said public school is not safely or conveniently accessible to the child: Third, when such child is mentally or physically defective in which case a certificate of a duly licensed physician or competent health worker shall be required; Fourth, when, on account of indigence, the child cannot afford to be in school; Fifth, when the child cannot be accommodated because of excess enrolment; and Sixth, when such child is being regularly instructed by its parent or guardian or private tutor, if qualified to teach the several branches of study required to be taught in the public schools, under conditions that will be prescribed by the Secretary of Education,

S53. 6. There is hereby authorized to be appropriated out of any funds in the National Treasury not otherwise appropriated, such sums as may be necessary to carry out the purposes of this Act.

S53 .7. All acts or parts of acts inconsistent with the provisions of this Act are hereby repealed.

S53. 8. This Act shall take effect upon its approval.

Approved, June 20, 1953.

PAY YOUR INCOME TAX

It's high time you think of your income tax.

Lest, you forget there are new regulations governing this tax and for your benefit this paper is printing here the latest dope there is to it from the bureau of internal revenue. Here goes:

"In connection with the filing of the 1953 income tax returns of both individuals and corporations, the following are being released for the information and guidance of the taxpayers concerned:

1. Rates of individual income tax—The rates on individual income tax for the year 1953 have reverted to the 1949 rate as provided for under Republic Act No. 82 which took effect on January 1, 1946, because the effectivity of the rates provided under Republic Act No. 590, which were enforced from January 1, 1950 to December 31, 1952, has not been extended by Congress. The rates applicable to income of individuals during the year 1953 are as follows:

"For the 1st ₱200	3%
"₱2,000 to ₱4,000	6%
"₱4,000 to ₱6,000	9%
"₱6,000 to ₱10,000	13%
"₱10,000 to ₱20,000	17%
"₱20,000 to ₱30,000	22%
"₱30,000 to ₱40,000	26%
"₱40,000 to ₱50,000	28%
"₱50,000 to ₱60,000	30%
"₱60,000 to ₱70,000	32%
"₱70,000 to ₱80,000	34%
"₱80,000 to ₱90,000	36%
"₱90,000 to ₱100,000	38%
"₱100,000 to ₱150,000	40%
"₱150,000 to ₱200,000	42%
"₱200,000 to ₱300,000	44%
"₱300,000 to ₱400,000	46%
"₱400,000 to ₱500,000	48%
"₱500,000 to ₱700,000	50%
"₱700,000 to ₱1,000,000	52%
"₱1,000,000 to ₱2,000,000	55%
"₱2,000,000 up	60%

"2. Personal exemption—The personal exemption for single individual is ₱1,800 and for a married person or head of a family, ₱3,000. The additional exemption for each child below 21 years of age is ₱600. No proportional exemption is allowed except when the status of the taxpayer changes during the taxable year by reason of his death.

"3. Requirement for filing — All citizens and resident aliens having a gross income of ₱1,800 or more for the year 1953 are required to file income tax returns on or before March 1, 1954.

"4. Corporations—Corporations are required to pay for the year 1953 the rate of 20% on the first ₱100,000 net income and 28% on the excess over ₱100,000 of their net income. These rates have been extended up to December 31, 1954 by Republic Act No. 868.

"5. Withholding taxes on non-resident aliens and non-resident foreign corporations—The rates of withholding taxes are 24% for non-resident foreign corporations and 12% for non-resident alien individuals, unless the income of the latter from Philippine sources exceeds ₱16,500 in which case the graduated rates under Section 21 of the National Internal Revenue Code will be applied.

"6. Claiming the 10% optional standard deduction—In lieu of all deductions allowed by law, an individual other than a non-resident alien may claim an optional standard deduction of 10% of the gross income of ₱1,000—whichever is the lesser. The standard optional deduction cannot exceed ₱1,000. Only one kind of deduction can be claimed, either the itemized deduction or the optional. Both cannot be claimed. If both are claimed, whichever is greater will be allowed.

"Taxpayers are requested to file their income tax returns as early as possible and not to wait for the last day for filing the same in order to avoid the rush and crowd and in order to help the Bureau in processing their returns earlier. Likewise, it is

(*Continued on page* 94)

MEMORANDUM OF THE CODE COMMISSION

(*Continued from the January Issue*)

ARTICLE 522—Justice Reyes proposes that the words "after judicial summons" should be eliminated, because a possessor, originally in good faith, may become aware of the unlawfulness of his possession even before judicial summons, and if he persists in holding out against the person legally entitled to the possession, he should be liable for the deterioration or loss of the thing.

The reason for adding the words "after judicial summons" is based on the following opinions of Manresa:

"x x x. El art. 457 solo tiene en esta parte una explicacion posible. El Codigo llama poseedor de buena fe al que la ha tenido hasta el momento del litigio, aun suponiendo que por la citacion pierda ese caracter, cosa discustible: sigue llamandole poseedor de buena fe para distinguirle de que siempre la tuvo mala o laperdio anteriormente. El art. 457 se refiere a ese poseedor de buena fe, que, ante el despecho o la con conviccion de pedder lo que se habia acostumbrado a mirar como suyo, intencionalmente destruye la cosa, la ocuita, deteriora, etcetera, en el periodo que media desde la citacion hasta la entrega, cuando ya puede sostenerse que se poseedor de mala fe. Alguna razon hay, porfue esta mala fe dudosa es obra de una ficcion, pues, en realidad, hasta que la sentencia se hace firme, el poseedor puede sequir creyendo que la cosa es suya; tal vez por eso solo pena el art. 457 en, ese caso, el dolo, la intencion injusta, el proposito de perjudicar."

ARTICLE 562—Justice Reyes states that the description of "usufruct" misses two fundamental characteristics, namely; that it is a real right, and that it is of temporary duration.

These qualities are perfectly well-known and understood. At any rate, they are more properly to be dealt with in a treatise and not in a civil code.

The emphasizing of the form and substance, which is also done in Art. 467 of the old Civil Code, is necessary because the usufructuary in the enjoyment of the property right go so far as to impair the form and substance of the thing. This abuse is all too frequent. Therefore, it is necessary to make an express limitation to that effect. Of course, title or the law may dispense with this condition, and so a statement to that effect is made in this article.

ARTICLE 587—Justice Reyes states that by translating "caucion juratoria" as merely a promise under oath, the idea of the Code of 1889 is left truncated and unintelligible.

It being evident that this Art. 587 has been taken from Art. 495 of the old Civil Code, and inasmuch as the "caucion juratoria" has a historic and established meaning in connection with said source (Art. 495 of the old Code), there is no need of stating in detail the meaning the promise under oath.

ARTICLE 611—Justice Reyes suggests that this article be amended to provide expressly that "successive usufructs shall not exceed the limits fixed by Art. 863."

Although the amendment is not absolutely necessary because, as Manresa says, a successive usufruct "casi exclusivamente se constituye por ultima voluntad" and therefore the limitations fixed by Art. 863 in almost all cases of successive usufruct applies, and although the principle of Art. 863 is applicable by analogy in cases of successive usufructs created inter vivos, nevertheless for purposes of clarification in the rare cases of successive usufruct created inter vivos, the proposal of Justice Reyes is accepted by the Code Commission.

ARTICLE 613—Justice Reyes proposes that in lieu of "immovable," the term should be "immovable estate." The proposed amendment would not improve the wording, if such improvement is necessary, but no improvement or change is necessary because it is self-evident that an "immovable" by destination, such as machinery or, by analogy, like real rights over immovable property, can not be dominant or servient estates.

ARTICLE 621—Justice Reyes thinks that the words "forbade, by an instrument acknowledged before a notary public" is unpleasantly vague. He says that, in the first place, it gives no clear idea of the content of the instrument to be notarized.

Our comment is that the rest of the sentence under discussion clearly shows the content of the instrument. The whole sentence says, "x x x from the day on which the owner of the dominant estate forbade, by an instrument acknowledged before a notary public, the owner of the servient estate, from *executing an act which would be lawful without easement.*"

Furthermore, Justice Reyes asks, "How is the servient to know of the prohibition?" He, therefore, suggests that document must be served upon the owner of the servient estate.

Our observation is that there is no necessity for any express provision that the instrument should be served because the words "the owner of the dominant estate forbade" perforce require that the instrument be served. How can it be reasonably conceived that there could be a prohibition unless it is conveyed to the owner of the servient estate?

ARTICLE 624—Justice Reyes recommends that the word "continued" on line 4 should read "be exercised." His reason is that while both estates belong to the same owner, there can be no easement.

It is true, strictly speaking, that there is no easement under Art. 613, which requires that there be two owners. However, this is a special kind of an easement which is created by a special situation. It will be noted, in this connection, that the first two lines of Art. 624 refer to "the existence of an apparent sign of easement *between two estates* established or maintained by the owner of both." There is no intention in the Article to imply that an ordinary easement exists, because it is expressly stated that the easement is *between the two estates* establishd or maintained by the owner of both. Therefore, the Code Commission does not agree with the proposed amendment.

ARTICLE 626—Justice Reyes makes these observations: "Why limit the easement to the tenement (not immovable, see comment to 613) *originally* contemplated? So long as the burden is not increased (as it is prohibited by Art. 627) what does it matter that the dominant estate is enlarged?"

As already stated, the article under consideration is not taken from any provision of the old Civil Code. It does not apply to a case where, for example, in an easement of right of way, the dominan estates is enlarged. It is an embodiment of the following observations by Manresa:

"Solo puede usarse la servidumbre para utilidad del predio o de la parte de predio en cuyo favor fue establecida, y en el modo y forma que resulte del titulo, de la costumbre en el caso de posesion y prescripcion, cuando esta sea admisiable, o de la ley que limita la servidumbre a lo estrictamente necesario para el destino y el conveniente uso del predio dominante con el menor daño posible para el sirviente. Asi, en terminos generales, *el que tiene derecho a tomar agua para el riego de toda su finca o una parte de ella, no puede destinarla al riego de otra finca o de otra porcion.*" (Vol. 4, p. 573).

ARTICLE 657—Justice Reyes suggests a redrafting of this article as follows:

"Existing easements of right of way for the passage of

PAY YOUR INCOME . . .

(*Continued from page 93*)

informed that the inventory list as required be filed within thirty (30) days after the close of the taxable period of the taxpayer. With reference to the granting of extensions of time within which to file income tax returns, the general public is also informed that the Bureau is adopting a strict policy on such extensions and only in meritorious case will such extensions be granted. The requests for extensions shall be filed directly with the Chief of the Income Tax Division in duplicate and the approval and disapproval will be stamped on such requests upon presentation to this Office.

"The filing of the 1953 4th quarterly return on withholding tax, Form W-1, together with the filing of the alphabetical list of employees, and of Form W-3 will be on or before January 31, 1954.

"The last day for filing of income tax returns covering all incomes earned in 1953 is March 1, 1954.

(Sgd.) SILVERIO BLAQUERA
Deputy Collector of Internal Revenue"

livestock shall be governed by the ordinances and regulations relating thereto, and in the absence thereof, by the usages and customs of the place.

"Whenever it is necessary to establish hereafter a compulsory easement of right of way or for a watering place for animals, the provisions of this Section and those of Articles 640 and 641 shall be observed. In this case the width shall not exceed 10 meters."

The Code Commission disagrees with the proposal, because it is necessary to retain paragraph 2 of the article in question, which fixes the width of animal paths and animal trails. This should be done, regardless of any historical background in Spain, because it is desirable to fix a maximum width for animal paths and animal trails, otherwise the easement, if it is too wide, may be prejudicial to landowners.

ARTICLE 668(2)—Justice Reyes states that express reference to Art. 621 is necessary to clarify the meaning of the phrase "formal prohibition." However, such express reference is not necessary because Justice Reyes himself says, "*Obviously* this means the notarial instrument provided for in Art. 621."

ARTICLE 669—Justice Reyes states that to impose a 30 cm. sq. limit on *windows* is "to undermine the well being of household owners."

In the first place, these are not *windows* but mere openings to admit light at the height of the ceiling joists or immediately under the ceiling. It is very evident that openings at such a height, that is, immediately under the ceiling, are not intended as windows for people to look through or get fresh air, but they are merely, as the article itself says, "openings to admit light."

In the second place, to increase the size to "not less than one meter square" would be dangerous because the wall where the opening is may be just a few inches from, or in fact, it may be on the boundary line, as Art. 669 applies only when the distances in Art. 670 are not observed. (That is to say two meters for direct views or 60 cm. for indirect views.) This being the case, even if there is an iron grating as well as a wire screen, it would be easy for thieves and other persons criminally inclined to destroy the grilles and the wire screen in order to go through the opening, which would be large enough to allow a person to go through.

ARTICLES 669-672; 674; 677-681—Justice Reyes says that these articles do not refer to easements but to restrictions of the right of ownership and should be placed elsewhere. He refers to his notes to Art. 431.

We also refer to our observations under Art. 431. And also to our comment on Art. 682 and 683 immediately following.

ARTICLES 682 and 683—Justice Reyes believes that these articles on easement against nuisance are improperly placed in the chapter on "Easements."

However, we believe that this is the most logical place for these articles, for these reasons:

1. According to our comment on the proposed amendment to Art. 431, no separate chapter on the limitations of ownership should be incorporated in the Code. In addition to the reasons already set forth under Art. 431, we submit that in such proposed separate chapter on limitations to ownership, in order that it may fully serve its purpose *all the limitations of ownership must be stated and explained.* Now, according to Sanchez Roman, there are many such limitations, and he outlines them as follows:

LIMITACIONES DEL DOMINIO.
Contenido de la relacion juridica, DOMINIO
POR RAZON:

"I. Del dominio eminente del Estado:
- a. Imperio general de las leyes.
- b. Mas especial y concreto de los reglamentos y ordenanzas.
- c. Servicios fiscales.
- d. Expropiacion forzosa y otras formas de utilidad publica.
- e. Servidumbres legales.
- f. Explotacion del subsuelo.

"II. De la voluntad del transmitente:
- a. Por contrato.
- b. Por ultima voluntad.

"III. De la propia voluntad del dueño. (creacion de los derechos reales limitativos del dominio.):
- a. Servidumbres:
  - Reales.
  - Personales.
- b. Censos:
  - Enfiteutico.
  - Consignativo.
  - Reservativo.
- c. Hipoteca.
- d. Prenda.
- e. Superficie.
- f. Retracto.
- g. Inscripcion arrendaticia.

"IV. De un conflicto de derechos particulares:
- a. Los nacidos de la posesion civil.

(Vol. 3, p. 93)

In order to make the proposed chapter serve a useful purpose, it would have to be drafted and developed in accordance with the foregoing outline. The result would be that practically the rest of the Code concerning easements, usufruct, mortgage, pledge, redemption (retracto) and lease record, as well as possession, would have to come under the chapter. In addition all the subjects coming under Numbers I and II of Sanchez Roman's outline referring to the "Dominio eminente del Estado" and "la voluntad del transmitente" including contracts and wills would also logically come within the chapter. The result would be fantastic!

2. There is nothing absolute and definitive about the propriety or impropriety of using the term "easement" or "servitude." For example, Manresa classifies usufruct as a "servidumbre personal"; then Art. 531 of the old Civil Code provides: "Tambien pueden establecerse servidumbres en provecho de una c mas personas, o de una comunidad, a quienes no pertenezca la finca gravada."

3. In English and American law, easement and nuisance are dealt with together. Tiedeman on Real Property says, under the heading of "Easements," (Sec. 622, p. 596): "*Legalized nuisances.*— Where one acquires from the owners of the land in the neighborhood by grant or prescription the right to do things which without such license would be a nuisance, and for which an action would lie, he is said to have acquired *an easement in the lands to commit the nuisance,* free from liability for the consequences."

In the "English and Empire Digest," vol. 19, pp. 178-179, under the subject of "Miscellaneous Easements," we read: "By lapse of time, if the owner of the adjoining tenement, which, in the case of light or water, is usually called the servient tenement, has not resisted for twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbor."

ARTICLES 684-687

Justice Reyes says these articles do not create an easement.

The remarks just submitted are also applicable to these articles on "Lateral and Subjacent Support". In the American and English law "lateral and subjacent support" is considered an easement.

Tiedeman on Real Property, sec. 618, pp. 590-591, under the topic of "Easements," says: "*Right of lateral and subjacent support.* — As an incident to the right of property in lands, the proprietor cannot make excavations upon his land, which will deprive the adjoining land of that lateral support which is necessary to keep it from falling in. In the same manner, where there is a separate ownership in the surface, and the mines beneath, the owner of the mines cannot, by working them, so weaken the subjacent support to the surface as to cause it to cave in. The cases are numerous in which the right to lateral and subjacent support is claimed and conceded, and the general principles determine the character and limitations of both kinds of support. *These are natural rights of easements,* which are independent of any covenant or grant."

Likewise, the "English and Empire Digest," vol. 19, pp. 172-174 deals with "Easement of Support". And the same volume, p. 8, quotes Lord Shelborn in one case thus:

"From the view which I take of the nature of the right to support, *that it is an easement,* not purely negative, capable of being granted, and also capable of being interrupted, it seems to me to follow that it must be within Prescription Act, 1832 (c. 71), S. 2, unless that section is confined to rights of way and rights of water.

"x x x I think it is clear that any such right of support to a building, or a part of a building *is an easement* x x x."

Lastly, Sec. 801 of the California Civil Code provides: *"Servitudes attached to land.* The following land burdens, or *servitudes* upon land, may be attached to other land as incidents or appurtenances, and are then called *easements*:

"13. x x x x the right of receiving more than natural support from adjacent land or things affixed thereto."

ARTICLE 692

Justice Reyes says: "An easement acquired by prescription can not be called voluntary, because precisely it is acquired against the will of the owner. This Article logically belongs to section 3 of Chapter 1 entitled 'Rights and Obligations of Owners of the Dominant And Servant Estates."

This article is an exact reproduction of Art. 598, old Code. Attention is invited to the words "in a proper case" under Art 692. on the first line. Suppose "A" and "B" enter into a contract whereby "A", the owner of the dominant estate, acquires a right of way through the land of "B" for purposes of merely hauling crops and transporting agricultural implements, such as plows, harrows, etc. Later on, "A" establishes a large factory, and he uses the right of way without any authority from "B", for large trucks everyday for hauling the goods manufactured. If this unauthorized use of the right of way continues for ten years, this new method of using the right of way is acquired by prescription, under Art. 632, although the original easement has been created by contract and is a voluntary easement. This is the interpretation of Sanchez Roman (Vol. 3, p. 648) who, not finding Article 598 misplaced, says:

"El régimen juridico por el que se gobierna el *contenido* de la relacion juridica de servidumbre, cuando son de la clase de las *voluntarias*, es el asunto del art. 598, segun el cual ha de atenderse: *primero*, al titulo de su constitucion; *segundo*, en su caso, a la posesion de la servidumbre adquirida por prescripcion, toda vez que, segun el art. 547, por este medio se adquiere, no solo la servidumbre misma, sino la *forma* de prestarla; y *tercero*, en defecto de los anteriores origenes, ha de atenderse a las disposiciones del Codigo que le sean aplicables. En todos estos casos, bajo el influjo de la limitacion general de *no contrariar a las leyes ni al orden publico*."

ARTICLE 694 (5)

Justice Reyes states the hindrance or impairment of the use of the property should be qualified by expressly providing that such hindrance or impairment is not authorized, or is excessive or unreasonable or unnecessary.

Such an addition would indeed be "excessive", or "unnecessary" because the word "nuisance" implies *ex vi termini* that it is not authorized, or is excessive, unreasonable or unnecessary. Besides, attention is invited to the following words in Art. 695: "although the extent of the annoyance, danger or damage upon individuals may be unequal." Lastly, the very words "hinders or impairs" imply that the act of the defendant is unauthorized, or is excessive, unreasonable or unnecessary, otherwise it would neither be a hindrance to, or an impairment of, the use of property.

Title IX. Registry of Property

Justice Reyes suggests that an article be inserted requiring the registers of deeds to keep a special book for recording of contracts of marriage settlements.

Although this should be the subject of an amendment to the special laws concerning registration of property, however, for purposes of clarification, the proposed amendment is accepted.

CONCLUSION

The foregoing observations on the proposed amendments to Book II of the new Civil Code are respectfully submitted to the code committees of both Houses of Congress. The Code Commission earnestly hopes that said observations will be given due and careful consideration not only by the committee members but also by the Congress as a whole. If this is done, we are confident that only those amendments will be made which have been accepted or initiated by the Code Commission. We respectfully urge that with the exceptions just mentioned, the new Civil Code be left intact for the next two years, for these reasons:

1. The legal profession needs at least two more years to meditate upon the philosophy of the reforms, most of which are very new to the majority of lawyers, judges and law professors. Very few of the legal profession have read the new Code entirely.

2. Many of the proposed amendments stem from the natural reaction to an innovation, especially because the legal profession all over the world is conservative. But most of these "innovations" in the new Civil Code have been derived from the laws of other countries which they have by experience understood the justice and wisdom of the provisions.

3. Other suggested changes on the new Civil Code are due to a mistaken interpretation of the article in question, as already shown in this memorandum and in the previous memoranda as well as in public hearings heretofore held before the code committees.

4. Still other recommended amendments seek to fill gaps. The existence of many gaps in a civil code is inevitable. No civil code in the world can cover all possible situations. Even the longest civil code — which is that of Argentina — has not been able to forsee the numerous doubts that have arisen since its enactment in 1869. The same thing can be said of the Spanish Civil Code of 1889. It is of the nature of a civil code that is only the *basic* private law. Details are furnished by special laws and court decisions. A legal system gradually built up by the courts upon the foundation of codes and statutes is the best and soundest type.

5. The new Civil Code of the Philippines should be improved and developed as the other civil codes in the world have been improved and developed: by interpretation through judicial decisions. Such an interpretation is the wisest and most advisable because the solution comes, not from mere abstraction or theory but from reality.

6. Only a very small portion of the legal profession has come forward with proposed amendments. Only two jurists have suggested changes. But by waiting for two more years, the code committees of Congress would hear from other jurists, and from the legal profession as a whole. Thus, the code committees would have before them at least four or five times more than the number of amendments now suggested. In this way, the code committees would have a more comprehensive view of the orientation of how and on what bases the new Civil Code should be amended.

7. If Congress should effect a general overhauling of the new Civil Code during this session, there would be a tendency not to undertake the study and consideration of other amendments submitted by the legal profession during the next two or three years. Many of the future proposed amendments will likely be better than those already submitted to the code committees of Congress because the legal profession will have had more time to reflect on the new Code. But such coming proposed amendments will probably not be taken up. So it would be advisable to wait at least two more years, so that when the Congress is ready to undertake a broad revision of the new Civil Code, the better future recommendations will be studied.

8. The Code Commission has accepted or initiated many amendments. It is earnestly submitted that considering the seven foregoing reasons, such accepted or initiated amendments should be the only ones to be approved during the current session.

Respectfully submitted,

JORGE BOCOBO
Chairman, Code Commission

Manila, February 17, 1951.

"The trouble is that lawyers necessarily acquire the habit of assuming the law to be right. It is their business to advise people what the law is and to endeavor to defend people in the exercise of their legal rights. As a rule, the pure lawyer seldom concerns himself about the broad aspects of public policy which may show a law to be all wrong, and such a lawyer may be obvious to the fact that in helping to enforce the law he is helping to injure the public Then, too, lawyers are almost always conservative. Through insisting upon the maintenance of legal rules, they become instinctively opposed to changed, and thus are frequently found aiding in the assertion of legal rights under laws which have once been reasonable and fair, but which, through the process of social and business development, have become unjust and unfair without the lawyers seeing it. I am conscious that I have myself argued cases and drawn papers and given advice in strict accordance with laws whose wisdom it had never occurred to me to question, but which I should now, after many years of thinking what the law ought to be, condemn."

—Letter, November 16, 1906 to Gen. John C. Black of the U.S. Civil Service Comm.; as quoted in I Jessup, Elihu Root, page 208.

(*Continued from the January Issue*)

(§214) 2. *Statutory provisions as to "fiesta" in Philippine municipalities in regular provinces.*

"*Celebration of fiestas.* A fiesta may be held in each municipality not oftener than once a year upon a date fixed by the municipal council. A fiesta shall not be held upon any other date than that lawfully fixed therefor, except when, for weighty reasons, such as typhoons, inundations, earthquakes, epidemics, or other public calamities, the fiesta cannot be held in the date fixed, in which case it may be held at a later date in the same year, by resolution of the council."[41]

"*Changing date of fiesta.* A municpal council may, by resolution passed by two-thirds of all the members of the council, change the fixed date for the celebration of the fiesta; but when the date has been once fixed by the municipal council, it shall not be changed with greater frequency than one in five years."[42]

"*Fixing date of fiesta.* In fixing or changing the date of the fiesta. the municipal council shall give preference to a date which, by reason of an important event in the municipality, the province, the Philippines, and in general, in the history of the Philippines, may be considered memorable and worthy of being commemorated by a local fiesta."[43]

(§215) G. *Engaging in business enterprises.*

— 1. *In general.* "Some authorities have stated broadly that the state has no power to authorize a municipal corporation to engage in a business of a private nature. It is generally considered that in the absence of special circumstances it is not within the constitutional power of the legislature to authorize a municipal corporation to engage in a business which can be and ordinarily is carried on by private enterprise, without the aid of any franchise from the government, merely for the purpose of obtaining an income or deriving a profit therefrom. Although it might be designed and expected that the returns from the business would cover the expense, and perhaps produce a profit and thus reduce the burden of taxation, it would be impossible to foresee the actual result, and since, if the business should prove unsuccessful, the deficit would have to be made up by taxation, a statute authorizing a municipality to go into a private business is objectionable as bringing about the possibility of taxation for a purpose not public. Thus, it has been denied that a state legislature has power to authorize a municipality to maintain an elevator or warehouse for the public storage of grain; to conduct a municipal motion-picture theater; to engage in the plumbing business and the sale of plumbing supplies; or to establish manufactories on its own account and operate them by public officers. A municipal corporation is allowed to go into business only on the theory that thereby the public welfare will be observed. So far as gain is an object, it is a gain to a public body and must be used for public ends. More recent cases, although reasserting the rule, indicate a tendency to broaden the scope of those activities which may be classed as involving a public purpose in which a municipal corporation may lawfully engage. A municipality exercising a part of the sovereign power of the state which the Constitution has not curtailed may, if the public interest so requires, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, and compete with private interest engaged in a like activity. The state may lawfully authorize municipal corporations to own and lease manufacturing enterprises for the purposes of relieving unemployment and utilizing the raw materials of the state, although under ordinary circumstances this power has been denied. Such a statute has been held not to violate due process under state and Federal Constitutions or to violate a constitutional provision that private property shall not be taken or damaged for public use except where compensation is first made to the owner.

"Under the view that a municipal corporation has only the powers expressly given or those implied powers which are necessary or indispensable to the exercise of those expressly given, it has been held that a municipal corporation has no power to engage in any private business, however desirable or convenient it may seem to be, or to manufacture articles necessary for its lawful enterprises when they are in common use and are to be had in open market. The principle of strict construction of grants of municipal power is sometimes said to apply with special force to statutes enabling municipal corporations to enter into commercial activity. Under this view, it has been held that a municipal corporation cannot own or operate a stone quarry to furnish paving material for its streets, nor maintain a plant for the manufacture of brick to be used for paving its streets, nor operate or conduct a private garage business in the basement of one of its public buildings. A municipal corporation cannot engage in the business of buying and selling real estate, or in erecting buildings to gain an income by renting them. If a project of a municipal corporation is merely colorable under the pretense of actual authority, but is intended to promote some private or unauthorized purpose, it will be declared illegal. There is a recent authority, however, holding that a municipal corporation may erect property for rental purposes where the legislature has declared such activity to be a public purpose. On the other hand, under the view that implied powers need not necessarily be indispensable to the exercise of those expressly given, it has been held that the power to own and operate a stone quarry may be implied from the express power to grade and pave streets and to own and hold real estate. Likewise, the power of a municipal corporation to operate a nursery to provide trees and shrubs for its parks and public grounds may be implied from express power to acquire, improve, and maintain municipal parks and play-grounds, and to acquire land which is useful, or advantageous, or desirable for municipal purposes. Municipal power to engage in certain other enterprises is discussed under other titles and in other divisions of the present article.

"According to some authorities. where as a necessary result of carrying on a legitimate public enterprise in a reasonably prudent manner, a surplus of the material used or distributed is acquired or a by-product created, a municipal corporation may lawfully engage in the business of disposing of such surplus or by-product for profit, without special legislative authority.

"When a municipal corporation engages in an activity of a business nature, such as is generally engaged in by individuals or private corporations, rather than one of a governmental nature, it acts as a corporation, and not in its sovereign capacity."[44]

(§ 216) 2. *Sale of commodities to public.* "It was, until very recently at least, looked upon as a well-established principle of law that a municipal corporation could not constitutionally be authorized by the legislature to engage in the business of selling and distributing to its inhabitants, at reasonable rates and without discrimination, the conveniences or even the necessities of life, if the business was of such a nature that it could be and ordinarily was carried on by private individuals without the aid of any franchise from the state. It was for this reason that it has been held that it is not within the power of the legislature to authorize municipal corporations to establish fuel yards and to purchase coal and wood to resell to their inhabitants, even at a time when fuel is scarce and the price are high, so that the cost to consumers might be expected to be reduced by such an undertaking on the part of the municipality; the manufacture of ice by a town and its distribution among the inhabitants has been held to be equally objectionable.

"There were, from the beginning, some exceptions recognized to the rule which made it unlawful for municipalities to engage in a business which could be and ordinarily was carried on by private citizens without any franchise from the state. Thus, the establishment of markets by municipalities, and the building of markets houses with a view to leasing the stalls therein to indivi-

41 Sec. 2282, Rev. Adm. Code.
42 Sec. 2283, Rev. Adm. Code.
43 Sec. 2284, Rev. Adm. Code.

44 37 Am. Jur. 746-748.

dual dealers in meat and provisions, has the sanction of almost immemorial usage, and it is now too late to contend that it is unconstitutional. Even the courts which deny the power of the legislature to establish municipal fuel yards concede that if a condition arose in which the supply of fuel would be so small, and the difficulty of obtaining so great, that persons desiring to purchase it would be unable to supply themselves through private enterprise, since it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not, the government might constitute itself an agent for the relief of the community; consequently, the money expended for the purpose would be expended for public use. Some judges have taken an even more advanced view, and have insisted that when money is taken to enable a municipal body to offer to the public, without discrimination, an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water, gas, electricity, or education, to say nothing of cases like the support of paupers and the taking of land for railroads or public markets. Other courts, while perhaps not going so far, nor conceding that a municipality might be authorized to engage in every form of commercial enterprise which involves the sale and distribution of a public necessity, have considered that such commodities as ice and coal, in the sale of which competition is necessarily not as free and untrammeled as in ordinary articles of commerce, on account of private control of the limited sources of supply, fall within the class of the proper subjects of municipal dealing and traffic. A municipal charter authorizing the city to engage in the business of selling gasoline and oil to its inhabitants has been held not to violate the Fourteenth Amendment to the Federal Constitution or the state constitutional provisions relating to the control of business affecting public welfare."[45]

(§217) 3. *Tourist or trailer camps.* "The operation of a tourist camp, whether the municipal corporation receives any compensation therefrom or not, especially where the inhabitants of the corporation are excluded, is not a public business, and the municipality cannot expend money in the purchase of land for such a camp. However, it has been held that maintenance of a tourist camp in a municipal park is not a diversion of property devoted to park purposes, and statutes authorizing the establishment and maintenance of tourist or trailer camps are becoming more frequent, and their validity in some instances has been assumed."[46]

(§ 218) H. *Fire regulations. — In general.* — a. Generally in the exercise of their police powers municipal corporations may enact such regulations as are necessary for the prevention of, and protection from fires.[47]

"*A quaint statement of the rule* is that found in Bacon's Abridgment; it reads thus: 'so if a by-law be made in London, that none shall make a hot-press, nor use it within the city, under the penalty of 10, for the making thereof, and 5 for the use thereof, this is a good by-law; because the use of those presses is dangerous with regard to fire, and also deceitful, inasmuch as they make clothes and stuff look better to the eye than in truth they are." 2 *A bridg.* 147."[48]

And it is the duty of municipal corporation to enact such regulations. "The corporate authorities may fix what is known as a fire district and forbid the erection of wooden buildings therein. No town or city, compactly built, can be said to be well-ordered or well-regulated which neglects precautions of this sort. It is its duty to the public to take such measures as may be practicable to lessen the hazard and danger of fire. The public good and safety are superior to the individual rights of the inhabitants, and under this principle such regulations are not the divestiture of the individual right of ownership and use, but is only conforming the use of individual property to the necessities, safety, and interests of the public. It is a regulation of its enjoyment."[49]

While some decisions consider or refer to this power as inherent in municipal corporations, it, nevertheless, usually exists by reason of an express grant or a necessarily implied statutory or constitutional delegation. The reasonable view is that, like other municipal powers, it may be implied. But the corporation cannot exceed the authority given or granted by statute or charter. Fire municipal regulations must be reasonable and not arbitrary; but the courts will not declare such regulations unreasonable, unless in clear cases of abuse. The power to prevent fire carries with it the right to employ the most effective means to that end. In the exercise of the power the erection or use of buildings for the purpose of a more or less dangerous character may be prohibited. Where the statute or charter enumerates the means by which the municipal authorities may provide for the prevention of, and protection from, fires, and also authorizes for the regulation by other means of preventing and extinguishing fires as the municipal authorities may direct, it is held that the means particularly specified are not exclusive, and that the residuary clause is not to be construed according to the rule *ejusdem generis* as limited to things of the same kind as those specified. The specific right conferred by statute to regulate and restrain the erection of wooden buildings is not a limitation upon the municipal power to take reasonable means for the prevention of fire by exercising supervision over the erection of other buildings. Statutes empowering municipalities for the prevention of fires to regulate buildings and to prescribe penalties for violation of such regulations are considered as penal and in derogation of the common law, and, as a general rule, are strictly construed.[50]

Under charter giving power to insure safety of the public from conflagrations, a municipal council may require by ordinance that buildings for theatrical and cinematograph performances and exhibitions to be built of concrete, reinforced with steel and to be equipped with not less than six exits.[51]

[§ 219] b. *Statutory statement as to Philippine municipal corporations.* — (1) *Municipalities in regular provinces.* "The municipal council shall have authority to exercise the following discretionary powers:

"* * * *

"(c) To establish fire limits in populous centers, prescribe the kinds of buildings that may be constructed or repaired within them...

"* * * *"[52]

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

"* * * *

"(i) *Building regulations.* — To establish fire limits, and prescribe the kind of buildings and structures that may be erected within said limits, and the manner of constructing and repairing the same.

"* * * *

"(k) *Lights, fires, and fireworks.* — To regulate the use of lights in stables, shops, and other buildings and places, and to regulate or restrain the building of bonfires and the use of firecrakers, fireworks, torpedoes, and pyrotechnic displays.

"* * * *"[53]

[§ 221] (3) *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *

"(h) To establish fire limits, determine the kinds of buildings or structures that may be erected within said limits, regulate the manner of constructing and repairing the same, and fix the fees for permits for the construction, repair, or demolition of buildings and structures.

"* * * *

"(j) To regulate the use of lights in stables, shops, and other buildings and places, and to regulate and restrict the issuance of permits for the building of bonfires and the use of firecrakers, fireworks, torpedoes, candles, skyrockets, and other pyrotechnic displays, and to fix the fees for such permits.

"* * * *"[54]

45 37 Am. Jur. 748-750.
46 37 Am. Jur. 752.
47 Fabie v. Manila, 21 Phil. 486.
48 Clark v. South Bend, 85 Ind. 276, Am. 15.
49 Monroe v. Hoffman, 29 La. Ann. 651, 29 Am. 345.
125 48 C.J. 395.
50 43 C.J. 368-369.
51 Bastida v. City Council of Baguio, 53 Phil. 555. For facts and ruling, see 132, supra.
52 Sec. 2243, Rev. Adm. Code.
53 Sec. 2625, Rev. Adm. Code.
54 Sec. 18, Rep. Act No. 409.

[§ 222] 2. *Fire limits.* "One of the usual methods by which the power may be, and is, exercised is by the enactment of ordinances or regulations establishing fire limits, and forbidding the use of inflammable materials in buildings or other structures, or in the erection thereof, within such limits. The limits of a fire district largely rest within the sound discretion of the administrative or legislative body which is authorized to create it. Ordinances establishing fire limits and regulating the construction of buildings therein should be strictly enforced. That a wooden structure ceases to be such when encased with iron has been held by some courts, but this view has not been generally accepted." [55]

"*Method of enforcing regulations.* Although the ordinance may provide a penalty for the violation of a fire limit regulation, such remedy is not exclusive; and the municipal corporation may in civil action enjoin the erection of a proposed building in violation of the regulation, and ask for the removal of a building or structure in violation of the regulation. Such fine or penalty is not considered as a full, complete, and adequate remedy so as to prevent a court of equity from exercising its jurisdiction." [56]

[§ 223] 3. *Fire hazards; storage or accumulation of inflammable materials.* "When the province or municipality is infested with outlaws, the municipal council, with the approval of the provincial governor, may authorize the mayor to require able-bodied male residents of the municipality, between the ages of eighteen and fifty years, to assist, for a period not exceeding five days in any one month in apprehending outlaws or other lawbreakers and suspicious characters, and to act as patrols for the protection of the municipality, not exceeding one day in each week.

"Nothing herein contained shall authorize the mayor to require such service of officers or employees of the National Government, or the officers or servants of companies or individuals engaged in the business of common carriers on sea or land, or priests, ministers of the gospel, physicians, *practicantes, druggists or practicantes de farmacia* actually engaged in business, or lawyers when actually engaged in court proceedings." [57]

[§ 224] 1. *Fiscal management, debts and securities.* The power of municipal corporations to incur debts and expenditures is treated in a subsequent chapter.

[§ 225] J. *Businesses and occupations.*[58] — 1. *In general.*— (a) *Generally.* "While an individual has an inherent or natural right to engage in any lawful business, occupation, or trade, and may use his property for that purpose, yet the nature of the business, occupation, or trade sought to be carried on may be such as to render it subject to regulatory control by municipal corporations, in the exercise of their police powers, or authority delegated to them by the legislature or constitution, as under authority granted to restrict or prohibit nuisances. Such regulation is permitted in the interest of the public peace, health, morals, and general welfare of the municipality. The authority of the corporation in the premises must be granted by the state either expressly or by obvious implication; it is not inherent. Ordinances regulating business or occupations are strictly construed. A regulation providing that in any building or premises any lawful use existing therein at the time of the passage of the regulation may be continued, although not conforming to the regulations, does not authorize the conducting of another business which might prior to the enactment of the regulation have been lawfully conducted in such building, although it could not, subsequent to the enactment, be originally established there." [59]

[§ 226] b. *Statutory provisions as to Philippine municipal corporations.* — (1) *Municipalities in regular provinces.* "The municipal council shall have authority to exercise the following discretionary powers:

"* * * *

"(d) To provide for the numbering of houses and lots; the naming of streets, avenues, and other public places and, subject to the approval of the Secretary of the Interior, the changing of the names thereof; and for the lighting of streets, and the sprinkling of the same.

"* * * *

"(n) To regulate the establishment and provide for the inspection of steam boilers within the municipality.

"(q) To regulate any business or occupation subject to a municipal license tax...

"* * * *" [60]

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

"* * * *

"(e) *Regulations for conducting business.* — To make regulations for the conducting of the business of the persons and places named in subsection (d) of this section [namely, Hawkers, peddlers, hucksters, not including hucksters or peddlers who sell only native vegetables, fruits or foods, personally carried by the hucksters or peddler, auctioneers, plumbers, barbers, tailor shops bakeries manicuring establishments massage parlors, embalmers, collecting agencies, mercantile agencies, transportation companies and agencies, advertising agents, tattoers, hotels, clubs, restaurants, lodginghouses, livery stables, boarding stables, laundries, cleaning and dyeing establishments, establishments for the storage of highly combustible or explosive materials, public warehouses, bicycles, dealers in secondhand merchandise, junk dealers]. To regulate the business and fix the location of blacksmith shops, foundries, steam boilers, steam engines, lumber yards, sawmills, and other establishments likely to endanger the public safety by giving rise to conflagrations or explosions; to regulate the storage and sale of gunpowder, tar, pitch, resin, coal, oil, gasoline, benzine, turpentine, nitroglycerin, petroleum, or any of the products thereof and of all other highly combustible or explosive materials.

"* * * *" [61]

[§ 228] (3) *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *

"(l) To regulate... the following: hawkers, peddlers, hucksters, not including hucksters or peddlers who sell only native vegetables, fruits, or foods, personally carried by the hucksters or peddlers; barbers, collecting agencies, manicurists, hairdressers, tattoers...

"(m) To... regulate the business of hotels, restaurants, refreshment places, cafes, lodginghouses, boardinghouses, brewers, distillers, rectifiers, laundries, dyeing and cleaning establishment, beauty parlors, physical or beauty culture and schools, clubs, livery garages, public warehouses, pawnshops... and the letting or subletting of lands and buildings, whether used for commercial, industrial or residential purposes; and further to fix the location of... and regulate the business of, livery stables, boarding stables, embalmers... dealers in secondhand merchandise, junk dealers,... the sale of intoxicating liquors, whether imported or locally manufactured.

"* * * *

"(q) To regulate the method of using steam engines and boilers, other than marine or belonging to the National Government; to provide for the inspection thereof, and for a reasonable fee for such inspection, and to regulate and fix the fees for the licenses of the... engineers engaged in operating the same.

"* * * *

"(ii) To... regulate any business, trade, or occupation being conducted within the City of Manila not otherwise enumerated in the preceding subsections...

"* * * *" [62]

[§ 229] (2.) *Extent and limits.* — a. *In general.* "The power must be exercised reasonably, within constitutional limitations, not arbitrarily or in restraint of trade, without discrimination, fair to all alike, and with some reasonable reference to the public peace, health, morals, safety, or general welfare of the municipality. The question whether a limitation upon the conduct of business or trade has a reasonable relation to the accomplishment of a legitimate public purpose is one that must be decided upon a view of the

55 43 C.J. 369-370.
56 Id. 370.
57 37 Am. Jur. 942-943.
58 Various particular business and occupation discussed in other sections of this chapter.
59 43 C.J. 357-359.
60 Sec. 2243, Rev. Adm. Code.
61 Sec. 2625, Rev. Adm. Code.
62 Sec. 19, Rev. Adm. Code.

particular legislation and the circumstances to which it is applied; the question is largely one of fact. The regulations of the kind under consideration cannot be applied to an occupation, employment, or business not carried on within the municipal boundaries." [63]

[§ 230] b. *Place or location.* "In the exercise of municipal power to regulate business, trades, or callings, particular occupations may be excluded from certain parts of a municipal corporation, or may be required to be conducted within designated limits within the corporation. The power to regulate the carrying on of certain lawful occupations in a municipality includes the power to confine the carrying on of the same to reasonable limits, wherever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, namely, to protect the public health, morals, safety, and comfort. For example, under its police power a municipality may validly prohibit the maintenance of a particular enterprise within a specified distance of certain types of buildings, such as schools, churches, hospitals, etc. A municipality may also validly prohibit the carrying on of business activities in or on certain portions of the municipality directly under municipal control or supervision and involving specifically the public safety, as, for example, on municipal streets, highways, and sidewalks.

In determining the validity of municipal police regulations which forbid engaging in specified forms of activity thenceforth in particular areas of a municipality, it can make no difference that a trade was lawfully established prior to the prohibitory ordinance and that it has become offensive solely on account of the growing up of the municipality about it. A business which is lawful today may, in the future, — because of a changed situation, the growth of population, and other causes, — become a menace to the public health and welfare, and be required to yield to the public good. It cannot be argued as a contention against such an exercise of the police power that a municipality cannot be formed or enlarged against the resistance of an occupant of property, or that if it grows at all it can grow only as the environment of the occupations which are usually banished to the purlieus.

"There is not necessarily any valid distinction, in considering municipal regulations forbidding a business to be exercised in a particular part of a municipality, between businesses which are not affixed or dependent upon a particular municipal locality for their operation, which class it is admitted can be regulated, and business which it is claimed can be conducted from a financially advantageous position in only one particular place in a municipality because of the location in that place of the raw material from which a finished product is made. Regulation may also be had in the latter type of cases in spite of the fact that there has been an investment in property, where manufacture of the finished product will be injurious to the health and comfort of the community. So long as the prohibition of the business goes merely to the operations and manufacture of the raw materials in the particular place designated as forbidden, and there is no prohibition of the removal of the valuable material from such spot, so that it can be manufactured elsewhere, constitutional rights are not violated

"While police regulations of the character here considered are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the lawmaking power; so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been selected arbitrarily, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment. On the other hand, municipal regulations as to the location of particular businesses within the municipality are invalid where, under the circumstances, they constitute an unreasonable regulation or interference not warranted in the public interest, where they unnecessarily or arbitrarily interfere with the property rights, and where they are indefinite and uncertain. It has also been stated that a grant of power to regulate lawful occupations and business place is certainly not an express grant of power to locate or prescribe the limits of the carrying on of lawful occupations upon private premises.[64]

[§ 231] c. *Time.* "No generalization can safely be stated as to the validity and reasonableness of municipal regulations of the time during which businesses may be conducted. The result depends largely on the nature of the business sought to be regulated.

"Regulations by municipalities of the hours during which specified businesses may be conducted have been declared reasonable and constitutional where there is a patent relationship between the regulations and the protection of the public health, safety, morals, or general welfare, as where the business is of such a character that the public health or morals are likely to be endangered if it is carried on during the late hours of the night. It has been held that under a general grant of power in a municipal charter to regulate business houses, the municipality has the power to close such places at midnight, or earlier.

"A municipality has no authority, under its police power, to regulate arbitrarily and unreasonably the hours of private business, conducted in a reasonable manner, under the guise of promoting the public health or general welfare of the community. Laws which regulate closing hours and do not in any manner directly or remotely tend to promote public health, good order and peace of the community cannot be justified as an exercise of municipal police power. Thus, a regulation of the hours of a particular business which is not explainable by a relation between the regulation and the protection of objects within the police power, but solely on the ground that there is a desire to discriminate unconstitutionally in favor of local dealers in the business, is unconstitutional. Ordinances attempting to regulate closing hours are also sometimes invalidated on the ground that they violate the principles that ordinances must be reasonable, consistent with general law, and not destructive of lawful business, or because they are found not to be within the authority granted to the particular municipality seeking to enact and enforce them." [65]

[§ 232] d. *Prohibition.* "There are some businesses or commercial activities which are, or may be, so offensive, dangerous, and detrimental to the public health, safety, comfort, peace, morals, and welfare that municipal corporations, in the exercise of their granted police power, may prohibit them altogether within the municipality or its police jurisdiction. This principle, however, is subject to definite limitations. Municipal authorities cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. Furthermore, a municipality cannot, under the general welfare clause of its charter, make it unlawful to carry on a lawful trade in a lawful manner. It has also been held that authority to 'license and regulate' a business does not confer power to prohibit it absolutely." [66]

"The 14th Amendment [of the American Constitution] protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." [67]

"There is quite a difference between prohibition of a trade and the regulation of it. Indeed, 'a power to regulate seems to imply the continued existence of that which is to be regulated.' An ordinance which prescribes that certain persons shall not carry on their business, which would otherwise be legitimate, in a particular place, or on certain premises, is, as to such place, clearly prohibitive; and to authorize the passage of such an ordinance, where the power is undoubted, the injury to the public, which furnishes the justification for the ordinance, should proceed from the inherent character of the business when conducted at such place or upon such premises. Where, however, the business can be

63 C.J. 359-360.
64 37 Am. Jur. 957-960.
65 37 Am. Jur. 960-962.
66 37 Am. Jur. 962.
67 Murphy v. California, 225 U.S. 623, 32 Sup. Ct. 697, 698, 56 L. ed. 1339, 41 LRANS 153.

conducted there by proper persons without harm or inconvenience to the public, the prosecution of it should not be entirely prohibited, but such necessary police rules and regulations should be prescribed for carrying on such business in that particular locality as may be necessary for the public good." [68]

"*The test* in every case is: Is the prohibition of a particular business or the sale of a particular article necessary to prevent the infliction of a public injury? It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some engaged in it. Because many men engaged in the calling persist in so conducting the business that the public suffers and their acts can not otherwise be effectually controlled, is no justification for a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public." [69]

[§ 233] 3. *Copra warehouse.* Under the charter provision of a city authorizing it to regulate the business and fix the location of match factories, the storage and sale of gunpowder, oil, and other establishments likely to endanger the public safety or give rise to conflagrations or explosions, such city may regulate and fix the location of a warehouse for storing copra, because the same is an establishment likely to endanger the public safety or likely to give rise to conflagrations or explosions.[70]

[§ 234] 4. *Gasoline filling and service stations.* "Gasoline filling stations located within the municipal boundaries may be proper subjects for regulation by the municipality." [71]

An ordinance prohibiting the installation of gasoline stations within the distance of 500 meters from each other, not only to prevent ruinous competition among merchants engaged in this kind of business but also to protect the public from any harm or danger that may be occasioned by said inflammable substance is valid.[72]

Illustration. — The plaintiffs Francisco Javier and Roman Ozaeta commenced this action in the Court of First Instance of Manila to restrain the defendant Tomas Earnshaw, Mayor of the City of Manila from cancelling the permit or license issued by him for the installation and operation of a gasoline pump and underground tank at the corner of Kansas Avenue and Tennessee Street. They appealed from the judgment dismissing their complaint.

It appears that the plaintiffs, being the owners of a parcel of land situated at the corner of Kansas Avenue and Tennessee Street, Manila, entered into a contract with the Asiatic Petroleum Co. (P.I.) Ltd., whereby the latter would provide them with a pump, underground tank and gasoline on the land in question, for the exclusive use of the motor vehicles of the Makabayan Taxicab Co., Inc., operated by the plaintiffs and would obtain the necessary license from the defendant mayor of Manila. The plaintiffs and the Asiatic Petroleum Co. (P.I.), Ltd., obtained the necessary permit to install a gasoline pump and an underground tank in the premises of the plaintiffs, for the exclusive use of the motor vehicles of the Makabayan Taxicab Co., Inc. One of the conditions imposed in the contract is that the permit was nontransferable and that it was revocable at the expiration of 30 days from notice of the concessionaire. The pump and the tank were installed and the plaintiffs used them for some time to provide gasoline exclusively for the motor vehicles of the Makabayan Co., Inc. Sometimes later, however, as the plaintiffs had succeeded in having the office of the city treasurer insert the word "sells" (which should read "sales') in the receipt issued by it for payment of the license tax, they began to sell gasoline to the public, thereby giving rise to protests from operators of the Socony Gasoline Station situated at the corner of Taft Avenue and Herran Street. The complaint was investigated and not only was it proven but the plaintiffs themselves also admitted that they were really selling gasoline to the public. The mayor, on June 9, 1934, sent a letter to the Asiatic Petroleum Co., (P.I.), Ltd., requiring it to show cause within five days why the license issued to it should not be cancelled for violation of the condition not to sell gasoline to the public. The requirement was endorsed to the plaintiffs who gave their explanation in their letter of June 11, 1934. The explanations given by the plaintiffs not having been satisfactory, and they having admitted the violation of the condition by acknowledging that they have been selling gasoline to the public, the mayor, on July 16, 1934, sent a letter to the plaintiffs advising them that after 15 days from the receipt of said letter by them, he would order the cancellation of the permit, which he in fact decided to do, and the permit was cancelled. The court, upon the bond filed by the plaintiffs, issued the writ of the preliminary injunction applied for.

The ordinance in question which was violated by the plaintiffs was Ordinance No. 1985 of the City of Manila, and the pertinent provision pertaining to this case provides:

Sec. 1. (3) "That no gasoline station will be permitted to be installed within a distance of five hundred meters from any existing gasoline station:"

The plaintiffs assailed the validity of the said provision of the ordinance as arbitrary, unreasonable and discriminatory.

The Supreme Court held that the municipal board of the City of Manila, in the exercise of the police power, may reasonably regulate professions and business enterprises within its territorial limits when the public health, safety and welfare so demand. Ordinance No. 1985 in question is of this nature and, therefore, is not illegal. The Municipal Board of the city of Manila, by virtue of the police power, may reasonably regulate the use of private property whenever such measure is required by the public health and safety, and the welfare of its inhabitants.

The ordinance under consideration prohibits the installation of gasoline stations within the distance of 500 meters from each other not only to prevent ruinous competition among merchants engaged in this kind of business but also to protect the public from any harm or danger that may be occasioned by said inflammable substance. The ordinance is not arbitrary, unreasonable or discriminatory because, it was enacted by the City of Manila in the exercise of the police power delegated to it by the Legislature, it tends to protect the inhabitants thereof from the dangers and injuries that may arise from the inflammable substance, and the measure is general and applicable to all persons in the same situation as the plaintiffs.

The appealed judgment is affirmed, and the writ of preliminary injunction issued by the trial court is set aside.[73]

[§ 235] 5. *Laundries.* "Municipal corporations may regulate the establishment and operation of laundries, and may provide for a license fee to care for the additional expense incurred by the corporation for properly enforcing such regulation. The power to regulate laundries must be exercised within its scope, and the regulations must be reasonable. Municipalities may require as police regulations that laundries shall be confined to certain parts of the city, prohibit them from being carried on within a designated distance from a church, school, or hospital, and that they shall be carried on only in buildings of brick or stone. But it seems that an ordinance is invalid which requires the consent of a certain number of taxpayers and citizens of the vicinity for the establishment of the business." [74]

"*Discrimination.* Municipal regulations dealing with laundries must not be discriminatory; for instance, the corporation cannot deny privileges to laundrymen allowed to similar operators of machinery. But the corporation may classify laundries on a natural and reasonable basis. A laundry regulation exempting domestic laundries from its operation is not discriminatory."[75]

Under the general welfare clause, as well as under the power to "regulate" laundries, a municipal corporation may require laundries, dyeing and cleaning establishments to issue receipts for articles received in English and Spanish. Such ordinance is a reasonable exercise of the police power.[76]

68 Cosgrove v. Augusta, 103 Ga. 835, 837, 42 LRA 711.
69 Tolliver v. Blizzard, 143 Ky. 773, 35 LRANS 890.
70 Uy Matiao & Co., Inc., v. City of Cebu, etal., XVIIIL.J. 394.
71 43 C.J. 380.
72 Javier and Ozaeta v. Earnshaw, infra.
73 Javier and Ozaeta vs. Earnshaw, 64 Phil. 626-629, 631, 640.
74 43 C.J. 390.
75 43 C.J. 390.
76 Kwong Sing v. City of Manila. 41 Phil. 103. For facts and ruling, see 142 supra.

[§ 236] 5. *Lumberyards.* "The location of lumberyards within the municipal limits may be a subject of municipal regulation. The consent of the municipal council may be required as a condition precedent to their operation." [77]

Under statutory authority to enact such ordinance and make such regulations as shall seem necessary and proper to provide for the health and safety, promote the prosperity, improve the morals, peace, good order, comfort, and convenience of the municipality and the inhabitants thereof, and for the protection of property therein, and to declare and abate nuisances, a municipality may prohibit the maintenance and operation of a sawmill and lumberyard within specified areas of the municipality, where such maintenance and operation would necessarily disturb residents and passers-by.[78]

[§ 237] k. *Fraud in sale of commodities of prime necessity.* 1. *In general.* Municipal Corporations, under their properly delegated police powers, may enact regulations for the detection and preventions of imposition and fraud on the public in the sale and purchase of food and drink offered for sale to the public. It may regulate so as to secure honest weights and measures; it may enforce the keeping of proper legal weights and measures by all vendors; and provide for the inspection of such weights and measures. It may require that the true weight or measure be stated on the package or other container in which articles of food or drink are sold. Such regulations must be reasonable, and not arbitrary or discriminatory." [79]

Public scales. "Under the usual municipal power, it is competent to provide that the standard weights and measures for coal, hay, cotton, corn and the like shall be observed in all sales within the corporate limits, by test upon the public scales provided by the municipality, and prescribe what fee shall be paid for weighing, and that the same shall be paid in halves by seller and buyer." [80]

Opinion of Secretary of Justice. "I have the honor to comply with your request for opinion of July 22, 1940, as to the legality of Ordinance No. 9, series of 1939, of the Municipal Council of General Luna, Tayabas, requiring all merchants and dealers in articles and commodities of prime necessity, such as food stuffs, building construction materials, hardware and clothing, to label the same, stating therein the grade, kind, quality or class and the corresponding prices thereof.

"Obviously, the ordinance in question was enacted under and by virtue of the provision of general welfare clause of the Municipal Law (Sec. 2238, Rev. Adm. Code)

"The purpose of the ordinance is fairly evident to prevent deception and to promote fair dealing in the sale of commodities of prime necessity.

"A requirement that the contents of all packages containing aticles of food must be shown by labels, brands or tags is obviously a most efficient method of insuring protection to the public from the sale of inferior and injurious articles of commerce. *It is settled beyond question that statutes requiring the seller to disclose, by label or otherwise, the nature and quality of the articles offered, are valid as a legitimate exercise of the police power* (11 R.C.L. p. 1106, par. 12 citing the cases of Savage v. Jones, 225 U.S. 501, 32 S. Ct. 715, 56 U.S. (L. ed.) 1182; Standard Stock Food Co. v. Wright, 225 U.S. 540, 32 S. Ct. 784, 56 U.S. (L. ed.) 1197; State v. 81 Ia. 642, 47 N.W. 777, 11 L.R.A. 355; State v. Asleen, 50 Minn. 5, 52 N.W. 220, 36 A.S.R. 628; 50 L.R.A. Sherod, 80 Minn. 446, 86 N.W. 417, 18 A.S.R. 268; 50 L.R.A. 660; Alcron Cotton Oil C. vs. State, 100 Miss. 299, 56 Ohio St. 236, 48 Am. Rep. 429; Dorsey v. State, 38 Tex. Crim. 527, 44 S.W. 514, 70 A.S.R. 762, 40 L.R.A. 201).

"It is well recognized, that the legislative body in the exercise of its police power may regulate or restrict the sale of personal property within the state. It may impose reasonable requirements as to labelling commodities to prevent frauds and imposition on the public (23 R.C.L. p. 1190, par. 3). The authority to legislate on this matter has been invariably upheld by the courts. (See National Fertilizer Association v. W.W. Bradley, 301 U.S. 178, 81 L. ed. 990; State v. Buck Mercantile Co. 57 A.L.R. 675; 38 Wyo. 47, 264 Pac. 1023; U.S. v. Ehreveport Frain & Elavator Co., 286 U.S. 77, 77 L. ed. 175; Evparte Beau, 15 Pac. (2d) 489; 216 Cal. 536; People v. Franch Bottling Works Inc., 180 N.E. 537, 529 N.Y. 4; State v. Reininger, 239 N.W. 849; and McDermoth v. State, 126 N.W. 888)

"In view of the foregoing, I am therefore of the opinion that there is very good authority for the conclusion that the ordinance in question which requires all merchants and dealers to label their commodities, is legal, it being a legitimate exercise of the police power conferred upon the Municipal Councils by the general welfare clause provision of the Revised Administrative Code.

"In this connection, your attention is called to an objectionable provision in section 4 of the ordinance that the Justice of the Peace of the municipality shall be a member of the Anti-Profiteering Law Enforcement Board. It seems that as a matter of good policy, the justice of the peace should not be made a member of said board." [81]

[§ 235] 2. *Statutory provision as to City of Manila.* — "The Municipal Board shall have the following legislative powers:

"* * * *

"(w) To regulate the inspection, weighing, and measuring of brick, lumber, coal and other articles of merchandise.

"* * * *" [82]

[§ 239] L. *Gaming or gambling.* — 1. *In general.* The passage of gambling laws is included within the police power of municipalities and although some games are not strictly games of chance or hazard and prohibited by the general gambling law, still in a general sense some games are a species of gambling, and the municipality can suppress or control them, in the exercise of its police power.[83]

Illustration:

"At common law a common gaming house was a common nuisance and was indictable as such. Gambling and the keeping of gaming houses are usually punishable by statute, but several court have held (the decisions, however, are not uniform), that the fact that the offense is punishable by statute does not prevent the enactment, under due legislative authorization, of municipal ordinances upon the same subject and providing a penalty for the violation thereof. The power to suppress gambling is frequently conferred upon municipalities by express statutory provision, and it has been held that when the crime of gaming is defined by law statutory authority to a municipality to suppress is confined to the offense defined by statute. But express authority is not required to confer authority upon the municipality to suppress gaming and the keeping of gambling houses. Such authority has been implied from the general welfare clause, from general power to pass police ordinances, from power to regulate and preserve the good order and peace of the city, and from power to provide for the punishment of disorderly conduct and all practices dangerous to public order. Under the power to regulate establishments, they may be confined to prescribed limits. The act of setting up, keeping, and maintaining a gambling house is continuous in its nature in the absence of evidence of an interruption in the conduct of the house. Hence, for the maintenance of such a house only one penalty can be imposed, and separate penalties cannot be executed for each day. The prohibition of the ordinance may be directed not only against the keeping of gaming houses, but also against inmates and visitors to them."[84]

The power given to regulate does not necessarily carry the power to suppress.[85]

Power to license. "A municipal corporation which by its charter is authorized to prevent and suppress gaming and gambling houses is not authorized to make such places lawful by licensing them. The power to suppress is not authority to permit and regulate. A license fee on a tenpin alley or the like cannot be imposed by ordinance without legislative authority. It has been held that, under the power to restrain gaming, municipal corporations have the power to license, and that such power repeals general statutes inconsistent therewith when such is the intention of the legislature." [86]

Punishment. "While under express or implied power municipal corporations may make gambling a punishable offense,[87] it has been held that, under the mere power to suppress gambling, a municipal

77 43 C.J. 391.
78 Tan Chat v. Iloilo (Mun of 60 Phil. 465.
79 43 C.J. 374.
80 43 C.J. 374.

81 Letter dated December 6, 1940, of Secretary of Justice, Jose A. Santos to the Undersecretary of Interior; Opinion No. 340, series 1940.
82 Sec. 18, Rep. Act No. 409.
83 U.S. v. Salvareria, 39 Phil. 192. For facts and rulings, see ss 133, 142.
84 2 Dillon, Mun. Corp., 5th ed., 1109-1112.
85 In re McMonies, 75 Nebr. 702, 106 NW 465; State c. McMonies, 75 Nebr. 443, 106 NW 454.
86 43 C.J. 376.
87 U.S. v. Jscon, 26 Phil. 1; U.S. v. Espiritusanto ,23 Phil. 610.

corporation has no power to provide for its punishment as a misdemeanor; nor has it power to impose fines or penalties for gambling or keeping gambling houses." [88]

Inmates of gambling houses; frequenting gambling houses." "Within its express or implied powers a municipal corporation may punish inmates of gambling houses, suppress visiting at gambling houses, and may make it punishable to be found in gambling houses. On the other hand, it has been held that it is without the power of a municipal corporation to make it an offense to be found in a gambling house without regard to the purpose for which one was present." [89]

Illustration. The seven defendants in this case were convicted in the justice of the peace of Davao, Davao, of violation of ordinance No. 394 of said municipality. On appeal, the Court of First Instance of Davao ordered the dismissal of the case on the ground that the ordinance aforementioned is null and void. The prosecution appeals from and challenges this order of dismissal of the court below.

Ordinance No. 394 of the municipality of Davao prohibited the playing of "jueteng", and provided various penalties for the violation of said ordinance.

The question to be decided is whether the ordinance in question is valid or not.

The municipal council of Davao is empowered by law to enact ordinance No. 394 of said municipality prohibiting the playing of jueteng. The suppression of gambling is within the police power of a municipal corporation and "Ordinances aimed in a reasonable way at the accomplishment of this purpose are undoubtedly valid." (U.S. vs. Salaveria, 39 Phil., 102, 108.) The various penalties imposed for the violation of the ordinance in question come within the limits of paragraph (ii) of the same section of the Revised Administrative Code.

It is admitted that jueteng is already prohibited and penalized in article 195 of the Revised Penal Code. But the fact that an act is already prohibited and penalized by a general law does not preclude the enactment of a municipal ordinance covering the same matter. The rule is well-settled that the same act may constitute an offense against both the state and a political subdivision thereof and both jurisdictions may punish the act, without infringing any constitutional principle. (See U.S. vs. Pacis, 31 Phil., 524.) Indeed, this principle is impliedly accepted in our Constitution by the limitation provided that "If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act." (Arts. III, sec. 1, par. 20.)[90]

[§ 240] 2. *Statutory provisions as to Philippine municipal corporations.* — a. *Municipalities in regular provinces.* "It shall be the duty of the municipal council, conformably with law:

"* * * *

"(j) To prohibit and penalize . . . gambling . . .

"* * * *"[91]

The section in which this provision is to be found is entitled "*Certain legislative powers of mandatory character.*"

"The municipal council shall have authority to exercise the following discretionary powers:

* * * *"

"(i) To regulate cockpits, cockfighting, and keeping or training of fighting cocks, or prohibit either.

"* * * *"[92]

[§ 241] b.*Municipalities in specially organized provinces.* "The municipal council shall have power by ordinance or resolution:

"* * * *

"(bb) *Cockfighting.* — To regulate and license or prohibit cockfighting and the keeping or training of fighting cocks, and to close cockpits subject to the provisions and restrictions of general law.

"* * * *

"(jj) *Gambling, riots, and breaches of the peace.* — To prevent and suppress . . . gambling . . .

"* * * *"[93]

[§ 242] c. *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *

"(r) To provide for the prohibition and suppression of . . . gambling house, gambling and all fraudulent devices for purposes of obtaining money or property . . .

"(s) To . . .regulate the keeping or training of fighting cocks.

"* * * *

"(j) To . . . permit and regulate wagers or betting by the public on boxing, 'sipa', bowling, billiards, pools, horse or dog races, cockpits, jai alai, roller or iceskating or any sporting or athletic contests, as well as grant exclusive rights to establishments for this purpose, notwithstanding any existing law to the contrary.

"* * * *"[94]

[§ 243] M. *Health and sanitation.* — 1. *In general* — a. *Generally* "Our municipal corporations are usually invested *with express power to preserve the health and safety of the inhabitants.* This is, indeed, one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain. In determining the validity of ordinances adopted to promote the health and comfort of the inhabitants it may be taken as firmly established that the State possesses, and therefore municipal corporations under legislative sanction may exercise, the power to prescribe such regulations as may be reasonably necessary and appropriate for the protection of public health and comfort, and that no person has an absolute right to be at all times and in all circumstances wholly freed from restraint; but person and property are subject to all reasonable kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State, the public as represented by its constituted authorities taking care always that no regulation, although adopted for these ends, shall violate rights secured by the fundamental law nor interfere with the enjoyment of individual rights beyond the necessities of the case. It is equally well settled that if a regulation, enacted by competent public authority avowedly for the protection of the public health, has a real, substantial relation to that object, the courts will not strike it down upon grounds merely of public policy or expediency." 2 Dillon, Mun. Corp. 5th ed., 1022-1023.

[§ 244] b. *Statutory provisions as to Philippine municipal corporations.* — (1) *Municipalities in regular provinces.* "It shall be the duty of the municipal council, conformably with law:

"* * * *

"(m) To prohibit the throwing or depositing of filth, garbage, or other offensive matter in any street, alley, park, or public square; provide for the suitable collection and disposition of such matter and for other public places of the municipality.

"* * * *

"(o) To require any land or building which is in an insanitary condition to be cleansed at the expense of the owner or tenant, and, upon failure to comply with such an order, have the work done and assess the expense upon the land or building.

"(p) To construct and keep in repair public drains, sewers and cesspools, and regulate the construction and use of private water-closets, privies, sewers, drains, and cesspools.

"* * * *

"(r) To provide for and regulate the inspection of meat, fruits, poultry, milk, fish, vegetable, and all other articles of food.

"(s) To adopt such other measures, including internal quarantine regulations, as may from time to time be deemed desirable or necessary to prevent the introduction and spread of disease."[95]

The section in which these provisions are to be found is entitled "*Certain legislative powers of mandatory character*".[96]

"*Restriction upon measures relative to sanitation.* Ordinances, regulations, and orders enacted or promulgated by a municipal council in the exercise of authority over matters of sanitation shall not be inconsistent with the regulations of the Bureau of Health."[97]

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

"* * * *

"(o) *Streets: lighting, cleaning, care, and control.* — . . .to

88 43 C.J. 376.
89 43 C.J. 376.
90 People vs. Chong Hong, 65 Phil. 625-628.
91 Sec. 2242, Rev. Adm. Code .
92 Sec. 2243 Id.
93 Sec. 2625 Rev. Adm. Code.
94 Sec. 18, Rep. Act No. 409.
95 Other statutory provisions in furtherance of the protection of the public healt are set forth in connection with particular subjects.
96 Sec. 2242, Rev. Adm. Code.
97 Sec. 2247.
97 Sec. 2247 Rev. Adm. Code.

prohibit the throwing or depositing of offal, garbage, refuse, or other offensive matter [in streets and public places, and to provide for its collection and disposition . . .

"(u) *Insanitary property.* — To require any land or building which is in an insanitary condition to be cleansed at the expense of the owner or tenant, and, upon failure to comply with such order, have the work done, and assess the expense upon the land or buildings.

"(v) *Property below grade.* — To fill up or require to be filled up to a grade necessary for proper sanitation any and all lands and premises which may be declared and duly reported by health officer of the municipality as being insanitary by reason of being below such grade or which, in the opinion of the council, the public health or welfare may require.

"(w) *Drains, sewers, and so forth.* — To construct and keep in repair public drains, sewers, and cesspools, and regulate the construction and use of private watercloseets, privies, sewers, drains, and cesspools.

"(x) *Burial of dead.* — To prohibit the burial of the dead within the centers of population of the municipality and provide for their burial in such proper place and in such manner as the council may determine, subject to the provisions of the general law regulating burial grounds and cemeteries and governing funerals and the disposal of the dead.

"(y) . . . to provide for and regulate the keeping, preparation, and sale of meat, fruits, poultry, milk, fish, vegetables, and all other provisions or articles of food offered for sale.

"(z) *Enforcement of health laws and regulations.* — To enforce health laws and regulations, and by ordinance to provide fines and penalties for violations of such regulations; to adopt such other measures to prevent the introduction and spread or disease as may, from time to time, be deemed desirable and necessary."[98]

[§ 246] (3) *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *

"(1) To regulate . . . the keeping, preparation, and sale of meat, poultry, fish, game, butter, cheese, lard, vegetable, bread, and other provisions . . .

"* * * *

"(x) Subject to the provisions of existing law, . . . to prohibit the placing, throwing, or leaving of obstacles of any kind, garbage, refuse, or other offensive matter or matter liable to cause damage, in the street and other public places and to provide for the collection and disposition thereof . . .

"* * * *

"(y) . . . to provide for or regulate the drainage and filling of private premises when necessary in the enforcement of sanitary ordinances issued in accordance with law.

"* * * *"[99]

[§ 247] 2. *Food.* "Municipal corporations may enact such regulations as may be required to insure the sanitary production, sale, and disposition of all articles of food offered for sale to the public. The corporation may require that food offered for sale should be protected from dust, dirt, etc.; for instance, that all fruits exposed for sale outside of a building, or in any wagon or cart, shall be protected from flies and dust."[100]

"*Medical examination.* Municipal corporations may require that persons engaged in handling food products offered for sale subject themselves to medical examinations, and may prohibit the employment of persons suffering with infectious or contagious diseases."[101]

"*Retailing meats from vehicles.* Under the power to regulate the sale of foodstuffs the corporation may prohibit the retailing of meats from vehicles. Such prohibition is not unreasonable, although no public market places have been provided for; also, such prohibition is not discriminatory, although it does not apply to wholesale sales."[102]

[§ 248] 3. *Garbage, offal, and other refuse matter.* "The *removal and disposal of garbage,* offal, and other refuse matter is recognized as a proper subject for the exercise of the power of a municipality to pass ordinances to promote the public health, comfort, and safety. The natural scope of an ordinance on this subject is confined to discarded and rejected matter, i.e., to such as is no longer of value to the owner for ordinary purposes of domestic consumption. If the matter in question has not been rejected or abandoned as worthless and is not offensive in any way to the public health, it does not come within the natural scope of such an ordinance. *Garbage matter and refuse* are regarded by the decisions as inherently of such a nature as to be either actual or potential nuisances. By reason of the inherent nature of the substance, it is therefore not a valid objection to an ordinance requiring disposal in a specified manner that garbage has some value for purposes of disposal, and that the effect of the ordinance is to deprive the owner of householder of such value. That the owner suffers some loss by destruction or removal without compensation is justified by the fact that the loss is occasioned through the exercise of the police power of the State, and the loss sustained by the individual is presumed to be compensated in the common benefit secured to the public

"Founded upon the foregoing considerations, it is therefore within the power of the city not only to impose reasonable restrictions and regulations upon the manner of removing garbage, but also, if it sees fit, *to assume the exclusive control* of the subject, and to provide that garbage and refuse matter shall only be removed by the officers of the city, or by a contractor hired by the city, or by some single individual to whom an exclusive license is granted for the purpose. An exclusive right so created is not open to the objection that it is a monopoly.

"An ordinance of a city prohibiting, under a penalty ,any person, *not duly licensed therefor* by the city authorities, from 'removing or carrying through any of the streets of the city and house-dirt, refuse, offal, or filth,' is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is *not in the nature of a monopoly,* but is founded upon a wise regard for the public health. It was contended that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, as well as they could those of licensed persons; but *practically* it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able from habit to do the work in the best way and at the proper time."[103]

[§ 249] 4. *Quarantine.* "While a municipal corporation has been held to have no power to establish quarantine unless such power is expressly granted or is implied as an incident to a power granted or is essential to the declared objects and purposes of the corporation, as a general rule it is competent for a municipal corporation to establish quarantine regulations, and to exclude, remove, or detain persons affected with, or who have been exposed to, contagious or infectious diseases, it being considered a proper exercise of the police power."[104]

Harbors. "Authority by charter to pass ordinances respecting the harbors and wharves, and "every other by-law necessary for the security, welfare, and convenience of the city," gives to the city council power to pass a health ordinance requiring boats coming from infected places to anchor before landing and to submit to an examination, provided such ordinance be not repugnant to the general law of the state. And it was further held that a general law of the State, prohibiting "any person coming into the State from an infected place, and in violation of quarantine regulations," was not repugnant to, and did not render the ordinance invalid."[105]

[§ 250] N. *Intoxicating liquors.* — 1. *In general.* "There is no natural or inherent right to manufacture or sell intoxicants, in any such sense as to remove it from the legitimate sphere of legislative control. Nor is there any vested right acquired by those already engaged in the liquor traffic when prevents it's being afterward forbidden by statute."[106]

"Under their inherent police power, the several states (of the Union) had, prior to the Eighteenth Amendment, the right to prohibit, regulate, or restrain the manufacture and sale of intoxicants, and, in the exercise of this power, subject to the limitations and restrictions imposed by the constitution of the United States or of the state, had power to enact any and all laws for the suppression

98 Sec. 2625, Rev. Adm. Code.
99 Sec. 18, Rep. Act No. 409.
100 43 C.J. 371-372.
101 102 Id. 371-372.
103 2 Dillon, Mun. Corp., 5th Ed., 1023-1028.
104 43 C.J., 429.
105 2 Dillon Mun. Corp., 5th Ed., 1030.
106 33 C.J. 449.

of intemperance and the minimizing of the evils resulting from the traffic in intoxicating liquors by totally prohibiting or by restricting and licensing the manufacture and sale thereof, and to make such provisions to enforce and prevent evasion of such laws as seemed expedient to the several legislatures. To this end they may regulate or prohibit the transportation or shipment of intoxicants, or prohibit their importation, their manufacture, even for the use of the manufacturer, their gift, except for certain specified purposes, and their possession, when unlawfully acquired, or possession in excess of a specified quantity. But it has been held that the legislature may not prohibit a citizen from having in his possession intoxicants for his own use, or for keeping in his possession for another, intoxicants."[107]

"*In the exercise of its police power* to regulate the traffic in intoxicating liquors, it was held that the legislature of a state might lawfully provide a system for the granting of licenses to sell such liquors, imposing proper conditions and restrictions upon the granting of such licenses, prescribing the qualifications necessary to secure them, making it a punishable offense to sell without a license, and providing for the forfeiture or revocation of licenses for due cause. Such statutes, it was held, did not violate the constitutional guaranties securing the just rights of the individual. But there must be no unjust or arbitrary discrimination as to the privileges granted by the license or the amount of the fee payable therefor between individuals of the same class or doing business in the same locality. Since the licensing of persons to sell liquor is not an exercise of the taxing power of the state to raise revenue, but of the police power, it follows that the fixing of the fees for licenses is not governed by the constitutional provisions regulating taxation, such as those requiring equality and uniformity."[108]

The legislative authority to license or regulate the sale of intoxicating liquors does not authorize a municipality to prohibit it, either in express terms or by imposing prohibitive license fees. The general power granted in the general welfare clause does not authorize a Municipal Council to prohibit the sale of intoxicants, because as a general rule when a municipal corporation is specifically given authority or power to regulate or to license and regulate the liquor traffic, power to prohibit is impliedly withheld.[109]

Illustration. The Municipal Council of Tacloban, Leyte, enacted Ordinance No. 4, series 1944, providing among other things that it shall be unlawful for any person, association, or firm, to manufacture, distill, produce, cure, sell, barter, offer or give or dispose of in favor of another, possess or to have under control any intoxicating liquor, drink or beverage, locally manfactured, distilled, produced or cured wine, whiskey, gin, brandy and other drink containing liquor including tuba.

The defendants Timoteo Esquerra, Simplicio Sabandal, Teofilo Dacatoria, Vicente Uy, Uy Lawsing, Francisco Tan, Jose Chan, Victoriano Macariola, Miguel Galit, Eufracio Gaspay, Rosalia Estolano, Felix Labordo, Pilar E. Pascual, Melecio Aguillos, and Victoriano Teriapel, were accused in the Court of First Instance of Leyte for the violation of the above mentioned ordinance. The trial court, after hearing the arguments of the prosecution and the defense, declared the ordinance in question null and void, and dismissed the cases against the defendants.

The prosecuting attorney, in behalf of the plaintiff The People of the Philippines, appealed from the decision of the lower court. The appellant contends that the ordinance at bar was enacted by virtue of the police power of the Municipality of Tacloban conferred by the general welfare clause, section 2238 of the Revised Administrative Code, and is therefore valid.

Held: The lower court has not erred in declaring the ordinance No. 44, series 1944, ultravires and therefore null and void. Under the general welfare clause, Sec. 2238 of the Revised Administrative Code, a municipal council may enact such ordinances, not repugnant to law, as shall seem necessary and proper to provide for the health and safety, etc., of the inhabitants of the municipality. But as the ordinance in question prohibiting the selling, giving away and dispensing of liquor is repugnant to the provision of Sec. 2242 (g) of the same Revised Administrative Code, the Municipal Council of Tacloban had no power under Sec. 2238 to enact the ordinance under consideration. The prohibition is contrary to the power granted by Sec. 2242 (g) "to regulate the selling, giving away and dispensing of intoxicating malt, vinous, mixed or fermented liquors at retail;" because the word "regulate' means and includes the power to control, to govern and to restrain; and can not be construed as synonumous with "suppress" or "prohibit." (Kowng Sing vs. City of Manila, 41 Phil. Rep., 103). Since the municipality of Tacloban is empowered only to regulate, it cannot prohibit the selling, giving away and dispensing of intoxicating liquors, for that which is prohibited or does not legally exist can not be regulated.[110]

[§ 251] 2. *Statutory statement as to Philippine municipal corporations.* — a, *Municipalities in regular provinces.* "It shall be the duty of the municipal council, conformably with law:

"* * * * *"

"(g) To regulate the selling, giving away, or dispensing of intoxicating, malt, vinous, mixed, or fermented liquors at retail.

"* * * *"[111]

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

[§ 252] b. *Municipalities in specially organized provinces.* The municipal council shall have power by ordinance or resolution:

"* * * *"

"(d) * * *

"To regulate, . . . or prohibit . . . the selling, giving away, or disposing, in any manner of any intoxicating, spiritous, vinous, or fermented liquors . . .

"But nothing in this section shall be held to repeal or modify the provisions of law prohibiting the sale, gift, or disposal of intoxicating liquors, other than native wines and liquors, to non-christian inhabitants.

"* * * *"[112]

[§ 253] c. *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *"

"(p) To . . . regulate the sale of intoxicating liquors, whether imported or locally manufactured.

"* * * *"[113]

[§ 254] O. *Markets and market places.* — 1. *In general.*— a. *Generally.* "The public sale of articles of food has been subject of police regulation and control from the early days of the common law. The right to conduct such sales, or to open a place where sales might be conducted by others, was treated in England as a franchise held under the kind to be supported by express grant or by prescription. In the United States the right to establish and regulate markets is an exercise of the police power of the states. And the right to open and conduct a market is usually derived from the municipal corporation within whose limits the market is kept. The police power of the states to establish and regulate markets may be delegated to municipal corporations and is a particularly appropriate subject for municipal regulation. This power may be exercised either under statutory or charter provisions relating expressly to the establishment and regulation of markets, or the vending of meat and other commodities usually sold at such places, or under the general police powers ordinarily possessed by municipal corporations. The power may be exercised whether the market is carried on by a corporation, an unincorporated association, or even a private individual. While in judging the reasonableness of such regulations the court will not look closely into mere matters of judgment where there may be a reasonable difference of opinion, and will not interfere with the exercise of the discretion granted to the municipal corporation upon the ground of unreasonableness ex-

107 Ibid. 505-507.
108. Ibid. 512-513.
109 People of the Philippines vs. Esguerra et al., G.R. Nos. L-501, L-502, L-503, L-504, L-505, L-506, L-507, L-508, L-509, L-510, L-511, L-512, May 21, 1948, XIII, L.J. 447.
110 People vs. Esguerra, 13 L.J. 337-338.
111 Sec. 2242, Rev. Adm. Code.
112 Sec. 2625, Rev. Adm. Code.

cept in a clear case, regulations relating to markets must be reasonable, and not arbitrary or discriminatory. The regulation must have its foundation on public necessity; it must have some rational tendency to promote the public health, safety, and welfare of the municipality. The right to establish and regulate public markets cannot be used to create a monopoly of the right to sell, or so as to deny the right of consumers and producers of market supplies to deal with each other directly. The power granted by statute must be exercised in the manner prescribed therein. Any ordinance relating to the regulation of markets is invalid if in conflict with a valid statutory provision, and a statute expressly limiting the powers of municipal authorities in regard to markets is not repealed by a general statute authorizing them to enact all ordinances necessary for the general welfare of the municipality."[114]

"*Prohibition*: The power to regulate markets does not include the power to prohibit."[115]

"*Construction of power.* The power conferred upon a municipal corporation to establish and control markets is, as a rule, to be liberally construed, unless such a construction will tend to produce a monopoly in favor of private individuals."[116]

"*Surrender of power.* The municipal police power over markets cannot be surrendered."[117]

[§ 255] b. *Statutory statement as to Philippine municipal corporations.* — (1) *Municipalities in regular provinces.* "It shall be the duty of the municipal council, conformably with law:

"* * * *"

"(q) To establish or authorize the establishment of . . . markets, and inspect and regulate the use of the same."[118]

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

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

"* * * *"

"(y) *Slaughterhouses and markets.* — To establish or authorize the establishment of . . . markets, and inspect and regulate the use of the same . . .

"* * * "[119]

[§ 257] (3) *City of Manila.* "The Municipal Board shall have the following legislative powers:

"* * * *"

"(cc) Subject to the provisions of ordinances issued by the Department of Health in accordance with law, to provide for the establishment and maintenance and fix the use of, and regulate . . . markets . . . and prohibit or permit the establishment or operation within the city limits of public markets . . . by any person, entity association, or corporation other than the city."

"* * * "[120]

[§ 258] 2. *Delegation of power.* "In the absence of express authorization from the state or power necessarily implied from that granted, the discretionary power to control and regulate markets must be exercised by the municipal governing body and cannot be delegated to any board or official; it must be exercised by the board or official on whom the power has been conferred. Under delegated authority municipal corporations may provide that certain markets shall be established and operated subject to the regulations adopted by designated boards or officials. The fixing of rent of market stores has been held to be an administrative function which may be delegated to designated officials or boards."[121]

[§ 259] 3. *Location; abandonment and removal.* "In the absence of any restriction as to place, the right to establish a market includes the right to fix its location; to shift that location from place to place when convenience or the necessity of the people requires it; and to abolish a previously existing market and establish another in a different locality within the municipal boundaries. The fact that the site was acquired for market purposes is immaterial. But a municipal corporation should not abolish a duly authorized and existing public market which is the only one within the municipal boundaries."[122]

[§ 260] 4. *Leases and sales; stalls and privileges.* "The right to sell in public market stands or stalls is acquired by contract with the municipal or other authorities controlling the market. Municipal corporations have power to lease or sell stalls in public markets, or to prohibit the occupancy of a stall without procuring a lease. The precise rights of the occupant of a stall in the market will depend as a general rule upon the terms of the contract under which the stall is held."[123]

"The purchase of these stalls in a public market, like the purchase of a pew in a church, does not confer on the purchaser an absolute property, but a qualified right only. The right acquired is in the nature of an easement in, not a title to, a freehold in the land; and such right or easement is limited in duration to the existence of the market, and is to be understood as acquired subject to such changes and modifications in the market, during its existence, as the public needs may require. The purchase confers an exclusive right to occupy the particular stalls with their appendages, for the purposes of the market and none other. If the owner be disturbed in the possession of the stalls, he may maintain case or trespass according to the nature and circumstances of the injury, against the wrongdoer. But he cannot convert them to any other use than that for which they were sold, and in this use of them he is required to conform to the regulations of the market as prescribed by the ordinances of the city."[124]

The right to sell at a stall or stand in a public market is to be exercised by the lessee thereof subject to all qualifications and restrictions that the municipal corporation may impose; and this is so whether they are made part of the lease or contract or not. Such requirements or restrictions must be reasonable. His right is limited in duration to the existence of the market. The lessee of a market or its revenues also takes subject to the provisions of existing ordinances, and the rights of the municipality to make necessary public improvements. The lease of a market stall does not imply a contract on the part of the municipality to protect the lessee against competition by unlicensed vendors, nor does a lease of the revenues of an established market prevent the municipality from establishing another market and leasing it to a different person, or require it to protect the lessee against competition by unauthorized private markets, unless the contract so provides, or gives such lessee any right of action against a person maintaining a competing and unauthorized private market. A person in possession of the stall under a verbal lease from the market master, although the latter had no authority to make it, is not a trespasser so as to authorize a forcible seizure and removal of his property, nor can the lessee and collector of market revenues summarily eject the occupant of a stall admitted by his predecessor in office who has tendered the required dues and conformed to the market

114 43 C.J. 391-392.
115 Id. 392.
116 Id. 393.
117 Id. 393.
118 Sec. 2242, Rev. Adm. Code.
119 Sec. 2625, Rev. Adm. Code.
120 Sec. 18, Rep. Act No. 409.
121 43 C.J. 393.
122 43 C.J. 393.
123 43 C.J. 395.
124 Rose v. Baltimore, 51 Md. 256, 270, 31 AmR 307 [quot Fonte v. Fisher, 138 Md. 663, 114 A 703, 704.

THE NATURAL LAW . . .

(*Continued from page 65*)

failed here dismally — there are millions still languishing in slave and labor camps, there are still people shipped in cattle cars and there will still be millions who will be cannon fodder at the whim of so-called leaders. On this level, the Declaration of Human Rights, approved by the United Nations Organization on December 10, 1948 is a modern application of the natural law. It contains the harmony of ideas and agreement of views of so many United Nations representatives of widely different oblutiacs or cultures, philosophies and religions. That is not an accident of political agitation or propaganda and oratory or rhetoric. It is the conspicuous result of the presence in all men of the continuing protective postulates of natural law. Let us hope that policy makers and responsible government fuctionaries realize the useful role and function of the natural law in the legal order.

regulations. The occupant of a market stall who sells his rights to another is not bound in warranty to his vendee in case of an eviction or disturbance of the latter by the municipality itself, but would be liable only for his own acts which interfere with the enjoyment of what he sells."[125]

A charter provision requiring that when any market belonging to a municipality is to be let to a private party the same shall, unless otherwise directed by a state official therein referred to, be let to the highest and best bidder refers to the leasing of a market in its entirety, and does not apply to distribution and award of spaces therein."[126]

Illustration. This case is here on appeal by the plaintiffs Julia Lorenzo and her husband Mariano Estrella from a decision of the Court of First Instance of Cavite, dismissing their complaint against the Municipal Council of Naic, Cavite and Pilar Dinio. For purposes of the present decision, the folowing facts gathered from the record may be briefly stated.

Prior to February 15, 1948, it seems that the municipal market of Naic, Cavite was conducted and maintained without much attention as to the order and classification of the business done in it by the vendors and stallholders, and that furthermore, there was lack of light and ventilation in said market. To remedy this situation the municipal counci of that town passed Resolution No. 20 on February 15, 1948, rearranging, zoning and otherwise putting in proper order the mercantile transactions and the market space according to a scheme or plan. This is partly stated and described in paragraph 1 of said Resolution No. 20 which reads as follows:

"7 That for purposes of unity, better zoning system and for aesthetic reasons, all market stores and stalls are hereunder classified as regards the kind of goods they are to sell or dispose to the public, and that, no store or stall should be allowed to sell products or goods other than specifically provided."

All he stores and stalls previously maintained in front of the market building up to the fence were ordered removed and the space declared "off limits," the owners of said stores and stalls to be given spaces within the market proper. The scheme was graphically embodied in a plan prepared by the District Engineer and amended by the municipal council, and is now marked as Exhibit D.

Prior to the rearrangement and re-planning of the Naic market, Julia Lorenzo, the appelant herein, was occupying a stall or market space, which is the very same space appearing as lot No. 4 (with a circle in red pencil), east block, center column A, in plan Exhibit D, and now occupied by her. R. Manalaysay who previously occupied a space or stall in the portion declared "off limits," and because of the strategic position of said stall, was awarded a corner lot. Lot No. 2 (with a circle in red pencil), east block, center column A, in the same Exhibit D. Pilar Dinio who was formerly occupying a space outside of the market was given lot No. 1 (with a circle in red pencil), east block, center column B, in the same exhibit. For reasons not known and not material to this case, and through a private agreement Manalaysay exchanged his lot No. 2 for lot No. 1 of Pilar Dinio. The award of lot No. 2 to R. Manalaysay, and his exchange of said lot for lot No. 1 of Pilar was protested by Julia, but the municipal council in its Resolution No. 28 overruled the protest. As a result, Pilar Dinio is now occupying lot No. 2 while R. Manalaysay occupies lot No. 1.

It should be stated in this connection so as to fully understand the reason why Julia brought this action, that before the zoning and rearrangement of the Naic market as per Resolution No. 20, the space occupied by Julia which is now lot No. 4 in Exhibit D was a corner lot or stall, lot No. 2 then being used as an alley. As a result of the rearrangement, Julia's lot No. 4 is no longer a corner lot, and according to her testimony, her daily sales had diminished by one-half, thereby materially reducing her gross income and her profits. Naturally, Julia is interested in lot No. 2 and she wants to have it or at least have a chance to get it.

Julia contends that the action of the Municipal Council of Naic in awarding lot No. 2 to R. Manalaysay was illegal and unconstitutional because it was not done thru public bidding as should have been done, and that furthermore, Resolution No. 28 of the same council approving the barter or exchange of lots 1 and 2 between Manalaysay and Pilar was equally illegal.

The trial court invoking section 2242 (q) of the Revised Administrative Code which imposes upon a municipal council the duty to establish or authorize the establishment of markets and inspect and regulate the use of the same, held that the municipal council of Naic was authorized to make the award of lot No. 2 to R. Manalaysay, which award the plaintiff could not very well question in the present case inasmuch as she did not include Manalaysay as party-defendant; and that furthermore, the allege illegal exchange of lots 1 and 2 was clearly a private arrangement or agreement which concerns only the parties thereto. So, the trial court dismissed the complaint.

In her appeal Julia maintains that the trial court erred in not holding Resolution No. 20 illegal in so far as it approved the awarding of lot No. 2 to R. Manalaysay without any public bidding and without giving any chance to her to lease said lot, and that the lower occupying lot No. 2 for the reason that the exchange made between her and Manalaysay was illegal.

HELD: "The appellant does not question the right of the municipal council to dispose of a market space under the provisions of section 2242 (q) of the Revised Administrative Code. She insists, however, that under section 2319 of the same Code, a space in a municipal market should be let or awarded to the highest bidder.

126 Lorenzo et al. v. Mun. Council of Naic, Cavite, 47 Off. Gaz. 2380.

OUR SECRETARY . . .

(*Continued from page 57*)

and Agusan. In a year, he was transferred to Ilocos Sur.

Promotion came in 1918. That was when he was designated assistant attorney in the Bureau of Justice. His merit was being recognized. In three years, he was acting Attorney General. It was while holding that position that he was nominated Undersecretary of Justice. Instead of getting his new promotion, he was kicked out — the Senate did not act on his appointment. His next job was that of general attorney for the Manila Railroad. The salary was much higher, but it lacked glamour and prestige.

Before long, he was designated judge of First Instance. For 12 years he was successively judge of Albay, Ambos Camarines, Tayabas, Rizal, and finally Manila, Branch I. In 1936, he was named Solicitor General. Two years later, he was elevated to the Court of Appeals where he sat quietly throughout the enemy occupation.

President Sergio Osmeña returned with the forces of liberation, swept the entire Court of Appeals out, then abolished it. Collaboration became a burning issue, a battle-cry. The appellate justices accepted their fate with becoming dignity. They rallied under the banner of Senate President Manuel Roxas who, they knew, would show them sympathy and understanding. He did. Elected President, he promptly named Justice Tuason chairman of a committee to investigate the Philippine Relief and Rehabilitation Administration, some of whose officials seemed to have adopted the theory that to relieve and rehabilitate the country they must first relieve and rehabilitate themselves. Also due for investigation was the Emergency Control Administration, a number of whose officials were charged with having taken advantage of the emergency to place themselves, their relatives, and close friends, beyond control.

Before he could finish investigating the two administrations, he was elevated to the Supreme Court from which another President has recently taken him to head the Department of Justice. Asked which of the two positions he would prefer, he answered that the work of an associate justice was more suitable to his temperament, but that the secretaryship of justice was more interesting. In fact, he added, it is more important because it invests the occupant with tremendous powers for good or, or if he be so inclined, for evil.

Speaking of evil, Secretary Tuason thinks that the present high rate of criminality in the Philippines is due largely to the general disintegration of morals. Religious instruction, he feels, might help remedy the situation. It is for this reason that he is in favor of strict adherence to the constitutional provisions on religious teaching in the public schools. Unwilling to rush in "where angels fear to tread", he nevertheless believes that "any religion is better than no religion at all and that a man who believes in God becomes a better citizen."

LAUGHTER IS LEGAL

A LETTER TO THE TAX COLLECTOR ANONYMOUS

YOU HAVE BEEN TRYING to collect an income tax balance from one R..... R....., late of Winchendon, Massachusetts. This, despite the fact that you have been informed, several times, that the man in question departed from this wicked world on May 11, 1943, leaving no estate to be administered but many sorrowing creditors who wished that he had. Now you send a final notice to this deliquent that you hold a warrant of distraint for the said taxpayer. In these circumstances, the family and friends of the deceased have given this problem a thorough intellectual mastication, after which, they retained me in the name of their departed relative and friend to convey to you the sum total of their collective wisdom and co-operative spirit.

If you should decide to send a U.S. Marshal or other officer to serve the warrant, you will find the taxpayer, his kith and kin avow, comfortably ensconced in a cubicle 7 x 3 x 6 in St. Mary's Cemetery on Glenallen Street in said Winchendon. Your Marshal might first try whistling. If that brings no response, place a pint of Johnny Walker (Black label) within arm's reach of the tombstone. If that doesn't bring him up, then you will surely know that he is deader than a doornail. If your Marshal knows how to commune with the dead, he might be able to coax the fellow to explain his apparent delinquency.

However, if your Marshal is in no hurry — and I never saw one that was — let him bring some sandwiches and a comfortable chair with him and sit himself down with a copy of "Forever Amber" and wait around until Ressurrection Day. On that Day of Days, the man you are looking for will undoubtedly stand up for a ghostly seventh-inning stretch, at which time the warrant can be served.

Another happy thought might be of added consolation to you. If the taxpayer refuses to budge until he hears Gabriel blow his horn, don't let it bother you. For on that day, when the dead shall live again, you will be able to demand, not only the tax due but also you can ask for interest to the Day of Judgment. What you get from this guy alone will be enough to pay off all the national debt accumulated during the past golden decade. If you are a good Democrat — as you should be — that feat alone should entitle you to a great reward in the great Hereafter. There is one possible hitch to this happy thought. You see, my dear Collector, it all depends on whether the man you want is in Heaven or in Hell. If he's in Heaven, you have nothing to worry about — your money is as good as a Victory Bond. But, if by chance he should be in the other place, I'm afraid you're going to have a hell of a time. because some damn-fool lawyer is sure to get hold of him and put him through bankruptcy. Then, you'll be out of luck for fair.

But meantime, do as I suggest. Go down to see him and have a little chat with him. He may tell you where his permanent domicile is, in which case you'll know where you can go if you want your money.

If you should decide to talk to him, will you be good enough to tell him that my charge for writing this letter is $5.00 and that I don't want to go chasing all over Hell for it.

Client (just acquitted on burglary charge) — "Well, goodbye. I'll drop in on you some time."

Counsel — "All right, but make it in the daytime, please."

* * *

"I shall have to give you ten days or $20," said the judge. I'll take the $20, Judge," — said the prisoner.

* * *

"Repeat the words the defendant used," said the lawyer.

"I did rather not. They were not fit words to tell a gentleman."

"Then," said the attorney, "whisper them to the judge." — (2,500 *Jokes For All Occasions*)

* * *

Perfume salesgirl: "You've gotta keep changing. They build you an immunity to them." — *Charles Skiles — King Features*

* * *

The minister to drive home a point about the punishment due to wicked people in hell ended his sermon with the following:

"And there will be quashing of teeth in hell" . . . but an old man stood up, "how about me, I ain't got no teeth."

The minister answered, "Don't you worry, you will be provided with."

DOUBLE JEOPARDY . . .

(*Continued from page* 66)

fundamental constitutional guaranty to the contrary, the accused is placed twice in jeopardy for the same offense. *It is, therefore, well recognized that the doctrine of double jeopardy is predicated upon consideration of public policy which policy has become its ultimate and fundamental basis.* (underscoring ours.) For that reason no legal impediment exists to apply to the military establishment the prevailing view that "if the jury, after it has been duly sworn, is discharged before it has rendered a verdict, a second prosecution for the same offense is thereby barred, since to permit it to proceed would be to place the defendant twice in jeopardy."[25]

The rulings discussed above violate the democratic ideals of equal justice under the Constitution, which is the embodiment of all high hopes and aspirations of free men. That Constitution is applicable to all regardless of race, creed, or color, whatever their station in life may be. By that token, there are no such things as one plea of double jeopardy for civilians and another for military personnel. The fact that the military personnel are often exposed to inconvenience insofar as the administration of justice is concerned, means that the broader meaning of double jeopardy should apply to their case. After all, it is the prevailing view in the American courts of justice which the Philippine courts have traditionally followed As it applies to the civilians, there is no reason to deny it to the military personnel.

Said section reads as follows:

"'SEC. 2319. *Letting of municipal ferry, market, or slaughterhouse to highest bidder.*— When any ferry, market, or slaughterhouse belonging to a municipality is to be let to a private party, the same shall, unless otherwise directed by the Department Head, be let to the highest and best bidder for the period of one year or, upon the previous approval of the provincial board, for a longer period not exceeding five years, under such conditions as shall be prescribed by the Department Head.'

"We cannot agree with appellant in her interpretations of the above-quoted section. Said section clearly refers to the letting or leasing of a ferry, market or slaughterhouse in its entirety, to a private party to be operated by the latter. For instance, when a municipality does not wish to operate a slaughterhouse by administration but prefers to have a private party or entity operate the same for a fixed sum, for a period of say one year, under certain conditions, the Council calls for bidders and then makes the ward to the best and most responsible bidder. The same thing is done as regards a municipal market or ferry. But what is meant is the whole ferry, the whole market or the entire slaughterhouse and not any portion or any fractional part of the space therein. When a municipality itself administers a market, then under its authority regulate the use thereof, it may distribute and award spaces therein to be occupied by stores and stalls under conditions and regulations it may impose, but not by public bidding. Otherwise, the with the great number of stalls, numbering hundreds or even thousands, depending upon the size of the market, some stalls or spaces measuring only by a few square feet or square meters, public bidding would entail too much unnecessary proceedings and would result in unnecessary rivalry and competition between numerous parties and also differences in rate and amount of rent paid for the stalls instead of a simple uniform rate based only on the space occupied. It is therefore, clear that on legal grounds the stand taken by the appellant is untenable."[127]

127 Lorenzo et al vs. Mun. Council of Naic, Cavite G. G., 2350-2353.

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