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EDITORIAL

FAITH IN OUR COURTS OF JUSTICE

In our last issue, we commended Judge Narvasa for upholding the principle of the independence of the judiciary, by sentencing Taruc in accordance with what his conscience dictated to be the law applicable to the case, regardless of the public clamour demanding a higher penalty. We then expressed the view that Judge Narvasa's decision was a healthy sign that fortified our faith in our courts of justice. That faith is further strengthened by the order issued recently by the Hon. Jesus P. Morfe, District Judge of the Court of First Instance of Pangasinan, citing a party litigant to appear and show cause why he should not be punished for contempt for having sought the aid of the Presidential Complaints and Action Committee (PCAC) to intervene in his case.

The order of Judge Morfe is, in our opinion, not merely an assertion of the constitutional principle of separation of powers, but is also a reaffirmation of the time honored principle of judicial independence. As everyone knows, the PCAC is an agency newly created by the Chief Executive and designed to look into complaints brought to its attention by private individuals or organizations. While we do not question the right of any citizen to seek redress for his grievances, we cannot but view with grave concern the act of a litigant in asking the PCAC, an executive agency, to intervene in his case pending trial before the courts of justice. As Judge Morfe has rightly put it, such an act raises an issue whether "under the principle of separation of powers in the Republic, a litigant who has chosen to seek relief thru the Courts may enlist the good offices of the PCAC regarding the proceedings of his case pending consideration there."

The principle of separation of powers constitutes one of the basic features of our government. The functions of our government are divided into the three branches—executive, legislative and judicial. Each branch is co-ordinate and co-equal with and independent of the other branches. Within the framework of our system, persons entrusted with power in any one of the branches should not be permitted to encroach upon the powers confided to the other branches.

We are not unaware of the fact that separation of powers does not mean absolute independence of one branch from the other. To a certain extent there is interdependence between the different branches. Thus, the President is empowered to appoint judges, whose appointment must be confirmed by the Commission on Appointments created by the Congress. The Secretary of Justice is vested with the power of administrative supervision over the lower courts. The President may, upon the recommendation of the Supreme Court, suspend or remove a judge for valid cause. Notwithstanding these interdependent relations, we cannot but view with alarm any act that may tend to discredit the judiciary or undermine the judicial independence. That act of a litigant in soliciting the intervention of an executive agency in a case pending before the courts of justice, be it done in good faith, certainly discredits the judiciary. Besides, it sets a dangerous precedent which may seriously affect the principle of judicial independence.

We are fortunate to have in this country judges who, as zealous believers and exponents of the principle of judicial independence, would not countenance an act which would permit any other branch of the government or agency thereof to influence, directly or indirectly, judicial proceedings. Judge Morfe's contempt order could not have been inspired by any other than his honest belief that any litigant seeking the intervention of the PCAC undermines the prestige of the courts and destroys the very foundation of the independence of the judiciary.

If we want democracy to survive in this country, we should strengthen the faith of our people not only in the Executive Branch or in the offices and agencies under the direct supervision of the Executive Branch, but also in the Legislative and in our Courts. Faith in one branch of the Government alone would be very detrimental to the other two branches. It would spell a deathknell to our democratic institutions.

At this juncture, we would like to repeat the warning sounded a few years ago by Chief Justice Moran who said that if "x x x our constitutional form of government is to survive and the fundamental rights of the people are to prevail, there must be support and respect for the judiciary on the part of the people and the government, and it must be kept firm and strong so that it may withstand the most severe assaults of passion or malevolence and thus preserve sacred and inviolate those rights and liberties without which life is not worth living."

SUPREME COURT OF THE PHILIPPINES

G.R. No. L-7910

FELICISIMO OCAMPO, DEMETRIO ENCARNACION, ROMAN CAMPOS, GAVINO S. ABAYA, ENRIQUE MAGLANOC, MAXIMO ABAÑO, ROMAN IBAÑEZ, LUIS N. DE LEON, ELADIO LEAÑO, and JOSE BONTON

versus

THE SECRETARY OF JUSTICE, THE SOLICITOR GENERAL, THE CHIEF ACCOUNTING OFFICER, AND JUDICIAL OFFICER, COURTS, FINANCE AND STATISTICS DIVISION, DEPARTMENT OF JUSTICE

Memorandum for Petitioners

(*Continued from September Issue*)

IF REPUBLIC ACT NO. 1186 REALLY ABOLISHES THE OFFICE OF THE PETITIONERS, THEN SECTION 53 OF SAID ACT IS UNCONSTITUTIONAL BECAUSE IT TERMINATES THE TERM OF JUDICIAL OFFICE IN VIOLATION OF SECTION 9 OF ARTICLE VIII OF THE CONSTITUTION.

"The power that creates can destroy."

The Solicitor General contends that *offices* created by the legislature may be abolished by the legislature because "the power that creates can destroy." Our answer to this argument is that it is precisely for this reason—that the legislature may abolish any office created by it—that the Constitution, having in mind that the main function of the courts and the reason for its existence is to administer justice—justice which is the greatest interest of man on earth—thought it wise not to place the court on the same footing as any other office created by the legislature which may be abolished any time at the pleasure of the legislature. To this end, and to prevent the abolition of courts for the evil purpose of simply shortening or terminating the office of the judge, the Constitution secures the tenure of office of the judges by providing that the members of the Supreme Court and judges of inferior courts shall hold office during good behavior, until they reach the age of seventy years or become incapacitated to discharge the duties of their office.

A question primae impressionis.

The question as to whether the Legislature may abolish courts and thereby terminate the tenure of office of incumbent judges has not yet been decided by our Supreme Court. This is the first time that it has to decide this issue squarely, and no doubt its decision will go down in the history of our judicial institutions.

There is a case brought to the Supreme Court in 1915 in which the validity of Act No. 2347 reorganizing courts in the Philippines was raised. It was claimed that said Act was invalid because it abolished the Courts of First Instance created by Act No. 136 passed by the Philippine Commission in 1901, and removed the judges appointed under Act No. 136 to preside over the courts created thereby. Act No. 2347 provided in Section 7 thereof that the Judges of the Courts of First Instance, Judges-at-Large, and Judges of the Courts of Land Registration should vacate their positions on the date when said Act went into effect, and that the Governor-General, with the advice and consent of the Philippine Commission, should make new appointments of Judges of the Courts of First Instance and Auxiliary Judges in accordance with the provisions of said Act. One of the reasons advanced by the Supreme Court in holding the validity of said Act was that neither in Act No. 136 nor in the Constitution of the Philippines was there any provision which fixed the time during which the Judges of the Courts of First Instance of the Islands were entitled to hold such office. We quote:

> "Neither in Act No. 136, the law organizing the courts of justice in the Philippines Islands, nor in the Act of July 1, 1902, the constitutional law or Constitution of the Philippines, is there any provision which fixes or indicates the time during which the judges of the Courts of First Instance of the Islands are entitled to hold such office, the former Act merely stating in its section 48 that the judge appointed by the Philippine Commission shall hold office during its pleasure." (Conchada vs. Director of Prisons, 31 Phil. 94.)

Following the reasoning of this Supreme Court above quoted, we have it that if in the Philippine Bill, which was then the Constitu-

Memorandum for Respondents

(*Continued from September Issue*)

Incidentally, the long quotation (pp. 55-86, Francisco) is the *dissenting* opinion of Justice Snodgrass (p. 89, Francisco) in the above case of McCulley vs. State, *supra*. The majority opinion penned by Justice McAlister held —

> "x x x Construing these sections of the constitution, this court held: (1) That the legislature has the constitutional *power to abolish particular circuit and chancery courts*, and to require the papers and records therein to be transferred to other courts, and the pending causes to which they are transferred. The power to ordain and establish from time to time circuit and chancery courts includes *the power to abolish existing courts, and to increase and diminish the number*. (2) The judge's right to his full term and his full salary is not dependent alone upon his good conduct, but also upon the contingency that the legislature may for the public good, in ordaining and establishing the courts, from time to time consider his office unnecessary and abolish it. *The exercise of this power by the legislature is not such an interference with the independence of the judge or with his tenure of office as can be complained of.* When the court or courts over which a judge presides is abolished, the *office of the judge* is extinguished and his salary ceases. x x x" (53 S.W. 134, at p. 140)

The concurring opinion of Justice Wilkes held —

> "'x x x If the legislature had the power to enact the law, it must be either because the ordaining and *establishing of courts is a legitimate legislative power*, necessarily involving the *power to abolish* as well as to ordain and establish, and that the constitution has placed *no restriction upon the exercise of this power* inconsistent with the action of the legislature in the present case, or because the constitution, either expressly or by necessary implication, has vested in the legislature the power to ordain and establish courts, and that this power *carries with it the power of abolishing existing courts*. It is maintained by the attorney general and counsel for the state that the act in question is constitutional and valid on both of these grounds, while the counsel for the relators insist that the two courts abolished by the act were so guarded and protected by the constitution that, in the exercise of its power to ordain and establish courts, these two courts could not be abolished.' The court proceeds to discuss the questions involved in a manner at once exhaustive and able, and arrives at a conclusion that the *acts were valid and constitutional*. x x x" (53 S.W. at pp. 145-146.)

The quotation on pp. 22-23 in Atty. Francisco's Memo as "answer of the Solicitor General" is an immaterial citation from the Answer in the Zandueta case, and is not quoted from the answer of the undersigned Solicitor General in this case.

Counsel for petitioners claim that Republic Act No. 1186 only abolished the classification of the judges not their office (p. 26, Francisco). Our answer is best expressed in the explicit provision of Section 3, Republic Act No. 1186 which *abolished* the positions or offices of Judges-at-Large and Cadastral Judges and *repealed* Section 53 of Republic Act No. 296. The district judges were not covered by said Republic Act No. 1186.

Petitioners were not removed from their offices —

Counsel for petitioners claim that the effect of Republic Act No. 1186 is to remove the petitioners Judges-at-Large and Cadastral Judges from office and repeatedly used the term "to legis-

tion of the Philippines, there had been a provision securing the tenure of the office of the judges as in our present Constitution, the Supreme Court would not have upheld the validity of the Act in question which in reorganizing the Courts of First Instance in the Philippines vacated the office of the incumbent judges.

The phrase "may from time to time" in the American Constitution not incorporated in the Philippine Constitution.

The Constitution of the United States provides:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may *from time to time* ordain and establish. The judges, both of the supreme and inferior courts, shall hold their office during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office." (Sec. 1, Art. III.)

Our Constitution, which was patterned after the American Constitution, provides the following:

> "The judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law." (Sec. 1, Art. VIII.)
>
> "The members of the Supreme Court and all judges of inferior courts shall hold office during good behavior, until they reach the age of seventy years, or become incapacitated to discharge the duties of their office. They shall receive such compensation as may be fixed by law, which shall not be diminished during their continuance in office." (Sec. 9, *Ibid.*)

Comparing the provision of our Constitution above quoted with that of the American Constitution, it will be noticed that while the American Constitution gives the Congress the power to establish inferior courts *from time to time*, such is not however the power that our Constitution grants our Congress. Why did not our Constitution say; "such inferior courts as may *from time to time* be established by law"? May it not be because the sole intention of the Constitution was merely to create a judiciary in the Philippines under the system of government established by the Constitution in lieu of that which existed under the Commonwealth Act; a judiciary that could be said to breathe life from the Constitution itself instead of from prior organic laws? If the intention of the Constitution was that after the judicial system in the Philippines has been created by the Constitution and the Congress,— the Congress by creating the inferior courts—the Congress shall still have the power to establish from time to time inferior courts —would not the Constitution have inserted the phrase from time to time in the provision granting the Congress the power to establish inferior courts, as the American Constitution does?

Be that as it may, we contend that the power of the Congress to abolish courts, if at all, it may be implied from its power to establish them, must necessarily recognize limitations or restrictions.

Different schools of thought.

The American courts are divided on the question of whether the legislature may abolish a court and terminate the tenure of office of the judge of such court. Some American courts hold that the legislature may abolish a court because it has the power to create the same; that such power to abolish a court may be exercised without any restriction at all; and that when a court is abolished any unexpired term of the judge of such court is abolished also. Among the American decisions maintaining such theory is the Cherokee County v. Savage (32 So. 2d. 803; see *Lawyers Journal* of July 31, 1954, p. 360).

The other theory is that although the legislature may abolish a court because it has the power to create the same, it cannot however abolish a court when its effect is to terminate the tenure of the office of the judge of such court, because the tenure of office of the incumbent judge is protected by the Constitution.

late them out" (p. 40, Francisco), by legislating out judges (p. 15, Sebastian); Government's view would legislate them out of office (p. 70, Salazar), to remove "members of the Judiciary by legislative action" (p. 42, Francisco). Our answer is that there is no such removal, because the offices or positions of Judges-at-Large and Cadastral Judges were abolished. In the case of Manalang vs. Quitoriano, 50 O.G. 2515 (p. 18 of Respondents' Answer), petitioners assailed as illegal the designation of respondent as Acting Commissioner of the service as "equivalent to removal of the petitioner from office without just cause." This Honorable Court held that —

> "This pretense can not be sustained. To begin with, petitioner has never been Commissioner of the National Employment Service and, hence, he could not have been, and has not been, removed therefrom. Secondly, *to remove an officer is to oust him from office before the expiration of his term.* A removal implies that the office exists after the ouster. Such is not the case of petitioner herein, for Republic Act No. 761 *expressly abolished* the Placement Bureau, and, by implication, the office of director thereof, which, obviously, cannot exist without said Bureau. *By the abolition* of the latter and of said office, *the right thereto of its incumbent*, petitioner herein, *was necessarily extinguished thereby.* Accordingly, the constitutional mandate to the effect that 'no officer or employee in the civil service shall be removed or suspended except for cause as provided by law' (Art. XII, Sec. 4, Phil. Const.), is not in point, for there has been *neither a removal* nor a suspension of petitioner Manalang, but an *abolition* of his former office of Director of the Placement Bureau, which, admittedly, is *within the power of Congress to undertake by legislation.*" (pp. 2517-2518, underscoring supplied.)

The power of Congress to abolish statutory courts —

Under the second proposition in the memorandum of Atty. Francisco, he mentions three schools of thought (p. 52, Francisco), namely:

1. Theory of absolute and unrestricted power of the Legislature to abolish courts, (p. 54, Francisco);
2. The Legislature may abolish courts provided it is not motivated by bad faith, (p. 86, Francisco); and
3. The Legislature does not have the power to abolish courts when the intent is to terminate office of the incumbent judges. (p. 86, Francisco)

Counsel for petitioners argue that the established independence of the Judiciary and the tenure of office is "a limitation upon the power of the Legislature to abolish courts" (p. 88, Francisco). Our position is that the power of Congress to abolish inferior courts is expressly granted by Article VIII, Section 1 of the Constitution, which reads:

> "ARTICLE VIII, SECTION 1.— The Judicial Power shall be vested in one Supreme Court and in *such inferior courts as may be established by law.*"

While the Constitution equally provides for the judicial tenure of office under Article VIII, Section 9, such tenure only lasts "during their continuance in office and their compensation as may be fixed by law" (pp. 38-40, Respondents' Answer). The statement that the power of Congress over statutory courts is "a *general* legislative power and must be considered as circumscribed by the *specific* constitutional limitation" that a judge has definite tenure (p. 4, Sebastian) cannot be legally correct, because both provisions proclaim basic fundamental principles, which must be harmonized. The correct theory was enunciated by Justice Laurel in his concurring opinion in the case of Zandueta vs. De la Costa, 66 Phil. 615.

> "x x x I have a very serious doubt as to whether the petitioner, — on the hypothesis that the question involved is his security of tenure under the Constitution — could by acquiescence or consent be precluded from raising a question of pub-

Among the decisions holding such theory is Commonwealth v. Gamble (62 Pa. 343; see *Lawyers Journal, ibid.*) There is an intermediate theory, which holds that the office of the judge may be abolished by the abolition of the court provided "the office was abolished in good faith. If immediately after the office is abolished another office is created with substantially the same duties and a different individual is appointed, or if it otherwise appears that the office was abolished for personal or political reasons, the courts will interfere." (Garvey v. Lowell, 199 Mass. 47, 85 N.E. 182, 127 A.S.R. 468; State v. Eduards, 40 Mont. 287, 106 Pac. 695, 19 R.C.L. 236). Such doctrine is quoted in the decision of the Supreme Court in the case of Brillo vs. Enage, G.R. No. L-7115, March 30, 1954. That same doctrine is alluded to in the answer of the Solicitor General which we quote:

"* * * As the new court differs in its organization and jurisdiction from the old, we have no power to say that the abolition of the court was a scheme to turn this man out of office * * *. The act in question is therefore valid." (*Wenzler vs. People*, 58 *N. Y.* 516.)

The same doctrine has been applied in the following case:

"Appellant contends that the act of 1935 (House Bill No. 91) is unconstitutional as colorable legislation, passed to displace him as county judge or chairman. Inasmuch as he was not county judge at the time of the passage of this act, that feature of the attack on it may be dismissed. The office of county chairman was expressly abolished by said act. The act creating that office was repealed. The office of county judge was created. If the form and structure of the governmental agency created by the act were substantially different from that of chairman, then said act is valid. At least two changes are made which go to the organic constitution of the office of county judge: (1) The term of office is changed from one year to eight years, and (2) the county judge is to be elected by the people instead of by the quarterly county court. The second of these is clearly fundamental. Haggard v. Gallien, 157 Tenn, 269, 3 S. W. (2d) 364; Holland v. Parker, 159 Tenn. 306, 17 S. W. (2d) 926.

"The changes made being material and fundamental, it follows that the act is not open to the objection that it is colorable legislation adopted to displace appellant as chairman. Courts, in determining the validity of a statute, cannot inquire into the conduct and motives attributable to members of the General Assembly. Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 810, 60 A. L. R. 408; State v. Lindsay, 103 Tenn. 625, 53 S. W. 950. [Joseph A. Caldwell, Appt., v. W. D. Lyon et al., 168 Tenn. 607, 80 S. W. (2d) 80.]"

Which of these three theories must be adhered to for the benefit of our Republic, which, being young, will likely have to suffer most of the time the onset of political tempests? With due respect to the wisdom and statesmanship of the members of the highest court of the land, we beg to state that it is the second theory that should be followed. This theory is more in consonance with reason and tends to protect—not to destroy—the independence of the judiciary, which is justly regarded in a great measure as the "citadel of the public justice and the public security", in the words of Alexander Hamilton.

The theory of absolute and unrestricted power of the legislature to abolish courts.

We believe that this theory is unsound because it destroys the independence of the judiciary and the legislature may abuse such power without redress. The arguments of Chief Justice Snodgrass in the case of McCulley v. State, 53 S. W. 134, which have been condensed hereunder*, constitute the best refutation to such theory—

"We come to the question and proceed to its consideration with the elaboration it deserves, for the question is one of the most important that ever arose for final decision in this state and upon

* In the original memorandum these arguments were transcribed **verbatim.**

lic interest. *Security of tenure is certainly not a personal privilege of any particular judge.* x x x"

"The petitioner in his vigorous and impassioned plea asks us to vindicate the *independence of the judiciary* and uphold the constitutional mandate relative to the *security of tenure of judges*, embodied in section 9 of Article VIII of the Constitution. He claims that 'Commonwealth Act No. 145 is unconstitutional because the regrouping of the provinces into nine judicial districts as therein provided for was effected by the National Assembly without constitutional authority.' Upon the other hand, the Solicitor-General directs our attention to the *power of the legislature over courts inferior* to the Supreme Court, conferred by section 1 of Article VIII of the Constitution. I think the constitutional issue thus squarely presented should be met courageously by the court, x x x." (p. 625.)

"x x x Section 2, Article VIII of the Constitution vests in the National Assembly the power to define, prescribe and apportion the jurisdiction of the various courts, subject to certain limitations in the case of the Supreme Court. It is admitted that section 9 of the same article of the Constitution provides for the security of tenure of all the judges. The principles embodied in these two sections of the same article of the Constitution *must be coordinated and harmonized*. A mere enunciation of a principle will not decide actual cases and controversies of every sort." (Justice Holmes in Lochner vs. New York, 198 U.S., 45; Law. ed., 937.)

"I am not insensible to the argument that the National Assembly may abuse its power and move deliberately to defeat the constitutional provision guaranteeing security of tenure to all judges. But, is this the case? One need not share the view of Story, Miller and Tucker on the one hand, or the opinion of Cooley, Watson and Baldwin on the other, to realize that the application of a legal or constitutional principle is necessarily factual and circumstantial and that fixity of principle is the rigidity of the dead and the unprogressive. I do say, and emphatically, however, that cases may arise where the violation of the constitutional provision regarding security of judicial tenure is palpable and plain, and that legislative power of reorganization may be sought to *cloak an unconstitutional and evil purpose*. When a case of that kind arises, it will be the time to make the hammer fall and heavily. But not untill then. I am satisfied that, as to the particular point here discussed, the purpose was the fulfillment of what was considered a great public need by the legislative department and that Commonwealth Act No. 145 was *not enacted purposely to affect adversely the tenure of judges or of any particular judge*. Under these circumstances, I am for *sustaining the power of the legislative department* under the Constitution. x x x" (pp. 626-627.)

Unless the legislative power of abolishing statutory courts is exercised "to cloak an unconstitutional and evil purpose," or more specifically "to affect adversely the tenure of judges or of any particular judge," the power to legislate on inferior courts must be sustained. In fact, the tenure of judicial office must yield to the power of Congress to alter or abolish inferior courts.

"A constitutional provision that judges of a certain court shall hold their offices for five years *must yield to another provision that the legislature may alter or abolish the court*, and therefore the legislature may reduce the number of judges by fixing an end to the terms of certain of them although within five years after they took office." (Quoted on p. 37 of Respondents' Answer.)

"x x x If the framers of the Constitution intended to leave it to the legislature to establish and *abolish courts* as the public necessities demanded, this *was not qualified or limited by the clause as to the judge's term of office*. To so hold would be to allow the clause as to the length of the judge's term to overthrow the other clause, whereas we construe the provision that the judge's term shall be eight years to be upon the *assumption*

its determination hangs not only the independence but the existence of the judicial department of the state government. x x x Our government, state and national, is divided into three distinct and independent departments — legislative, executive and judicial. x x x Our constitution, after providing that 'all power is inherent in the people' proceeded to declare how the people would have it exercised, to distribute into departments and to vest in it such as the people wished each to exercise and to put upon each the limitation which was deemed essential to confine it within the scope of the authority the people vested and beyond which they intend to restrain. x x x While, it is sometimes said that the legislature is omnipotent and its authority unlimited except when restrained by the Federal or state constitution, this is only sub modo true generally in the cases in which it has been uttered but it is wholly inaccurate when given the general application to which its formulation would lead. All that is meant by it is that the legislatures of states of the Union, as legislative representatives of the people, have all legislative power, not expressly or by necessary implication limited. *Smith v. Normant*, 5 *Yerg*. 272, 273. x x x

"In 1875 it was held that, though true in theory that circuit courts and chancery courts must be maintained, it was not so in fact, — the legislature could abolish any it chose. State ex rel. Coleman v. Campbell, 3 Tenn. Cas. 355. Of course, if it could abolish any, it could abolish all, as it was not and is not pretended that any one or more of them enjoyed a special immunity from legislative control. This case was based upon the theory that the power to establish involved necessarily the power to abolish, — a theory wholly inconsistent with the constitutional provision for the establishment and continuance of the circuit and chancery court system; for, if one or both is 'established,' it can and 'shall' exist or have jurisdiction vested in it under the constitution, and thus be kept alive and preserved against legislative power, as a part of the court system, as a constitutional court; but, if the power to establish includes the power to destroy, such cannot be the result, and there is no protection to either circuit or chancery court system thus recognized and attempted to be preserved and protected by the constitution.

"That the conclusion of the court in the afore-cited case of State ex rel. Coleman v. Campbell, 3 Tenn. Cas. 355, is so incorrect, not to say transparently erroneous, as to be perfectly demonstrable, appears from the simplest statement. If the legislature must preserve circuit and chancery courts, and yet may abolish them; if it is true also, as it constitutionally is, that it may also establish other inferior courts, and vest in them such jurisdiction as it chooses, — why could it not abolish all circuit and chancery courts, and then establish other inferior courts in whom it might vest all inferior jurisdiction? Who would say, and what but the constitution could say, how many, if any, circuit courts or how many chancery courts, if any, it should preserve? It is so clear that the power to establish does not include, as against this preservative provision of the constitution, the power to destroy any or all of them, that it is wonderful to us that the contrary view could have ever prevailed for a moment. To say nothing of the provisions which make constitutionally the term of all the judges of all these courts eight years, and prevent changing their salaries during the the time for which they were elected, it seems so manifest that the power to destroy one or all those courts when created, is against the preservative clause of the constitution respecting the circuit and chancery courts, as only need suggestion to demonstrate its nonexistence. If the legislature can abolish one, it can abolish all. Which shall it re-establish, and how can it be required to re-establish, any one of them, if so, which, especially in view of its power to establish other inferior courts and vest them with any jurisdiction it pleases? It is a vain thing to say it can abolish as it pleases, but must retain or recreate the same tribunals. The concession of the power to abolish one, coupled with the declaration of constitutional necessity for the retention of the system, which the court holds in that case must be done, is a patent impracticability, not to say absurdity.

that the court continues to exist; x x x" (McCulley vs. State, 53 S.W. 134.)

The contention of petitioners is predicated mainly in the case of Commonwealth vs. Gamble, 62 Pa. 343 (p. 102, Francisco; p. 61, Salazar). But the act involved in said case was to "deprive a *singled judge only* of his office."

> *"The act displaces Judge Gamble as the presiding judge, and appoints Judge White and his law associate to hold the courts therein.* If such a thing can be done in one district, it may be done in all, and thus, not only would the independence of the judiciary be destroyed, but the judiciary, as a co-ordinate branch of the government, be essentially annihilated." (See Lawyers' Journal of July, 1954, p. 363.)

Admittedly, Republic Act No. 1186 was not enacted to single out any particular judge or particular judges. It applied to *all* positions of Judges-at-large and Cadastral Judges. If the ten petitioners had been appointed as District Judges like the other 23 Judges-at-large and Cadastral Judges, whose positions had been abolished, they would not have complained against Republic Act No. 1186. In fact, this case would never have been filed. But petitioners were not appointed by the President in the exercise of his sole prerogative of executive appointment. Hence, the complaint of the petitioners should be directed not so much against *Congress* in abolishing the positions of Judges-at-large and Cadastral Judges, but more so, and in particular, against the Chief Executive in not having appointed them as District Judges. (p. 20, Respondents' Answer)

Moreover, the case of Commonwealth vs. Gamble, *supra*, which is inapplicable to the instant case, because it *singled out a judge*, was not followed in the case of Aikman vs. Edwards, 30 L.R.A. 149, 42 Pac. 366, wherein the Supreme Court of Kansas discussed the decision of Commonwealth vs. Gamble, and held that—

> "x x x It is contended that the judicial department is co-ordinate with and independent of the legislative, and that, if the right of the legislature to *destroy* a judicial district, and thereby legislate a judge out of office, is recognized, the *independence of the judiciary* is destroyed, and the legislative will become dominant over the judicial department of the government. In support of this contention it must be conceded that cases closely in point, decided by eminent courts, are cited. *Among the strongest may be mentioned Com. v. Gamble*, 62 *Pa.* 343, 1 Am. Rep. 422; State v. Friedley, 135 Ind. 119, 21 L.R.A. 634; People v. Dubois, 23 Ill. 547; and State v. Messmore, 14 Wis. 177. We have carefully weighed and considered these authorities, and recognize their full force. While the reasoning of courts in these cases is applicable to the one now under consideration, we may remark that in each of the cases mentioned the court had under consideration *an act of legislature which would deprive a singled judge only of his office*, if valid. In this case the legislature had under consideration the *rearrangement* of the judicial districts covering a *large part of the state*. Notwithstanding our great respect for the tribunals by which these cases were decided, and the force of the reasoning by which their decisions are supported, we are *constrained to give a different construction* to the provisions of our own Constitution. The provisions in article 3 of that instrument, so far as they affect the matter under consideration, are as follows:
>
> "'Sec. 1. The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such *other courts inferior* to the supreme court *as may be provided by law*. And all courts of record shall have a seal to be used in the authentication of all process'." (at p. 369)
>
> "x x x The question we now have to consider is whether this purpose has been accomplished without any violation of the constitutional restrictions. The argument on behalf of the plaintiff, and the reasoning of the courts in the authorities sustaining his contention, may, perhaps, be divided into two main pro-

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"The only argument for the preservation of the system is its constitutional establishment over and against the power of the legislature to abolish it, when established, during the existence of any term. It is not a question of trusting the legislature not to do it; it is a question of its power to do it, against the positive provision that these courts must exist by the preservative clause vesting in them the jurisdiction when created. No other conclusion meets this difficulty, and no argument has been made or could be made which obviates it. We would just as well say it must exist, but may not exist, as to assert the proposition, contended for, or put two and two together, and say they shall not make four, as to assert that the constitution preserves this system of courts against the power of the legislature, and then say it may destroy it by destroying the court severally or in toto. The principle herein contended for was conceded by the same court which decided the Coleman Case, and still that case was in part adhered to in State ex rel. Halsey v. Gaines, 2 Lea, 316, 319. In that case it was conceded (page 326) that an act abolishing a circuit with intent to destroy a judge would be void. This concession can mean nothing else than that an act destroying a judge by abolishing a circuit or division would be void, because it has been before and has repeatedly since been decided that the personal motive or intent of the legislature in passing an act cannot be inquired into, and, as the only intent which can be considered is the legal one determined by the effect of the act, if that effect is to destroy the judge the intent appears, and the act void. If this is not so, the concession is meaningless and misleading, not to say frivolous. For almost the same reasons are the other inferior judges protected from legislative interference. They are to be men of the same age, the same term of service, with the same unchangeable compensation, and elected by the same voters in the same district or circuit where they serve. Const. art. 6, § 4. To this conclusion this court came in the case of State v. Leonard, 86 Tenn. 485, 7 S. W. 453, and we used language there which we thought could by no possibility be misconstrued. In this connection we said: 'The constitution, in fixing the terms of the judges of inferior courts, elected by the people, at eight years, intended not only to make the judiciary independent, and thereby secure to the people the corresponding consequent advantages of courts free from interference and control, and removed from all necessity of being subservient to any power of the state, but intended also to prevent constant and frequent experimenting with court systems, than which nothing could be more injurious or vexatious to the public. It was intended, when the legislature established an inferior court, that it should exist such a length of time as would give opportunity for mature observation and appreciation of its benefits or disadvantages, and that the extent of its duration might discourage such changes as were not the result of most mature consideration. Realizing that a change, if made so as to constitute an inferior court, would fix that court in the system for eight years, a legislature would properly consider and maturely settle the question as to the propriety and desirability of such change or addition to our system; and conscious of the impropriety and the hazard of leaving the judicial department of the government at the mercy and whim of each recurring legislature itself elected but for two years, the framers of the constitution wisely guarded against these evils by the section referred to. Properly construed and enforced, it is effectual for that purpose. Disregarded or impaired by such interpretation as leaves it to exist in form without force or substance, and we have all the evils and confusion of insecure, changing, and dependent courts; frequent and constant experimenting with systems provided in haste, tried in doubt, and abolished before their merits or demerits are understood. It would be mortifying reflection that our organic lawmakers intended any such result in their avowed effort to make a government of three distinct and independent departments, and still more humiliating if we were driven to the conclusion that, while they did not intend it, they had been so weak and inapt in phraseology adopted as to have accomplished it. When a court whose judge is elected by the people of one or more counties in a district or circuit is

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positions: One, that it was the general purpose of the framers of the Constitution to protect the judicial department from legislative interference; the other, that they intended to insure to the judge a *tenure of office for the full term for which he was elected;* the one being necessary for the preservation of the *independence* and integrity of the judicial branch of the government in the administration of justice between litigants, and the other to preserve the individual right of the judge to his office. That the constitution intends to secure to the judiciary as an independent co-ordinate branch of the government is conceded on all hands, and that the district courts are an important part of the judicial system is beyond question. It is contended that, because the Constitution provides for district courts, and fixes the term of the judges, and *prescribes the mode of their removal from office,* their position is fixed, and is as safe from legislative interference as that of the justices of this court; that both are constitutional officers, in exactly the same sense, and to exactly the same extent. But it will be noticed that under the provisions of the Constitution above quoted the judicial power is vested, not merely in supreme and district courts, but in probate courts, justices of the peace, and such other courts, inferior to the supreme court, *as the legislature may see fit to create.* x x x" (at p. 368.)

"x x x The case of district judges and justices of the peace is different in this important particular: that the number of judicial districts and therefore the number of district judges, as well as the number of justices of the peace, *depend on legislative discretion.* x x x." (at p. 368)

"We think prior decisions of this court have construed our Constitution and announced the principles decisive of this case. In the case of *Devision of Howard County,* 15 Kan. 94, it was held that 'the *legislature has the power to abolish counties and county organizations* whenever it becomes necessary for them to do so in changing county lines or in creating new counties.' *Re Hinkle,* 31 Kan. 712, decides: 'The legislature has the power to abolish or destroy a municipal township, and when the *township is abolished or destroyed, the township officers must go with it.*' The doctrine of this case is reaffirmed in *Re Wood,* 34 Kan. 645. In the case of *State v. Hamilton,* 40 Kan. 323, it was said: 'There is no constitutional restriction upon the power of the legislature to *abolish* municipal and county organizations, and the *existence of the power is not disputed* and cannot be doubted.' x x x." (at p. 368)

"x x x To allow the legislature, while making one new district, *to legislate the judge of an old district out of office,* and provide for the appointment or election of two new judges, would clearly be vicious in the principle, and this is the class of legislation which falls within the constitutional inhibition. But to prohibit the legislature from *abolishing a district* which had been improvidently established, and thereby *vacate the office of a judge,* is another and altogether different thing, which the Constitution does not, in express terms, prohibit. While the independence and integrity of courts in the exercise of all the powers confided in them by the Constitution should be firmly maintained, jealousy of encroachments on judicial power *must not blind us to the just power of the legislature in determining within constitutional limits the number of courts required* by the public exigencies, and the *kind and extent* of the jurisdiction and functions to be discharged by each. We think the *legislature has the power to abolish as well as to create, to diminish as well as to increase, the number of judicial districts.* We might say, in this connection, that the plaintiff in this case does not claim any vested right in an office, and that no question is presented by the record before us as to the *right of the legislature to deprive a district judge of the compensation allowed him by law.* x x x (at p. 369)

"x x x The *great fallacy,* as we view the case, in the ar-

constituted by the legislature, and an election had, and the officer commissioned and qualified, it is not in the power of the legislature to take from him the term of eight years by devolving them intact upon another, or otherwise. If it can abolish in this way the office of county judge, it can abolish the office of any inferior judge, as all are protected, by the clause of the constitution referred to (article 5). For the honor of the framers of our constitution, the best interests of our people, the independence of the judiciary, and the security and order of our court system against rash and constant experiments of legislation, it affords us much satisfaction to give the constitution its plain, natural, and unobscure effect, to invalidate legislation of this character, and to be able to say that nothing as yet decided by our court stands as an obstacle in the way of our doing so. But, if there were, it would afford us pleasure to remove it.' State v. Leonard, 86 Tenn. 485, 7 S. W. 453. x x x Giving the constitution this construction harmonizes the entire section quoted, makes the judiciary department in fact, and not merely in fiction, independent, and harmonizes all the other cases before and since on this subject. See Smith v. Normant, 5 Yerg. 271; Pope v. Phifer, 3 Heisk. 682; State v. McKee, 8 Lea, 24; Cross v. Mercer, 16 Lea, 486; State v. Maloeny, 92 Tenn. 68, 20 S. W. 419; State v. Cummins, 99 Tenn. 674, 42 S. W. 880.

"It should be noted here that all the cases in this court have gone upon the theory, generally recognized in the American courts, that when the legislature makes or creates an office without a tenure, or independently of constitutional provision, it can abolish it or change its tenure or its compensation at pleasure, but that when it creates a constitutional office (that is, one directed or authorized under the constitution or recognized by it, and for which the constitution has provided a tenure) the legislature can not abolish the office, abridge its term, or destroy its substantial functions or emoluments. 12 Am. & Eng. Enc. Law, pp. 18, 19. x x x

"Nothing is better settled in this state at this time than this proposition. It is equally settled that the legislature may, as in the sheriff's case we held (State v. Cummins), diminish or increase the duties; and in the case of circuit, chancery, and other established inferior courts, it may diminish or increase the jurisdiction, enlarge or contract the territory of their work, but it cannot destroy either the officer or the office in toto. And it cannot, therefore, abolish a circuit or chancery division, because that would destroy the judge. The line must be drawn somewhere. We undertook to draw it in the Cummins Case. x x x There must be a line — a reasonable line — drawn somewhere, which permitted the law to regulate the office, but recognized and continued its constitutional existence. We drew the only one possible. It applies in the same way to the judges. The constitution is ever more specific as to them, for it directs the vesting of jurisdiction, and requires a fixed territory for service and an unchangeable compensation. The rule is the same, — must necessarily be the same. Legislation may increase or diminish the jurisdiction of constitutional judges. It may add territory or take it away, but it cannot take all jurisdiction of constitutional judges. It may add territory or take it away, but it cannot take all jurisdiction or all territory away. Enough must be left to preserve the substantial jurisdiction and functions of the office. Nothing less than this is reasonable to the law. Nothing more is agreeable to the constitution. To show how clear this is from another standpoint, we consider what appears in the constitution as to the supreme court, and our construction of it. The constitution says our jurisdiction shall be appellate only, 'under such restrictions and regulations as may be from time to time prescribed by law.' Article 6, § 2. Under this clause we have recognized the right of the legislature to take from us and confer on other courts (notably the court of chancery appeals) certain jurisdiction. But we did not mean — the constitution could not mean—that the legislature could take it all away. If so, there need be no supreme court. Here, too, the line must be drawn. We must have jurisdiction. The legislature may reasonably limit. It cannot, therefore, des-

gument in favor of the plaintiff, and in the cases cited by him, *is that the rights of the particular individual who chances to be elected judge are looked upon as paramount and superior to the rights of the public.* The *correct view* is that a public officer, no matter what the department of the government in which he serves is a *public servant.* A district judge is provided to aid in the administration of the laws. While it is right that the public should deal justly with him, *his individual rights are by no means of primary importance.* x x x." (at p. 369 (Underlining supplied.)

The debates during the Constitutional Convention on the Judiciary will reveal the reason for the judicial tenure as prohibiting the Constitution to *single out* judges—

"x x x MR. JOVEN. Granting that there is a provision *insuring fixed tenure of office,* and granting also that there is a provision in the Constitution assuring that once appointed the justice of the court, will at least have a fixed compensation which cannot be reduced by the Legislature, but by leaving the *creation or the existence of the court* of appeals in the hands of the Legislature, suppose the National Legislature will abolish the courts of appeals because it is at its mercy.

"Will not the abolition of the court of appeals have the effect of nullifying those provisions regarding fixed tenure of office and fixed compensation? *If the office does not exist, naturally that is one means of getting rid of the incumbent,* and *will not that fact affect the independence of the judiciary,* affecting the administration of justice?

"MR. LAUREL. I desire to invite the attention of the gentleman from Ilocos Sur to the very able dissertation of Alexander Hamilton in a series of articles, especially No. 86, on the Federal Judiciary, in regard to the extent and limitation of that provision with regard to the good behavior of justices and judges. In the first place, I will commence by saying that if the argument is that we should insert a court of appeals in this constitution in order to tie up the hands of the National Assembly, well, there is no reason why if you want to carry your argument to its logical conclusion, why include only the court of appeals and not include the courts of first instance and other inferior courts?

"As regards the other point raised by the gentleman from Ilocos Sur which brings rather a very delicate question, I do not want to be quoted as author for this, but simply to the extent of quoting the statement of Mr. Alexander Hamilton in regard to the provisions as to the *tenure of office of judges* during good behavior. The purpose, according to him, of inserting that provision in the Federal Constitution of the United States *is not to tie up entirely the hands of Congress or the Assembly in our case,* from trying to reorganize the judicial system in case of emergency or in case of a sudden necessity. The purpose of this provision is not to permit the Executive or anybody under the Federal Government *to single out judges* who are *persona non grata* to him because he is in power, and give rise to the retention of those who are probably not as capable as those who are *being singled out.* That is the point in the dissertation of Alexander Hamilton, so that the point of doubt raised by Your Honor would not happen to a situation where in case of an economic collapse or an economic bankruptcy, the Federal Government may not take the necessary measures. I would even go further by saying that under the police power of the State which is not stated in the Constitution but which is inherent in every sovereignty, the Government of the Philippines that we shall establish may adopt the necessary measures calculated to safeguard the supreme and paramount interest of the people and the nation, with or without the Constitution as an inherent attribute of sovereignty." (Debates on the Judiciary in the Constitutional Convention, Lawyers' League Journal, Vol. III, No. 10, pp. 558-559; underlining supplied.)

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troy. If so, it can destroy this court. The Cummins Case declares the sound principle on which all constitutional offices must be sustained, and upon it the courts with all others. x x x See cases cited in reference to 12 Am. & Eng. Enc. Law, pp. 18, 19 from many states; and see, especially, Com. v. Gamble (Pa.) 1 Am. Rep. 422; Reid v. Smoulter, 128 Pa. St. 324, 18 Atl. 445, L.R.A. 517; Fant. v. Gibbs, 54 Miss. 396; State v. Friedley (Ind. Sup.) 34 N.E. 872, 21 L.R.A. 634; Foster v. Hones, 52 Am. Rep. 638; People v. Dubois. 23 Ill. 498; Attorney General v. Jochim (Mich.) 58 N.W. 611, 23 L.R.A. 703; State v. Messmore, 14 Wis. 177; Ex parte Meredith (Va.) 36 Am. Rep. 778; Hoke v. Henderson, 25 Am. Dec. 677; King v. Hunter (N. C.) 6 Am. Rep. 754; State v. Douglass (Wil.) 7 Am. Rep. 89 and note; 7 Lawson, Rights, Rem. & Prac. 3817, note; Throop, Pub. Off. § 19, 20.

"As supposed to the contrary of this great weight of authority, four cases are cited. They are Aikman v. Edwards (Kan. Sup.) 42 Pac. 366; Crozier v. Lyons, 72 Iowa, 401, 34 N. W. 186; Board v. Mattox, 30 Ark. 566; Hoke v. Henderson, 25 Am. Dec. 677.

"In the case of Aikman v. Edwards (Kan. Sup.) 42 Pac. 366, the question as to the power of the legislature to interfere with a judicial tenure of office was not involved. x x x The sole question before the court was whether the legislature, by statute, had the power under the constitution to abolish a judicial circuit by transferring the counties composing it to another circuit. The act in question abolished four districts by transferring their jurisdiction to other districts. As is shown in the opinion of the court, this was done upon economical grounds, and to dispense with extravagant and useless courts. The fact that under these circumstances the legislature reserved to the judges of the abolished courts their salaries for their full terms of office furnishes the evidence that the legislature considered that this act would be unconstitutional unless such reservation was made. The constitution referred to in this case provided that judges should hold their offices for a term of four years. x x x

"The case of Crozier v. Lyons, 72 Iowa, 401, 34 N. W. 186, has no bearing upon the question in the case at bar. The constitution of Iowa (1857) provided that the judicial power should be vested in a supreme court, district court, and such other courts inferior to the supreme court as the general assembly may from time to time establish. It further provided for a fixed term of office as to the judges of the supreme court and district court, and for an undiminished compensation during the term for which they were elected. It further provided for the reorganization by the legislature of judicial districts, and an increase of judges of the supreme court, but that this should be done so as not to remove a judge of said court from office. As to inferior courts which were not embraced in the classes of courts before named, said constitution contained no provision for a fixed tenure of office, nor for an undiminished compensation during continuance in office, nor any prohibition against removal from office. In law, the prohibition in said constitution against removal from office of one class, the judges conferred the implied power to remove the other class, the judges of the inferior courts constituting said class. It will be seen from said constitution that the class of courts designated in the same as 'inferior courts' were intended to be creatures of the legislature, subject to its will, and for this reason no constitutional limitations were thrown around such courts. It is obvious from the terms of said constitution that no question of the legislative intereference with a constitutional tenure of office arose in said case. 7 Hough, Am. Const. (Iowa Const.) p. 382, art. 5.

"The case of Board v. Mattox, 30 Ark. 566, was grounded upon express provisions of the Arkansas constitution, and is not in point x x x." In this case an inferior court was abolished by an act of the legislature, and the judge of the court instituted a mandamus proceeding to compel the payment of his salary. The court, holding adversely to the contention, said: "Where the court is abolished, as was the case in this instance, there was no longer an office to fill, no officer, no service to render, and no fees due." It

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Hypothetical law reducing membership of the Supreme Court would not apply to the case at bar —

Counsel for petitioners apparently followed the remarks of Prof. Aruego during the last minutes of the oral argument held on August 10, 1954, when he expressed the opinion that a law reducing the membership of the number of this Honorable Court from 11 to 7 would be constitutional under Art. VIII, section 4, which provides:

> "SEC. 4. The Supreme Court shall be composed of a Chief Justice and ten Associate Justices and may sit either in banc or in two divisions unless otherwise provided by law;"

but unconstitutional under Art. VIII, Section 9 of the Constitution which provides for judicial tenure of office. Such statement directed at this Hon. Supreme Court partakes of an "*ad hominem*" argument. And we do not believe that a law can be both constitutional and unconstitutional at the same time. Counsel for petitioners following the same argument submit that a law reducing the number of this Honorable Supreme Court from 11 to 7 by eliminating the four youngest members in point of service or the four oldest members (p. 9, Sebastian), or if Congress should increase the membership of the Supreme Court to 15 and after the 4 additional justices are commissioned, the number is again reduced to 11 (p. 70, Salazar), the reduction would be unconstitutional as violative of judicial tenure of office. We may agree to the conclusion that such a law reducing the membership of this Honorable Supreme Court from 11 to 7 by eliminating the 4 oldest or the 4 youngest members would be unconstitutional, but the reason would be that such a hypothetical act would *single out* 4 definite justices of this Honorable Court, and in the words of Justice Laurel, such a law would be "enacted purposely to affect adversely the tenure" of justices or of particular justices (or judges) and thereby "cloak an unconstitutional and evil purpose" (Zandueta vs. de la Costa, 66 Phil. 615, at p. 627).

Prof. Aruego drawing a parallel to the instant law, Rep. Act No. 1186 which abolished the positions of judges-at-large and cadastral judges, expressed his opinion that such a law would be constitutional because Congress has the power to organize, abolish and reduce statutory courts, but unconstitutional insofar as it would deprive the petitioners of their tenure of office. We disagree with the opinion of Prof. Aruego as to the invalidity of Rep. Act No. 1186, because the law does not single out any specific or particular judges. Rather, it abolished all the existing positions or offices of judges-at-large and cadastral judges. The law is general. It was not enacted to affect adversely the tenure of any particular judge. It was not a cloak to cover an unconstitutional or evil purpose.

Such an hypothetical law if applicable to the Supreme Court and intended to deprive the four oldest or four youngest members of this Honorable Tribunal of their judicial tenure of office would be invalid under the principle enunciated in the case of Commonwealth vs. Gamble, 62 Pa. 343. However, Republic Act No. 1186 abolishing all the positions of judges-at-large and cadastral judges is valid and constitutional under the principles enunciated in the cases of Cherokee County vs. Savage, 32 S. ed. 803; McCulley vs. State, 53 S. W. 134; Aikman vs. Edwards, 42 Pac. 366, and the other Philippine decisions cited in the Answer of respondents (pp. 9-19), and restated in this Reply Memorandum (pp. 5-9) re: authorities upholding the abolition of judgship.

Alleged purpose to legislate petitioners out of office —

In our Answer (pp. 24-27), we cited authorities to the effect—

> "Courts will not institute any inquiry into the motives of the legislative department" (Downy vs. State, p. 24 of Answer);
>
> "With the motives that dictated the Legislatures in either case the courts are not concerned." (People vs. Luce, p. 24 of Answer);

will be seen that said constitution (that of Arkansas) expressly conferred upon the legislature the power to abolish inferior courts. The constitutional limitation upon the legislature, that it should not interfere with the term of office of a judge, is to be construed in connection with the provision conferring the power to abolish. This limitation was construed by the court, that while the office existed, only during this time the term of office should not be interfered with. It is therefore evident that the court based its conclusion upon the theory that said limitation did not control the provision conferring the express power to abolish, and that the limitation was subordinate to this provision. So, therefore, the case is grounded on an express constitutional provision conferring upon the legislature the power of abolition; that power of abolition necessarily carrying with it the power of deprivation of office.

The case of Hoke v. Henderson, 25 Am. Dec. 677, involved the tenure of office of a clerk, — an office recognized by the constitution of the state, but as to which there was no tenure of office prescribed in that instrument, such tenure being left to the will of the legislature. In other words, the ruling in this case is applicable only to offices which are subject to legislative will, and not to offices the tenures of which are constitutionally defined. The case itself expressly declares that the legislature is powerless to interfere with officers the tenure of which is constitutionally prescribed.

"Having shown that the two Tennessee cases (out of line with former and subsequent cases on the same principle) directly against the holding in Pope v. Phifer, 3 Heisk, 682, repudiated by three cases since, precisely in point (State v. Ridley, State v. Leonard, State v. Cummins), never should have been controlling I wish to present the original question against the merit of these opinions, per se, and in this connection I would refer first to their inherent want of weight by reason of the fallacious doctrine upon which they are rested. It is, first the assumption that 'whatever the legislature could establish it could destroy.' The authorities already cited and quotations made wholly overturn this assumption. It is clear that when a thing is established by the legislature, and exists only by virtue of that authority, the authority may be withdrawn and the thing itself destroyed. It is equally clear in reason, and we think we have demonstrated it to be so in authority, that when it is established by virtue of constitutional direction, and to exist and take power and duration, with unchangeable salary, from the constitution, it is embedded in the constitution and beyond legislative control. x x x The second fallacy upon which it was based was the lack of independence of the judicial department. The republican form of government which we in common with other states had adopted in theory embraced three independent departments, — the legislature, executive and judicial — each supreme in its own sphere and independent of the others. This theory had been assumed to be correct, and this condition of independence actually existing in fact, from the adoption of our earliest constitution."

The theory that the legislature may abolish courts provided it is not motivated by bad faith nor intended to turn the judges out of office.

This theory is less objectionable than the first one but is subject to the objection that it makes the intent of the legislature subject to inquiry on the part of the courts. The authorities are in conflict as to whether courts may inquire as to the motive and intent of the legislature in passing a law.

The theory that the legislature does not have the power to abolish courts when the intent or effect thereof is to terminate the office of the incumbent judges.

We now proceed to give the reasons why this theory is, among the three, the most sound and the most in consonance with the spirit of the Constitution.

"The discretion being conceded and the power admitted, the expediency of the legislative will, or the motives which may actuate that will in a given case, is not a fit or allowable subject of inquiry or investigation" (Bruce vs. Fox, p. 25 of Answer);

"Courts may not review questions of legislative policy" (p. 26 of Answer);

"The judiciary is not the respository of remedies for all political or social ills" (Vera vs. Avelino, p. 26 of Answer).

In the case of McCulley vs. State, 53 S.W. 134, the Court said—

"The exercise of this power by the Legislature is not such interference over the independence of the judge, or with his tenure of office, as can be properly complained of. The power may be possibly exercised without good cause, but in such case the courts can furnish no remedy." (at p. 136)

"An act cannot be annulled because it violates the best public policy, or does violence to some natural equity, or interferes with the inherent rights of a citizen, nor upon the idea that it is opposed to some spirit of the constitution not expressed in its words, nor because it is contrary to the genius of a free people; and hence the wisdom, policy, and desirability of such acts are matters addressed to the general assembly, and must rest upon the intelligence, patriotism, and wisdom of that body, and not upon the judgment of this court." (concurring opinion of J. Wilkes, at p. 144)

But counsel for petitioners insist that the purpose of Republic Act No. 1186 was "to weed out undesirable judges" (quoting Congressman Tolentino, p. 18, Sebastian). The statement of personal opinion by one Congressman is not the will of Congress. In fact Congressman Francisco who was the sponsor of the measure on the floor of Congress stated—

"MR. FRANCISCO. Mr. Speaker, the bill now under consideration is House Bill No. 1961 amending the Judiciary Act of 1948. The main feature of the measure is the *abolition* of the positions of cadastral judges and judges-at-large and the creation in lieu thereof of the position of auxiliary *district* judges."

"MR. FRANCISCO. The *purpose* of the law is clearly stated in the explanatory note. The *purpose of the law is twofold*: First, in order to remedy the backlog of cases, we propose to increase the number of judges. Secondly, in order to do away with the *abuses of the past*, we propose to limit the power of the Secretary of Justice to transfer a judge from Jolo to Batanes or from Batanes to Jolo, with a view to avoid political interference. Now, if I may be permitted to ask the gentleman from Ilocos Norte, does he believe that his interpretation of the Constitution is correct?" (Lawyers Journal, July, 1954, pp. 325-326)

Respondents' Answer submitted that good reasons of public interest justify the exercise of the governmental powers of the Legislative and Executive departments (pp. 27-36), among which, to stop the obnoxious practice of "rigodon de jueces" (p. 31), to prevent the Sec. of Justice from handpicking judges to try specific cases (p. 32) and eventually to strengthen and fortify the independence of the judiciary (p. 35 of Respondents' Answer).

Counsel for petitioners cite the opinion of Secretary of Justice, Hon. Pedro Tuason, that the bill would be unconstitutional in so far as it would affect the tenure of the incumbent judges (p. 132, Francisco; p. 24 Sebastian), and state that the undersigned Solicitor General should follow the "opinion of his Chief" (p. 132, Francisco). Secretary Tuason merely expressed his *personal* opinion. According to Atty. Salazar, counsel of the petitioners, the concurring opinion of Mr. Justice Laurel in the Zandueta vs. de los Costa, 66 Phil. 615, "cannot be accepted as controlling" (p. 86, Salazar).

Supposing a constitution gives the Legislature the power to establish inferior courts but is silent as to the tenure of office of the judges; may the Legislature, after it has established such courts, abolish the same? The respondents will undoubtedly answer the question in the affirmative, invoking the principle that offices created by the Legislature may be abolished by the Legislature and that the power that creates can destroy. Now, supposing said constitution is amended by inserting therein a provision to the effect that judges of such courts shall hold office during good behavior; what would be the answer of the respondents to the question of whether the Legislature may abolish such courts and terminate the office of the judges? Without doubt they will give the *same answer*, that is, that the Legislature may abolish these courts because the power to create them carries with it the power to destroy. If that were so, what then is the difference between giving the Legislature the power to establish inferior courts without the constitutional guarantee of tenure of office of the judges, and giving the Legislature such power but securing at the same time in the Constitution the tenure of office of such judges?

If with or without a provision in the Constitution guaranteeing the tenure of office of a judge, the Legislature may without restriction abolish any court created by it, what then is this provision regarding security of tenure for? Is it conceivable that this provision was inserted in the Constitution for no purpose or effect? Since no sensible man would think that the provision guaranteeing the tenure of office was inserted in the Constitution without any purpose at all, and that a constitution without such provision has the same effect as a constitution containing the same, with regard to the power of Legislature to terminate the office of a judge by abolishing his court, we have to conclude that such provision places a limitation upon the power of the Legislature to abolish courts. In other words, the unrestricted power of the Legislature to abolish courts created by it, when the constitution does not guarantee the tenure of office of the judges of said courts, becomes restricted when the constitution guarantees and protects the tenure of office of the judges of the courts created by the Legislature.

The second reason why we say that the second theory is the most sound among the three is because the provision of the Constitution securing the tenure of office of the judges has for its object and effect to establish the complete independence of the judiciary, not only in its operation among the people, but as against possible encroachment by the other coordinate branches of the government. On this score, we can do no better than to quote the pronouncements of some of the most eminent American justices on the matter, which we arranged in the form of syllabi.

McCulley v. State, 102 *Tenn.*, 509, 53 *So.* 184, *Dissenting Opinion of C. J. Snodgrass.*

POWER OF CREATING AND ABOLISHING JUDGES; ENGLISH THEORY. — The power of creating or abolishing judges never did, and does not now, abide in the parliament of England. The English theory was that the king was the judge in England. Later this kingly power was delegated by him to others appointed by him. They existed with him (subject to his power of removal), and officially died with him, if not before removed. Yet, later, on recommendation of the king, the last feature was changed by act of parliament, and the tenure of the office of each incumbent was extended beyond the death of the king; and the office was ultimately held during good behavior, which, of course, meant during life, if not forfeited by misconduct. But still to this was added a right of of removal by the king upon what was termed an "address" of both houses of parliament, and which, it is said, was made in the form of a resolution.

DEPENDENT JUDGES. — It will be remembered by all students of history that the course of dependent judges rendered truculent by control, and made infamous by subservience, had created for the English people a more insupportable condition of legal tyranny and authorized oppression than had ever found existence in the

How then can counsel for petitioners argue that Secretary Tuason's personal opinion should be controlling?

Former judiciary laws required incumbents to vacate—

Prof. Enrique M. Fernando in his oral argument mentioned Act No. 2347 and Act No. 4007 and both Acts required the incumbent judges to vacate their positions. We quote the pertinent provisions of said Acts.

> "Sec. 7. Of the appointment of the judges and auxiliary judges of Courts of First Instance. — The district judges appointed by the Governor-General, with the advice and consent of the Philippine Commission to serve, subject to the provisions of sections eight and nine hereof until they have reached the age of sixty-five years: Provided, That no person shall be appointed to said positions unless he has practiced law in these Islands or in the United States for a period, of not less than five years or has held during a like period, within the Philippine Islands or within the United States an office requiring a lawyer's diploma as an indispensable requisite: Provided further, That before assuming such judicial office he shall qualify as a member of the bar of the Supreme Court of the Philippine Islands if he has not already done so; And provided, further, *That the present judges of Courts of First Instance, judges-at-large, and judges of the Court of Land Registration vacate their positions on the taking effect of this Act*, and the Governor-General, with the advice and consent of the Philippine Commission, shall make *new appointments* of judges in accordance with the provisions of this Act, taking into account, in making said appointments, the services rendered by the present judges." (Act No. 2347, enacted February 28, 1914; underlining supplied.)
>
> "Sec. 41. All the present Secretaries and Undersecretaries of Department, except the Secretary of Public Instructions, the judges and auxiliary judges of first instance, the Public Service and Associate Public Service Commissioners, and the chiefs and assistant chiefs of bureaus and offices, except the Insular Auditor, the Deputy Insular Auditor, and those detailed from the United States Government, *shall vacate their respective positions on the taking effect of this Act*, and the Governor-General shall, with the consent of the Philippine Senate, make *new appointments* of Secretaries and Undersecretaries of Department, judges and judges-at-large of first instance, Public Service and Associate Public Service Commissioners, and chiefs and assistant chiefs of bureaus and offices, in accordance with existing law as modified by this Act: Provided, That in the making of such appointments the services rendered by the present incumbents shall be taken into account." (Act No. 4007, approved December 5, 1932)

The judicial incumbents, including judges-at-large and cadastral judges, were required to vacate their positions upon the effectivity of said Acts. There was no question raised as to the constitutionality of said legislative Acts. And both Acts required *new appointments*. The claim of counsel for petitioners that under Rep. Act No. 1186, which abolished the positions of judges-at-large and cadastral judges — "no new appointment will be necessary" (p. 134, Francisco) — can not be correct, because Rep. Act No. 1186 abolished all the positions of Judges-at-large and Cadastral judges, and petitioners were not *District* judges. Another counsel of petitioners states — "of course they also could have been extended *new appointments as district judges* by the President, the same to be confirmed by the Commission on Appointments (p. 21, Sebastian). But certainly petitioners were not entitled to automatic appointment as District judges.

Petitioners could not be automatically appointed District judges—

Counsel for petitioners remind us that in the original Laurel

widest usurpation of pretenders or the most abominable license of established despots. This, among all the grievances which caused revolution and advanced the cause of freedom there, and gave it absolutely here, was the result of such disregard of popular rights and liberties by dependent creatures of the crown called "judges."

COMPLAINTS OF THE AMERICAN COLONIES. — It is to be remembered that one of the complaints of the American colonies against the injustice of the king was that: "He has obstructed the administration of justice by refusing his assent to laws for the establishment of judiciary powers. He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries."

INDEPENDENT JUDICIARY; HOW SECURED. — An independent judiciary in an independent government the tenure was for life or (what may be the same thing, and must be, to a faithful and irreproachable official) during good behavior, and there was a provision against decreasing judicial salaries.

INTENDMENT OF TENURE OF OFFICE PROVISION CLEARLY ESTABLISHED IN THE LIGHT OF HISTORY OF THE UNITED STATES. — "That the tenure of office provisions of the constitution were expressly intended to secure the term of office and the judges of the office during the tenure, subject alone to the defined grant of power of removal is firmly established in the light of history, and the conditions which led to the establishment of our federal and state forms of government. When we look to these, we find the full import of the framers of our organic law 'hammered and crystallized' in the few brief words which defined and secure judicial independence by a fixed tenure of office, and an undiminished compensation during that tenure. The struggle for judicial independence has been a long and eventful one. * * * Judicial independence was intended to be secured by the provision that 'the judges of both the supreme court and inferior courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation, which shall not be diminished during their continuation in office.' (Const. U.S. art. 3, sec. 1.)* * * After the formation of the constitution it was submitted to the respective conventions of the states for adoption. The records of the debates in some of these conventions have been preserved. These debates establish beyond controversy that said clause of the federal constitution was intended to put the tenure of office of the entire federal judiciary beyond any legislative interference whatever, except by impeachment. * * *"

REASONS FOR ADOPTING THE JUDICIAL TENURE OF OFFICE CLAUSE. — *According to the debates in states conventions*:

Massachusetts Convention. — Mr. Tacker: "* * * *The independence of judges is one of the favorable circumstances to public liberty, for when they become the slaves of a venal, corrupt court, and the hirelings of tyranny, all property is precarious and personal security at an end.*"

Connecticut Convention. — Mr. Elsworth, a Member of the Federal Convention: "This constitution defines the extent of the powers of the general government. If the general legislature should at any time overlap its limits, the judicial department is a constitutional check. If the United States go beyond their powers, — if they make a law which the constitution does not authorize, it is void; *and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.* On the other hand, if the states go beyond their limits, — if they make the law which is a usurpation upon the general government, — the law is void; *and upright, independent judges will declare it to be so.*"

Virginia Convention. — Edmond Randolf, a member of the Federal Convention: — "* * * *If congress wish to aggrandize themselves by* oppressing the people, the judiciary must first be corrupted."

bill there was a provision for the automatic reappointment of the judges-at-large and cadastral judges into district judges (Sec. 5 of Bill No. 170, p. 12, Sebastian), but said provision of the bill was eliminated in the final law, Rep. Act No. 1186. The reason, we submit, was the realization that such a provision would be unconstitutional as constituting "legislative appointment" (pp. 21-22 of Answer), and therefore an interference with the sole power of exclusive prerogative of the Executive to appoint. (p. 23 of Answer)

In fact petitioners' positions as judges-at-large and cadastral judges are tainted with unconstitutionality (p. 28 of Answer), because they violate the spirit, if not the letter of Art. VIII, sec. 7 of the Constitution which provides:

> "No judge appointed for a particular district shall be designated or transferred to another district without the *approval of the Supreme Court.* The Congress shall by law determine the residence of judges of inferior courts."

The reply of petitioners to respondents' answer did not traverse, much less discuss this constitutional issue. The scanty discussion of this issue by counsel for petitioners (pp. 128-131, Francisco; pp. 10-11, Salazar; none by Sebastian) would reveal the weakness of petitioners' position on this new point raised by the undersigned counsel for respondents. The fact that this issue was never raised before or the constitutionality of the positions of Judges-at-large and Cadastral Judges have been taken for granted cannot estop the respondents from raising this new and vital issue. Certainly the fact that such judges had no permanent residence as required by Art. VIII, Sec. 7, and could furthermore be designated from province to province at the sole will or discretion of the Department Head (Sec. 53 of Rep. Act No. 296) does violence to said sec. 7 of Art. VIII, which prohibits the transfer of a judge "without the approval of the Supreme Court". If therefore the positions of such judges-at-large and cadastral judges were tainted with constitutional infirmity from their very existence, petitioners can hardly have any right or personality to question the validity of Section 3 of Republic Act No. 1186, which abolished such positions whose creation and continuance are of doubtful constitutional validity, and expressly repealed Section 53 of Republic Act No. 296.

Republic Act No. 1186 cannot be given prospective effect only—

Counsel for petitioners suggest that Section 3 of Republic Act No. 1186 should operate prospectively (Francisco, p. 147; Salazar, p. 30). This suggestion however cannot be adopted in view of the express provision of Section 3 of Republic Act No. 1186, which we quote again:

> "All the existing positions of Judges-at-large and Cadastral Judges are *abolished,* and section fifty-three of Republic Act Numbered Two hundred and ninety-six is hereby *repealed.*" (Underscoring supplied.)

The law abolishes "all existing positions," and expressly repeals Section 53 of Republic Act No. 296. If the power of Congress to abolish statutory courts is admitted, and the exercise thereof is constitutional, provided the law does not single out any particular judge or judges, even if the incumbents are deprived of their offices, which are clearly abolished, the law must be given the effect it openly expresses and the interpretation it clearly deserves.

Counsel for petitioners express the fear that "all judges of District Courts could thus be legislated out" (Sebastian, p. 26), and would thus demolish the independence of the judiciary, which "will henceforth be a myth" (Sebastian, p. 20). The fact is that Republic Act No. 1186 has not abolished any district judge. But if Congress should see fit for public interest to reduce or abolish some Courts of First Instance, we would still maintain that such exercise of Legislative power would be valid and constitutional within the framework of our Constitution, provided such a law would not *single out* any particular judge or judges. In the same

(*Continued on next page*)

Mr. Pendleton: — "* * * Whenever, in any country of the world, the judges are independent, the liberty and property are secure."

Mr. John Marshall: — "* * * If a law be exercised tyrannically in Virginia, to what can you trust? To your judiciary? What security have you for justice? Their Independence."

Mr. Henry: — "* * * The judiciary are the sole protection against a tyranical execution of the laws. But if by this system we loss our judiciary, and they cannot help us, we must sit down quietly and be oppressed."

North Carolina Convention. — Mr. Steele: — "* * * If the Congress makes laws inconsistent with the constitution, independent judges will not uphold them, nor will the people obey them."

It is clear from these debates that the constitution was considered as intending that the tenure of office and salaries of judges should not be disturbed during good behavior, and that a breach of the condition of good behavior should only be considered by means of an impeachment.

According to Hamilton: "According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behavior, which is conformable to the most approved of the state constitutions, — among the rest, that of this state. The standard of good behavior for the continuance in office of the judicial-magistracy is certainly one of the most valuable of the modern improvements in the practice of government. * * * And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws. Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution, because it will be least in capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword, of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment, and must ultimately depend upon the aid of the executive for the efficacious exercise even of this faculty. This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power, that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attack. It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from the dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; that as nothing can contribute so much to its firmness and independence as permanency in office, — this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and in a great measure as the citadel of the public justice and of the public security. The complete independence of courts of justice is peculiarly essential in a limited constitution. If, then, the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so ardous a duty. This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and a more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the government and serious oppressions of the minor party in the community; for it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution where the legislative invasions of it had been instigated by a major voice of the community."

According to Cooley: "This constitution provided that 'judges should hold their office during their good behavior.' Article 5, sec. 2. The meaning of these words is to be interpreted in the light of the history and conditions preceding the formation of the constitution. So interpreted, it seems beyond controversy that this provision was intended to secure to the judges a tenure of office safe from any legislative interference or abridgment, direct or indirect, except for cause for which the judge might become responsible by breaching the condition of good behavior, this being provided for by impeachment." (Cooley, Const. Lim., 6th ed., p. 80.)

—*According to Tucker*: "To give them the courage and the firmness to do it, the judges ought to be confident of the security of their salaries and station. The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends also to secure a succession of learned men on the bench, who, in consequence of a certain, undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station." (1 Kent, Comm., pp. 294-295.)

"This absolute independence of the judiciary, both of the executive and the legislative departments, which I contend is to be found both in the letter and spirit of our constitutions, is not less necessary to the liberty and security of the citizen and his property in a republican government than in a monarchy. Such an independence can never be perfectly attained but by a constitutional tenure of office, equally independent of the frowns and smiles of the other branches of the government. And herein consists one of the greatest excellencies of our constitution, — that no individual can be oppressed whilst this branch of the government remains independent and uncorrupt; it being a necessary check upon the encroachments or usurpation of power by either of the other. And as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches, who have the custody of the purse and the sword of the confederacy, and as nothing can contribute so much to its firmness or independence as permanency in office, this quality therefore may

MEMORANDUM FOR RESPONDENTS

(*Continued from page 487*)

way that a superior court, like the Court of Appeals, was created, abolished and then recreated (pp. 11-12 of Respondents' Answer).

Conclusion:

The undersigned counsel for respondents is as much interested as counsel for petitioners in maintaining and preserving an independent judiciary. In fact, we want to further strengthen and fortify the independence of the judiciary (pp. 35-36 of Respondents' Answer). This is one reason why we justify the abolition of judges-at-large and cadastral judges as expressly provided by Section 3 of Republic Act No. 1186.

P R A Y E R

WHEREFORE, the prayer contained in respondents' Answer dated July 20, 1954, is hereby respectfully reiterated.

Manila, September 4, 1954.

AMBROSIO PADILLA
Solicitor General

be justly regarded as an indispensable ingredient in the constitution, and in a great measure as the citadel of the republic, justice and the public security." (1 Tuck. Bl. Comm. Append. 354, 360.)

—*According to Story*: "The reasons in favor of the independence of the judiciary apply with the augmented force to republics, and especially to such as possess a written constitution, with defined powers and limited rights. It is obvious that, under such circumstances, if the tenure of office of the judges is not permanent, they will soon be rendered odious, not because they do wrong, but because they refuse to do wrong; and they will be made to give way to others who shall become more pliant tools of the leading demagogues of the day. There can be no security for the minority, in a free government, except through the judicial department. In the next place, the independence of the judiciary is indispensable to secure the people against the intentional as well as unintentional usurpations of the executive and legislative departments. It has been observed with great sagacity that power is perpetually stealing from the many to the few, and the tendency of the legislative department to absorb all the other powers of the government has always been dwelt upon by statesmen and patriots as a general truth, confirmed by all human experience. * * * In a monarchy the judges, in the performance of their duties with uprightness and impartiality, will always have the support of some of the departments of the government, or at least of the people. In republics they may sometimes find the other departments combined in hostility against the judicial, and even the people, for a while, under the influence of party spirit and turbulent factions, ready to abandon them to their fate. Few men possess the firmness to resist the torrent of popular opinion, or the content to sacrifice present ease and public favor in order to earn the slow rewards of a conscientious discharge of duty, the sure that distant gratitude of the people, and the severe but enlightened award of posterity. The considerations above stated lead to the conclusion that in republics there are in reality stronger reasons for an independent tenure of office by the judges — a tenure during good behavior — than in monarchy. Indeed, a republic with a limited constitution, and yet without a judiciary sufficiently independent to check usurpation, to protect public liberty, and to enforce private rights, would be as visionary and absurd as to society organized without any restraints of law. In human governments there are but two controlling powers, — the power of arms and the power of laws. If the latter are not enforced by a judiciary above all fear and above all reproach, the former must prevail, and thus lead to the triumph of military over civil constitutions. The framers of the constitution, with profound wisdom, laid the corner stone of our national republic in the permanent independence of judicial establishment. Upon this point their vote was unanimous. The main security relied on to check an irregular or unconstitutional measure, either of the executive or the legislative department, was, as we have seen, the judiciary. To have made the judges, therefore, removable at the pleasure of the president and congress, would have been a virtual surrender to them of the custody and appointment of the guardians of the constitution. It would have been placing the keys of the citadel in the possession of those against whose assaults the people were most strenuously endeavoring to guard themselves. It would be holding out a temptation to the president and congress, whenever they were resisted in any of their measures, to secure a perfect irresponsibility by removing those judges from office who should dare to oppose their will. Such a power would have been a signal proof of a solicitude to erect defenses around the constitution for the sole purpose of surrendering them into the possession of those whose acts they were intended to guard against. Under such circumstances, it might well have been asked where could resort be had to redress grievances or to overthrow usurpation. . . . It is almost unnecessary to add that, although the constitution has with so sedulous a care endeavored to guard the judicial department from the overwhelming influence or power of the other coordinate departments of the government, it has not conferred upon them any inviolability or irresponsibility for an abuse of their authority. On the contrary, for any corrupt violation or omission of the high trust confided to the judges they are liable to be impeached, as we have already seen, and, upon conviction, removed from office. Thus, on the one hand a pure and independent administration of public justice simply provided for, and on the other hand an urgent responsibility secured for fidelity to the people." (Story, Const. Sec. 1610, 1612-1614, 1619, 1621, 1624, 1628, 1635.)

TENURE OF OFFICE CLAUSE CAN NOT BE ABRIDGED OR LIMITED BY THE CLAUSE GRANTING THE LEGISLATURE THE POWER TO ESTABLISH SUPERIOR AND INFERIOR COURTS. — This constitution (of 1796) provided that judges should "hold their offices during their good behavior." Article 5, Sec. 2. The meaning of these words is to be interpreted in the light of the history and conditions preceding the formation of the constitution. So interpreted, it seems beyond controversy that this provision was intended to secure to the judges a tenure of office safe from any legislative interference or abridgment direct or indirect except for causes for which the judge might become responsible by breaching the condition of good behavior; this being provided for by impeachment. Cooley, Const. Lim (6th Ed.) p. 80. It is evident that the judicial tenure of office provided for in the constitution of 1796 was modeled after the federal constitution, and was intended to bear the same meaning and construction. Under these conditions, and with these preceding events in the knowledge of the convention, it seems wholly unreasonable to suppose this tenure of office clause was intended to be in any way abridged or limited by the clause in said constitution providing that the judicial power of the state "shall be vested in such superior and inferior courts of law and equity as the legislature shall from time to time direct and establish." Article 5, Sec. 1. The convention of 1896 framed an organic law (said by Jefferson to be "the least imperfect and most republican" of any then framed) to govern a free people. Its every intent and purpose must have been to erect every barrier to oppression, and to provide every possible safeguard for the protection of the people. With the dangers which attended a judiciary dependent upon the king, and the protest of the Declaration of Independence, in its knowledge, it seems incredible that this convention intended to submit judicial independence to abridgment and destruction by legislative will; thus transferring dominion from an executive power to a legislative power, — a change from one to many masters. The authority of said convention given to the legislature to "direct and establish courts," viewed in the light of history, could not have been intended to permit the destruction of the judicial tenure expressed in terms, and thus by a mere implication permit the power to interfere with judicial independence by the abolition of courts. (McCulley v. State, 102 Tenn. 509.)

Commonwealth v. Gamble
(62 *Pa.* 343)

CONSTITUTIONAL LAW; TENURE OF JUDGES FIXED BY THE CONSTITUTION. — The respondent judge, having been elected and subsequently commissioned as president judge of the 29th district, took the oath of office and entered upon the performance of his duties as judge of said court. The tenure of the office was, by the constitution, to continue for 10 years, on the only condition that he would so long "behave himself well." *Held*: Having taken the office and entered upon the performance of his duties, its duration was assured to him by the constitution for the full period mentioned, subject to be terminated only by death, resignation or breach of the condition, which breach could not be legislatively determined, but only by the trial before the senate on article of impeachment duly preferred, or, in the case the breach amounted to total disqualification, perhaps by address of 2/3 of each branch of the legislature. These are the ordained constitutional remedies in such cases and there can be no others.

TENURE AND COMPENSATION OF JUDGES; OBJECT.— The constitutional provision regarding tenure of office and the other requiring that adequate compensation shall be provided by law for the judges, which shall not be diminished during the continuance of

his office, not only give the protection but inviolability to the tenure of judicial office, by any but the constitutional mode referred to. Their object and effect were, undoubtedly, to establish the complete independence of the judiciary, not only in its operation among the people, but as against possible encroachment by the other coordinated branches of the government.

REASON FOR PROTECTING THE JUDICIARY. — Possessing neither the power of the purse nor the sword, as the executive and the legislative branches, may be said to do, the judiciary was by far the weakest branch of the government; and as its operations were necessarily to affect individual interests in the community, it was obviously proper, in order to secure its independence against the action of the other branches more liable to be swayed by impulse, or operated upon by individual, party or sectional influence, to protect it by express constitutional barriers; and it was so done.

INDEPENDENCE OF THE JUDGES. — The independence of the judges is equally requisite to guard the constitution and rights of individuals from the effect of those ill-humors which the acts of designing men, or the influence of particular conjunctures, sometimes create among the people themselves, and which, although they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and severe oppression of the minor party in the community. (Commonwealth v. Mann, 5 W. & S. 403.)

AN INDEPENDENT JUDICIARY MUST BE A CARDINAL PRINCIPLE. — An independent judiciary must ever be a cardinal principle of constitutional government. It was adopted in forming the federal constitution, both in regard to the express tenure of the office, and in providing a fixed compensation, undiminishable during the continuance of the office. And so in every state in the union this independence is secured, during the tenure of the office, by constitutional provisions, and judges are made secure from interference from any quarters, with the exercise of their jurisdiction and powers, excepting in the modes prescribed in the several constitutions. These provisions were not the result of a wise philosophy or farseeing policy, merely. They resulted, rather from severe trials — experience — in the country from which we have largely derived our laws and many of our principles of liberty. History has preserved numerous melancholy examples of the want of a judiciary independent by law, before it was accomplished in England.

UNCONSTITUTIONALITY OF LEGISLATION ABOLISHING A JUDICIAL DISTRICT. — The judicial office is created by the constitution, and so is its tenure, and the compensation is protected by it when once fixed by the legislature. The amenability of the judges is also provided for, and this excludes all other modes. Thus is independence supposed and intended to be secured by the constitution. It must follow, therefore, that any legislation which impinges on the feature of the constitution is invalid. Not only was the judiciary thus made independent, but, as a co-ordinate branch of the government, its protection and existence were supposed to be completely assured.

ID.; ID. — Could the principle of the independence of the judiciary and, at the same time, its integrity as a coordinate branch of the government, have been more effectually assailed than by the passage of the act repealing the twenty-ninth judicial district, and its transfer bodily to another district and to other judges? Even if the commission might, for compensation, endure after all power and every duty under it had ceased — a result I do not admit — the act was not less destructive of the principle of independence with which it was the purpose of the framers of the constitution to invest the judges. What could be more destructive to all independence of action of a judge than the momentary liability, during the recurring sessions of the legislature, to be dismissed from the exercise of the functions of his office by the repeal or abolition of his judicial district? If, all the while, he must be conscious that he exercises the powers and authority conferred by his commission only by the forbearance of the legislature, although it might be possible that independence of action might still exist, it would be an exception; as a rule, it would be a myth. Such a state of things would follow a rule, the result of affirming the constitutionality of the act in question, would be utterly subversive of the independence of the judiciary, and destructive of it as a co-ordinate branch of government. The case of the twenty-ninth district this year might become that of any, or half, the other twenty-eight districts next year, for reason quite as legitimate as those operating to procure its repeal. Establish this power in the legislature, and it will be as easy, as it will be common, for powerful corporations and influential citizens to move the legislature to repeal districts, and supersede judges who may not be agreeable to their wishes and interests, and transfer their business to other jurisdictions supposed to be more favorably inclined. This would be destructive of all that is valuable in the judicial office, and preservative alone of those evil qualities which flow from a subverted and subservient judiciary.

ID. — I think in this state there has never been known a more palpable and direct blow at one coordinate branch of the government by the others, or one so destructive of the uses for which it was established, as is contained in this act, though undesigned, we must believe. If there were no special reasons for holding it unconstitutional, these general views would require it so to be held.

TENURE OF OFFICE CANNOT BE TERMINATED BY LEGISLATIVE ACTION. — The constitution, after providing for the election and commissioning of judges, fixes the tenure of their offices, by providing that the "president judges of the several courts of common pleas, and of such other courts as are or shall be established by law, and other judges required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well." Judge Gamble's commission had nine and two-thirds years to run, when the act in question was passed. By the express terms of the condition it was inviolable, by any authority for any other cause, during the period, than a breach of the condition, in the commission, for good behavior; and, as already said, that could be redressed only by impeachment, or an address by the legislature. This is the mode fixed and ordained by the constitution, and is utterly incapable of being supplied or supplemented, directly or indirectly, by legislative action.

THE JUDICIAL OFFICE IS INCAPABLE OF ANY LIMITATION BUT THAT ATTACHED TO IT. — This is a constitutional grant of the right to exercise the powers and authority belonging to the office of president judge, and is incapable of any limitation but that attached to it. If this were not so, and it might be changed by legislative action, then would the authority of the constitution be subject and subordinate to legislative authority — a position not to be entertained for a single moment, especially when it is remembered that what the constitution itself ordains is so much of the sovereign power withheld from the legislative power.

ID.; POWER TO REORGANIZE COURTS. — The aggregate of the duties of a judge in any given district may be materially diminished by a division of his district, or by the election of an assistant. But that grows out of a power to reorganize or regulate the courts — a power not withheld by the constitution, leaving the authority and jurisdiction pertaining to the office intact; and is quite a different thing from taking them away in toto. Their extent may, it is admitted, be changed, increased or diminished by a reorganization of the courts. This is an express provision of the constitution, and a condition to which the office is necessarily subject. With these exceptions, no other legislative interference is legal or constitutional.

ID.; PROHIBITION IMPLIED IN THE GRANT AND TENURE OF OFFICE. — The grant and tenure of the office of judge are fixed by the constitution, and are necessarily an implied prohibition of all interference with it, in these particulars, by any other authority.

ID.; THE OFFICE AND TENURE OF OFFICE ARE INSEPARABLE AND THE LEGISLATURE CANNOT TAKE THEM AWAY DURING THE LIFETIME OF THE COMMISSION. — The constitution ordains that the office of president judge shall continue for ten years, and this fixes inevitably the duration of the authority and powers which constitute it an office. They are inseparable; and it establishes that the legislature, by an ordinary act of legislation, cannot take them away during the life-time of the commission.

ID.; ID.;—If the legislature could blot out a district, it could limit the duration of the commission granted to a less period than ten years, if it might so choose. That, it cannot shorten the tenure of the office of a judge, as fixed by the constitution, is certain, and this ought to establish that it can pass no act to do by indirection that which may not be done directly.

ID.; ID.—The act displaces Judge Gamble as the president judge, and appoints Judge White and his law associate to hold the courts therein. If such a thing can be done in one district, it may be done in all, and thus, not only would the independence of the judiciary be destroyed, but the judiciary as a co-ordinate branch of the government, be essentially annihilated.

State v. Leonard, 86 *Tenn.* 485, 7 *S. W.* 453.

CONSTITUTIONAL LAW; CONSTITUTIONAL TENURE OF OFFICE CANNOT BE TERMINATED BY THE LEGISLATURE. —Acts. Tenn. 1887, c. 84, repealed Acts Tenn. 1885, c. 71, under which defendant had been duly elected to the office of county judge of Marshall county, and conferred the power and duties incident to it on the chairman of the county court. *Held*: That this act could not deprive defendant of office for the remainder of the term for which he was elected, under Const. Tenn. art. 6, providing that the terms of office of the judges of such inferior courts as the legislature from time to time shall establish shall be eight years.

IBID.; IBID.—The act of 1887 did not attempt to abolish or diminish the powers and duties appertaining to the office. It simply repealed so much of the act as applies to Marshall county, (another county having had a similar chance made in its court system by the same act) and undertook to re-establish the office of chairman of the county court after the first Monday in April, 1887, and to vest in these officers all the rights, privileges, jurisdiction, duties, and powers pertaining to the officers as established and exercised by the county judge. If this legislation had merely named the defendant, and by name and title removed him from the position, and given it to another, it would not have more directly accomplished the purpose actually effected, if this be valid.

IBID.; PURPOSE OF THE CONSTITUTION IN FIXING THE TERMS OF JUDGES.—The constitution in fixing the terms of the judges of inferior courts elected by the people at eight years intended not only to make the judiciary independent, and thereby secure to the people the corresponding consequent advantages of courts free from interference and control, and removed from all necessity of being constant and frequent experimenting with county systems, than which nothing could be more injurious or vexatious to the public. It was intended when the legislature established an inferior court that it should exist such a length of time as would give opportunity for mature observation and appreciation of its benefits or disadvantages, and that the extent of its durability might discourage such changes as were not the result of most mature consideration.

IBID.; THE CONSTITUTION GUARDED THE JUDICIAL DEPARTMENT AGAINST BEING AT THE MERCY AND WHIM OF EACH RENEWING LEGISLATURE.—Realizing that a change, if made, to constitute an inferior court, would fix that court in the system of eight years, a legislature would properly consider and maturely settle the question as to the propriety and desirability of such change or addition to our system; and, conscious of the impropriety and the hazard of leaving the judicial department of the government at the mercy and whim of each renewing legislature—itself elected for but two years,—the framers of the constitution wisely guarded against these evils by the section referred to. Properly construed and enforced it is effectual for that purpose. Disregarded or impaired by such interpretation as leaves it to exist in form, without force or substance, and we have all the evils and confusion of insecure, changing, and dependent courts, frequent and constant experimenting with systems provided in haste, tried in doubt, and abolished before their merits or demerits were understood. It would be a mortifying reflection that our organic law maker intended any such result in their advanced efforts to make a government of three distinct independent departments; and still more humiliating, if we were driven to the conclusion that, while they did not intend it, they had been so weak or inept, in the phraseology adopted, as to have accomplished it. Neither the intent nor the language of the constitution employed to express it fortunately bears any such construction.

IBID.; JUDGES ENTITLED TO THE PROTECTION AGAINST UNCONSTITUTIONAL LEGISLATION DEPRIVING THEM OF THEIR OFFICE.—When the court whose judge is elected by the people of one or more counties in district or circuit is constituted by the legislature, and an election had, and the officer commissioned and qualified, it is not in the power of the legislature to take from him the powers and emoluments of office during the term of eight years by devolving these intact upon another, or otherwise. The court so constituted, and judge elected, in this instance, was under the authority to establish inferior courts already quoted. The incumbent of the office was a judicial officer of this state (State v. Gleen, 7 Heisk, 486; State v. McKey, 8 Lea, 24) and is entitled to the protection of the constitution as such, against unconstitutional legislation to deprive him of his office.

IBID.; THE CASE AT BAR DISTINGUISHED FROM STATE V. CAMPBELL AND STATE V. GAINES. — It is is argued, however, that this act of removal is the same as the act abolishing a circuit court, with all its powers and jurisdiction, from the consequences of which it has been held by this court a circuit judge would be deprived of office. State v. Campbell, (M.S.); State v. Gaines, 2 Lea, 316. The act construed in these cases was one abolishing the Second circuit court of Shelby county,—the First and Second. As one was enough to do the business of the county, or supposed to be, the legislature abolished this court, leaving the entire business of both courts to be done by the first; thereafter to be styled "The Circuit Court of Shelby County." It was held in the cases referred to that the legislature might abolish a circuit court, held for a circuit or given territory, and that when the court was abolished the office of judge thereof terminated. Without desiring to be understood as assenting to the conclusion reached in those cases, (to the reasoning of which we do not subscribe) and which conclusions, we may remark in passing, were reached by a divided court, and against the weight of many opinions in other states, it is sufficient to say that the case here presents no such question as that determined there. The act of 1875 construed had abolished the court. It did not leave the court with all its powers, jurisdiction, rights, and privileges intact, and devolve them upon another, as in this case. Here the court was left as it existed, except the change made in its official head. He was simply removed by the operation of the act, if it could take effect according to its terms, and another put in his place.

IBID.; IBID.—It cannot be doubted that, if the legislature had said in the act of 1875, as in the act now being construed, that the office of the judge of the Second circuit court should be abolished, and that the court should remain, with like jurisdiction and duties, but these should be exercised by another officer, leaving the First circuit court also existing with its original jurisdiction and duties only,—that such would have been declared void. Nor can it be doubted that if the legislature should now declare that the office of a given circuit is hereby abolished, leaving the circuit and its court machinery as it, except the removal of the presiding judge, such act would be void. If this were not true, the legislature, at its next or any subsequent session, might pass a law setting out the

circuits and chancery divisions by numbers, and declaring that the office of judge of each be abolished.

IBID.; CONSTITUTIONAL TEST.—It is nc argument in answer to this to say that the legislature will not do this. It is not a question of what they will do that we are now considering; it is a question of constitutional power of what it can do. The question as to how such power is granted, or restraint imposed, cannot be determined on the probability or improbability of its exercise. If it can abolish in this way the office of county judge, it can abolish the office of any inferior judge, as all are alike protected or not protected by the clause of the constitution referred to.

IBID.; THE INDEPENDENCE OF THE JUDICIARY MUST BE GUARDED AGAINST RASH AND CONSTANT EXPERIMENTS OF LEGISLATION.—For the honor of the framers of the Constitution, the best interests of our people, the independence of the judiciary, and the security and order of our court system against rash and constant experiments of legislation, it offers us much satisfaction to give the constitution its plain, rational, and unobscure effect to invalidate legislation of this character, and be able to say that nothing as yet decided by our court stands as a precedent in the way of our doing so. But if there were, it would afford us pleasure to overrule it.

State, ex rel. Gibson v. Friedley
21 *L. R. A.*, 634

CONSTITUTIONAL LAW; THE LEGISLATURE CANNOT LEGISLATE OUT A JUDGE.—The Constitution of Indiana provides that the circuit courts shall each consist of one judge, that the state shall, from time to time, be divided into judicial circuits, a judge for each circuit shall be elected by the voters thereof. He shall reside within his circuit and hold his office for a term of six years, if he so long behave well. The Constitution likewise provides that there shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for three years. *Held*: It seems beyond the power of the legislature to legislate a judge and prosecuting attorney out of office, and if the legislature cannot by a direct act deprive them of their offices, neither can it do so by the indirect mode of abolishing their circuit. The authors of our constitution well understood the long struggle for many years previous to secure the independence of the judiciary and the tenure of office of the judges; hence the Constitution divides the powers of the state government into three distinct co-ordinate departments, carefully excluding any control of one over another. If the legislature, by a special act, may remove one judge or one prosecuting attorney, it may remove any and all such officials in the state, and hence they would be at the mercy of any legislature whose amity or ill-will they may have incurred.

ID.; LEGISLATURE CANNOT TRANSFER THE ENTIRE CIRCUIT OF ONE JUDGE AND ATTACH IT TO ANOTHER CIRCUIT.—If the general assembly can transfer bodily the entire territory which constitutes the locality in which the judge or prosecuting attorney may lawfully exercise the functions and duties of his office, and attach that territory to another circuit, then it can strip the incumbents of their respective offices as effectually as it is possible to do so by any words that can be used. It is, in fact, as much a removal of the judge and prosecutor so deprived of all territory as would be a judgment of a supreme court removing either of them from his trust. It is not to be assumed that the framers of the constitution builded it so unwisely as to secure to a judge an office and its tenure, and the right to exercise all its prerogatives within a defined locality for a period of six years, if he so long behave well, and by the same organic law intended that the general assembly might remove him, at its will, from the exercise of all the privileges and duties pertaining thereto, without a hearing, without a conviction for misconduct, under the guise of "from time to time dividing the state into judicial circuits."

ID.; LIMITATIONS OF THE LEGISLATIVE POWER TO DIVIDE THE STATE INTO CIRCUITS.—The division of the state into judicial circuits may be exercised by the legislature, where the act does not legislate judges and prosecutors out of their respective offices, but not otherwise. The general assembly may add to, or may take from the territory constituting a circuit. It may create new circuits. It may abolish a circuit, if the act be made to take effect at, and not before the expiration of the terms of office of the judge and prosecutor of such office, as constituted, at the time of the act. The general assembly has the power, at its discretion, to divide a judicial circuit, at any time, during the terms of office of the judge and prosecuting attorney of such circuit, subject only to the restrictions that the legislature cannot, by any legislation, abridge the official terms of either of such officers, nor deprive either of them of a judicial circuit, wherein he may serve out the constitutional term for which he was elected.

State ex rel, v. Link, Sup. Ct. of Tenn.,
Jan. 15, 1948, 111 *S. W. 2d* 1024.

CONSTITUTIONAL LAW; ABOLITION OF COURT OPERATES TO VACATE OFFICE OF JUDGE.—The power to create the office of county judges or judge of other inferior courts was conferred on General Assembly by constitutional provision which authorized establishment of "inferior courts." Terms of all judges, including judges of inferior courts, are fixed by the Constitution at 8 years, and their tenure cannot be impaired except where Legislature finds it necessary to redistribute business of courts for purposes of economy and efficiency, and, when such rearrangement results in abolition of the tribunal, it operates to vacate office of judge who presided over such tribunal.

AN ACT WHICH ABOLISHED THE OFFICE OF JUDGE BUT DID NOT ABOLISH COURT OVER WHICH THE JUDGE PRESIDED IS UNCONSTITUTIONAL.—Where county judge for Stewart county was elected and commissioned according to law, an act which abolished the office and repealed act which created it, but which did not abolish court over which judge presided, was an unconstitutional exercise of legislative power.

State v. Mabry, Sup. Ct. of Tenn.,
Nov. 20, 1953, 178 *S. W. 2d* 379.

CONSTITUTIONAL LAW; ACT PURPORTING TO ABOLISH OFFICE OF COUNTY JUDGE INVALID.—Private Act purporting to abolish the office of County Judge by repealing the private act creating the court and undertaking to create and establish a new county court of Clay County and naming a chairman thereof was invalid as an attempt to defeat the right of the judge thereto elected and holding office in accordance with the existing law.

IBID.; A JUDGE CANNOT BE LEGISLATED OUT OF OFFICE.—We cannot close our eyes to the palpable effort to legislate the relator Bailey out of office and substitute in his place and stead another person who is designated in another private act to perform the same official duties. Chapter 53 of the Private Acts of 1943 purports to abolish the office of County Judge by repealing the act that created it. Eight days after the repealing act was approved by the Governor the Re-Districting Act was passed in which defendant Mabry was named as "Chairman of the County Court." The duties of this office were identical with that of county judge under the act which was sought to be repealed. The jurisdiction was the same in all respects.

IBID.; LEGISLATURE CANNOT REMOVE A JUDGE BY ABOLISHING THE OFFICE.—The legislature cannot remove a county judge by abolishing the office and devolving the duties upon a chairman of the county court.

IBID.; DISTINCTION BETWEEN STATUTES INEFFECTIVE TO REMOVE A JUDGE FROM OFFICE AND STATUTES THAT ACCOMPLISH REMOVAL BY ABOLISHING THE TRIBUNAL.—The distinction between statutes ineffective to remove a judge from office, and statutes that accomplish removal by abolishing the tribunal and transferring its business to another, was made clear by Mr. Justice Wilkes in Judges Cases, 102 Tenn. 509 560, 53 S. W. 134, 146, 46 L.R.A. 567.

In Re Opinion of the Justices, Supreme Judicial Court of Massachusetts, April 15, 1930; 271 *Mass.* 575, 171 *N. E.* 237.

CONSTITUTIONAL LAW; TENURE OF OFFICE DURING GOOD BEHAVIOR.—The tenure of office during good behavior imports not only the length of the term but also the extent of service. When a constitution has made definite provision covering a particular subject, that provision is exclusive and final. It must be accepted unequivocally. It can neither be abridged nor increased by any or all of the departments of the government.

Commonwealth v. Sheatz, 77 *Atl.* 547.

CONSTITUTIONAL TENURE OF OFFICE.—When the Constitution fixes the duration of a term, it is not in the power of the legislature either to extend or abolish it. The legislature has no power to enact a law which, in its effect, would create a vacancy.

The case of *State v. Noble*, 118 Ind. 350, 4 L. R. A. 101, fully establishes the independence of the judiciary. The legislature cannot extend or abridge the term of an office, the tenure of which is fixed by the constitution.

In *State v. Johnston*, 101 Ind 223, it is decided by the court that the general assembly has the power, at its discretion, to divide a judicial circuit, at any time, during the terms of office of the judge and prosecuting attorney of such circuit, subject only to the restrictions that the legislature cannot, by any legislation, abridge the official terms of either of such officers, nor deprive either of them of a judicial circuit, wherein he may serve out the constitutional term for which he was elected.

In *Hoke vs. Henderson* (N.C.) 25 Am. Dec. 704, *note* 1, it is said: "It is without the power of the legislature to indirectly abolish the office by adding the circuit of the incumbent to another then existing, and this even if it be within the power of the legislature to create new or alter old circuits, for that power must be so exercised as to leave the incumbent his office.

"But if the constitution provides for the duration of an office, the legislature has no power, even for the purpose of changing the beginning of the term, to alter its duration."

In *People vs. Dubois*, 23 Ill. 547, the supreme court of Illinois holds that although the creation of new judicial districts was expressly authorized by the constitution, yet no new districts could be created by which the judge in commission could be deprived of a right to exercise the functions of his office during the continuance of his commission. The court says: "The question is, Can the legislature expel the circuit judge from his office by creating a new district taking from him the territory which constituted his district? The bare reading of the constitution must convince every one that it was intended to prohibit such a proceeding."

To vacate the office of a district judge already elected by the people, and serving, by an act increasing the number of judges, would clearly be, in effect, the removal of a judge from office when his office was not destroyed. To allow the legislature, while making one new district, to legislate the judge of an old district out of office, and provide for the appointment or election of two new judges, would clearly be vicious in principle, and this is the class of legislation which fails within the constitutional inhibition. *Aikman v. Edwards*, 42 *Pac.* 366.

"However, we lay no stress upon this legislative declaration, further than as it shows what the General Assembly understood what the Constitution meant. For the term of office of circuit judge being, as we have seen, fixed by the organic law, and beyond the control of the Legislature, no enactment that they might indulge in would cause the term to end a day sooner or a day later. All that portion of the third section of the act above quoted, which prescribes the duration of the term, and the election, may therefore be stricken out as superfluous; these matters being regulated by the Constitution and general laws of the state." *State v. Cothem*, 127 *S. W.* 260.

The term of office is four years; this being a constitutional provision it is beyond legislative change. It is a fixed quantity." State ex rel Goodin v. Thoman, 10 Kan. 191, cited in 74 Neb. 188, 104 N.W. 197, p. 202. *Wilson v. Shaw*, 188 *N.W.* 940.

Where a city has been reincorporated, but its name, identity, and territorial limits remain the same, a justice of the peace cannot be legislated out of office by the new charter's provision reducing the number of justices, when the Constitution provides that a justice shall hold his office for four years and until his successor is elected and qualified. *Gratopp v. Van Eps* (1897) 113 *Mich.* 590, 71 *N.W.* 1080.

All the authorities above quoted show conclusively that as long as a court exists the office of the judge also exists. And this is so because a court cannot be established without clothing it with jurisdiction, which is the office of the judge. That is why it was said that a court cannot exist without jurisdiction and judge. And that if the court is stripped of its jurisdiction and the judge is taken away, the court will be a nonentity.

Before proceeding to discuss the third proposition that we set forth in this memorandum (page 41), shall answer the arguments which the Solicitor General advanced in his reply and at the hearing of this case.

As to the argument that the action of the petitioners is predicated on the fact that they were not appointed district judges.

The Solicitor General has been harping that "if petitioners were appointed to the *new district courts*, this petition would never have been filed". (p. 20, Answer). Certainly, had the petitioners continued as judges of the Courts of First Instance, under the name of district judges, they would not have filed this action. Why? Because of the elementary rule that one who has not sustained any injury as a result of the enforcement of a law cannot impugn the validity of the same. (People vs. Vera, 65 Phil. 56). May we remind the learned counsel for the respondents that Republic Act No. 1186 has not created any new district courts?

As to the argument that the Supreme Court cannot inquire as to the intent and purpose of the Congress in providing in the Act the abolition of the position of judges-at-large and cadastral judges.

The Solicitor General predicated this proposition on the principle of separation of powers. But it is the Solicitor General himself who advanced the theory that the purpose of the Act is to brush aside the obnoxious practice of *rigodon de jueces* which we deny. We contend that the real purpose of the Act is to legislate out the judges-at-large and cadastral judges and in support of our contention we have cited the speech of the Majority Floor Leader of the House, who was one of the authors and sponsors of the bill, in which he publicly acknowledged that the main purpose of the bill is to weed out undesirable judges.

Mr. Cooley, in his work on Constitutional Limitations (2d Ed., p. 65), says: "When the inquiry is directed to ascertaining the mischief designated to be remedied or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory."

The Supreme Court has held that "courts can avail themselves of the actual proceedings of the legislative body to assist in the construction of a statute of doubtful import." (Palanca vs. City of Manila, 41 Phil. 125).

Section 3 of Republic Act No. 1186 is of doubtful import be-

cause it provides that the position of judges-at-large and cadastral judges are abolished but the Act itself did not abolish any of the Courts of First Instance, the exercise of jurisdiction of which was vested by the Constitution and the Judiciary Act of 1948 in the judges of First Instance who are the district judges, judges-at-large and cadastral judges. We repeat: the power to try and decide civil and criminal cases as prescribed in the Judiciary Act of 1948 constitutes the office of these judges and when they exercise such jurisdiction, they discharge the functions of their office.

As to the argument that the law providing that Judges-at-Large and Cadastral Judges may be designated by the Secretary of Justice to any district or province to hold court is unconstitutional.

It is contended by the Solicitor General that such a provision of law is unconstitutional because it violates Article VIII, Section 7, of the Constitution, which provides: "No judge appointed for a particular district shall be designated or transferred to another district without the approval of the Supreme Court." This proposition is advanced to justify the abolition of the positions of Judges-at-Large and Cadastral Judges. It is not difficult to see how fallacious this argument is.

Since 1914 we have had judges without permanent stations. They were called "Auxiliary Judges" of Courts of First Instance and, at first, numbered seven. (See Act No. 2347, Section 4). In 1916 the Administrative Code was passed and the provision regarding the positions of seven Auxiliary Judges of First Instance was maintained (Act No. 2657, Section 152). On March 10, 1917, the Revised Administrative Code (Act No. 2711) was passed, and provided:

> "Sec. 157. *Judges-at-Large.*—In addition to the judges mentioned in section one hundred and fifty-four hereof, as amended, there shall also be appointed five judges who shall not be assigned permanently to any judicial district and who shall render duty in such districts, or provinces as may, from time to time, be designated by the Department Head."

On March 17, 1923, Act No. 3107, amending Section 157 of the Revised Administrative Code, was passed, increasing the number of Auxiliary Judges from seven to fifteen. On March 1, 1933, Act No. 4007 was approved, amending the Revised Administrative Code without touching the provision regarding Auxiliary Judges. The Constitution was approved by the Constitutional Convention on February 8, 1935.

As may be seen, at the time of the drafting of the Constitution, there had already been in this country for many years before, judges with permanent stations called "Judges of First Instance" and judges-at-large known as "Auxiliary Judges." The constitutional Convention did not consider obnoxious the existence of Judges-at-Large who could be transferred from one province to another, upon the direction of the Secretary of Justice, to try cases. What the Constitutional Convention considered obnoxious was the transfer from one province to another of Judges of First Instance with permanent stations, that is, the District Judges. And in order to stop such practice, which was then known as *rigodon de jueces*, it provided in the Constitution that "no judge appointed for a *particular district* (that is, District Judge) shall be designated or transferred to another district without the approval of the Supreme Court." It is evident, therefore, that this provision of the Constitution refers to District Judges or judges appointed for particular districts. How, then, can the Solicitor General seriously contend that the provision of the Judiciary Act of 1948 regarding Judges-at-Large and Cadastral Judges, who can be transferred from one province to another by the Secretary of Justice in the public interest, is violative of Article VIII, Section 7, of the Constitution?

There may be instances when it becomes necessary for the court to indulge in presumptions in order to know what the members of the Constitutional Convention had in mind when they drafted a particular provision of the Constitution. Thus, in the Krivenko case, the Court said:

> "At the time the Constitution was adopted, lands of the public domain were classified in our laws and jurisprudence into agricultural, mineral, and timber, and that the term 'public agricultural lands' was construed as referring to those lands that were not timber or mineral, and as including residential lands. It may safely be presumed, therefore, that what the members of the Constitutional Convention had in mind when they drafted the Constitution was this well-known classification and its technical meaning then prevailing." (Krivenko v. Register of Deeds, City of Manila, G.R. No. L-630, Vol. 12, Lawyer's Journal, p. 577.)

In the present case we need not presume, as in the aforecited case of Krivenko, what the Constitutional Convention had in mind, when it drafted Section 7 of Article VIII because the text itself of the provision makes direct and exclusive reference to "judges appointed for a particular district," who are named by the Revised Administrative Code of 1917 as "District Judges."

As to the provision in the Act converting the Judges-at-Large and Cadastral Judges to District Judges would constitute a legislative appointment.

Secretary of Justice Tuason expressed the opinion at the hearing on House Bill No. 1960 that there should be a proviso in the Act that the actual Judges-at-Large and Cadastral Judges should continue as district judges.

> "MR. VELOSO (I). But suppose the bill as now proposed intends to abolish the judges-at-large and cadastral judges, would you think that this bill is unconstitutional?
>
> SEC. TUASON. Well, that is why I say, — in order to prevent the bill from being unconstitutional, the abolition must contain the proviso that these judges are not to be ousted, they are not to be re-appointed but they are to continue as district judges and their districts are to be determined by somebody or by the Department of Justice." (*Transcript of hearing on March* 17, 1954 *of the Committee on Judiciary, House of Representatives.*)

Now comes the Solicitor General saying that his Chief (Art. 83, Revised Administrative Code) is wrong, because such a provision would constitute legislative appointment and therefore unconstitutional. He is seconded by our so-called constitutionalists. We sincerely believe, however, that the Secretary of Justice was right. Let us see the argument of the Solicitor General. "Had the Congress inserted in Republic Act No. 1186 a provision that the judges-at-large and cadastral judges will continue as district judges, that would constitute a legislative appointment which would be unconstitutional because it is the exclusive prerogative of the Executive to make appointments." He cites the case of Springer v. Government of the Philippine Islands, 277 U.S. 189.

We submit that the ruling in said case does not argue against the opinion of the Secretary of Justice. In said case the validity of a law creating a voting committee or board composed of the Governor-General, the Senate President, and the Speaker of the House of Representatives was questioned. The function of the committee was to exercise the voting power of the Philippine Government as owner of some of the shares in certain business corporations. The Supreme Court held that the law was invalid, because it not only created a committee, which was an office, but also filled it. The specification of the persons to constitute the board was in fact a legislative appointment.

In the case at bar the Act in question does not create a new office. This is so because said Act did not establish any new dis-

trict nor create new Courts of First Instance. Had the Act established new judicial districts and new Courts of First Instance, then we can say that the Act has created new judicial offices for which the judges who will discharge the judicial functions in said Courts must be appointed. But, we repeat, the Act did not create any new judicial office for, are not the Courts of First Instance created under the Judiciary Act of 1948 and to exercise the jurisdiction of which the petitioners were appointed, the same Courts of First Instance now existing under Republic Act No. 1186? Would the Solicitor General say that the present Courts of First Instance are not the same Courts of First Instance created by the Judiciary Act of 1948 and in which the petitioner-judges were exercising their judicial functions?

Since they are the same Courts of First Instance and the jurisdiction that the petitioners would exercise, if they were made district judges, is the same, no new appointments will be necessary, as held in several cases, among which are the following:

(1) State v. Manrey, 16 S.W. (2d) 809.

(2) State v. Caldwell, 23 So. (2d) 855.

(3) Amos v. Mathews (State ex rel. Davis, v. Carlton), 99 Fla. 1, 126 So. 308.

(4) Singleton v. Knott, 101 Fla. 1077, 138 So. 71.

(5) Whitaker v. Parson, 86 So. 247.

(6) Shoemaker vs. United States, 147 U.S. 282, 37 Law. Ed., 170.

State v. Manrey, 16 *S.W.* (2d) 809.

In 1924 respondent Judge Manrey was elected to the office of Judge of the 9th Judicial District of Texas for a term of four years, that being the term fixed by the Constitution. When Judge Manrey was elected in 1924 the said 9th judicial district was composed of the counties of Hardin, Liberty, Montgomery, San Jacinto and Polk, and the 75th Judicial District was then composed of the counties of Hardin, Chambers, Montgomery, Liberty and Tyler. In 1925 the Legislature of Texas enacted a statute reorganizing the 75th, 9th and 80th judicial districts.

By Section 1 of said Act the 9th judicial district was reorganized so as to be composed of the counties of Polk, San Jacinto. Montgomery and Waller.

By Section 2 of said Act the 75th district is reorganized so as to be composed of the counties of Hardin, Liberty, Tyler and Chambers.

By Section 3 of the Act the 80th district is left as it already was, except that Waller County was removed from the 80th district. It was traced, by Section 1, in the 9th district.

Thus it will be seen that by the terms of the new Act the territory of the 9th district was changed by taking two counties, Hardin and Liberty, out of it, and by adding one county thereto, Waller. The territory of the 75th district was changed by taking one county, Montgomery, out of it, and no counties were added. The only change made in the territory of the 80th district was that Waller county was removed therefrom. Section 5 of said act reads as follows:

"The present judges of the Ninth and Seventy-Fifth Judicial Districts as the same now exists, shall remain the district judges of their respective districts as reorganized under the provisions of this Act, and shall hold their offices until the next general election and until their successors are appointed or elected and duly qualified, and they shall receive the same compensation as is now, or may hereafter be provided by law for district judges, and a vacancy in either of said offices shall be filled as is now, or may hereafter be provided by law, and the present judge of the district court for the Eightieth Judicial district shall hold his office until his term expires and until his successor is elected and qualified, and a judge of said court shall hereafter be elected at the time and in the manner provided by law by the qualified voters of Harris County."

It appears that, notwithstanding the fact that Judge Manrey had been elected in 1924 for a full four-year term as Judge of the 9th judicial district, he again announced himself a candidate for said office in 1926, on account of the provisions of Section 5, *supra*, which provides that the judge of the 9th district shall hold his office until the next general election, etc., and caused his name to be placed on the official ballot, and received the highest number of votes at the 1926 general election for said office.

It appears also that in 1928 Judge Manrey and Judge McCall were both candidates for the Democratic nomination for said office at the general primary election of the Democratic Party in 1928, and Judge McCall received the highest number of votes and was declared the Democratic nominee. No contest of this election was had, and Judge McCall's name was printed on the official ballot of the November, 1928, general election as a Democratic candidate, and he received the highest number of votes cast in said general election for said office.

On November 6, 1928 Judge Manrey filed a suit against Judge McCall, claiming that Judge McCall was not entitled to receive a commission to the 9th Judicial District. The question raised was whether the Legislature in creating new judicial districts may appoint judges of previously existing districts to act until appointments of successors at next general election.

HELD:

We have carefully read and examined the act of the 39th Legislature in question, being chapter 166, General Laws of said Legislature, p. 378. An examination of said act as a whole, including the caption, the body of the act, and the emergency clause, shows clearly that the Legislature did not create any new judicial districts in said act. The act is just exactly what its caption shows it to be—an act to reorganize, not to abolish, said districts, by doing the things shown in the act. If the act operates so as to create a new district, then it created a new office, and the part of section 5 thereof which attempted to appoint Judge Manrey as judge thereof by legislative action was null and void, as it is not a legislative power to appoint district judges. Such is an executive power and is so expressly by the plain terms of our Constitution. State v. Gillette's Estate (Tex. Com. App.) 10 S.W. (2d) 984; State v. Valentine (Tex. Civ. App.) 198 S.W. 1006 (writ ref.). However, as above stated, we do not think that the act created new districts at all, but merely reorganized the old districts.

It is provided by section 7 of article 5 of the Texas state Constitution that:

"The state shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters thereof, at a general election, a judge, who shall be a citizen... who shall hold his office for a period of four years...."

If the Legislature created no new district, and did not abolish the Ninth district then it follows that Judge Manrey having been elected judge of the Ninth district in November, 1924 at the general election of that year, for a four-year term, was entitled to such full four-year term under the Constitution and that the part of section 5 of the act of 1925 which attempted to shorten the term and cause a new election in 1926 for such office was in plain violation of the express provision of our Constitution above quoted and is null and void. However, this does not affect the validity of the balance of the act.

It follows from what we have said that there is no doubt under the Constitution and laws of this state Judge Manrey

was duly and constitutionally elected judge of said Ninth district in 1924 for a full four-year term, and that, said district not having been abolished, he was entitled to serve out said full term.

State v. Caldwell, 23 *So.* (2d) 855.

The Legislature of 1945 of the State of Florida enacted Chapter 22821 creating the "Florida State Improvement Commission," hereafter called the "Commission," and defining its powers and duties. On petition of the Attorney General *quo warranto* was directed to respondents as members of the Commission, commanding them to show cause why they should not be ousted from office and enjoining them from further exercising the duties imposed on them as such. It is contended that Chapter 22821 is void and unconstitutional because it designates the chairman of the State Road Department as a member of the Commission and in so doing trenches on the power of the Governor to appoint and suspend officers for designated causes, contrary to Section 27, Article III, of the Constitution.

"This question is answered contrary to the contention of relator in Whitaker v. Parsons, 80 Fla. 352, 86 So. 247, Amos v. Mathews (State ex rel. Davis v. Carlton), 99 Fla. 1, 126 So. 308, and Singleton v. Knott, 101 Fla. 1077, 138 So. 71, the gist of the holding in all these cases being that State and County offices may be created and the duties of the holders defined by statute or the Constitution. These cases are also authority for the doctrine that the legislature may impose additional powers and duties on both constitutional and statutory officers so long as such duties are not inconsistent with their duties imposed by the Constitution. This court has accordingly approved the rule that *the legislature may make an existing officer the member of another and different board by enlarging his duties.* If the chairman of the Road Department should be suspended as such, he would likewise be suspended as a member of the Commission."

Whitaker v. Parsons, 86 *So.* 247.

HELD: The Legislature, having all the law-making power of the state that is not withheld by the Constitution, may prescribe duties to be performed by officers expressly provided for by the Constitution, in addition to the duties of those officers that are defined in the Constitution, where not forbidden by the organic law; and the Constitution does not withhold from the Legislature the power to prescribe additional duties to be performed by the state treasurer, or others of "the administrative officers of the executive department," that are not inconsistent with their duties as defined by the Constitution; and such duties may be to act as members of boards or commissions in conjunction with other officers who are provided for by statute—the commissions issued to constitutional officers being sufficient to cover any duties imposed upon them by law. In such cases the incumbent does not "hold or perform the functions of more than one office under the government of this state at the same time," within the meaning and purpose of that quoted provision of the Constitution. ...

In providing (section 1, c. 7345, Acts of 1917) that "there is hereby created and established a board to be known and designated as the state live stock sanitary board, which shall be composed of the commissioner of agriculture, the superintendent of public instruction, the state treasurer, and two other members who shall be appointed by the Governor," the statute merely authorizes the appointment of two officers by the Governor, and imposes duties upon the three state officers who, with the two officers appointed, constitute the state board, with designated duties. This does not create new offices for the three state officials. It adds new administrative duties to existing administrative offices. The duties imposed are not inconsistent with the duties defined in the Constitution.

...when a statute provides that stated officers shall constitute a board with administrative functions, no new offices are thereby created, but new duties are imposed upon officers already in commission. ...

Shoemaker vs. United States,
147 *U.S.* 282, 37 *Law. Ed.* 170.

There are several features that are pointed to as invalidating the Act. The first is found in the provision appointing two members of the park commission, and the argument is, that while Congress may create an office, it cannot appoint the officer; that the officer can only be appointed by the President with approval of the Senate; and that the Act itself defines these park commissioners to be public officers, because it prescribes that three of them are to be civilians, to be nominated by the President and confirmed by the Senate. This, it is said, is equivalent to a declaration by Congress that the three so sent to the Senate are "officers," because the Constitution provides only for the nomination of "officers" to be sent to the Senate for confirmation; and that it hence follows that the other two are likewise "officers," whose appointment should have been made by the President and confirmed by the Senate.

HELD:

As the two persons whose eligibility is questioned were at the time of the passage of the Act and of their action under it officers of the United States who had been therefore appointed by the President and confirmed by the Senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the Act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

As to whether the Legislature has the power to increase or diminish the number of Justices of the Supreme Court.

During the oral argument one of the Justices propounded the following question to the Solicitor General: If the Legislature can abolish the positions of Judges-at-Large and Cadastral Judges, don't you think that it can also increase or reduce the number of Justices of the Supreme Court at its pleasure? The answer of the Solicitor General, if we remember well, is that the legislature cannot do that because the members of the Supreme Court are constitutional officers. We do not agree to this. Article VIII, Section 40, of the Constitution reads as follows: "The Supreme Court shall be composed of a Chief Justice and ten Associate Justices and may either sit *in banc* or in two divisions unless otherwise provided by law." The undersigned, who was then the Chairman of the Committee on Judiciary of the Constitutional Convention, explained that the words "unless otherwise provided by law" referred to the number of Justices to compose the Supreme Court as well as their sitting *in banc* or in two divisions. This appears in the record of the Constitutional Convention.

We take this occasion to explain why this is so. During the proceedings in the Constitutional Convention, the Supreme Court was interested in the creation of the Court of Appeals in order to remove the congestion of cases in the Supreme Court, for according to the Justices, such situation would always exist unless an intermediate appellate court was created. The Chief Justice secured a commitment from President Quezon that such court would be created in the Constitution. However, the plan of the Chairman of the Committee on Judiciary was to increase the number of the members of the Supreme Court to twenty-four, dividing it into civil and criminal divisions like the Supreme Court of Spain. So he was opposed to the creation of the Court of Appeals. President Quezon then invited the members of the judiciary to a conference in his

house. In the conference there were present on the part of the Constitutional Convention its President, Delegate Recto, Delegate Briones, and the Chairman of the Committee on Judiciary. On the part of the Supreme Court were present Justices Avanceña, Imperial and Abad Santos. President Quezon asked the Chairman his reasons for opposing the creation of the Court of Appeals. After expressing his reasons, and the justices having likewise given theirs, President Quezon decided to leave the question entirely in the hands of the Convention. The Convention rejected the creation of the Court of Appeals, leaving to the discretion of the Legislature the creation of the same. The reason advanced was that, since the Court of Appeals was to be established for the first time in this country by way of experiment, the same must be created by the Legislature so that in case the experiment fails, the Court of Appeals may be abolished by law and the congestion of cases in the Supreme Court may be remedied by increasing the number of its Justices. Such is the history of the provision of the Constitution that unless otherwise provided by law, the Supreme Court shall be composed of a Chief Justice and ten Associate Justices.

Now we come to the question propounded to the Solicitor General. If the provisions of Republic Act No. 1186 abolishing Judges-at-Large and Cadastral Judges is constitutional, then the Legislature may at any time decrease the number of Justices from eleven to seven and add four more Justices to the Court of Appeals, or may increase the number of Justices of the Supreme Court to sixteen, for example, and later on abolish the positions of the additional justices as it pleases. In other words, the position of the members of the judiciary, from the Justices of the Supreme Court down to the Justices of Peace, will be at the mercy of the Legislature. We repeat in this connection what Chief Justice Snodgrass said:

> "It is no argument in answer to this to say that the Legislature will not do this. It is not a question of what they will do that we are now considering; it is a question of constitutional power, of what it can. The question as to how such power is granted, or what restraint imposed, cannot be determined on the probability or improbability of its exercise."

—III—

TO AVOID HOLDING SECTION 53 OF SAID ACT UNCONSTITUTIONAL ON THE GROUND THAT IT INFRINGES THE CONSTITUTIONAL PROVISION GUARANTEEING THE TENURE OF JUDICIAL OFFICE, THIS COURT MAY DECLARE THAT SAID ACT OPERATES PROSPECTIVELY.

This proposition is discussed in the Memorandum of Attorney Salazar.

—IV—

IF THIS COURT WILL DECLARE THAT REPUBLIC ACT NO. 1186 HAS ABOLISHED THE OFFICE OF THE PETITIONERS AND HAS TERMINATED THEIR TERMS OF OFFICE, AND WILL FURTHER DECLARE THAT SAID ACT IS CONSTITUTIONAL, THEN THE CONSTITUTIONAL PROVISION GUARANTEEING THE TENURE OF JUDICIAL OFFICE WOULD BE A MYTH AND NO MEMBER OF THE JUDICIARY, FROM THE JUSTICES OF THE SUPREME COURT TO THE JUDGES OF THE JUSTICE OF THE PEACE COURTS, WOULD BE SECURE IN THEIR OFFICE WHICH, IN THE LAST ANALYSIS, WOULD BE AT THE MERCY OF THE CONGRESS.

This proposition is discussed in the Memorandum of Attorney Sebastian.

CONCLUSION

It cannot be gainsaid that the removal of the judges by the Congress has considerably affected the prestige of the judiciary. No political party has ever remained—or can hope to remain—in power forever. After some future general election, another political party which will succeed the party in power may do what the present party has done, that is, eliminate judges of the past administration and place in their stead new judges belonging to the winning party. It is the general belief that the elimination of some judges by the present Congress was motivated by political expediency and this impression is bolstered by what appeared in the newspapers in connection with the appointment of the new judges. Take, for instance, what appeared in the *Manila Times* of July 28, 1954 (page 5, column 5). It reads:

> "A number of appointments in the judiciary will be opposed by commission members, especially those from the House who had vigorously protested the appointments on the ground that they had not been consulted, and that such appointments failed to conform with a principle laid down by the party regarding party loyalty."

The *Evening News* of July 24, 1954, page 23, first column, carries the following under the heading of "8 Judges Bypassed":

> "The Judiciary committee of the commission on appointments today decided to bypass the appointments of eight district judges named by President Magsaysay on the ground that their qualifications do not conform with the new standards agreed upon in a Malacañang caucus.
>
> "This was disclosed by Senate Majority Floor-leader Cipriano P. Primicias who admitted that one of the criteria for judges set forth at the Palace meeting was loyalty to the Nacionalista party.
>
> "Primicias would not divulge the names of the eight judges 'for obvious reasons'."

This corroborates to some extent the observations made by Senator Paredes in his speech during the deliberations of Senate Bill No. 170, pertinent parts of which are reproduced hereunder.

> "Senator Laurel, as a member of the Supreme Court, has laid the rule that should be followed, and I believe it is only proper to bring his ruling before the attention of this Senate. In the celebrated case of Zandueta cited here this morning, it was held by Justice Laurel that a reorganization that deprives a judge of his office is not necessarily unconstitutional. But any reorganization may become unconstitutional if the circumstances are such as to show that the intention of the reorganization is to put out a member of the judiciary by legislation. I will not charge anybody with any hidden intention or improper motives in this bill, but if the question is ever presented to the Supreme Court by any judge who may be affected by the provisions of this bill which I suppose will be approved this afternoon, I feel, Mr. President, that if the circumstances — preceding, coetaneous and subsequent to the approval of the bill—are presented to the Supreme Court, the constitutionality of the bill will be seriously endangered. If the motives of the Congress in reorganizing are simply public policy, public welfare, public service, and the prestige or the protection of the judiciary and the members thereof, there can be little question about the constitutionality of the bill, but otherwise, the bill is unconstitutional.
>
> "Let us now, Mr. President, examine the circumstances attending this reorganization, and then ask ourselves whether or not our protestations of good motives are likely to be given credence by the courts. For the last seven years, the administration was controlled by the Liberal Party. The Nacionalista Party being then in the minority, had always been complaining against the acts of the Liberal Party administration. Right or wrong, there were alleged irregularities committed and which were the subject of attacks and complaints on the part of the members of the minority party, then the Nacionalista Party. The Judiciary was not free from these attacks and from these charges of irregularities. The Judiciary was also accused of having become a tool of the Chief Executive in the dispensation of justice. Comments were made, attacks were freely hurled during the campaigns against members of the Judiciary or the way in which the members of the Judiciary performed their duties. Main subject of attacks was the frequency with which the Secretary of Justice assigned judges to try specific cases

and attributing to this action the ulterior motive of securing the conviction or the acquittal of the accused in criminal cases. Since the elections and after the new administration was installed into office, what did we notice in the matter of changing employees and reorganizing? In the Executive Department, not only have the high officials had to present their resignation out of propriety, but even those who were holding technical positions and who ordinarily would not be affected by changes in the leadership of the government, had to resign, and I say "had to" because they were asked to resign, or else.... So they did resign one by one. They quit their positions, because they were asked to.

"And that was not enough. In the provinces changes were made. I will not now say that legislative violations were made, changes were made in the Executive Department, governors, mayors, councilors, board members were changed from Liberals to Nacionalista. There seems to be a craze of changing personnel, ousting all the Liberals, all those who belong to the Liberal party, and putting in their places members of the Nacionalista Party. Very natural, that was to be expected. For so many years has the Nacionalista Party been deprived of the opportunity to control the government, and this being the first opportunity of the Nacionalistas, it is only natural that they should wish to place their own men in order to be able to carry out their promises. They did not have confidence in the members of the Liberal Party. It was their right and privilege and duty to themselves, I should say, to bring new men to carry out their policies.

"Mr. President, this was done, not only in the executive and also the elective positions. In the Department of Foreign Affairs, soon after the assumption to office, the Secretary announced publicly and openly that all the members of the Department of Foreign Affairs should resign notwithstanding the fact that there is a law protecting them, the tenure of their office being assured on good behavior. Then investigations against members of the Foreign Service started, all with the end in view of removing incumbent Liberals.

"The same was done in the bureaus. Chief of Bureaus were asked to resign. Some of them did, others did not, but finally had to give up their place in favor of new ones, all belonging to the Nacionalista Party. This series of similar acts following the same standard will help discover the intention of this judiciary reorganization bill.

"As to the Judiciary, there is no way of laying off the judges. The judges cannot be asked simply to resign because the Constitution protects them. There is a need to follow a different course if we want to change those who, during the former regime or administration, were suspected to being a tool of the Executive. A reorganization to get rid of them would be a most convenient course.

x x x x x x

"If I may resume now, in the judiciary, there is an absolute impossibility of asking any body to resign if he does not want to, because he is protected by the Constitution. That will be presented to the Supreme Court. Now, as for other coetaneous circumstances. What was done in the matter of the appropriation law in order to facilitate legislating out some of the employees, civil service men? Lump sum appropriations were requested for certain offices, but which were not granted by the Senate because the Senate, I am proud to say, represented by the distinguished gentlemen of the majority and also joined by a few members of the minority, saw fit to oppose that objectionable move, or at least saw fit to act in such a way as to avoid any posibility of suspicion. But other facts will also be brought up, Mr. President, which will add to the series of circumstances that will be used by those who may question the law, to change the Senate with ulterior motives. What are those facts, Mr. President? I was told right this afternoon, when I was on the floor of the Lower House, that no less than the floor leader of the majority stated that one of the purposes of the bill is to get rid of the judges that are no good. This is on record. With such a confession, **how can we say to the** Supreme Court, in all sincerity, that **our intentions are purely** to serve the judiciary. The Secretary of Justice is even quoted as having said that five or six judges will be affected. Take those circumstances into consideration, Mr. President, and again the other side will say, "What was the purpose of the reorganization, the evident purpose of the reorganization?" It has been said, *first*, to equalize, give the same rank, jurisdiction and salary to all judges. The same rank can be accomplished now if we only raise the salary of the lower judges. The cadastral judge will have the same jurisdiction as the district judge if he is assigned to try all kinds of cases. By administrative order, he can have the same rank, although not the same salary and the same name. The auxiliary judges now have the same privileges as a district judge except the salary. If that is the reason for the bill, why not simply raise the salary of these judges so that they may have the same rank as the others. *Second alleged motive*: To avoid the possibility of these judges being used and assigned from one district to another as they had allegedly been used and assigned in the past, to try special cases and to follow the wishes of the administration. I wish to pay a tribute of admiration to the gentlemen of the majority for having said that that is their purpose. I believed that is the purpose of the gentlemen who authored the bill and sponsored the bill, Senator Laurel. But, Mr. President, that same purpose can be accomplished by simply amending the law, by simply providing that the Secretary of Justice shall not do this hereafter without the consent of the affected judge and the Supreme Court. That would have been a remedy. So, we cannot allege that as the reason for the amendment. Now, what is the other possible and alleged reason? To give all judges the same name. Mr. President, I believe this is too childish a reason for a wholesale reorganization of the judiciary.

"These being the circumstances, I would ask the gentlemen of the Senate to kindly consider whether our protestation of clean conscience and clear motives are not outbalanced by the preceding and coetaneous circumstances, and whether or not, if we approve this bill we will have any chance of having it sustained by the Supreme Court.

It is only the Supreme Court which can restore the prestige of our courts and make the people realize that under our republican form of government the independence of our judiciary can never be destroyed or impaired. The Legislature, though possessing a larger share of power, no more represents the sovereignty of the people than either the executive or the judicial department. The judiciary derives its authority from the same high source as the Executive and the Legislature. The framers of our Constitution have incorporated therein certain permanent and eternal principles, and erected an independent judiciary as "the depository and interpreter, the guardian and the priest of the articles of freedom." It has been said that of all the contrivances of human wisdom, this invention of an independent judiciary affords the surest guarantee and the amplest safeguard to personal liberty and the rights of individuals.

We, therefore, pray that, for the sanctity of the Constitution, the paramount interest of our people, and the independence of the judiciary, this Honorable Court declare: (1) that Section 3 of Republic Act No. 1186 is unconstitutional insofar as it legislates out the petitioners-judges, and (2) that the petitioners are entitled to continue exercising their judicial functions in the Courts of First Instance of the Philippines in accordance with the Judiciary Act of 1948.

Manila, Philippines, August 21, 1954.

VICENTE J .FRANCISCO
One of the Attorneys for the Petitioners
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OPINION NO. 152

(On the question as to whether crude oils which will be imported by Caltex (Philippines), Inc., in accordance with the terms of the petroleum refining concession granted to it by the Government of the Philippines on June 20, 1953, under the Petroleum Act of 1949 (Rep. Act No. 387) may be imported free of customs duty under Article 103 of the Petroleum Act.)

2nd Indorsement
June 28, 1954

Respectfully returned to the Honorable, the Secretary of Finance, thru the Honorable, the Executive Secretary, Office of the President, Malacañang, Manila.

This is in connection with the imposition of customs duties on the crude oils which will be imported by Caltex (Philippines), Incorporated, in accordance with the terms of the petroleum refining concession granted to it by the Government of the Philippines on June 20, 1953, under the Petroleum Act of 1949 (Republic Act No. 387). The crude oils to be imported will not be sold as such but will be refined in the petroleum refinery of said company into gasoline, kerosene, diesel, and fuel oils.

Opinion is requested on whether said crude oils may be imported free of customs duty under Article 103 of the Petroleum Act which provides:

> "ART. 103. Customs duties. — During the first five years following the granting of any concession, the concessionaire may import free of customs duty, all equipment, machinery, materials, instruments, supplies and accessories.
>
> "No exemption shall be allowed on goods imported by the concessionaire for his personal use or that of any others; nor for sale or for re-export; x x x."

The Philippine Tariff Act of 1909, as amended by Republic Act No. 571, however, imposes customs duties on "mineral oils, crude or refined" [Sec. 8, subsection 22 (a)].

The above-mentioned Tariff Act is a law of general application enacted to raise revenues for the government, and the provision thereof imposing customs duties on mineral oils is a broad provision covering importations of mineral oils in general. On the other hand, the Petroleum Act deals with a special subject, and Article 103 thereof is a special provision limited to importations by petroleum concessionaires.

It is a settled rule of statutory construction that a special or specific provision prevails over a general or broad provision and that the latter operates only upon such cases as are not included in the former. In other words, the special or specific act and the general or broad law stand together, the one as the law of a particular case and the other as the general rule. Thus, the special or specific provision is often referred to as an exception to the general or broad provision (50 Am. Jur. 562-563). Therefore, Article 103 of the Petroleum Act may be considered applicable to importations by petroleum concessionaires, as an exception to the above-mentioned provision of the Philippine Tariff Act.

The next question, then, is, are crude oil materials within the purview of said provision of the Petroleum Act?

The word "material" refers to the substance matter which enters into the making of the finished product. Thus, it has been held that the word "material" as used in a tax statute relating to spirituous liquors means the raw or original material from which the liquor is produced. (U.S. v. Teebrook, Fed. Cas. 33; Pendleten v. Franklin, 7 NY 108). Crude oil has been defined by the Petroleum Act as "oil in its natural state before the same has been refined or otherwise treated, but excluding water and foreign substances". [Art. 2(b)]. Crude oil is therefore the substance matter or raw material from which petroleum is refined. And a refining concession grants to the concessionaire the right to manufacture or refine petroleum or to extract its derivatives (Art. 10(d) R.A. 387). It follows that crude oil is a "material" which the refining concessionaire must have to use in the exercise of the right granted to it under a refining concession. It is, therefore, within the scope of the first paragraph of the above-quoted Article 103.

And such crude oils are not such goods as are mentioned in the second paragraph of the same article. For it is obvious that the crude oils in question are not being imported for the personal use of the concessionaire or of other persons. Moreover, while it is true that after such crude oils will have been refined, the finished product will ultimately be sold, it is also true that the phrase "nor for sale or for export" refers to imported articles to be sold or re-exported in the same condition in which they were imported.

The undersigned is therefore of the opinion that the crude oils which will be imported by the Caltex (Philippines), Incorporated, and which will be used as materials in its petroleum refinery may enter free of customs duty within the first five years following the grant of its concession.

(SGD.) PEDRO TUASON
Secretary of Justice

OPINION NO. 129

(On the question as to whether or not the action taken by the Export Control Committee in disapproving applications to export rice bran abroad allegedly upon the recommendation of the Director of Animal Industry is legal.)

The Executive Officer
Export Control Committee
Office of the President
Malacañang, Manila

S i r :

This is in reply to your request for opinion as to the legality of the action taken by the Export Control Committee in disapproving applications to export rice bran abroad allegedly upon the recommendation of the Director of Animal Industry.

The Export Control Law (Republic Act No. 613, as revived and amended by Republic Act No. 824) makes it unlawful for any person, association or corporation to export or re-export to any point outside the Philippines machineries and their spare parts, scrap metals, medicines, foodstuffs, abaca seedlings, gasoline, oil, lubricants and military equipment or supplies suitable for military use without a permit from the President (Section 1). It authorizes the President of the Philippines to control, curtail, regulate and/or prohibit the exportation or re-exportation of such materials, goods and things above enumerated and to issue rules and regulations as may be necessary to carry out the provisions of the statute (Section 3).

Executive Order No. 453, series of 1951, as amended by Executive Order No. 482, same series, and revived by Executive Order No. 526, series of 1952, issued by the President pursuant to the power conferred upon him by Section 3 of the Export Control Law, lists under separate categories the different articles absolutely banned from exportation or re-exportation and those which may be exported or re-exported under certain conditions (Annexes A, B and C, Ex. Order No. 453, as amended). Commodities not listed are not governed by the said Executive Order (Section 11).

I have carefully examined the articles and commodities listed in Annexes A, B, and C to Executive Order No. 453, as amended, and rice bran is not one of them. This being so, and since commo-

(Continued on page 527)

I

Jose De Leon, et al., Petitioners, vs. Asuncion Soriano, et al., Respondents, G. R. No. L-7648, 1954, Montemayor, J.

JUDGMENT; EXECUTION OF JUDGMENT PENDING APPEAL, NOTWITHSTANDING THE FILING OF SUPERSEDEAS BOND BY APPELLANTS.—A and her natural children had an amicable settlement according to which the latter would deliver to A more than 1,000 cavanes of rice from 1943, until the latter's death. The children defaulted in the delivery of the rice as provided for in the agreement by not making full delivery. A filed an action against them for the payment of the value of the deficiencies of 3,400 cavanes of palay, corresponding to the years 1944, 1945 and 1946. On November 7, 1950 judgment was rendered in favor of A; on January 15, 1951, judgment was executed, and A received the cash in satisfaction of the judgment in 1952. In the meantime, the children had been defaulting in their palay deliveries from 1947 up. A filed another action in September 1950 to recover the value of their deficiencies. Judgment was rendered by the Bulacan court on December 3, 1953, again in favor of A. Defendants appealed. In order to stay the order of execution, defendants filed a supersedeas bond in the sum of ₱30,000.00, but A insisted on execution. Notwithstanding the filing of the supersedeas bond as required by the Court, said court issued a second special order dated March 18, 1954, ordering the immediate execution of the judgment and requiring A to file a bond of ₱50,000. Defendants filed a petition for certiorari to set aside the special order of March 18, 1954, on grounds of abuse of discretion and excess of jurisdiction. By this time, A was already 75 years old, sickly and without relatives and heirs and without any means of support.

HELD: (1) Even after the filing of a supersedeas bond by an appellant, intended to stay execution, the trial court may in its discretion still disregard said supersedeas bond and order immediate execution provided that there are special and compelling reasons justifying immediate execution. (2) There are special cases and occasions where the surrounding circumstances are such as to point to and lead to immediate execution. We admit that such special cases and occasions are rare, but in our opinion the present case is one of them. A's need of and right to immediate execution of the decision in her favor amply satisfy the requirement of a paramount and compelling reason of urgency and justice, outweighing the security offered by the supersedeas bond, because she is already 75 years old, sickly, without any close relatives and heirs, and without any means of support.

Juan R. Liwag, Jose P. de Leon, and *Manuel V. San Jose,* for the Petitioners.

Vicente J. Francisco, for the Respondents.

DECISION

MONTEMAYOR, *J.*:

Briefly stated, the facts in the case are as follows. When Dr. Felix de Leon and Asuncion Soriano married, they were more than well-to-do, and during their marriage, with the fruits of their individual properties and their joint efforts, they acquired valuable properties so that when Dr. De Leon died in 1940, he left extensive properties, including ricelands in the provinces of Bulacan and Nueva Ecija, listed in his name. To the couple no children were born, but the husband had three acknowledged natural children named Jose, Cecilio, and Albina, all surnamed DE LEON.

As surviving spouse, Asuncion, initiated intestate proceedings for the settlement of the estate of her deceased husband under Special Proceedings No. 58390 of the Court of First Instance of Manila and she asked that she be appointed administratrix. She also asked that some of the properties included in the inventory filed by the special administrator as properties of Felix de Leon, be declared as her paraphernal property and the rest as conjugal property. The three natural children abovementioned opposed the petition, claiming all the properties listed in the inventory as belonging exclusively to their father. The parties — Asuncion on one side and the natural children on the other — finally came to an amicable settlement "in deference to the memory of Dr. Felix de Leon, and with the view to expediting the final distribution of his estate." The agreement was marked Exhibit "F" and we reproduce the pertinent portions thereof:

"WHEREAS, the PARTY OF THE FIRST PART is the surviving spouse and the PARTIES OF THE SECOND PART are the acknowledged natural children of Dr. Felix de Leon who died in Manila on November 28, 1940;

x x x x x x

"WHEREAS, the estate of the deceased Dr. Felix de Leon is now the subject of intestate proceedings, numbered Sp. Proc. No. 58390 of the Court of First Instance of Manila;

x x x x x x

"WHEREAS, the PARTY OF THE FIRST PART filed a petition dated May 31, 1941 asking that certain properties in the said inventory be declared her paraphernal properties and as such be excluded therefrom, which petition was opposed by the PARTIES OF THE SECOND PART in their pleading dated June 9, 1941;

x x x x x x

"WHEREAS, the parties hereto, in deference to the memory of Dr. Felix de Leon, and with a view to expediting the final distribution of his estate, have agreed to settle the existing differences between them under the terms and conditions hereinafter contained, the parties hereto have agreed, each with the other, as follows:

"That Doña Asuncion Soriano will receive as her share in the conjugal partnership with the deceased Felix de Leon and in full satisfaction of her right, interest or participation she now has or may hereafter have in the properties acquired by the deceased during his marriage to Asuncion Soriano:

(a) 'A parcel of land, situated in the City of Manila which was mortgaged for ₱9,000.00 and which the children of the deceased Felix de Leon assumed the obligation to release and cancel the mortgage;

(b) 'At the end of each agricultural year, by which shall be understood for the purposes of this agreement the month of March of every year, the following amounts of palay shall be given to the PARTY OF THE FIRST PART by the PARTIES OF THE SECOND PART in the month of March of the current year 1943, one thousand two hundred (1,200) cavanes of palay (macan); in the month of March of 1944, one thousand four hundred (1,400) cavanes of palay (macan); in the month of March, 1945, one thousand five hundred (1,500) cavanes of palay (macan); and in the month of March of 1946 and every succeeding year thereafter, one thousand six hundred (1,600) cavanes of palay (macan). Delivery of the palay shall be made in the warehouse required by the government, or if there be none such, at the warehouse to be selected by the PARTY OF THE FIRST PART, in San Miguel, Bulacan, free from the cost of hauling, transportation, and from any and all taxes or charges.

"It is expressly stipulated that this annual payment of palay shall cease upon the death of the PARTY OF THE FIRST PART and shall not be transmissible to her heirs or to any other person.

(c) 'The residue of the entire estate of the deceased shall

pass to the children of the deceased De Leon."

Because the De Leon children defaulted in the delivery of the palay as provided for in the agreement or rather did not make full delivery, as for instance, instead of delivering all the 1,400 cavanes of palay in March 1944, they gave only 700 cavans; in 1945 they delivered only 200 instead of 1,500 cavans; and in 1946 they gave Asuncion only 200 cavans of palay instead of 1,600, Asuncion filed an action against them, Civil Case No. 135 of the Court of First Instance of Bulacan, for the payment of the value of the deficiencies of 3.400 cavanes of palay corresponding to said three years.

The three defendants therein admitted their short deliveries but alleged as special defense that the deficiencies were caused by force majeure occasioned by Huk depredations, floods, and crop failure, and that the parties intended that the palay to be delivered yearly be harvested from the ricelands in Bulacan, and consequently, the failure of the Bulacan ricelands to produce the yearly amounts of palay agreed upon absolved them from any liability. The Bulacan court on August 16, 1947, rendered judgment in favor of Asuncion and against the defendants, holding that the obligation imposed upon the defendants to make yearly deliveries of palay was a generic one and was not excused by force majeure. On appeal to the Court of Appeals, the decision was affirmed on the same grounds. We quote a part of the decision of the said Court of Appeals:

> "We find the above-mentioned contention of the defendants-appellants untenable. Exhibit "E" clearly calls for the delivery of certain number of cavans of palay of the macan class, which are undoubtedly indeterminate or generic thing. The claim that the above-mentioned stipulations contained in agreement Exhibit "F" converted defendants' undertaking into a specific obligation to deliver palay that would be produced by the ricelands of Felix de Leon in San Miguel, Bulacan, is unwarranted. The aforesaid stipulations simply refer to the time, place and manner of payment. There is nothing in the agreement from which such pretended real intent of the parties may be deduced or inferred x x x." (Decision of the Court of Appeals.)

Defendants again appealed to this Tribunal which on August 24, 1950, affirmed the decisions of the trial court and the Court of Appeals on the same grounds. Because of defendants' motions for reconsideration and later their opposition to the execution of the final judgment, it was only on November 7, 1950, that the trial court ordered the execution thereof, and because of defendants' motion for reconsideration it was only on January 15, 1951, when the judgment was executed, and we understand Asuncion received the cash in satisfaction of the judgment only in the year 1952.

In the meantime, the De Leon children had again been defaulting in their palay deliveries from 1947 up. Thus, in March 1947 they delivered only 600, leaving a balance of 1000 cavans; in March 1948 they delivered only 500, with a deficiency of 1100 cavans; in March 1949 there was a deficiency of 800 cavans; and in March 1950 the delivery of palay was short by 900 cavans. To recover the value of these deficiencies as well as the amount of palay for every year after 1950, she (Asuncion) filed another action in September 1950 in the same Bulacan court, Civil Case No. 488. While said case was pending the De Leon children continued in their default and short deliveries; as for instance, for the year 1951, they delivered only 800, leaving a balance of 800 cavans; in 1952 they delivered 800, with a deficiency of 800 cavans. After hearing, judgment was rendered by the Bulacan court on December 3, 1953, the dispositive part thereof reading as follows:

> "IN VIEW OF THE FOREGOING, the Court renders judgment in favor of the plaintiff and orders the defendants:
>
> (1) To pay the plaintiff the amount of ₱60,450.00, corresponding to the price of 5,400 cavanes of palay that the defendants failed to deliver in 1947, 1948, 1949, 1950, 1951, and 1952, and to deliver to her 1,000 cavanes of palay corresponding to the short delivery in 1953;
>
> (2) To pay the plaintiff as damages interest at 6% on ₱12,000.00 from October 10, 1947; on ₱11,000.00 from December 8, 1948; on ₱11,880.00 from December 8, 1949; on ₱9,450.00 from September 4, 1950; on ₱8,560.00 from October 2, 1952; and on ₱8,560.00 from October 2, 1952, up to the date of payment;
>
> (3) To pay further to the plaintiff twenty percent (20%) of the total amount of plaintiff's recovery excepting the interests as damages in the form of attorney's fees;
>
> The defendants are also hereby ordered to deliver to the plaintiff 1,600 cavanes of palay in the month of March 1954 and every month of March of the succeeding years during the lifetime of the plaintiff, and to pay also the costs of this suit."

In Civil Case No. 488, the defendants De Leons put up the same defense, namely, that it was the intention of the parties that the palay to be delivered by them yearly to Asuncion was to come from the ricelands in Bulacan, and that because of failure of said ricelands to produce palay sufficient to cover the deliveries agreed upon, due to force majeure caused by Huk trouble and crop failure, they were excused or absolved from the full fulfillment of their obligation. The trial court in its decision said that this was the same defense and issue put up and raised in Civil Case No. 135 in 1946, and that because of the final decision in that case by the trial court, affirmed by the Court of Appeals and reaffirmed by the Supreme Court, the present defendants in Civil Case No. 488, in the words of the trial court are "foreclosed from putting up this defense of force majeure in crop failure on the principle of estoppel by or conclusiveness of judgment."

Defendants have appealed from that decision. However, pending the perfection of their appeal, plaintiff Asuncion petitioned for the execution of the judgment pending appeal on the ground that the appeal was frivolous, intended only for purposes of delay. Over the opposition of the defendants the trial court issued a special order dated February 12, 1954, accepting the reasons given by Asuncion in her petition as good and sufficient grounds for execution, and granting the petition unless the defendants put up a supersedeas bond in the sum of ₱30,000.00. Asuncion moved for the reconsideration of the order insisting on execution. The defendants filed the corresponding supersedeas bond. After the filing of several pleadings and a prolonged discussion of the legality and propriety of executing the judgment pending appeal, notwithstanding the filing of the supersedeas bond as required by the court in its special order, said court issued a second special order dated March 18, 1954, ordering the immediate execution of the judgment in spite of the filing of the supersedeas bond, but requiring plaintiff Asuncion to file a bond in the sum of ₱50,000.00, which she did. To give some idea of the reason prompting the trial court in ordering immediate execution we quote a paragraph of its order, to wit:

> "Therefore, in conclusion this Court is of the opinion and so hold that the fact that the appeal is frivolous and intended for the purpose of delay, and considering that the herein plaintiff is an old woman of 75 years, sickly and without any means of living, are all in the opinion of the Court strong grounds to justify the execution of the judgment in spite of the supersedeas bond, because the right of the plaintiff to live and to pursue her happiness are paramount rights which outweigh the security offered by the supersedeas bond."

Claiming that the appeal is not frivolous and that there is no good reason for ordering immediate execution of the judgment pending appeal because the appellee has the security of their supersedeas bond; but that on the other hand a premature execution would cause irreparable damage to them (appellants) should they finally win the case because said execution would mean the sale of extensive properties of the appellants, the latter have filed the present petition for certiorari to set aside the special order of March 18, 1954, on grounds of abuse of discretion and excess of jurisdiction.

Petitioners invoke the provisions of Rule 39, Section 2, which for purposes of ready reference, we reproduce below:

"SEC. 2. *Execution discretionary.* — Before expiration of the time of appeal, execution may issue, in the discretion of the court, on motion of the prevailing party with notice to the adverse party, upon good reasons to be stated in a special order. If a record on appeal is filed thereafter,the special order shall be included therein. Execution issued before the expiration of the time to appeal may be stayed upon the approval by the court of a sufficient supersedeas bond filed by the appellant, conditioned for the performance of the judgment or order appealed from in case it be affirmed wholly or in part."

They lay stress on the last sentence, particularly that phrase referring to stay of execution, whose provision, in their opinion is mandatory in the sense that upon the approval by the court of the supersedeas bond filed by appellants, the court has no choice and must stay execution.

We are favored with able briefs and memoranda filed by counsels for both parties, and after a careful study and consideration of the authorities and arguments contained in them, we have arrived at the conclusion that even after the filing of a supersedeas bond by an appellant, intended to stay execution, the trial court may in its discretion still disregard said supersedeas bond and order immediate execution provided that there are special and compelling reasons justifying immediate execution.

In the case of Caragao vs. Maceren, promulgated on October 17, 1952, this Court said:

"The general rule is that the execution of judgment is stayed by the perfection of an appeal. While provisions are inserted in the rules to forestall cases in which an executed judgment is reversed on appeal, the execution of the judgment is the exception, not the rule. And an execution may issue only 'upon good reasons stated in the order'. The ground for the granting of the execution must be good ground (Aguilos vs. Barrios, 22 Phil. 285). It follows that when the Court has already granted stay of execution, upon the adverse partly filing a supersedeas bond, the *circumstances* justifying execution in spite of the supersedeas bond *must be paramount;* they should *outweigh the security offered by the supersedeas bond.* In this case only *compelling reasons* of *urgency or justice* can justify the execution."

From the above quoted ruling one may gather that there are special cases and occasions where the surrounding circumstances are such as to point to and lead to immediate execution. We admit that such special cases and occasions are rare, but in our opinion the present case is one of them. Asuncion's need of and right to immediate execution of the decision in her favor amply satisfy the requirement of a paramount and compelling reason of urgency and justice, outweighing the security offered by the supersedeas bond.

Without necessarily anticipating the result of the appeal which involves, according to the trial court, the same issue raised and decided in Civil Case No. 135 between the same parties, one might venture to speculate and to say that as between the parties appellants and appellee, the odds are a little against the former. First, appellants have to convince the appellate court or courts that although nothing is said in the agreement between the parties (Exhibit F) about the palay which the defendants undertook to deliver yearly, as coming from the ricelands of Dr. de Leon in the province of Bulacan, still, that was the intention of the parties, this, in spite of the fact that the courts, trial and appellate, including this Tribunal, in Civil Case No. 135 have finally interpreted said agreement and decided against them; and secondly, and equally important, they must convince the appellate court or courts that they (appellants) may again raise this same question or issue before the courts in this case, involving as it does, the same parties. Because of this, the trial court in ordering immediate execution, considered the appeal frivolous and made for purposes of delay, which reasons we held in the case of Sawit et al. vs. Rodas, 73 Phil. 310 to be good reasons for ordering execution pending appeal.

Now, to justify execution in spite the filing of the supersedeas bond required by the trial court, we find added, weighty reasons, one of which is that if the execution of the judgment is to await the final decision of the case by the appellate court or courts, considering the age and state of health of appellee Asuncion Soriano, even if she won the case eventually, she may not be alive by then to enjoy her winnings.

It will be remembered that Asuncion obtained a judgment in the Bulacan court in 1947 ordering the herein defendants to pay to her the value of the deficiencies in palay deliveries for 1944, 1945, and 1946, but that judgment was not finally satisfied in cash until 1952, that is to say, a period of about five years after the judgment of the trial court in 1947. According to counsel for respondent Asuncion this was due to the numerous motions for reconsiderations and written oppositions of the defendants therein which he considered dilatory tactics. Petitioners De Leon in this case have appealed from the decision in favor of Asuncion in Civil Case No. 488. Considering the fact that the decision appealed from involves questions of fact such as the value of palay in the years 1947, 1948 up to March 1953, the appeal may have gone to the Court of Appeals, and it is not improbable that the case may further be appealed to this Tribunal. And if what happened in Civil Case No. 135, as regards the interval of about five years between the trial court's judgment in 1947 and the satisfaction thereof in 1952, is any indication, Asuncion may yet have to wait about four or five years before this case is finally terminated. And she is afraid that considering her delicate health and her age (she is now 75 years old) she may not live that long. We fully agree with her and her counsel. She is nearing the end of life's span. Of course, it is to be hoped that she may have many more years to live; but we all know that man's hopes and wishes on that point have little, if any effect.

If we examine the contents of the agreement (Exhibit F) particularly the period of time within which the palay deliveries are to be made, we will notice that it is only during Asuncion's life time. Says the agreement — "it is expressly stipulated that this annual payment of palay shall cease upon the death of the PARTY OF THE FIRST PART (Asuncion);" it further says that the right to said palay deliveries "shall not be transmissible to her heirs or to any other person." Clearly, the right is peculiarly personal, only for Asuncion, and only as long as she lived. In other words, the palay was intended in the nature of a life pension for her maintenance, support and enjoyment, and if that was the intention of the parties, it is evident that said purposes would be frustrated and the benefit to Asuncion intended would be futile and unavailing, if the palay deliveries are too long delayed and are to be deferred until after final decision of this case, which may be after her death. The case is not unlike that of a judgment for support and education of children. The money or property adjudged for support and education should and must be given presently and without delay because if it had to await the final judgment, the children may in the meantime have suffered because of lack of food or have missed and lost years in school because of lack of funds. One cannot delay the payment of such funds for support and education for the reason that if paid long afterwards, however much the accumulated amount, its payment cannot cure the evil and repair the damage caused. The children with such belated payment for support and education cannot as gluttons eat voraciously and unwisely, afterwards, to make up for the years of hunger and starvation. Neither may they enroll in several classes and schools and take up numerous subjects all at once to make up for the years they missed school, due to non-payment of the funds when needed. Neither can one say that it is perfectly fair and to delay the satisfaction of the judgment in favor of Asuncion even after her death because her heirs will inherit it anyway, because it is a fact that she has no direct heirs and she is living all alone without any near relatives. All these circumstances combine and make up a compelling and paramount reason to warrant immediate execution of the judgment despite the filing of the supersedeas bond. Far better that respondent-plaintiff Asuncion be allowed and granted the opportunity to receive and enjoy the palay she is entitled to under the agreement as interpreted by the courts, now, even at the inconvnience of

petitioners-defendants, but with the security of the ₱50,000-bond, than that she be required to await final judgment which may yet take a few years, and which for her may come too late.

In the foregoing considerations as to the necessity of immediate execution of the judgment, we have in mind and refer only to that part of the decision (paragraphs 1 and 2 of the dispositive part) regarding the value of the palay not delivered from 1947 to 1952, inclusive; the palay or the value thereof corresponding to the deficiencies in March 1953 and March 1954, and for the years thereafter, including the interest mentioned in paragraph 2. With respect to attorney's fees, as to the propriety of whose award and the amount thereof, has yet to be passed upon by the appellate court or courts, we feel that it should await the final decision in this case.

In view of the foregoing, the petition for certiorari is denied in part as regards execution of paragraphs 1 and 2 of the dispositive part of the trial court's decision, and as mentioned herein; it is in part granted as regards the payment of attorney's fees. No costs. The writ of preliminary injunction heretofore issued is dissolved.

Paras, C.J., Pablo, Bengzon, Padilla, Alex Reyes, Jugo, Concepcion, J.B.L. Reyes, J.J., concur.

Bautista Angelo and *Labrador,* J.J., did not take part.

II

Smith, Bell & Co., Ltd., Petitioner vs. Register of Deeds of Davao, Respondent, No. L-7084, October 27, 1954, *Pablo, J.*

CONSTITUTIONAL LAW; LEASE OF PRIVATE PROPERTIES TO ALIENS. — The Constitution and the Civil Code of the Philippines do not prohibit the lease of private properties to aliens for a period which does not exceed 99 years. The contract, the registration of which is the object of litigation, lasts 25 years only extendable for another 25 years; it does not reach 99 years. Therefore, it is in accordance with law and is valid.

Ross, Selph, Carrascoso & Janda for Petitioner.

Patrocinio Vega Quintain for Respondent.

DECISION

PABLO, *M.*:

La recurrente pide una orden perentoria contra el Registrador de Títulos de la ciudad de Davao para que registre el contrato de arrendamiento otorgado a su favor por la Atlantic Gulf & Pacific Co. of Manila.

Los hechos son los siguientes: La recurrente es una corporación extranjera, organizada de acuerdo con las leyes de Filipinas, con oficinas en Manila. En 9 de junio de 1953 la Atlantic Gulf & Pacific Co. of Manila, una corporación organizada de acuerdo con las leyes de West Virginia, Estados Unidos de América, con licencia para negociar en Filipinas, dió en arrendamiento a las recurrente el Lote No. 1241 del catastro de Davao. La claúsula de la escritura pertinente al caso es del tenor siguiento:

> "2. That the term of this lease shall be twenty five (25) years from the date hereof, subject to renewal or extension for another twenty-five (25) years, under such terms and conditions as the parties hereto may thereupon mutually agree. For the purposes of such renewal or extension, the LESSEE shall so convey in writing to the LESSOR at least ninety (90) days before the expiration of the lease."

En 13 de julio del mismo año la recurrente, por medio de su abogado, presentó la escritura de arrendamiento para su inscripción al Registrador de Títulos de Davao, el cual expresó sus dudas acerca de la procedencia del registro, teniendo en cuenta la circular No. 139 de la Oficina General de Registro de Terrenos; y si la recurrente insistía en el registro, dicho registrador elevaría el asunto en consulta a la 4.a sala del Juzgado de Primera Instancia de Manila. El abogado de la recurrente, creyendo que tardaría mucho tiempo una consulta al juzgado, acudió a la Oficina General de Registro de Terrenos, cuyo jefe, el Sr. Enrique Altavás, resolviendo la consulta, expidió el siguiente dictamen:

> "With reference to your letter of the 13th instant, inquiring as to whether or not the Register of Deeds of Davao was justified in refusing the registration of the lease agreement over a parcel of land executed by Atlantic, Gulf & Pacific Co. (American owned) in favor of your client, Smith, Bell & Co., Ltd., an alien corporation, for a period of 25 years with option to renew for another 25 years, I have the honor to quote hereunder the dispositive portion of the resolution of the Court of First Instance of Manila, 4th Branch, to Consulta No. 136 of the Register of Deeds of Camarines Sur, as follows:
>
> > "After a careful study of the facts stated in the abovementioned transcribed consulta, the undersigned is of the opinion that, until otherwise fixed by a superior authority, twenty-five years is a reasonable period of duration for the lease of a private agricultural land in favor of an alien qualified to acquire and hold such right, which has been recognized by the Supreme Court in its decision in the case of Krivenko vs. The Register of Deeds of Manila.'
>
> "In view thereof, the Register of Deeds of Davao, was justified in refusing the registration of the aforesaid lease as it is in contravention of the said resolution of the Court which has been circularized to all Registers of Deeds in our Circular No. 139 dated May 6, 1952."

El jefe de la Ofina General de Registro de Terrenos funda su opinión en una circular del Secretario de Justicia, que en parte dice así: "since it is ownership by aliens which is prescribed, the test in determining the reasonableness of the period should be whether the lease in effect amounts to a conferment of dominion on the lessee" so that the period of the lease should not be of "such a duration as to vest in the lessee the possession and enjoyment of land with the permanency which proprietorship ordinarily gives."

Fundándose en el párrafo 6 del articulo 1491, relacionado con el artículo 1646 del Código Civil de Filipinas, algunos contienden que los extranjeros que no pueden comprar bienes inmuebles por disposición constitucional (Krivenko contra Director de Terrenos) tampoco pueden obtenerlos en arrendamiento. En nuestra opinión, la contención carece de base por varias razones.

Para saber el alcance de estos tres artículos del nuevo Código Civil, investiguemos la razón por qué fueron adoptados. Dichos artículos dicen así:

"ART. 1646. The persons disqualified to buy referred to in articles 1490 and 1491, are also disqualified to become lessees of the things mentioned therein.

"ART. 1490. The husband and the wife cannot sell property to each other, except:

(1) When a separation of property was agreed upon *in*[1] *the marriage settlements;* or

(2) When there has been a judicial separation of property (in accordance with the provisions of Chapter VI, Title III, of this book) *under article* 191.

"ART. 1491. The following persons cannot acquire by purchase, even at a public or judicial auction, either in person or through the mediation of another:

(1) The guardian or PROTUTOR, the property of the person or persons who may be under his guardianship;

(2) Agents, the property whose administration or sale may have been entrusted to them, *unless the consent of the principal has been given;*

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[1] Las lineas subrayadas son adiciones al Codigo Civil antiguo, los que estan entre parentesis son las sustituidas y las que estan en letras mayusculas son las partes suprimidas.

(3) Executors *and administrators*, the property of the estate under administration;

(4) Public officers and employees, the property of the State or of any subdivision thereof, or *of any government owned or controlled corporation*, or of PUBLIC institution, the administration of which has been intrusted to them; this provision shall apply to judges and *government* experts who, in any manner whatsoever, take part in the sale;

(5) Justices, judges, prosecuting attorneys, clerks of superior and inferior courts, and other officers (of such courts) *and employees connected with the administration of justice*, the property and rights in litigation *or levied upon on execution* before the court within whose jurisdiction or territory they exercise their respective functions; this prohibition includes the act of acquiring by assignment and shall apply to lawyers, with respect to the property and rights which may be the object of any litigation in which they may take part by virtue of their profession.

ACTIONS BETWEEN CO-HEIRS CONCERNING THE HEREDITARY PROPERTY, ASSIGNMENT IN PAYMENT OF DEBTS, OR TO SECURE THE PROPERTY OF SUCH PERSONS, SHALL BE EXCLUDED FROM THIS RULE.

(6) . . *Any others specially disqualified by law.*

¿Por qué se prohibe la venta de bienes entre marido y mujer? Para impedir el fraude: evitar la simulación de venta, o que se ejerza indebida influencia en el otorgamiento de la misma en perjuicio de terceros.

La prohibición de los cinco casos del artículo 1491 se funda en principios de moralidad: El tutor, albacea o administrador no debe aprovecharse de la confianza depositada en él, comprando los bienes de la tutela, del albaceazgo o de la administración. Los agentes no deben tomar ventaja de su relación fiduciaria con el mandante, adquiriendo en compra la propiedad del mandante, a menos que éste lo haya consentido. Los funcionarios públicos no deben aprovecharse de las ventajas que les proporciona su cargo para comprar los bienes confiados a ellos para beneficio del público. Los magistrados, jueces, fiscales, escribanos y otros empleados relacionados con la administración de justicia tampoco deben hacer uso indebido de su cargo para adquirir los terrenos en litigio en su respectiva jurisdicción.

¿Se refiere el párrafo 6 del artículo 1491 a todas las personas y a todos los bienes en general, o solamente a ciertas personas que tienen relación fideicomisaria con los bienes cuya adquisición por compra se prohibe? Creemos que no se refiere a todas las personas en general, nacionales o extranjeros, sino solamente a aquellas personas a quienes, por las relaciones especiales que tienen con los bienes, no debe permitirse comprarlos. Y por eso dice: "Any others *specially* disqualified by law."

"It is a general rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

"This rule is commonly called the 'ejusdem generis' rule, because it teaches us that broad and comprehensive expressions in an act, such as 'and all others,' or 'any others,' are usually to be restricted to persons or things 'of the same kind' or class with those specially named in the preceding words. It is of very frequent use and application in the interpretation of statutes.

"Illustrations and Applications

"The rule of 'ejusdem generis' is properly applied to a statute exempting from taxation certain enumerated kinds of property and 'other articles,' the general term being strictly confined to the similitude of those specifically named." (Black on Interpretation of Laws, 2nd Ed., 203.)

Por eso el artículo 1646 dice que las personas descualificadas para comprar de acuerdo con los artículos 1490 y 1491 están también inhabilitadas para obtener en arrendamiento las cosas mencionadas allí (of the things mentioned therein).

Los miembros de la Comisión Codificadora y del Congreso saben al dedillo la prohibicion constitucional y el asunto de Krivenko. Si su intencion hubiera sido prohibir el arrendamiento a las personas descualificadas para comprar terrenos, el artículo 146 se hubiese redactada en esta forma: "The persons disqualified to buy agricultural lands, according to the Constitution, are also disqualified to become lessees of the same."

¿Por qué se adoptó el artículo 1646? Por la analogía que existe entre el contrato de venta y el de arrendamiento: Se transmite en el uno el dominio y en el otro el goce o uso de la cosa. Es verdad que hay similitud entre uno y otro; pero es sólo aparente, superficial. El arrendatario tiene al parecer los mismos derechos que el dueño; pero entre uno y otro existe una diferencia muy importante, sustancial, en cuanto al dominio. El arrendador no tiene la posesión de la cosa, pero conserva la propiedad, el dominio; el arrendatario goza del uso del inmueble nada más: no ejerce el derecho dominical.

El extranjero que compra un terreno se hace dueño, ejerce dominio sobre el mismo; pero el que obtiene arrendamiento no consigue más que la posesión o uso del terreno; no existe el peligro de que un arrendatario se convierta en dueño del terreno; el dominio lo conserva el arrendador. Un arrendamiento por cincuenta años no concede posesion permanente que ponga en peligro la seguridad del territorio; la posesión sólo tiene la duración estipulada por medio del contrato.

La base sobre que descansa la prohibición constitucional de venta a extranjeros es la necesidad de conservar el dominio sobre el patrimonio nacional; la Asamblea Constituyente quería retener en manos de los nacionales el dominio sobre los terrenos de propiedad privada para no poner en peligro la integridad de la nación. Imagínese por un momento la situación de Filipinas si el 70% de la propiedad inmueble estuviera bajo el dominio de los extranjeros Parte de la población tendría que remontarse o vivir en balsas sobre los inmundos esteros, lagos o mares. Habría una población flotante como en Hongkong. Los naturales en dicha colonia, en vez de vivir en casas, nacen, viven y mueren en "sampanes"; por falta de albergue, muchos duermen tiritando de frío en las acercas de edificios extranjeros. La isla era de los chinos; pero hoy, apenas se puede contar con los dedos a los chinos que conservan dominio sobre terrenos. Mientras los extranjeros prosperan y viven en la abundancia, los naturales se arrastran en la miseria, ni siquiera tienen un palmo de tierra en donde caer muertes. Ofuscados por el brillo del oro, se desprendieron de sus terrenos sin percatarse de que más tarde las monedas se escaparían de sus manos como aves de paso. Y todo porque no han tenido la provisión de conservar la propiedad bajo su dominio.

Prohibir el arrendamiento de bienes inmuebles en Filipinas por extranjeros es impedir ques sus dueños perciban el beneficio correspondiente. No tenemos estadísticas a la vista; pero no es exagerado decir que más de un 50% de las fincas comerciales en las ciudades de Filipinas están, mediante arrendamiento, ocupadas por extranjeros. Si se prohibiera el arrendamiento de inmuebles a extranjeros, quedarían vacantes muchos. No es difícil calcular el daño que causaría tal prohibición. El artículo 1, Título XIII de la Constitución, dispone:

> "Pertenecen al Estado todos los terrenos agrícolas, madereros y mineros del dominio público, las aguas, los minerales, el carbón, el petróleo y otros aceites minerales, todas las fuentes de energía potencial y cualesquiera otros recursos naturales de Filipinas; y su disposición, explotación, desarrolo o aprovechamiento se limitarán a los ciudadanos filipinos, o a las corporaciones o asociaciones, de cuyo capital, en un sesenta por ciento, por lo menos, fueren dueños dichos ciudadanos, con sujeción a cualesquier derecho, privilegio, arrendamiento o concesión que existie-

ren respecto a dichos recursos naturales en la fecha de la inauguración del Gobierno que se establece bajo esta Constitución. Con excepción de los terrenos agrícolas del dominio público, no serán enajenados los recursos naturales, y no se otorgará ninguna licencia, concesión o arrendamiento para la explotación, desarrollo o aprovechamiento de cualesquiera recursos naturales, por un período mayor de veinti-cinco años, prorrogable por otros veinticinco, excepto en cuanto al aprovechamiento de aguas para fines de riego, abastecimiento, o para pesquerías u otros usos industriales, que no sean la producción de energía, respecto a los cuales el uso provechoso podrá ser la medida y el límite de la concesión."

Si la Constitucion no prohibe el arrendamiento de terrenos públicos a ciudadanos extranjeros ¿por qué el Congreso va a prohibirles, por medio del Código Civil nuevo, el arrendamiento de los bienes de la propiedad privada? ¿Para que los propietarios no reciban la renta de sus fincas? El arrendamiento de terrenos públicos fomenta su desarrollo y los mejora. Si se limitase su arrendamiento solamente a los naturales, la mejora sería lenta. Tenemos un ejemplo: El área ganada al mar (Port Area) de Manila y Cebú se da en arrendamiento a cualquiera persona por 99 años, y al expirar el plazo, toda la mejora se convierte en propiedad del Estado. Con este sistema de arrendamiento muchas mejoras se han hecho en al área y al cabo del término ganará el gobierno las mejoras hechas sin invertir un solo céntimo. Otro: En la ciudad de Cebú, los extranjeros construyen edificios de concreto en lotes arrendados y al cabo de diez años las mejoras se convierten en propiedad de los dueños de dichos lotes. De suponer es que los congresistas y senadores cebuanos en particular y los miembros del Congreso en general tenían conocimiento de todo esto; el Congreso no podía haber prohibido el arrendamiento a extranjeros de bienes inmuebles. Ello retardaría la mejora del área ganada al mar y de los terrenos de propiedad privada en Cebú, una ciudad completamente arrasada por la última guerra.

En Zamboanga, Cagayán de Oro y Davao existen también espacios (para pier) disponibles para arrendamiento.

El contrato de venta o arrendamiento de terreno con título Torrens no obliga a terceras personas, a menos que esté inscrito; sólo obliga a las partes contratantes. Por eso, como medida de precaución, se ordena su inscripción.

El artículo 193 de la Ley No. 2711 y el artículo 57 de la Ley de Registro de Torrenos, disponen que es deber del Registrador de Título inscribir todas las escrituras relativas a terrenos registrados cuando la ley exige o permite su registro. La obligación del Registrador de Título de inscribir un contrato de arrendamiento es ministerial. (67 Phil., 222.)

Y, por último, el artículo 1643 del Codigo Civil de Filipinas dispone en parte lo siguiente: "x x x However, *no lease for more than ninety-nine years shall be valid.*"

El contrato, cuyo registro es hoy objeto de litigio, solamente dura 25 años, prorrogable en otros 25: no llega a 99 años. Por tanto, está de acuerdo con la ley, es válido: solamente es nulo el arrendamiento por más de 99 años.

Se ordena al Registrador de Títulos de la ciudad de Davao que registre el contrato de arrendamiento otorgado por la Atlantic Gulf & Pacific Co. a favor de la recurrente.

Bengzon, Jugo, Bautista Angelo, Concepción y J. B. L. Reyes, MM., están conformes.

Padilla y Montemayor, MM., están conformes con el resultado.

PARAS, *C.J., concurring*:

In the case of Alexander A. Krivenko vs. Register of Deeds, City of Manila, 44 O. G. (2) 471, this Court (at least the majority) held that aliens are disqualified from acquiring private agricultural land which includes private residential land. This ruling was based on section 5 of Article XIII of the Constitution, providing that "save in cases of hereditary succession, no private agricultral land shall be transferred or assigned except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain in the Philippines."

Article 1646 of the new Civil Code provides that the persons disqualified to buy referred in articles 1490 and 1491 are also disqualified to become lessees of the things mentioned therein; and article 1491, paragraph (6), disqualifies from acquiring by purchase, in addition to the persons enumerated in paragraphs (1) to (5) thereof, "any others specially disqualified by law." In the case at bar, the petitioner, an alien corporation, seeks to register a lease in its favor of a lot in Davao. Applied strictly, paragraph (6) of article 1491 may easily refer to all persons in general, who are disqualified by any law, and not merely to those who have confidential relations with the property to be purchased. If paragraph (6) simply provides "and others," the principle of *ejusdem generis* would apply. As the petitioner is disqualified from acquiring private agricultural land (which includes residential land) not only by a law but by the Constitution which is more than a law, it cannot hold in lease the lot in question. Even so, I concur in this decision, because it in effect is in conformity with my dissent in the Krivenko case.

Se concede el recurso.

III

Honorable Marciano Roque, Etc., Petitioners, vs. Pablo Delgado, et al., Respondents, No. L-6770, August 31, 1954, Paras, C.J.

1. INJUNCTIONS; APPEALS; DISCRETION OF TRIAL COURT TO RESTORE WRIT PENDING APPEAL OR IN ANTICIPATION OF APPEAL. — Under section 4, Rule 39 of the Rules of Court, when an appeal is taken from a judgment granting, dissolving or denying an injunction, the trial court, in its discretion, may make an order suspending, modifying, restoring, or granting such injunction during the pendency of the appeal. Although this provision speaks of an appeal being taken and of the pendency of the appeal, the court may restore the injunction before an appeal has actually been taken. As a matter of fact, there is authority to the effect that the trial court may restore a preliminary injunction in anticipation of an appeal.

2. ACTIONS; PARTIES; SEPARATION OF PARTY WHO IS A GOVERNMENT OFFICER; DISMISSAL IF NO SUBSTITUTION IS MADE. — Another reason why the present petition was dismissed, is that although the petitioner had ceased to hold the office in virtue of which he instituted the petition, no substitution was made in accordance with section 18 of Rule 3 of the Rules of Court.

First Assistant Solicitor General Ruperto Kapunan, Jr. and *Solicitor Pacifico P. de Castro* for petitioners.

Amador E. Gomez for respondents.

DECISION

PARAS, *C.J.*:

On September 6, 1952, the Acting Executive Secretary issued an order for the closure of a cockpit known as "Bagong Sabungan" located in barrio Calios, municipality of Sta. Cruz, province of Laguna, being only some 500 meters from the Seventh Day Adventist Church, in violation of Executive Order No. 318, series of 1941. On November 21, 1952, Pablo Delgado, Eugenio Zamora and Pio Manalo filed in the Court of First Instance of Laguna a petition for certiorari and prohibition, Civil Case No. 9616, against Hon. Marciano Roque as Acting Executive Secretary, Hon. M. Chipeco as Provincial Governor of Laguna, and Patricio Robeque as Municipal Secretary of Sta. Cruz, Laguna, praying for the issuance of a writ of preliminary injunction restraining said respondents from carrying out the order of closure above mentioned. On November 22,

1952, Judge Nicasio Yatco issued the corresponding writ. On March 6, 1953, a decision was rendered in Civil Case No. 9616, dismissing the petition for certiorari and prohibition and dissolving the writ of preliminary injunction. On April 23, 1953, the petitioners in Civil Case No. 9616 filed a motion, praying that under the provision of Rule 39, Section 4, of the Rules of Court, the writ of preliminary injunction issued on November 22, 1952, be restored, and on June 1, 1953, Judge Yatco granted the motion in the following order:

> "Acting upon the motion filed by Atty. Amador Gomez under date of April 23, 1953 and after hearing both counsel Atty. Gomez and Assistant Provincial Fiscal Mr. Nestor Alampay on the matter, and the consideration of the facts and the circumstances surrounding the case, the Court, in consideration of Rule 39, Section 4, of the Rules of Court, makes use of its discretion in ordering the suspension of the dissolution of the injunction during the pendency of the appeal of the judgment rendered by this Court in its decision of March 6, 1953, by thereby reinstating the writ of preliminary injunction pending appeal. The Court further took into consideration the importance of the case and the tense situation of the contending parties, at this stage of the proceedings. The Executive Secretary and all other authorities concerned are hereby instructed to abide by this Order, made effective upon receipt hereof, for the maintenance of the status quo."

The First Assistant Solicitor General, in representation of the Acting Executive Secretary, filed an urgent motion for reconsideration dated June 3, 1953, which was denied by Judge Yatco on June 11, 1953. On June 26, 1953, Hon. Marciano Roque, Acting Executive Secretary, through the First Assistant Solicitor General, instituted in this Court the present petition for certiorari with preliminary injunction against Pablo Delgado, Eugenio Zamora, Pio Manalo and Judge Nicasio Yatco of the Court of First Instance of Laguna, for the annulment of the order of June 1, 1953, issued in Civil Case No. 9616.

It is contended for the petitioner that the respondent Judge acted with grave abuse of discretion or in excess or lack of jurisdiction, because when the order restoring the writ of preliminary injunction was issued, there was no pending appeal. It appears, however, that in the petition dated April 23, 1953, filed in Civil Case No. 9616, it was expressly alleged that, in their projected appeal, the petitioners therein would in effect assail the correctness of the decision in said case. Section 4 of Rule 39 provides that "the trial court, however, in its discretion, when an appeal is taken from a judgment granting, dissolving or denying an injunction, may make an order suspending, modifying, restoring, or granting such injunction during the pendency of the appeal, upon such terms as to bond or otherwise as it may consider proper for the security of the rights of the adverse party." Although this provision speaks of an appeal being taken and of the pendency of the appeal, we cannot see any difference, for all practical purposes, between the period when appeal has been taken and the period during which an appeal may be perfected, since in both cases the judgment is not final. As a matter of fact there is authority to the effect that the trial court may restore a preliminary injunction in anticipation of an appeal. (Louisville & N. R. Co. et al. v. United States et al., 227 Fed. 273.)

It is also argued for the petitioner that at the time the order of June 1, 1953, was issued by the respondent Judge, the act sought to be enjoined had already been performed, the cockpit in question having been actually closed on May 24 and 31, 1953. In answer to this argument, it may be recalled that as early as April 23, 1953, the petitioners in Civil Case No. 9616 filed a petition to suspend the decision of March 6, 1953 and to restore the preliminary injunction previously issued, which petition was not resolved until June 1, 1953, with the result that, if there was any closure, it should be deemed to be without prejudice to the action the respondent Judge would take on said petition dated April 23.

Another contention of the petitioner is that the respondent Judge was inconsistent in holding in his decision of March 6, 1953, that the location of the cockpit is in open violation of Executive Order No. 318, and in subsequently restoring the writ of preliminary injunction that would allow the continued operation of said cockpit. It is significant that, under section 4 of Rule 39, the respondent Judge is vested with the discretion to restore the preliminary injunction; and when we consider that the order of June 1, 1953, took into account "the facts and the circumstances surrounding the case," as well as "the importance of the case and the tense situation of the contending parties, at this stage of the proceedings," in addition to the fact that in his order of June 11, 1953, denying the motion for reconsideration filed by the First Assistant Solicitor General on June 3, the respondent Judge expressly stated that he acted "on the basis of the new facts and circumstances registered on record on the date of the hearing" of the petition of April 23 filed by the petitioners in Civil Case No. 9616, we are not prepared to hold that the respondent Judge had acted with grave abuse of discretion. The allegation in the herein petition that the petitioner was not notified of the hearing of the petition of April 23, is now of no moment, since the petitioner, through counsel, had filed a motion for the reconsideration of the order of June 1, 1953.

Another reason, though technical, why the present petition should be dismissed, is that although the petitioner, Hon. Marciano Roque, had ceased to hold the office in virtue of which he instituted the petition, no substitution has been made in accordance with section 18, Rule 3, of the Rules of Court.

Wherefore, the petition is hereby denied, and it is so ordered without costs.

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

IV

Federico Magallanes, et al., Petitioners, vs. Honorable Court of Appeals, et al., Respondents, No. L-6851, September 16, 1954, Paras, C.J.

1. PATERNITY AND FILIATION; SUCCESSION; NATURAL CHILDREN NOT LEGALLY ACKNOWLEDGED NOT ENTITLED TO INHERIT. — Natural children not legally acknowledged are not entitled to inherit under article 840 of the old Civil Code.

2. ID.; ID.; ID.; ACTION FOR COMPULSORY RECOGNITION MUST BE BROUGHT WITHIN FOUR YEARS AFTER DEATH OF NATURAL FATHER. — The action for compulsory recognition must be instituted within four years after the death of the natural father.

Vicente Castronuevo, Jr. for petitioner.

Diosdado Caringalao for respondents.

DECISION

PARAS, *C.J.*:

In Civil Case No. 1264 of the Court of First Instance of Iloilo, Maximo Magallanes, et al., plaintiffs vs. Federico Magallanes, et al., defendants, a decision was rendered on May 28, 1951, with the following dispositive part:

> "In view of the foregoing considerations, the Court finds that the preponderance of evidence is that the above properties are of Justo Magallanes and that both plaintiffs and defendants are the legal heirs of Justo Magallanes, therefore, they should share proportionately in the properties in question. Each child of Justo Magallanes from both wives is entitled to 1/7 of the undivided share of the land in question. Inasmuch as the plaintiffs paid P220.00 for the mortgages as shown in Exhibits D and C, the other heirs are obliged to reimburse proportionately the said amount of P220.00 to the plaintiffs."

Upon appeal by the defendants to the Court of Appeals, the latter Court rendered on April 22, 1953, a decision the dispositive

part of which reads as follows:

"Wherefore, the decision appealed from is hereby modified in the sense that each of the plaintiffs shall participate in the proportion subject of litigation in the proportion of one-half (1/2) of the share that corresponds to each of the defendants. The latter are further sentenced to pay jointly and severally to plaintiffs said sum of P220.00 that they spent for the redemption of the parcels of land under Tax Declarations Nos. 21719 (Exh. D) and 2153 (Exh. G). In the meantime this is not done, the properties mentioned in Exhibits D and G will answer for the payment of this sentence. Without pronouncements as to costs."

Not satisfied with the decision of the Court of Appeals, the defendants have filed the present petition for its review on certiorari.

The findings of fact of the Court of Appeals upon which its decision rests, quoted verbatim, are as follows:

"(a) That the properties under litigation were not of Damiana Tupin but of her husband, the late Justo Magallanes;

"(b) That plaintiffs Maximo, Gaspar, Baltazar and Bienvenido, surnamed Magallanes, had redeemed from their vendees *a retro* Filomeno Gallo and Soledad Canto (Exh. D) and Jose Capanang (Exh. G) the parcels of land under Tax 21719 and 2153 mentioned in said exhibits and paid for such redemptions the sums of P100.00 and P120.00, respectively;

"(c) That Enrica Tagaduar, alleged mother of the plaintiffs, did not marry Justo Magallanes in the year 1918 after the death of his first wife Damiana Tupia occurred in 1915. We arrived at this conclusion not only because Justo's sister Aleja Magallanes positively declared 'that until the death of my brother (Justo) he was never married again,' but also because Magallanes himself declared in various documents that he executed in his lifetime and up to 1938, that he was a widower (Exhs. B, C and D), and although it is true that in 1939 his civil status appearing on Exhibit F is that of 'married' (without stating to whom he was married then), it does not follow, even if the statement of such status was not due to a clerical error, that he was precisely married to Enrica Tagaduar who did not pretend that she married him between 1936 and 1938, but in 1918. Plaintiffs-appellees state that according to our jurisprudence:

> 'A man or woman who are living in marital relations, under the same roof, are *presumed* to be legitimate spouses, united by virtue of a legal marriage contract, and this presumption can only be rebutted by sufficient contrary evidence.' (U.S. vs. Uri et al., 34 Phil. 653; U.S. vs. Villafuerte, 4 Phil. 559).

but this doctrine only establishes a presumption that in the case at bar was rebutted by the testimony of Aleja Magallanes and by documents executed by Justo Magallanes himself. In this case it is not a matter of imagining what might have happened to the plaintiffs, as the trial court does without adequate support in the record. Furthermore, and even considering that the plaintiffs are the natural children of Justo Magallanes and that sometime between 1936 and 1939 Justo Magallanes married Enrica Tagaduar, such marriage could not have the effect of automatically legitimizing the children both prior to the marriage, because our Civil Code provides:

> 'Art. 121 Children shall be considered as legitimized by a subsequent marriage *only* when they have been acknowledged by the parents before or after the celebration thereof.'

and the record fails to adequately show that such acknowledgment ever took place.

"(d) That the plaintiffs are the natural children of the late Justo Magallanes by Enrica Tagaduar. The defendants do not deny their status as such and it can be inferred from the records that they enjoyed such status during the lifetime of their deceased father."

Petitioners' main contention is that the Court of Appeals erred in holding that the respondents Maximo, Gaspar, Baltazar and Bienvenido Magallanes, as mere natural children of the deceased Justo Magallanes, without having been legally acknowledged, are entitled to inherit under article 840 of the old Civil Code, which reads as follows:

> "When the testator leaves legitimate children or descendants, and also natural children, legally acknowledged, each of the latter shall be entitled to one-half of the portion pertaining to each of legitimate children who have not received any betterment, provided that it may be included within the freely disposable portion, from which it must be taken, after the burial and funeral expenses have been paid.
>
> "The legitimate children may pay the portion pertaining to the natural ones in cash, or in other property of the estate, at a fair valuation."

Petitioners' contention is tenable. We are bound by the finding of the Court of Appeals in its decision that said respondents are the natural children of Justo Magallanes, that the petitioners do not deny their status as such, and that it can be inferred from the records that they enjoyed such status during the lifetime of their deceased father. Nonetheless, we are also bound by its finding that the record fails to adequately show that said respondents were ever acknowledged as such natural children. Under Article 840 of the old Civil Code, above quoted, the natural children entitled to inherit are those legally acknowledged. In the case of Briz vs. Briz, 45 Phil. 763, the following pronouncement was made: "x x x the actual attainment of the status of a legally recognized natural child is a condition precedent to the realization of any rights which may pertain to such child in the character of heir. In the case before us, assuming that the plaintiff has been in the uninterrupted possession of the status of natural child, she is undoubtedly entitled to enforce legal recognition; but this does not in itself make her a legally recognized natural child." It being a fact, conclusive in this instance, that there was no requisite acknowledgement, the respondents' right to inherit cannot be sustained.

The respondents cannot demand that this suit be considered a complex action for compulsory recognition and partition, under the authority of Briz vs. Briz, *supra*, and Lopez vs. Lapez, 68 Phil. 227, for the reason that the action was not instituted within the four years following the death of the alleged natural father (Art. 137, old Civil Code; Art. 285, New Civil Code). According to the decision of the Court of Appeals, the father, Justo Magallanes, died in 1943, and the present action was instituted seven years later in 1950.

Wherefore, the decision of the Court of Appeals is hereby motified by eliminating therefrom the ruling that the respondents Maximo, Gaspar, Baltazar and Bienvenido Magallanes are entitled to inherit from the deceased Justo Magallanes in the proportion of one half of the share that corresponds to each of the petitioners Federico, Fermin and Angel Magallanes. So ordered without costs.

Pablo, Bengzon, Padilla, Montemayor, A. Reyes, Jugo, Bautista Angelo, Concepcion and *J. B. L. Reyes, J.J.*, concur.

V

Tomas Bagalay, Plaintiff-Appellant, vs. Genaro Ursal, Defendant-Appellee, No. L-6445, July 29, 1954, Padilla, J.

DAMAGES; CLAIM FOR DAMAGES UNDER ARTICLE 27 OF THE CIVIL CODE; PARTY ENTITLED TO DAMAGES ONLY WHEN PUBLIC SERVANT REFUSES OR NEGLECTS TO PERFORM HIS OFFICIAL DUTY WITHOUT CAUSE. — Article 27 of the Civil Code which authorizes the filing of an action for damages contemplates a refusal or neglect without

just cause by a public servant or employee to perform his official duty which causes material suffering or moral loss. In the case at bar, plaintiff is not entitled to moral damages because the defendant did not refuse nor did he neglect to perform his official duty but on the contrary he performed it.

Numeriano G. Estenzo for plaintiff and appellant.

City Fiscal Jose L. Abad and First Assistant City Fiscal Honorato Garciano for defendant and appellee.

DECISION

PADILLA, *J.*:

An action was brought to recover moral damages in the sum of ₱10,000 and ₱2,500 for attorney's fees and costs. For cause of action the plaintiff alleges that the defendant, in his capacity as City Assesor of Cebu, wrote and mailed to him a letter by which he was informed that he was delinquent in the payment of realty tax from 1947 to 1951 on a parcel of land assessed at ₱1,800, amounting to ₱98.45 including penalties, and that unless the same be paid on 9 May 1952 the real property would be advertised for sale to satisfy the tax and penalty due and expenses of the auction sale; that the letter caused him mental anguish, fright, serious anxiety, moral shock and social humiliation; besmirched his reputation; wounded his feelings, all of which the plaintiff fairly estimates to be ₱10,000. A motion to dismiss the complaint on the ground that it does not state a cause of action was granted. A motion for reconsideration of the order of dimsissal was denied. Hence this appeal.

Laying aside the other unimportant point as to whether the letter was addressed to Tomas Bacalay and not to the plaintiff surnamed Bagalay and granting that it was addressed and mailed to the latter, still the facts pleaded in the complaint, admitting them to be true, do not entitle him to recover the amount of moral damages he claims to have suffered as a result of the writing and mailing of the letter by the defendant in his official capacity and receipt thereof by the plaintiff because the former has done nothing more than to write and mail the letter. There is no allegation in the complaint that the amount due for the realty tax and penalty referred to in the defendant's letter complained of had been paid by the plaintiff. Article 27 of the Civil Code which authorizes the filing of an action for damages, relied upon by the plaintiff, contemplates a refusal or neglect without just cause by a public servant or employee to perform his official duty which causes material suffering or moral loss. The provisions of the article invoked by the plaintiff do not lend support to his claim and contention, because the defendant did not refuse nor did he neglect to perform his official duty but on the contrary he performed it. All the moral damages the plaintiff claims he has suffered are but the product of oversensitiveness.

The order appealed from is affirmed, with costs against the plaintiff.

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

VI

Pio S. Palamine, Sulpicio Udarbe, Alfonso Sagado, Hipolito Exclise, Ireneo Sulita, Melecio Damasing, and Ludhero Baloc, Petitioners, vs. Rodrigo Zagado, Metrano Palamine, Brigido Canales, Dominador Acodo, Gualberto Saforteza, Respondents, G. R. No. L-6901, March 5, 1954, Bengzon, J.

ADMINISTRATIVE LAW; REMOVAL OR DISMISSAL OF CHIEF AND MEMBERS OF POLICE FORCE OF A MUNICIPALITY. — The chief and members of the police force of a municipality cannot be dismissed simply in accordance "with the new policy of the present administration," without charging and proving any of the legal causes specifically provided in Republic Act 557.

Tañada. Pelaez & Teehankee for petitioners.

Provincial Fiscal Pedro D. Melendez for respondents.

DECISION

BENGZON, *J.*:

The petitioners were on June 12, 1953, the chief and members of the police force of Salay, Misamis Oriental. On that date they were removed from the service by the respondent Rodrigo Zagado as the acting mayor of the same municipality. The other respondents are the persons subsequently appointed to the positions thus vacated.

This litigation was instituted without unnecessary delay, to test the validity of such removals and appointments, the petitioners contending they were illegal, because contrary to the provisions of section 1, Republic Act No. 557, which reads in part as follows:

> "Members of the provincial guards, city police and municipal police shall not be removed and, except in cases of resignation, shall not be discharged except for misconduct or incompetency, dishonesty, disloyalty to the Philippine Government, serious irregularities in the performance of their duties, and violation of law or duty, x x x"

There is no question that on June 12, 1953 each of the petitioners received from the respondent Rodrigo Zagado a letter of dismissal couched in these terms:

> "I have the honor to inform you that according to the new policy of the present administration, your services as Municipal Police, this municipality will terminate at the opening of the office hour in the morning of June 13, 1953, and in view hereof, you are hereby respectfully advised to tender your resignation effective immediately upon receipt of this letter."

There is also no question that on June 14, 1953 said respondent appointed the other respondents to the vacant positions, which the latter assumed in due course and presently occupy.

The respondents' answer, without denying the letters of dismissal, alleges that Acting Mayor Zagado had dismissed the petitioners "with legal cause and justification" and that "charges have been preferred against the said petitioners".

What that legal cause is, the pleading does not disclose. What the preferred charges were, we do not know. Whether they are charges of the kind that justify investigation and dismissal, respondents do not say. And when the controversy came up for hearing, none appeared for respondents to enlighten the court on such charges or the outcome thereof.

Hence, as the record now stands, the petitioners appear to have been dismissed simply in accordance "with the new policy of the present administration" as avowed in the letters of dismissal. Probably that is the "legal cause" alleged by respondents. But they forget and disregard Republic Act 557, inasmuch as no misconduct or incompetency, dishonesty, disloyalty to the Government, serious irregularity in the performance of duty or violation of law has been charged and proven against the petitioners. The Legislature in said statute has wisely expressed its desire that membership in the police force shall not be forfeited thru changes of administration, or fluctuations of "policy", or causes other than those it has specifically mentioned.

Reinstatement is clearly in order[1].

Wherefore, judgment is hereby rendered in favor of the petitioners, commanding the respondent Acting Mayor Rodrigo Zagado to reinstate them to their respective positions, and ordering the other respondents to vacate their places. Costs against respondents. So ordered.

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

Petitioners reinstated.

1 Mission et al vs. Del Rosario, G. R. No. L-6754, Feb. 26, 1954; Manuel vs. De la Fuente, 48 Of. Gaz., 4829.

VII

National Organization of Laborers and Employees (NOLE), Petitioners, vs. Arsenio Roldan, Modesto Castillo, and Juan Lanting, Judges of Court of Industrial Relations; Rizal Cement Co., Inc., Respondents, No. L-6888, August 31, 1954, Montemayor, J.

EMPLOYER AND EMPLOYEE; DISMISSAL FROM EMPLOYMENT AFTER EMPLOYEE HAD BEEN ACQUITTED IN CRIMINAL CASE. — The acquittal of an employee in a criminal case is no bar to the Court of Industrial Relations, after proper hearing, making its own findings, including the finding that the same employee was guilty of acts inimical to the interests of his employer and justifying loss of confidence in him by said employer, thereby warranting his dismissal or the refusal of the company to reinstate him.

Enage, Beltran and *Ramon T. Garcia* for petitioner.
Bausa & Ampil for respondent Rizal Cement Co., Inc.

D E C I S I O N

MONTEMAYOR, *J.*:

This is a petition to review on certiorari the order of the Court of Industrial Relations (CIR) dated January 5, 1953, signed by an associate Judge thereof, and the resolution of March 30, 1953, signed by the majority of the Judges thereof, denying the motion for reconsideration. The facts in the case are not disputed and only questions of law as we understand the petition are involved in this appeal.

Prior to March 12, 1952, the Rizal Cement Co., Inc., a corporation, had a factory and a compound in Binañgonan, Rizal, where cement was being manufactured. Over 200 employees were working in said factory. Most, if not all of them, belonged to the National Organization of Laborers & Employees (NOLE), a labor union of which Tarcilo Rivas was the President and Alberto Tolentino a member. On March 12, 1952, because of the supposed failure of the cement company to grant certain demands of the laborers, such as increase in salaries, vacation leave and accrued leave with pay, a strike was declared. The strikers numbering about 200, working in three shifts of about seventy men, maintained a picket line near and around the compound of the cement company and for their convenience a big tent was put up with cots in it where the strikers and their leaders could rest or sleep between shifts.

The following day the cement company filed a petition with the CIR praying that the strikers be ordered to go back to their work, and that the strike be declared illegal. At the suggestion of the CIR, an amended petition docketed as Case 676-V(3) was filed on March 15th by including as party-respondent the NOLE, and the case was set for hearing on March 18th. On that date a temporary settlement was arrived at between the cement company and the strikers to the effect that the former granted to the laborers a 7% general increase in their salaries or wages and fifteen days sick and fifteen days vacation leaves with pay, and shortly before March 20th all the strikers returned to work and with the exception of Rivas and Tolentino were admitted by the cement company. The reason for the non-admission of Rivas and Tolentino was that they had in the meantime been charged with illegal possession of hand grenades found under one of the cots inside the tent of the strikers, in a criminal case before the Court of First Instance of Rizal.

In July 1952, Rivas and Tolentino were acquitted by the Rizal Court of the charges of illegal possession of hand grenades, and armed with this judgment of acquittal, the two men through their union NOLE, filed an urgent motion in the CIR docketed as Case 676-V(5), praying for their reinstatement with the cement company, with backpay. The cement company opposed the motion. The two cases 676-V(3) and 676-V(5) were heard jointly by the CIR, after which it rendered a single order, that of January 5, 1953, now sought to be reviewed.

Despite the judgment of acquittal of Rivas and Tolentino on the ground that their guilt had not been established to the satisfaction of the trial court, or in other words, that their guilt had not been proven beyond reasonable doubt, the CIR made its own finding as to the relation or connection of Rivas and Tolentino with the three hand grenades in question, resulting in the CIR being convinced that these three hand grenades were illegally possessed and intended to be used by Rivas and Tolentino to blast the blasting cap and dynamite storage or magazine of the cement factory within the compound, in relation with the strike. Instead of making a resume of the findings of fact of the CIR and because by law and by established jurisprudence we may not disturb or modify said findings except where there is complete absence of evidence to support the same, we are reproducing that part of the order appealed from containing said findings, including the dispositive part thereof:

"On March 12, 1952, a strike was declared by the workers of petitioner in its factory at Binañgonan, Rizal; that due to said strike, the Armed Forces of the Philippines sent a group of soldiers to maintain peace and order therein. Among these soldiers are Sgt. Angel Huab of the Army and Sgt. Edilberto Buluran of the Constabulary. On March 16, 1952, at about 6:00 o'clock in the morning, Sgt. Huab saw Alberto Tolentino inside the tent occupied by the strikers, picking up three hand grenades and putting them inside a paper bag. Sgt. Huab got scared when he saw Tolentino walk out of the tent with the hand grenades. At this instant, Sgt. Huab ordered a policeman of the petitioner to overtake and stop Tolentino which was done. Thereupon, Sgt. Huab questioned Tolentino who readily admitted that he was carrying said hand grenades which were in a paper bag because he was ordered by Tarcilo Rivas to blast the dynamite storage of the Rizal Cement Factory. Sgt. Huab, being a member of the Army, without authority to investigate the case or cases of this nature, brought Tolentino inside the compound of petitioner and there surrendered him with the hand grenades to Sgt. Edilberto Buluran of the PC. On the strength of the statement of Tolentino implicating Tarcilo Rivas in connection with the hand grenades, Sgt. Buluran brought the two (Tolentino and Rivas) to the PC Headquarters in Pasig, Rizal, for further investigation.

"At the PC Headquarters of Rizal, Rivas and Tolentino were investigated by Sgt. Buluran, Lt. Del Rosario and Lt. Ver. Antonio Antiporda, admittedly the adviser or liaison man of the union to which Rivas and Tolentino belong, i.e., the Federation of Free Workers (FFW), was also investigated by the PC officers on March 16, 1952. The three of them, Antiporda, Rivas and Tolentino, then gave separate written statements to the PC investigating officers which, on March 17, 1952, were sworn to by each of them in the presence of each other and in the presence of the attesting witnesses before Nicanor P. Nicolas, Provincial Fiscal of Rizal, at the latter's office at Pasig, Rizal, Exhibits "AA-V(3)", "CC-V(3)", and FF-V(3)", respectively. The statement of Antonio Antiporda is not disputed. Neither is there any dispute as regards the correctness and veracity of the written confession of Tarcilo Rivas who admitted to the Court that he signed the same voluntarily.

"Respondent NOLE, however, endeavored to show that Exhibit "FF-V(3)", which is the statement of Alberto Tolentino, was signed by him under duress. Tolentino stated during the hearing that he signed said document because Sgt. Buluran was swinging up and down his revolver. Tolentino admitted, however, that Sgt. Buluran did not say or hint that he would hurt him (Tolentino) if he did not sign said statement. Tolentino's demeanor on the witness stand, coupled with the uncontradicted evidence that he swore to and signed his written statement before the Provincial Fiscal after the latter read to him said statement in the presence not only of Antiporda but also of Tarcilo Rivas, Lt. Ver and the attesting witnesses, shows that his (Tolentino's) statement was given voluntarily. The written statement of Antiporda, who was not presented even if only to explain or deny the same, supports also this finding of the Court. Besides, there is no reason, and no motive was shown, why Sgt. Buluran of the PC should threaten Tolentino to sign said statement.

"Tolentino admitted in his written statement, Exhibit "FF-V (3)" that when he was arrested on the morning of March 16, 1952, he was on his way to execute the order given to him by Tarcilo Rivas, President of NOLE, to blast the dynamite storage of the petitioner company. But when Tolentino took the witness stand, he stated that he was on his way to throw said hand grenades into the sea, in obedience to the order of Tarcilo Rivas. The Court is at a loss to comprehend this excuse of Tolentino. It was not explained why, instead of passing along the trail leading to the sea, Tolentino followed a path that brought him right into the edge of the compound where he was stopped in the direction of the dynamite and blasting cap storage of the petitioner's factory. Why did he not inform the Police, the Philippine Constabulary or the Army who were there for security purposes, particularly Sgt. Huab of the Army, who was only 5 to 15 meters away from where he picked up the hand grenades? Furthermore, this testimony of Tolentino that he was ordered by Rivas to throw the hand grenades into the sea runs counter to the written statement of Tarcilo Rivas (Exh. "AA-V(3)").

"Tarcilo Rivas also endeavored to extricate himself from his written statement, Exhibit "AA-V(3)". Rivas categorically stated that he ordered Tolentino to surrender the hand grenades to the Philippine Constabulary. This cannot be true because Tolentino was apprehended 300 meters away from the tent and, according to Rivas himself, eight or nine soldiers were around the place besides Sgt. Huab who was only 5 to 15 meters away from the tent. But Rivas claims that perhaps Tolentino did not hear his directive, Exhibit "AA-V(3)". The Court cannot accept this claim of Rivas, because if this were true, Rivas could have easily told the Army and PC soldiers about the hand grenades inside the tent if he was afraid to pick them up instead of ordering Tolentino to pick and surrender them to the PC. Again, Rivas should have called Tolentino back when the former saw Tolentino walked towards the dynamite storage of petitioner and away from the soldiers, if his instructions were really to surrender the hand grenades to the soldiers. What Rivas and Tolentino failed to do are the most natural things that anyone in their place would have done under the circumstances, to be consistent with their pretensions. What is more strange is that, apparently, none of the two hundred striking workers of the petitioner who occupied, used and had control of the tent in shifts of seventy (70), noticed who placed the hand grenades and their existence under a cot inside the tent until the morning of March 16, 1952, when Rivas told Tolentino to pick them up.

"In passing, it may be stated that the hand grenades were brought to the Court and, according to the testimony of Lt. Ver, they are live and unexploded and that they are not of the army type as they show signs of having been buried for some time.

"The reason why Rivas and Tolentino did not report to the PC and/or Army soldiers the existence of the hand grenades inside the tent is obvious. The directive of Rivas, according to the written statement of Tolentino, to blast the dynamite storage, coupled with the fact that he (Tolentino) was apprehended at the edge of the compound in the direction of the dynamite storage with the hand grenades in his possession, show very clearly the plan to blast said dynamite storage of the company in order to compel it to recognize the respondent NOLE.

"Indeed, it was only by acts independent of their own voluntary desistence that they were prevented from consumating their plan to blast and destroy the dynamite and blasting cap storage of the company by means of the hand grenades. This Court and the Supreme Court, in a number of cases, have held that when the purpose of a strike is to cause destruction of property and/or the means employed to uphold and maintain it is unlawful, the strike is illegal.

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"IN VIEW OF ALL FOREGOING CONSIDERATIONS, the Court believes and so holds, that the strike declared on March 12, 1952, by the workers of the Rizal Cement Company in its factory at Binañgonan, Rizal, is illegal. As a consequence, although the strike was voted for and approved by the workers only Tarcilo Rivas and Alberto Tolentino, who committed acts inimical to the interest of their employer, should be held responsible for the illegal strike and, therefore, their petition for reinstatement should be, as it is hereby, denied."

The main legal question involved in the present appeal, which we are called upon to determine is, whether or not the Rizal Court judgment of acquittal of Rivas and Tolentino of the charges of illegal possession of hand grenades bound the CIR and barred it from holding its own hearing in Case 676-V(5), thereafter making its own findings, including the finding that the two men had illegal possession of said hand grenades because with them they intended, even attempted to blast the dynamite storage of the cement company, their employer, which would have been an act of sabotage, and in finally declaring said two employees ineligible and unworthy of reinstatement in their posts abandoned by them when they went on strike.

In the case of National Labor Union vs. Standard Vacuum Oil Co., 40 O.C. 3503, this Tribunal said that —

"The conviction of an employee in a criminal case is not indispensable to warrant his dismissal by his employer. If the Court of Industrial Relations finds that there is sufficient evidence to show that the employee has been guilty of a breach of trust, or that the employer has ample reason to dismiss such employee x x x. It is not necessary for said court to find that an employee has been guilty of a crime beyond reasonable doubt in order to authorize his dismissal."

By a parity of reasoning, we hold that the acquittal of an employee in a criminal case is no bar to the CIR, after proper hearing, finding the same employee guilty of acts inimical to the interests of his employer and justifying loss of confidence in him by said employer, thereby warranting his dismissal or the refusal of the company to reinstate him. The reason for this is not difficult to see. The evidence required by law to establish guilt and to warrant conviction in a criminal case, substantially differ from the evidence necessary to establish responsibility or liability in a civil or non-criminal case. The difference is in the amount and weight of evidence and also in degree. In a criminal case, the evidence or proof must be beyond reasonable doubt while in a civil or non-criminal case, it is merely preponderance of evidence. In further support of this principle we may refer to Article 29 of the new Civil Code (Republic Act 386) which provides that when the accused in a criminal case is acquitted on the ground of reasonable doubt, a civil action for damages for the same act or omission may be instituted where only a preponderance of evidence is necessary to establish liability. From all this, it is clear that the CIR was justified in denying the petition of Rivas and Tolentino for reinstatement in the cement company because of their illegal possession of hand grenades intended by them for purposes of sabotage in connection with the strike on March 16, 1952.

The second question involved is whether or not the strike declared on March 12, 1952, maintained up to about March 20th when the strikers, with the exception of Rivas and Tolentino, returned to work and were admitted by the cement company, was legal. The majority of the Justices of this Court are not inclined to pass upon and determine this question for the reason, that among others, it seems to be moot. It will be remembered that as a result of the strike and evidently to induce the strikers to return to work the cement company had granted a general increase of 7% in their wages as well as 15 days vacation leave and 15 days sick leave, with pay, which grants or concessions still obtain and undoubtedly will continue. Moreover, as may be seen from the dispositive part of the order of the CIR of January 5, 1953, although the CIR declared the strike illegal, nevertheless it held Rivas and Tolentino as the only two responsible for the said illegal strike. The inference is that the rest of the strikers now working with the cement company and enjoying the concession granted them will not be held responsible

for the illegal strike, and that said strike cannot in any way affect their present status as laborers or any demands by them either pending or future. With this understanding, we decline to pass upon the legality or illegality of the strike declared on March 12, 1952, against the cement company, regarding the same as immaterial, if not moot.

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

Paras, C.J., Pablo, Bengzon, Padilla, Alex Reyes, Bautista Angelo, Jugo, Labrador, Concepcion and *J. B. L. Reyes, J.J.*, concur.

VIII

Urbano Casillan, Petitioner-Appellee, vs. Francisca E. Vda. De Espartero, et al., Oppositor-Appelants, No. L-6902, September 16, 1954, Reyes, A., J.

LAND REGISTRATION; JURISDICTION OF LAND REGISTRATION COURT TO ORDER RECONVEYANCE OF PROPERTY ERRONEOUSLY REGISTERED IN ANOTHER'S NAME; REMEDY OF LANDOWNER. — The Court of First Instance, in the exercise of its jurisdiction as a land registration court, has no authority to order a reconveyance of a property erroneously registered in another's name. The remedy of the landowner in such a case should the time allowed for the reopening of the decree have already expired — is to bring an ordinary action in the ordinary courts of justice for reconveyance, or for damages if the property has passed into the hands of an innocent purchaser for value.

Manuel G. Alvarado for the oppositors and appellants.
Manuel G. Manzano for petitioner and appellee.

D E C I S I O N

REYES, A., *J.*:

On December 19, 1950, Urbano Casillan filed a verified petition in the Court of First Instance of Cagayan in Cadastral Case No. 26, Record No. 2, G.L.R.O. No. 1390, alleging that he was the owner of Lot No. 1380, filed a claim therefor in said case and paid all cadastral costs, but that by mistake title was issued to Victorino Espartero, who never possessed or laid claim to the said lot. Petitioner, therefor, prayed that "in the interest of equity and under Section 112 of Act 496," the court order the heirs of Victorino Espartero — the latter having already died — to reconvey the lot to the petitioner, or merely order the correction of the certificate of title by substituting his name for that of Victorino Espartero as registered owner.

Opposing the petition, the heirs of Victorino Espartero filed a motion to dismiss on the ground, among others, that section 112 of Act 496 did not authorize the reconveyance or substitution sought by petitioner; but the court declared the section applicable. And having found, after hearing, that the lot belonged to petitioner and that title thereto was issued in the name of Victorino Espartero as a consequence of a clerical error in the preparation of the decree of registration, the court ordered the reconveyance prayed for. From this order, oppositors have appealed to this Court and one of the questions raised is that section 112 of Act 496 did not authorize the lower court to order such reconveyance.

Stated another way, appellants' position is that the Court of First Instance, in the exercise of its jurisdiction as a land registration court, had no authority to order a reconveyance in the present case. The appeal thus raises a question of jurisdiction.

In view of our decision in the case of Director of Lands vs. Register of Deeds et al., 49 Off. Gaz., No. 3, p. 935, appellants' contention must be upheld. In that case, the court of land registration had confirmed title in the Government of the Philippine Islands to a parcel of land situated in Malabon, Rizal, but the corresponding decree and certificate of title were issued, not in the name of the Philippine Government, but in that of the municipality of Malabon. Years after, the Director of Lands filed in the original land registration case a petition for an order to have the error corrected and the certificate of title put in the name of the Republic of the Philippines. Acting on the petition, the Court of First Instance of Rizal issued the order prayed for on the authority of section 112 of the Land Registration Act. But upon appeal to this Court, the order was reversed, this Court holding that the lower court, as a land court, had no jurisdiction to issue such order, as the section cited did not apply to the case. Elaborating on the scope of said section, this Court said:

> "Roughly, section 112, on which the Director of Lands relies and the order is planted, authorizes, in our opinion, only alterations which do not impair rights recorded in the decree, or alterations which, if they do prejudice such rights, are consented to by all the parties concerned, or alterations to correct obvious mistakes. By the very fact of its indefeasibility, the Court of Land Registration after one year loses its competence to revoke or modify in a substantial manner a decree against the objection of any of the parties adversely affected. Section 112 itself gives notice that it 'shall not be construed to give the court authority to open the original decree of registration,' and section 38, which sanctions the opening of a decree within one year from the date of its entry, for fraud, provides that after that period 'every decree or certificate of title issued in accordance with this section shall be incontrovertible'.
>
> "Under the guise of correcting clerical errors, the procedure here followed and the appealed order were virtual revision and nullification of generation-old decree and certificate of title. Such procedure and such order strike at the very foundation of the Torrens System of land recording laid and consecrated by the emphatic provisions of section 38 and 112 of the Land Registration Act, *supra*. In consonance with the universally-recognized principles which underlie Act No. 496, the court may not, even if it is convinced that a clerical mistake was made, recall a certificate of title after the lapse of nearly 30 years from the date of its issuance, against the vigorous objection of its holder. As was said in a similar but much weaker case than this (Government vs. Judge, etc., 57 Phil., 500): 'To hold that the substitution of the name of a person, by subsequent decree, for the name of another person to whom a certificate of title was issued (five years before) in pursuance of a decree, effects only a correction of a clerical error and that the court had jurisdiction to do it, requires a greater stretch of the imagination than is permissible in a court of justice.' (Syllabus.) It should be noticed that in that case, as in this case, the later decree 'was based on the hypothesis that the decree of May 14, 1925, contained a clerical error and that the court had jurisdiction to correct such error in the manner aforesaid'.
>
> "The sole remedy of the land owner whose property has been wrongfully or erroneously registered in another's name is, after one year from the date of the decree, not to set aside the decree, as was done in the instant case, but, respecting the decree as incontrovertible and no longer open to review, to bring an ordinary action in the ordinary court of justice for reconveyance or, if the property has passed into the hands of an innocent purchaser for value, for damages."

In line with the ruling laid down in the case cited, the order herein appealed from must be, as it is hereby, revoked, without prejudice to the filing of an ordinary action in the ordinary courts of justice for reconveyance, or for damages if the property has passed into the hands of an innocent purchaser for value. Without costs.

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

IX

Josefa De Jesus, Pilar De Jesus and Dolores De Jesus, Plaintiffs-Appellants, vs. Santos Belarmino and Teodora Ochoa De Juliano, Defendants-Appellees, G. R. No. L-6665, June 30, 1954, Bautista Angelo, J.

1. SALES; VENDEE WITH ACTUAL OR CONSTRUCTIVE

KNOWLEDGE OF MISTAKE IN AREA OF LAND BOUGHT, NOT PURCHASER IN GOOD FAITH. - Where the triangular portion of the lot bought by plaintiffs' predecessors-in-interest was erroneously included in the lot bought by one of the defendants, and the latter, having actual or constructive knowledge of such mistake, never claimed any right of ownership or of possession of said portion until after the issuance of the certificate of title in their favor, they can not claim to be purchaser in good faith of the portion in question even if they had paid the consideration therefor with the sanction of the Bureau of Lands.

2. COMPLAINTS; DISMISSAL BY MOTION; SUFFICIENCY OF MOTION, TESTED BY ALLEGATIONS OF FACTS IN COMPLAINT; TEST OF SUFFICIENCY OF FACTS ALLEGED TO CONSTITUTE CAUSE OF ACTION. — Where the complaint was dismissed not because of any evidence presented by the parties, or as a result of the trial on the merits, but merely on a motion to dismiss filed by the defendants, the sufficiency of the motion should be tested on the strenght of the allegations of facts contained in the complaint, and on no other. If these allegations show a cause of action, or furnish sufficient basis by which the complaint can be maintained, the complaint should not be dismissed regardless of the defenses that may be averred by the defendants. The test of the sufficiency of the facts alleged in a complaint, to constitute a cause of action, is whether or not, admitting the facts alleged, the court could render a valid judgment in accordance with the prayer of said complaint.

Nicolas Belmonte and *Delfin Aprecio* for plaintiffs and appellants.

Angel V. Sanchez and *Conrado T. Santos* for defendants and appellees.

DECISION

BAUTISTA ANGELO, *J.*:

Plaintiffs brought this action in the Court of First Instance of Laguna to recover a parcel of land containing an area of 7,396 sq. m. claimed to have been erroneously included in Transfer Certificate of Title No. T-129 of the land records of said province issued in the name of defendant Santos Belarmino.

The principal allegations of the complaint, as amended, are as follows: On July 1, 1910, the Bureau of lands sold to Timoteo Villegas Lot No. 400 of the Calamba Estate containing an area of 83,579 sq. m. situated in barrio Parian, Calamba, Laguna, at a price payable in 20 annual installments. Since then, Villegas has been in possession of said lot.

On January 11, 1915, Villegas sold his right and interest in said lot to Petrona Quintero by virtue of a certificate of sale which was duly approved by the Bureau of Lands. The purchase price of the lot was paid in full on September 30, 1931.

Petrona Quintero died in 1933 leaving as heirs her daughters Josefa de Jesus and Pilar de Jesus and her granddaughter Dolores de Jesus, who became the owners by succession of the lot. These heirs are now the plaintiffs herein.

Santos Belarmino, one of the defendants herein, also purchased from the Bureau of Lands on installment basis a portion of the same estate known as Lot No. 3211 containing an area of 61,378 sq. m., which was adjoining Lot No. 400 purchased by Timoteo Villegas. When the cadastral survey of the property covered by the Calamba Estate was ordered, a relocation was made of Lot No. 400 and Lot No. 3211 with the result that the latter was subdivided into Lot No. 3211-N, Lot No. 4639, and Lot No. 4640, but in making the subdivision a triangular portion with an area of 7,896 sq. m. which originally formed part of Lot No. 400 was erroneously included in the plan and description of Lot No. 4639. Said triangular portion was not part of the lot sold by the Bureau of Lands to Santos Belarmino but of the lot sold by said Bureau to Timoteo Villegas.

Without any judicial proceedings or court order, the Register of Deeds of Laguna issued Transfer Certificate of Title No. T-129 covering the lot originally bought from the Bureau of Lands by Santos Belarmino which, as above stated, erroneously included the triangular portion referred to in the preceding paragraph, and said transfer certificate of title was issued in the name of Santos Belarmino as to 21,776 sq. m. and of Epifania Amaterio as to 8,000 sq. m.

When the two lots mentioned above were sold by the Bureau of Lands to Timoteo Villegas and Santos Belarmino as above stated, the Government did not have any certificate of title specifically covering said lots, its only title being Original Certificate of Title No. 245 which covers the Calamba Estate, so when Transfer Certificate of Title No. T-129 was issued to Santos Belarmino and Epifania Amatorio, the Bureau of Lands did not rely on any title other than Certificate of Title No. 245 covering the Calamba Estate.

When Epifania Amatorio died, her interest was inherited by Teodora Ochoa de Juliano, who is now in actual possession of the portion of 8,000 sq. m. which was inherited by her, but defendant Santos Belarmino is in possession of the portion adjoining the triangular portion now in question and he alone claims right to said triangular portion. Santos Belarmino and his co-defendant Teodora Ochoa de Juliano never exercised any right of ownership nor possession over said triangular portion because the same had always been in the continuous, open, public, notorious, and adverse possession of the predecessors-in-interest of the plaintiffs as exclusive owners thereof.

The complaint further alleges that the herein defendants, or their predecessors-in-interest, know all the time that the triangular portion in question was not part of the lot sold by the Bureau of Lands to Santos Belarmino, but on the contrary they know that said portion always formed part of the land sold to the predecessors-in-interest of the plaintiffs, and that defendant Santos Belarmino never claimed any interest in said portion except sometime in March, 1952 when said defendant claimed for the first time that said portion was included in the certificate of title issued in his favor by the Register of Deeds.

Because of the error above pointed out, plaintiffs pray that they be declared as owners of the triangular portion above adverted to and that Certificate of Title No. T-129 issued in favor of Santos Belarmino be rectified by excluding therefrom said triangular portion. And making the Director of Lands as party defendant, plaintiff also pray that he be ordered to take the necessary steps to have a certificate of title issued in their favor covering the lot originally purchased by their predecessors-in-interest, since the purchase price thereof had been paid in full, and in the event that the triangular portion in dispute be not included in said title, the Director of Lands be ordered to pay to the plaintiffs the amount of P7,396 as value thereof, plus the costs of action.

Defendant Santos Belarmino filed a motion to dismiss alleging in substance that, assuming that a portion of the land owned or occupied by plaintiffs predecessors-in-interest was erroneously included in the title issued to the defendants when the latter bought a portion of the Calamba Estate owned by the Government, the defendants should not be blamed for that mistake there being no showing that they were instrumental or an accomplice in the commission of that mistake, aside from the fact that the title issued to them as grantees of public land is as indefeasible or incontrovertible as a title issued under the Land Registration Law.

The lower court uphold this contention and in an order issued on October 30, 1952, it held that the complaint does not state a cause of action because the defendants are holders of a certificate of title issued by the Government and as such they should be considered as third parties who acquired the property in good faith and for consideration, and so it dismissed the complaint without pronouncement as to costs. Plaintiffs have taken the present appeal.

It is our opinion that the complaint, as amended, contain facts sufficient to constitute a cause of action or to serve as basis for granting the relief prayed for by the plaintiffs. A cursory read-

ing of the complaint will show that both Timoteo Villegas, predecessor-in-interest of the plaintiffs and Santos Belarmino, one of the defendants, purchased from the Bureau of Lands two lots each, the former Lot No. 400 containing an area of 83,579 sq. m., and the latter Lot No. 3211 containing an area of 61,578 sq. m.; that Lot No. 400 included the triangular portion now in question, and not Lot No. 3211, and that since the date of its sale to Timoteo Villegas, the latter had been in possession of Lot No. 400, including the triangular portion; that, in a re-survey made of those lots in accordance with the cadastral law, Lot No. 3211 was subdivided into lots 3211-N, 4639, and 4640; that the original area of Lot No. 3211 was 61,578 sq. m., but after its subdivision into three lots, their total area was increased to 67,808 sq. m., or a difference of 6,230 sq. m., with the result that the area of Lot No. 400 became 76,591 sq. m. instead of its original area of 83,579 sq. m.; that defendants know all the time that the triangular portion in question was included in the sale made way back in 1910 by the Bureau of Lands to Timoteo Villegas and not in the sale made in the same year by said Bureau to Santos Belarmino, as they likewise well knew that the lot bought by Timoteo Villegas, including the triangular portion, had always been in continuous, open, public, notorious, and adverse possession of the plaintiffs and their predecessors-in-interest as exclusive owners.

The foregoing facts unmistakably show: (1) that the lot bought by plaintiffs' predecessors-in-interest included the triangular portion in dispute; (2) that said triangular portion was erroneously included in the lot bought by Santos Belarmino in a re-survey made by the Bureau of Lands years later; (3) that defendants knew, or had actual or constructive knowledge, of such mistake; and (4) defendants never claimed any right of ownership or of possession of said portion until after the issuance of the title issued to them in 1952. Under these facts, it is obvious that defendants cannot claim to be purchasers in good faith of the portion in question even if they had paid the consideration therefor with the sanction of the Bureau of Lands. (Cui & Joven v. Henson, 51 Phil. 606; Legarda & Prieto, 31 Phil. 590; Angeles v. Samia, 66 Phil. 444.) It should be borne in mind that the complaint was dismissed not because of any evidence presented by the parties, or as a result of the trial on the merits, but merely on a motion dismiss filed by the defendants. Such being the case, the sufficiency of the motion should be tested on the strength of the allegations of facts contained in the complaint, and on no other. If these allegations show a cause of action, or furnish sufficient basis by which the complaint can be maintained, the complaint should not be dismissed regardless of the defenses that may be averred by the defendants. It has been said that the test of the sufficiency of the facts alleged in a complaint, to constitute a cause of action, is whether or not, admitting the fats alleged, the court could render a valid judgment in accordance with the prayer of said complaint. (Paninsan v. Costales, 28 Phil. 487; Blay v. Batangas Transportation Co., 45 O. G. Supp. to No. 9, p. 1.) In our opinion, the allegations of the instant complaint are of this nature, and so the lower court erred in dismissing it.

Wherefore, the order appealed from is set aside. The Court orders that this case be remanded to the lower court for further proceedings, without pronouncement as to costs.

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

X

Teodoro Vaño, Petitioner, vs. Hipolito Alo, as Judge of the Court of First Instance of Bohol, Pedro Dumadag and Esmenio Jumamuy, Respondents, G. R. No. L-7220, July 30, 1954, Labrador, J.

1. PARTIES; IMPLEADING OF REAL PARTIES, APPLICABLE TO PARTIES PLAINTIFF ONLY. — The rule requiring real parties to be impleaded is applicable to parties plaintiffs, not to parties defendant.

2. ID.; ID.; PLAINTFF CAN CHOOSE CAUSE OF ACTION AND PARTIES HE DESIRES TO SUE WITHOUT IMPOSITION BY COURT OR ADVERSE PARTY. — It is the absolute prerogative of the plaintiff to choose the theory upon which he predicates his right of action, or the parties he desires to sue, without dictation or imposition by the court or the adverse party. If he makes a mistake in the choice of his right of action; or in that of the parties against whom he seeks to enforce it, that is his own concern as he alone suffers therefrom.

3. ID.; ID.; REMEDY OF OFFICERS SUED WHO DESIRE TO IMPLEAD MEMBERS OF UNREGISTERED CORPORATION—THIRD PARTY COMPLAINT. — Where the plaintiff sued the officers alone, and the latter desire to implead the members of the unregistered corporation and make them equally responsible in the action, their remedy is by means of a third party complaint, in accordance with Rule 12 of the Rules of Court. But they can not, compel the plaintiff to choose his defendants. He may not, at his own expense, be forced to implead any one who, under adverse party's theory, is to answer for the defendants' liability. Neither may the court compel him to furnish the means which defendants may avoid or mitigate their liability.

4. ID.; ID.; ID.; INDISPENSABLE PARTY AND PARTY JOINTLY OR ULTIMATELY RESPONSIBLE FOR OBLIGATION WHICH IS SUBJECT OF ACTION, DISTINGUISHED. —Where the complaint specifically alleged that the defendants, purporting to be the president and general manager of an unregistered corporation, entered into the contract by themselves, the presence of the members of the association is not essential to the final determination of the issue presented, the evident intent of the complaint being to make the officers directly responsible. (Article 287, Code of Commerce, *supra*). The alleged responsibility of the members for the contract to the officers, who acted as their agents, is not in issue and need not be determined in the action to fix the responsibility of the officers to plaintiff's intestate, hence said members are not indispensable in the action instituted.

Roque R. Luspo for the petitioner.

Victoriano Tirol for the respondents.

DECISION

LABRADOR, *J.*:

Petitioner instituted this action of certiorari to reverse an order of the Court of First Instance of Bohol refusing to admit his fourth amended complaint. The record discloses the following facts and circumstances as a background for the petition:

Around the year 1947 respondents herein Pedro Dumadag and Esmenio Jumamuy, purporting to be the president and general manager, respectively, of an unregistered corporation or association denominated APBA Cinematographic Shows, Inc., leased certain theatrical equipments from the late Jose Vaño at an agreed monthly rental of ₱200. Jose Vaño having died, his administrator, the present petitioner, filed an action in the Court of First Instance of Bohol for the return of the theatrical equipments and the payment of the agreed rentals. The original complaint was filed in September, 1947. Upon the filing of this complaint the association was dissolved. Counsel for the defendants below, respondents herein, appears to have insisted that all the members of the association should be made parties defendants, but petitioner was not inclined to do so. On January 28, 1953, the court ordered petitioner's counsel to submit a fourth amended complaint. This complaint in part alleges:

2. That in or about February 1947, defendant purporting to be the president and general manager respectively of the so-called "APBA" Cinematographic Shows Inc., leased from the late Jose Vaño, the aforementioned Theatrical Equipments at an agreed monthly rental of TWO HUNDRED (200.00) PESOS, and that he (Jose Vaño) shall pay the expenses in the installation, for the same shall be returned on his demand;

3. That said Theatrical Equipments mentioned in para-

graph 1, had been completely installed at the beginning of the month of February, 1947, at the "APBA" building Calape, Bohol, and since then the said show house begun its operation;

4. That upon inquiry, the plaintiff was informed and so allege that the "APBA" Cinematographic Shows Inc., has never been registered, hence Dumadag and Jumamuy who acted as the president and general manager respectively are the once made as party defendants;

Plaintiff did not include the members of the unregistered corporation as parties defendants, and so they were not summoned. On September 14, 1953, the court *a quo* entered the order complained of, which is as follows:

The association represented by defendants Pedro Dumadag and Esmenio Jumamuy, is not included as party defendant in the fourth amended complaint. It is a legal requirement that any action should be brought against the real party in interest.

In view of the opposition filed by the defendants Pedro Dumadag and Esmenio Jumamuy, the court denies the admission of plaintiff's fourth amended complaint dated February 17, 1953, and objected to on the date of the trial.

The fourth amended complaint (paragraph 2, supra) alleges that defendants, purporting to be the president and general manager of the unregistered corporation, leased the theatrical equipments from the plaintiff, petitioner herein. Said defendants, according to the complaint, did not enter into the contract in the name or on behalf of the corporation; consequently, the law applicable is Article 287 of the Code of Commerce, which provides;

Art. 287. A contract entered into by the factor in his own name shall bind him directly to the person with whom it was made; but if the transaction was made for the account of the principal, the other contracting party may bring his action either against the factor or against the principal.

The opposition of the respondents to the admission of the fourth amended complaint is procedural in nature, i.e., that notwithstanding the fact that the APBA was not registered, all its members should be included as parties defendants as provided in section 15 of Rule 3 of the Rules of Court. The trial court was of the opinion that the inclusion of the members was necessary as it considered them as "real parties in interest." In this respect, the trial court committed an error as the rule requiring real parties to be impleaded is applicable to parties plaintiffs, not to parties defendants.

It is the absolute prerogative of the plaintiff to choose the theory upon which he predicates his right of action, or the parties he desires to sue without dictation or imposition by the court or the adverse party. If he makes a mistake in the choice of his right of action, or in that of the parties against whom he seeks to enforce it, that is his own concern as he alone suffers therefrom. Granting that the members of the unregistered corporation may be held responsible, partly or wholly, for the agreement entered into by the officers who acted for the corporation, the fact remains that the plaintiff in the case at bar chose not to implead them, suing the officers alone. If the officers desire to implead them and make them equally responsible in the action, their remedy is by means of a third party complaint, in accordance with Rule 12 of the Rules of Court. But they can not compel the plaintiff to choose his defendants. He may not, at his own expense, be forced to implead any one who, under adverse party's theory, is to answer for the defendants' liability. Neither may the court compel him to furnish the means by which defendants may avoid or mitigate their liability. This was in effect what counsel for respondents wanted to compel the petitioner to do, and which the court was persuaded to do force the plaintiff to include the members of the unregistered corporation as parties defendants and when plaintiff refused to do so, it registered his fourth amended complaint.

The court's order, in so far as it demands the inclusion of the members of the unregistered corporation, has evidently been induced by a confusion between an indispensable party and a party jointly or ultimately responsible for the obligation which is the subject of an action. The members of the unregistered corporation could be responsible for the rental of the equipments jointly with their officers. But the complaint specifically alleges that said officers entered into the contract by themselves, hence the presence of the members is not essential to the final determination of the issue presented, the evident intent of the complaint being to make the officers directly responsible. (Article 287, Code of Commerce, supra.) The alleged responsibility of the members of the corporation for the contract to the officers, who acted as their agents, is not in issue and need not be determined in the action to fix the responsibility of the officers to plaintiff's intestate, hence said members are not indispensable in the action instituted.

We find that the trial court abused its discretion in refusing to admit plaintiff's fourth amended complaint. The writ prayed for is hereby granted, the order complained of reversed, and the complaint ordered admitted, and the court *a quo* is hereby directed to proceed thereon according to the rules. With costs against respondents Pedro Dumadag and Esmenio Jumamuy.

Paras, Pablo, Bengzon, Padilla, Montemayor, Alex Reyes, Jugo, Bautista Angelo, Concepcion and *J. B. L. Reyes, J.J.*, concur.

XI

The People of the Philippines, Plaintiff-Appellee, vs. Antonio Samaniego y Young alias Sy Liong Bok alias Tony, Defendant-Appellant, No. L-6085, June 11, 1954, Concepcion, J.

The People of the Philippines, Plaintiff-Appellee, vs. Ong Ing alias Cresencio Ong, and Alfredo Torres y Sagaysay, Defendant-Appellant, No. L-6086, June 11, 1954, Concepcion, J.

1. EVIDENCE; "RES INTER ALIOS ACTA". — The testimonies of peace officers for the prosecution in other criminal cases which were dismissed upon the ground that the confessions obtained by them, in connection with those cases, were tainted with irregularities are *res inter alios acta* and are not admissible in evidence.

2. ID.; ID.; ALIBI. — The uncorroborated testimony of one of the appellants that he was sick at home, when the offense charged was committed, cannot offset the positive testimony of witnesses who saw him near the scene of the crime.

3. ID.; CRIMINAL PROCEDURE; NEW TRIAL; NEWLY DISCOVERED EVIDENCE. — Where the alleged newly discovered evidence merely tends to corroborate appellants' alibi to the effect that they were not present at the scene of the crime and could not have participated in its commission, the motion for new trial should be denied.

4. ID.; ID.; ID.; EVIDENCE INSUFFICIENT TO OFFSET THAT FOR THE PROSECUTION WHICH HAS BEEN POSITIVELY ESTABLISHED. — The testimony of the new witness for the appellants to the effect that they were the authors of the crime charged and that no other persons could have committed it can not offset the positive testimonies of two unbiased witnesses for the prosecution that they have seen the appellants at the place of the occurrence at about the time of the perpetration of the offense charged, testimonies which were partly corroborated by one of the appellants himself.

Sixto S. J. Carlos, Guillermo S. Santos, Eleuterio S. Abad, and *Constantino B. Acosta* for the defendants and appellants.

Gaudencio C. Cabacungan for defendant Antonio Samaniego.

Solicitor General Juan R. Liwag and *Assistant Solicitor General Francisco Carreon* for the plaintiff and appellee.

DECISION

CONCEPCION, *J.*:

On April 28, 1950, at about 11:00 p.m., the dead body of Ong Tin Hui was found gagged and blindfolded in the Oxford Shoe

Emporium, at No. 329 Carriedo Street, Manila, where he was working, with his wrists tied and a cord around his neck. The medical examiner found, on said body, the following:

"Lacerations, auricular and occipital arteries and veins.

Lacerations, superficial, cerebral veins, basal portion, brain.

Marked congestion and edema, lungs, bilateral.
Old pleural adhesions, lungs, right.

Congestion, spleen.

Congestion, pancreas.

Congestion, kidneys, bilateral.

Hemorrhages, diffuse, hubdural and subarachnoid, specially base, brain.

Fracture, cribiform plate, ethmoid bone of cranium.

Wounds, lacerated, multiple (2) forehead.

Wounds, lacerated, temporal region, left.

Wound, lacerated. splitting, extermalacar, pinna, left.

Wounds, (2) lacerated, with extensive, contusion, scalp, posterior occipital region, head, left.

Wounds, lacerated, multiple (2) extensive, scalp, with contusion hematoma, occipital-parietail region, posterior head, right.

Tight-gag, mouth, and tight blind fold (piece of cloth), face.

Strangulation by cord, neck.

Tight cord around both forearms and wrist joints.

Cause of Death: Asphyxia and diffuse subarachnoid hemorrhage specially over the base of the brain due to suffocation by tight gagging of the mouth and whole face with cloth, and multiple laceration injuries by blows on the head and face:" (Appellants' brief, p. 31).

The peace officers who investigated the matter were tipped that Ong Tin Hui had an enemy by the name of Go Tay, whose brother-in-law, Ong Ing, had the reputation of being a tough guy and was unemployed. Upon questioning, Ong Ing, who, sometime later on, was seen loitering around Carriedo Street, stated that, at about the time of the occurrence, he had seen Alfredo Torres, one Antonio Tan and a Filipino whose name he did not know, coming from the Oxford Shoe store. Hence, Alfredo Torres, whose whereabouts were located with the assistance of Ong Ing, was arrested. Upon investigation, Torres, in turn, declared that Ong Ing had participated in the commission of the crime. When Ong Ing and Alfredo Torres were made to face one another, they mutually recriminated and incriminated each other. Moreover, Torres, Ong Ing *alias* Cresencio Ong and Go Tay made their respective statements in writing, Exhibits X, W and Y, implicating one Tony. Upon examination of the pictures of police characters in the files of the Police Department, Ong Ing and Torres identified the picture of one bearing the name of Antonio Tan, as that of Tony. Antonio Tan turned out to be known, also, as Antonio Samaniego, *alias* Sy Liong Tok, who, on June 15, 1930, was arrested in Mapirac, Naga, Camarines Sur, where he went late in May, 1950. Upon being questioned by the police, Samaniego declared substantially, that he was merely posted, as guard, at the door of the Oxford Shoe Emporium, during the commission of the crime charged, and that thereafter, he received from Alfredo Torres a certain sum of money as his share of the loot. Samaniego, likewise signed the statement Exhibit CC.

As a consequence, three criminal cases for robbery and homicide were instituted in the Court of First Instance of Manila, namely: Case No. 12734, against Ong Ing and Alfredo Torres y Sagaysay; Case No. 12941, against Antonio Samaniego; and Case No. 13031, against Ang Tu alias Go Tay. After entering a plea of "not guilty," which was subsequently withdrawn, Ong Ing was allowed to plead, in lieu thereof, and, after being carefully informed by the court of the serious nature of the charge and of the possible consequences of his contemplated step, did plead, "guilty," with the understanding that he would introduce evidence on the presence of some mitigating circumstances. Upon the presentation of said evidence, Ong Ing was sentenced to life imprisonment, with the accessory penalties prescribed by law, to indemnify the heirs of the deceased Ong Tin Hui in the sum of ₱5,000, without subsidiary imprisonment in case of insolvency, and to pay one-half of the costs -- which sentence is now being served by him. In due course, the Court of First Instance subsequently rendered a decision convicting Alfredo Torres and Antonio Samaniego, as principal and as accomplice, respectively, of the crime charged, and sentencing the former to life imprisonment, and the latter to an indeterminate penalty ranging from 8 years and 1 day of *prision mayor* to 14 years, 8 months and 1 day of *reclusion temporal*, with the accessory penalties provided by law and to jointly and severally indemnify the heirs of the deceased Ong Tin Hui in the sum of ₱5,000 and the Oxford Shoe Emporium in the sum of ₱104, and, Alfredo Torres to pay one-half of the costs in case No. 12734, and Antonio Samaniego the costs in case No. 12941, and acquitting Ang Tu *alias* Go Tay upon the ground of insufficiency of evidence, with costs *de oficio* in case No. 13031. Torres and Samaniego have appealed from said decision.

It is not disputed that the Oxford Shoe Emporium was burglarized and Ong Tin Hui killed therein by the thieves in the evening of April 28, 1950. The only question for determination in this case are: (1) whether appellants formed part of the group that perpetrated the offense, and (2) in the affirmative case, the nature of their participation therein. The evidence thereon consists of the following:

(a) Ong Ing, *alias* Cresencio Ong, testified that, pursuant to instructions of Ang Tu, *alias Go Tay*, who begged him to look for thugs to kill Ong Tin Hui, he (Ong Ing) sought appellants herein; that Ong Ing gave Samaniego the sum of ₱200, which had come from Ang Tu; that, upon hearing of the latter's plan, Samaniego remarked that Ong Tin Hui should really be killed, he being his (Samaniego's) creditor; that both appellants agreed to go to the Oxford Shoe Emporium in the evening of April 28, 1950; that on the way thereto, said evening, Samaniego suggested the advisability of finding a good excuse to knock at the door, in order that his companions could enter the store; that upon arrival thereat, Samaniego knocked at the door, which was opened by Ong Tin Hui; that, thereupon, Torres, another Filipino and one Chinese, whose name was not given, entered the store; that the unnamed Filipino expressed the wish to go to the toilet, for which reason Ong Tin Hui led him to said place; that, thereupon, the former struck the latter, from behind, with a piece of wood; that Torres tied the hands of Ong Tin Hui, whom Torres and the other Filipino dragged to the kitchen; that when Torres and his companions left the store, they stated that Ong Tin Hui was dead already; and that, soon later, they went to the house of Torres at Grace Park, where the loot of ₱104 was divided.

(b) Nazario Aquino and Apolinario Ablaza, watchman and inspector, respectively, of the PAMA Special Watchmen Agency, declared that, on April 28, 1950, between 10:00 and 11:00 p.m., Aquino saw Torres at Bazar 51 in Carriedo Street, whereas Ablaza met said appellant near the Alcazar Building, in the same street; that Aquino chatted with Torres, who said that soon he could buy whatever he needed, for he would get his backpay; that Torres was perspiring and his hair was ruffled when Ablaza saw him; that, that evening, Aquino, likewise, saw appellant Samaniego, with four companions, at the corner of Carriedo and P. Gomez streets, and this was admitted by Samaniego; and that Samaniego greeted him on that occasion.

(c) In his extrajudicial statement (Exhibit C), Torres declared that, pursuant to a previous understanding, he, Samaniego, Ong Ing, and others gathered at the Cliners Restaurant, where it was agreed that Torres would disuade the special watchman from patroling the vicinity of the Oxford Shoe Emporium; that Samaniego knocked at its door at about 10:45 p.m.; that while Samaniego and Torres

stood on guard outside, Ong Ing, the unnamed Filipino, and another Chinaman, entered the store; that after leaving the store, the group proceeded to the house of Torres, where the stolen money was divided; and that the blood stains found in his trousers and coat (Exhibits M and N), must have been caused by the unnamed Filipino, who had blood in his hands.

(d) Detective Lieutenant Enrique Morales and Detective Corporal Jose Sto. Tomas, testified that upon investigation, Samaniego stated that he was merely posted at the door of the Oxford Shoe Emporium during the occurrence.

(e) In his extrajudicial confession (Exhibit CC), Samaniego declared that he had known Ong Tin Hui since August 1949, because the Oxford Emporium was behind the store where said appellant used to work; that he was not inside the Oxford Shoe Emporium, but merely stood on guard at its door when the crime was committed; that Ong Ing gave him P200, which came from Ang Tu, in order to induce him to kill Ong Tin Hui; and that, after the occurrence, he received P23 or P24 as his share of the loot.

(f) In his extrajudicial statement (Exhibits W and AA), Ong Ing said that, in addition to agreeing to participate in the commission of the crime, Samaniego had suggested that it be perpetrated on a Friday; that it was Samaniego who knocked at the door of the Oxford Shoe Emporium in order that his companions could enter the store; and that Torres was one of those who participated in the commission of the crime charged.

(g) In Exhibits X and BB, the extrajudicial confessions of Torres, stated that besides knocking at the door of the Oxford Shoe Emporium, Samaniego received P26 as his share of the stolen money. Torres likewise identified Samaniego's picture, Exhibit J.

(h) The sales book Exhibit S, and the cash slip booklet and cash slips of the Oxford Shoe Emporium (Exhibits S, T, T-1 to T-16, U and U-1 to U-13), show that the sales made in said store on April 28, amounted, at least, to P104.00, thus corroborating the foregoing evidence on the amount of money taken from said store and divided among those who perpetrated the offense charged.

Appellants claim that the aforementioned statements were secured from them by members of the police department through duress. In the language, however, of His Honor, the Trial Judge, this pretense cannot be sustained, for:

> "First, the written statements of Torres and Samaniego, taken by question and answer, are too rich in details which only they themselves could furnish. It will be readily seen that in their respective statements each of these two defendants attempted as best he could to minimize the gravity of his participation in the crime. This is specially true in the case of Samaniego — the more intelligent of the two — who had finished the second year course in Commerce. If really the Police officers tortured the two defendants and manufactured their statements, the court has no doubt that the responsibility of the latter would have been placed in black and white in their respective statements.
>
> "Second, another proof of weight against the claim of torture is the case of defendant Go Tay alias Ang Tu alias Kiko. The known theory of the police is that Go Tay was the instigator of the crime. In the eyes of the police, he was the whale; Torres and Samaniego, compared to Go Tay, were but mere winnows. A written statement of Go Tay (Exhibit Y) was taken. The statement Exhibit Y reflects all that Go Tay really stated to the investigator. Go Tay said so in court. No inculpatory answer appears therein. This shows that the police officers did not inject into that statement facts which would bring about the conviction of this principal defendant. Yet, when Go Tay afterwards changed his mind and refused to sign the statement, no force was exerted against him — it remained unsigned.
>
> "Third, in the case of Torres, he himself stated in court that he did not sign a document presented to him whenever he did not want to. (Tr. pp. 1077-1079).
>
> "Fourth, in the case of Samaniego, the court observed that he speaks Tagalog rather fluently. (Tr. p. 1309). He reads and writes English. He can not say that he did not know the contents of his own statement, because if he reads English and he speaks Tagalog, undoubtedly he could read Tagalog words." (Decision, pp. 50-51, appellants' brief). (Brief of the Solicitor General, pp. 10-11).

Appellants insist that the testimonies of Lieutenant Morales and Detectives Sto. Tomas, Walker, Alday and Gorospe, to the that said statements were made freely and voluntarily, do not deserve credence, said peace officers having testified for the prosecution in other criminal cases which were eventually dismissed upon the ground that the confessions obtained by them, in connection with these cases, were tainted with irregularities. But, the evidence sought to be introduced by the defense, in support of its aforementioned pretense, was not admitted by the lower court, and the ruling thereof is not assailed in appellants' brief. At any rate, what those witnesses did or said in relation to other cases is *res inter alios acta* and, as such, irrelevant to the case at bar.

Appellants have set up their respective *alibis*. Torres said that he was sick at home, when the offense charged was committed. Obviously, his uncorroborated testimony cannot offset the incriminating evidence already adverted to, particularly considering the positive testimony of Aquino and Ablaza, who saw him at Carriedo Street, near the scene of the occurrence, at about the time of the perpetration of the crime. As regards Samaniego's *alibi*, we fully agree with the view of the lower court thereon, which we quote from the decision appealed from:

> "Weaker still is the *alibi* of defendant Samaniego. Samaniego testified in court that he went to Quiapo Church at around 8:30 in the evening of April 28, 1950; that after a few minutes there he went out and passed by Calle Carriedo; that he then proceeded to Avenida Rizal where he purchased a newspaper and thereafter went to Cine Capitol; and that he left the show before 11 o'clock in the evening. This admission of Samaniego by itself alone is sufficient to overcome his defense of *alibi*. The reason is that he could have been in the scene of the crime at the time of the commission thereof." (Appellants' brief, p. 50).

It is clear from the foregoing that the lower court has not erred in rejecting said alibis and in convicting appellants herein as above stated.

In a motion filed before this Court, during the pendency of the present appeal, appellants pray for a new trial upon the ground of newly discovered evidence consisting of the testimony of Narciso de la Cruz and Enrique Mojica, whose joint affidavit is attached to said motion as Annex C. Affiants declare therein that they are serving sentences, De la Cruz, of imprisonment for 20 years, for the crime of robbery with homicide, and Mojica of imprisonment for 17 years, for robbery; that they are the assasins of Ang Tin Hui; that no other persons have committed said crime; and that they perpetrated the same at the instigation of Ong Tu *alias* Go Tay.

Upon careful consideration of said motion for new trial, we are clearly of the opinion, and so hold, that the same should be, as it is hereby, denied, for:

1) The allegedly newly discovered evidence is merely corroborative of appellants' *alibis*. It merely tries to strengthen appellants' evidence to the effect that they were not present at the scene of the crime and could not have participated, therefore, in its commission.

2) Even if introduced in evidence, the testimony of Narciso De la Cruz and Enrique Mojica would not, in all probability, affect the result of the case. Considering the source of said testimony; the fact that the presence of appellants at the place of the occurrence, at about the time of the perpetration of the offense charged, has been positively estabilshed by the testimony of two unbiased witnesses, Nazario Aquino and Apolinario Ablaza, who were partly corroborated by the testimony of appellant Samaniego; and the circumstance that, credence cannot be given to the testimony of

said affiants without assuming that Ong Ing had pleaded guilty of, and is willingly serving sentence for, a crime he had not committed, the allegedly newly discovered evidence is, to our mind, insufficient to effect the evidence for the prosecution, or even to create a reasonable doubt on appellants' guilt. Moreover, as we said in case G. R. No. L-5849, entitled "People vs. Buluran," decided May 24, 1954:

"x x x for some time now this Court has been receiving, in connections with criminal cases pending before it, a number of motions for new trial, similar to the one under consideration, based upon affidavits of prisoners — either serving sentences (like Torio and Lao) or merely under preventive detention, pending final disposition of the charges against them — who, in a sudden display of concern for the dictates of their conscience — to which they consistently turned deaf ears in the past — assume responsibility for crimes of which others have been found guilty by competent courts. Although one might, at first, be impressed by said affidavits — particularly if resort thereto had not become so frequent as to be no longer an uncommon occurrence — it is not difficult, on second thought, to realize how desperate men — such as those already adverted to — could be induced, or could even offer, to make such affidavits, for a monetary consideration, which would be of some help to the usually needy family of the affiants. At any rate, the risks they assume thereby are, in many cases, purely theoretical, not only because of the possibility, if not probability, of establishing (in connection with the crime for which responsibility is assumed) a legitimate *alibi* — in some cases it may be proven positively that the affiants could not have committed said offenses, because they were actually confined in prison at the time of the occurrence — but, also, because the evidence already introduced by the prosecution may be too strong to be offset by a reproduction on the witness stand of the contents of said affidavits."

Wherefore, the decision appealed from is hereby affirmed, the same being in accordance with the facts and the law, with costs against the appellants.

IT IS SO ORDERED.

Paras, C.J., and *Pablo, J.*, concur.

XII

S. N. Picornell & Co., Plaintiff-Appellee, vs. Jose M. Cordova, Defendant-Appellant, G. R. No. L-6338, August 11, 1954, *J. B. L. Reyes, J.*

1. JUDGMENTS; WHEN JUDGMENT BECOMES FINAL; PERIOD OF LIMITATIONS BEGINS FROM DATE OF ENTRY OF FINAL JUDGMENT. — An appealed judgment of a Court of First Instance in an original prewar case does not become final until it is affirmed by the Court of Appeals, precisely because of the appeal interposed therein; hence the period of limitation does not begin to run until after the Court of Appeals denies the motion to reconsider and final judgment is entered (old Civil Code Art. 1971; new Civil Code Art. 1152).

2. ACTIONS; ACTION TO REVIVE JUDGMENT, WHEN BARRED BY PERIOD OF LIMITATIONS. — In this case, from the date the final judgment was entered until the present proceedings were commenced on January 16, 1950, less than ten years have elapsed, so that the action to revive the judgment has not yet become barred (sec. 43, Act 190; 31 Am. Jur. p. 486).

3. ID.; DEFENSES; MORATORIUM ACT, NO LONGER A DEFENSE. — Republic Act No. 342, known as the Moratorium Act, having been declared unconstitutional, by this Court in Rutter vs. Esteban (49 Off. Gaz., No. 5, p. 1807), it may no longer be invoked as a defense.

Fulgencio Vega for defendant and appellant.

Ross, Selph, Carrascoso & Janda and *Delfin L. Gonzales* for plaintiff and appellee.

DECISION

REYES, J. B. L., *J.*:

This is an appeal from the judgment rendered on November 15, 1950, by the Court of First Instance of Manila in its Civil Case No. 10115, reviving a prewar judgment (Civil Case No. 51265) against the defendant-appellant José M. Cordova and sentencing him to pay the plaintiff-appellee the sum of ₱12,060.63, plus interest thereon at the legal rate from May 27, 1941, until full payment; with the proviso that the judgment shall not be enforced until the expiration of the moratorium period fixed by Republic Act 342.

The material facts are as follows: In Civil Case No. 51265 of the Court of First Instance of Manila, the appellant José M. Cordova was sentenced on March 4, 1939, to pay the firm of Hair & Picornell the amount of ₱12,715.41 plus interest at the legal rate from May 4, 1937 and costs (Exh. B). Cordova appealed to the Court of Appeals, where the decision of the Court of First Instance was affirmed on December 27, 1940 (CA-GR No. 5471) (Exh. C). A motion for reconsideration was denied on February 7, 1941, and the parties were notified thereof on February 11, 1941 (Exh. D). Thereafter, the judgment became final and executory. Execution was issued; several properties of the defendant were levied upon and sold, and the proceeds applied in partial satisfaction of the judgment, but there remained an unpaid balance of ₱12,060.63 (Exh. E, F, G).

Subsequently, the interest of Hair & Picornell in the judgment was assigned to appellee S. W. Picornell & Co. (Exh. H). The latter, on January 16, 1950, commenced the present action (No. 10115) to revive the judgment in case No. 51265; but Cordova defended on two grounds: (1) that the action had prescribed; and (2) that the action against him was not maintainable in view of the provisions of sec. 2, of Republic Act No. 342, since he (Cordova) had filed a claim with the Philippine War Damage Commission, bearing No. 978113 (Exh. I). Both defenses were disallowed by the Court of First Instance, which rendered judgment as described in the first paragraph of this decision. Cordova duly appealed to the Court of Appeals, but the latter certified the case to this Court, as involving only questions of law.

Clearly, the appeal is without merit. The judgment of the Court of First Instance in the original prewar case, No. 51265, did not become final until it was affirmed by the Court of Appeals, precisely because of the appeal interposed by appellant Cordova; hence the period of limitation did not begin to run until final judgment was entered, after the Court of Appeals had denied Cordova's motion to reconsider on February 7, 1941 (old Civil Code Art. 1971; new Civil Code Art. 1152). From the latter date until the present proceedings were commenced on January 16, 1950, less than ten years have elapsed, so that the action to revive the judgment has not yet become barred (Sec. 43, Act 190; 31 Am. Jur. s. 846).

As to the defense based on the Moratorium Act, R. A. No. 342, our decision in Rutter vs. Esteban (1953), 49 O. G. (No. 5) p. 1807, declaring the continued operation of said Act to be unconstitutional, is conclusive, that it may no longer be invoked as a defense.

Wherefore, the decision appealed from is affirmed, except as to the proviso suspending execution of the judgment until eight years after the settlement of appellant's war damage claim. Said condtion is hereby annulled and set aside, in accordance with our ruling in the Rutter case.

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

XIII

Brigido Lobrin, Plaintiff and Appellee, vs. Singer Sewing Machine Company, Defendant and Appellant, No. 5751, *November* 6, 1940, *Tuason, J.*

WORKMEN'S COMPENSATION ACT, SECTION 6; INTERPRETATION; INJURED EMPLOYEE CANNOT RECOVER

BOTH DAMAGES AND COMPENSATION; RIGHT OF ELECTION; EFFECT OF ELECTION.—Under section 6 of the Workmen's Compensation Act, "an employee injured under circumstances as to afford him a right to compensation as against his employer, and also to impose a liability in damages on a third person, has a right to elect whether he will seek compensation or damages; he cannot recover both damages and compensation, cannot elect to take compensation and also to bring an action against a third person, and cannot proceed concurrently at common law for damages and under the compensation act for compensation. It has broadly been stated that when a binding election is made, it is final."

William F. Mueller for appellant.
Tomas P. Panganiban for appellee.

DECISION

TUASON, *J.*:

On and prior to December 4, 1937, Brigido Lobrin, plaintiff-appellee, was employed by Singer Sewing Machine Company, defendant-appellant, as assistant supervising agent with official station in the Province of Nueva Ecija and with a salary of ₱30 a week, plus ₱7.50 weekly for traveling expenses. On the above-mentioned date, while plaintiff was traveling in the performance of his duties on a Rural Transit jitney bus owned by the Bachrach Motor Company, Inc., that vehicle collided with a freight truck, as a result of which plaintiff sustained injuries and was taken to the provincial hospital of Nueva Ecija by William H. Beedle, plaintiff's immediate superior. As there was no X-Ray apparatus in that hospital, plaintiff transferred to the Philippine General Hospital on December 11, 1937. During his stay in the latter hospital and for sometime during his convalescence outside, defendant paid plaintiff his salary, the total amount thus paid being ₱570.

In the meantime, under date of February 10, 1938, plaintiff received from the Bachrach Motor Company, Inc., ₱2,000 "in full settlement of all claims and demands, and rights of action which" he might have against that firm, and in consideration thereof released the Bachrach Motor Company "from all obligations now existing or that may hereafter arise in my favor by reason of the said damages and injuries by me sustained."

Subsequently plaintiff brought this action against Singer Sewing Machine Company and was awarded a total compensation of ₱1,772.82 besides ₱2,286.96 for medical and hospital expenses, or a total of ₱4,059.78 from which were deducted the ₱570 which plaintiff had received from defendant as wages and the ₱2,000 paid him by the Bachrach Motor Company.

Defendant-appellant resisted payment in the court below on various grounds, one of which, now reiterated in this instance, is that "the settlement made by plaintiff with the Bachrach Motor Company, Inc., for all damages suffered, released defendant from any liability for payment of compensation." This defense, from our view of it, disposes of the whole case.

Section 6 of the Workmen's Compensation Act:

"Sec. 6. *Liability of third person.* — In case an employee suffers an injury for which compensation is due under this Act by any other person besides his employer, it shall be optional with such injured employee either to claim compensation from his employer, under this Act, or sue such other person for damages, in accordance with law; and in case compensation is claimed and allowed in accordance with this Act, the employer who paid such compensation or was found liable to pay the same, shall succeed the injured employee to the right of recovering from such person what he paid; Provided, that in case the employer recovers from such third person damages in excess of those paid or allowed under this Act, such excess shall be delivered to the injured employee or any other person entitled thereto, after deduction of the expenses of the employer and the costs of the proceedings. The sum paid by the employer for compensation or the amount of compensation to which the employee or his dependents are entitled under the provisions of the Act, shall not be admissible as evidence in any damage suit or action."

Referring to provisions like these, 71 C. J. 1533, 1534, says that "an employee injured under such circumstances as to afford him a right to compensation as against his employer, and also to impose a liability in damages on a third person, has a right to elect whether he will seek compensation or damages; he cannot elect to take compensation and also to bring an action against a third person, and cannot proceed concurrently at common law for damages and under the compensation act for compensation. It has broadly been stated that when a binding election is made, it is final."

On page 928 of the same work and volume, it is said that "an employee, by his election to take damages without action and to release the third person, exercises his option to proceed against the third person, and his claim for compensation is barred."

Commenting on section 6 of the English Compensation Act of 1906, after which ours is modelled, Labatt says in his treaties on Master and Servant:

"The acceptance of payments by the injured workman from a person other than the employer, who was alleged to be liable for negligence, although such liability is not admitted, precludes the workman, under section 6, sub-section 1, from obtaining compensation from the employer." (5 Labatt's Master and Servant, 2nd Edition, p. 5441.)

Plaintiff-appellee makes the point that "the third party against whom the plaintiff may exercise the option granted under section 6 of the Workmen's Compensation Act" is the driver of the freight truck. He argues that the Bachrach Motor Company, Inc., paid plaintiff ₱2,000 "not necessarily because the said company was guilty of causing injuries to the plaintiff, but because, whether or not guilty, it is liable for operating as a common carrier, to passengers sustaining injuries while on board any of its passenger trucks, although the injuries would not have been sustained were it not for the negligence or wrongful acts of another party."

This contention cannot be sustained. To start with, Beedle's testimony that plaintiff told him the chauffeur of the Rural Transit jitney was going too fast, thus blaming that driver, was not denied. Counsel's statement in his brief and memorandum that the operator of the freight truck has been prosecuted and convicted finds no support whatsoever in the evidence.

Even if it were true that the freight truck driver was to blame for the accident, and that the Bachrach Motor Company was liable regardless of whether or not it was free from negligence — a point which we need not attempt to decide—still that company clearly falls within the meaning of "other person" as this term is used in section 6 of the Workmen's Compensation Act. The reason for this is that the Bachrach Motor Company's liability arose out of the same accident that produced the defendant's liability, and that the employee can recover either damages or compensation, but not both.

If defendant had the right to be subrogated to plaintiff's right of action against the Bachrach Motor Company, plaintiff by electing to accept a settlement from that company has closed the door to defendant to proceed against it, and under the doctrine of estoppel by election, should be precluded from now asserting, to defendant's prejudice, a position inconsistent with that taken by him before.

Plaintiff insinuates that defendants can still go after the driver of the freight truck, but he ignores the fact that even if this driver could be held liable for plaintiff's injuries, that said driver is in all probability insolvent.

Plaintiff has not been prejudiced by his election to seek damages instead of compensation. The amounts he has already received are more than he would have been entitled to as compensation under the Workmen's Compensation Act. For his evidence is insufficient to prove that he paid Dr. Abuel and Dr. Abuel's widow ₱1,500. He has not shown the nature and quantum of Dr. Abuel's services. His own evidence seems to exclude the possibility that the services rendered by Dr. Abuel were worth ₱1,500. He was

confined in the Philippine General Hospital for only eighteen days and, according to Exhibit B-8, he underwent only two minor operations, one on December 13, 1937, and one on February 19, 1938. In other words, if plaintiff had choosen to sue defendant for compensation, an action which would have subrogated defendant into plaintiff's right of action against the Bachrach Motor Company or any other person responsible for his injuries, such compensation would have been less than the amount he has actually received from both the Bachrach Motor Company and the defendant, namely ₱2,570.

Upon all the foregoing consideration, the appealed decision is reversed and the action dismissed, with costs against plaintiff-appellee.

Bengzon, Padilla, Lopez Vito. and *Alex Reyes, J.J.*, concur

Judgment reversed.

XIV

Gliceria Rosete, Plaintiff-Appellee, vs. Provincial Sheriff of Zambales, Simplicio Yap and Corazon Yap, DefendantsAppellants. G. R. No. L-6335, July 31, 1954, Bautista Angelo, J.

EXECUTION; REDEMPTION BY WIFE OF CONJUGAL PROPERTY SOLD ON EXECUTION; REDEEMED PROPERTY BECOMES PARAPHERNAL. — Inasmuch as the wife redeemed two parcels of land belonging to the conjugal partnership which were sold on execution, with money obtained by her from her father, the two parcels of land has become paraphernal and as such is beyond the reach of further execution. (Section 23 of Rule 39; 1 Moran, Comments on the Rules of Court, 1952 ed., pp. 841-842; article 1596, old Civil Code; Hepfner vs. Orton, 12 Pac., 486; Taylor vs. Taylor, 92 So., 109; Malone vs. Nelson, 167 So., 714.) She has acquired it by right of redemption as successor in interest of her husband. It has ceased to be the property of the judgment debtor. It can no longer therefore be the subject of execution under a judgment exlusively affecting the personal liability of the latter.

Ricardo N. Agbunag for the defendants and appellee.
Jorge A. Pascua for the plaintiff and appellee.

DECISION

BAUTISTA ANGELO, *J.*:

In Criminal Case No. 2897 for murder of the Court of First Instance of Zambales, Epifanio Fularon was convicted and sentenced to indemnify the heirs of the victim in the amount of ₱2,000.

On February 10, 1949, to satisfy said indemnity, a writ of execution was issued and the sheriff levied upon four parcels of land belonging to the conjugal partnership of Epifanio Fularon and Gliceria Rosete. These parcels of land were sold at public auction as required by the rules for the sum of ₱1,385.00, leaving an unsatisfied balance of ₱739.34.

On March 8, 1950, Gliceria Rosete redeemed two of the four parcels of land which were sold at public auction for the sum of ₱879.80, the sheriff having executed in her favor the corresponding deed of repurchase.

On April 10, 1950, an alias execution was issued to satisfy the balance of the indemnity and the sheriff levied upon the two parcels of land which were redeemed by Gliceria Rosete and set a date for their sale. Prior to the arrival of this date, however, Gliceria Rosete filed a case for injunction to restrain the sheriff from carrying out the sale praying at the same time for a writ of preliminary injunction. This writ was issued upon the filing of the requisite bond but was later dissolved upon a motion filed by defendants who put up a counter-bond.

The dissolution of the injunction enabled the sheriff to carry out the sale as orginally scheduled and the property was sold to one Raymundo de Jesus for the sum of ₱970. This development prompted the plaintiff to amend her complaint by praying therein, among other things, that the sale carried out by the sheriff be declared null and void. After due trial, wherein the parties practically agreed on the material facts pertinent to the issue, the court rendered decision declaring the sale null and void. The defendants appealed, and the case was certified to this Court on the plea that the appeal involves purely questions of law.

The question to be decided is whether the sale made by the sheriff on May 9, 1950 of the two parcels of land which were redeemed by Gliceria Rosete in the exercise of her right of redemption is valid it appearing that they formed part of the four parcels of land belonging to the conjugal partnership which were originally sold to satisfy the same judgment of indemnity awarded in the criminal case. The lower court declared the sale null and void on the strength of the ruling laid down in the case of Lichauco v. Olegario, 43 Phil. 540, and this finding is now disputed by the appellants.

In the case above adverted to, Lichauco obtained a judgment against Olegario for the sum of ₱72,766.37. To satisfy this judgment, certain real estate belonging to Olegario was levied in execution and at the sale Lichauco bid for it for the sum of ₱10,000. Olegario, on the same day, sold his right of redemption to his cousin Dalmacio. Later, Lichauco asked for an alias writ of execution and the sheriff proceeded with the sale of the right of redemption of Olegario whereas Lichauco himself bid for the sum of ₱10,-000. As Lichauco failed to register the sale owing to the fact that the sale executed by Olegario in favor of his cousin was already recorded, Lichauco brought the matter to court to test the validity of the latter sale. One of the issues raised was, "Whether or not Faustino Lichauco, as an execution creditor and purchaser at the auction in question was entitled, after his judgment had thus been executed but not wholly satisfied, to have it executed again by levying upon the right of redemption over said properties." The court ruled that this cannot be done for it would render nugatory the means secured by law to an execution debtor to avoid the sale of his property made at an auction under execution. Said this Court:

> "We, therefore, find that the plaintiff, as a judgment creditor, was not, and is not, entitled, after an execution has been levied upon the real properties in question by virtue of the judgment in his favor, to have another execution levied upon the same properties by virtue of the same judgment to reach the right of redemption which the execution debtor and his privies retained over them."

Inasmuch as the Lichauco case refers to the levy and sale of the right of redemption belonging to a judgment debtor and not to the levy of the very property which has been the subject of execution for the satisfaction of the same judgment, it is now contended that it cannot be considered as a precedent in the present case for here the second levy was effected on the same property subject of the original execution. But this argument falls on its own weight when we consider the following conclusion of the court, "x x x what we wish to declare is that a judgment by virtue of which a property is sold at public auction *can have no further effect* on such property." (Underlining supplied)

Nevertheless, when this case came up for discussion some members of the Court expressed doubt as to the applicability of the Lichauco case considering that it does not decide squarely whether the same property may be levied on an alias execution if it is reacquired by the judgment debtor in the exercise of his right of redemption, and as on this matter the requisite majority could not be obtained the inquiry turned to another issue which for purposes of this case is sufficient to decide the controversy.

The issue is: Since it appears that plaintiff redeemed the two parcels of land in question with money obtained by her from her father, has the property become paraphernal and as such is

beyond the reach of further execution?

We are of the opinion that the question should be answered in the affirmative for the following reasons: (a) Gliceria Rosete, the wife, redeemed the property, not in behalf of her husband, but as successor in interest in the whole or part of the property, it being then conjugal. The term "successor in interest" appearing in subdivision (a), Section 23, Rule 39, includes, according to Chief Justice Moran, "one who succeeds to the interest of the debtor by operation of law" or "the wife as regards her husband's homestead by reason of the fact that some portion of her husband's title passes to her (Comments on the Rules of Court, 1952 ed., Vol. 1, pp. 841-842); and (b) a property is deemed to belong exclusively to the wife (1) when acquired by her by right of redemption, and (2) with money belonging exclusively to her (Article 1396, old Civil Code).

The interest which a wife has in conjugal property in this jurisdiction may be likened to that of a wife in a homestead in American jurisdiction. That interest is known as "inchoate right of dower", or a "contingent interest." By virtue of this inchoate right, a wife has a right of redemption of a homestead as *successor in interest* of her husband. Thus, in Hepfner v. Urten, 12 Pac., 486, it was held that by the declaration of homestead by the husband of the property sold a portion of his title passed to his wife, and "she had the right of residence thereon with him and the family during their joint lives, *with some rights in case she should survive him.* She had a right of redemption as his *successor in interest.*" (Underlning supplied) In Taylor v. Taylor, 92 So., 109, where a mortgage was executed on a homestead and the husband refused to pay the indebtedness, it was held that "the wife's 'inchoate right of dower', which is more than a responsibility and may well be denominated a contingent interest, was a sufficient interest in the lands to confer the right of equitable redemption under the mortgage." And in Malone v. Nelson, et al., 167 So., 714, it was declared that "the right of the wife to redeem is rested upon her interest — inchoate right of dower — a right subject to a monetary valuation." These authorities have persuasive effect considering the source of our rule on the matter.

The property in question has therefore become the exclusive property of the plaintiff. She has acquired it by right of redemption as successor in interest of her husband. It has ceased to be the property of the judgment debtor. It can no longer therefore be the subject of execution under a judgment exclusively affecting the personal liability of the latter. The conclusion reached by the lower court on this matter is therefore not warranted by law.

Wherefore, the decision appealed from is modified as follows: the sale of the two parcels of land executed by the sheriff on May 9, 1950 in favor of Raymundo de Jesus for ₱970.00 is hereby declared null and void, and the deed of repurchase executed by the sheriff in favor of the plaintiff on March 8, 1950 is hereby revived and maintained. The rest of the decision is declared without effect. No pronuoncement as to costs.

Paras, Bengzon, Padilla, Montemayor, Alex Reyes, Jugo, Labrador, Concepcion and *J. B. L. Reyes, JJ.*, concur.

Pablo, J.: took no part.

XV

Asuncion Roque, Petitioner, vs. Hon. Demetrio B. Encarnacion as Judge of the Court of First Instance of Manila, and Francisco Reyes, Respondents, No. L-6505, August 23, 1954, Labrador, J.

1. SUMMARY JUDGMENTS; ACTION FOR ANNULMENT OF MARRIAGE CANNOT BE DECIDED BY SUMMARY JUDGMENT PROCEEDING. — A counterclaim seeking to annul defendant's marriage to plaintiff, although not denied or resisted by the latter, cannot be decided by summary judgment proceeding — first, because such action is not one to "recover upon a claim" or "to obtain a declaratory relief," and second, because it is the avowed policy of the State to prohibit annulment of marriages by summary proceedings.

2. ID.; ID.; ABSENCE OF GENUINE ISSUE DOES NOT JUSTIFY MISINTERPRETATION OF RULES OR VIOLATION OF POLICY. — The Rules of Court expressly prohibit annulment of marriages without actual trial (section 10, Rule 35). The mere fact that no genuine issue was presented cannot justify a misrepresentation of the rule or a violation of the avowed policy of the State.

J. C. Orendain, Canuto Pefianco, Jr. & Luz Tordesillas for petitioner.

Celestino L. de Dios and *Jose S. Atienza* for respondents.

DECISION

LABRADOR, *J.*:

In Civil Case No. 16787 of the Court of First Instance of Manila, entitled Asuncion Roque Reyes vs. Francisco Reyes, plaintiff, petitioner herein, alleges that she married defendant in November, 1943, and that out of their marriage two children were born; that during the marriage plaintiff acquired certain personal and real properties which produce a monthly income of ₱3,530; that defendant committed concubinage with a woman named Elena Ebarle, and in 1952 he attempted to take away her life, giving her blows and attempting to strangle her. She, therefore, prays for (a) legal separation, (b) legal custody of the children, (c) liquidation of the conjugal property, and (d) alimony and support for the children.

In his answer, the defendant admits their marriage, claiming, however, that it took place in February, 1944, but he denies the alleged concubinage by him and the alleged income of the properties, or the squandering of the same. He presented a counterclaim, alleging that plaintiff was already a married woman when she contracted the marriage with him, having been married with one Policarpio Bayore since February 19, 1930; that she fraudulently represented herself as single, without inpediment to contract marriage; that she has been squandering money obtained from him, trying to acquire property in her own name, etc. He prays for (a) the annulment of his marriage to plaintiff, (b) custody of the children, and (c) damages in the amount of ₱30,000. Her answer to the counterclaim is one mainly of denials. As to the express allegation contained in the counterclaim that plaintiff is a married woman at the time of their marriage, plaintiff makes this denial:

> 6. That the plaintiff denies specifically each and every allegation averred in paragraph 6 of the counterclaim, the truth being that said Policarpio Bayore (plaintiff's husband) has been absent for 14 consecutive years.

On October 21, 1952, defendant filed a motion for summary judgment, opposition to which was filed by plaintiff on the ground that an action for annulment can not be a ground for summary judgment. In support of the motion for summary judgment, the desposition of Policarpio Payore, former husband of the plaintiff, was submitted. A supposed certified copy of his marriage to plaintiff was identified by Bayore at the time of the taking of his deposition. Plaintiff did not present any affidavit, deposition, or document to support his objection. Without much ado, the trial judge granted the motion for summary judgment, immediately rendering a decision (a) declaring plaintiff's marriage to defendant null and void *ab initio*, (b) declaring that plaintiff concealed her true status and awarding the custody of the children to defendant, and (c) declaring plaintiff's rights to the conjugal properties forfeited in favor of their children, although granting the custody of the smaller child to plaintiff.

The petitioner seeks to annul the judgment on the ground that the trial court had no jurisdiction to render a summary judgment in the action to annul the marriage, and on the further ground that there were real issues of fact raised in the pleadings, as she believed that her husband was already dead at the time of her marriage to defendant, etc.

The plaintiff does not deny the fact that she was married

to Policarpio Bayore in the year 1930, and that the latter is alive and the marriage still subsisting. May this counterclaim be decided by the summary judgment proceedings? Our answer must be in the negative, first, because an action to annul marriage is not an action to "recover upon a claim" or "to obtain a declaratory relief," and, second, because it is the avowed policy of the State to prohibit annulment of marriages by summary proceedings. An action "to recover upon a claim" means an action to recover a debt or liquidated demand for money. This is the restricted application of the rule in jurisdictions where the proceeding has been adopted. In Virginia this proceeding is limited to actions "to recover money"; in Connecticut, New Jersey, and New York, to recover a debt or liquidated demand; in Michigan, for an amount arising out of contract, judgment, or statute; in Columbia, to recover sums of money arising *ex contractu;* in Illinois, for the payment of money; in Delaware, to sums for the payment of money, or recovery of book accounts, or foreign judgments; and in England, in actions upon bills and promissory notes, etc. (Yale Law Journal, Vol. 38, p. 423.) In federal courts the proceeding has been used in patent, copyright, and trade mark cases, and in cases arising upon statutes or undisputed contracts or instruments. (See cases cited in I Moran 719-726, rev. 1952 ed.)

The fundamental policy of the State, which is predominantly Catholic and considers marriage as indissoluble (there is no divorce under the Civil Code of the Philippines), is to be cautious and strict in granting annulment of marriages (Articles 68 and 101, Civil Code of the Philippines). Pursuant to this policy, the Rules of Court expressly prohibits annulment of marriages without actual trial (Section 10, Rule 35). The mere fact that no genuine issue was presented, and we desire to expedite the dispatch of the case, can not justify a misinterpretation of the rule we have adopted or a violation of the avowed policy of the State.

We find that the trial court committed an error in annulling the marriage of plaintiff to defendant in a summary judgment proceeding without the formality of a trial. The trial court's error is not, however, limited to this. In spite of the fact that a genuine issue of fact was raised by plaintiff's pretense that she entered the marriage in good faith, this issue was ignored and the court declared her rights to properties obtained during the marriage forfeited, and the custody of one of the children denied to her. These constitute an abuse of judicial discretion amounting to excess of jurisdiction, properly the subject of a proceeding by certiorari.

The judgment entered in the case is hereby annulled, and the lower court ordered to proceed in the case according to the Rules.

Paras, Pablo, Bengzon, Padilla, Montemayor, A. Reyes, Jugo, Bautista Angelo, Concepcion and *J.B.L. Reyes, J.J.,* concur.

XVI

Nicanor Padilla, Plaintiff-Appellee, vs. Andres De Jesus, Pablo De Jesus. Josefa De Jesus, Doroteo Celis, Jr., Natividad De Jesus, Romeo Morales and Manuel De Jesus, Defendants-Apellants, No. L-6008, August 31, 1954, *Bautista Angelo, J.*

EJECTMENT; JURISDICTION; EXISTENCE OF ANOTHER ACTION TO ANNUL MORTGAGE OF THE PROPERTY DOES NOT DEPRIVE THE MUNICIPAL COURT TO TRY CASE OF EJECTMENT.—The circumstance that there is pending in the court of first instance a case in which defendants are seeking the annulment of the deed of mortgage of the property in question, executed by their father without their knowledge and consent, cannot and does not deprive the municipal court of its jurisdiction to try the ejectment case filed against them by the plaintiff, in the light of the fact averred in the complaint for ejectment, and supported by evidence, that plaintiff is the exclusive owner of the property in question, having purchased it at an auction sale in 1948.

Macario Guevarra for defendants and appellants.

Padilla, Carlos & Fernando for plantiff and appellee.

DECISION

BAUTISTA ANGELO, *J.:*

On August 24, 1950, plaintiff filed an action for ejectment in the Municipal Court of Manila against defendants to recover the possession of a parcel of land located at Paco, Manila.

On September 7, 1950, defendants filed a motion to dismiss on the grounds, (1) that there is another case pending in the Court of First Instance of Manila between the same parties and over the same subject-matter; (3) that the claim sought by plaintiff has been condoned; and (3) that the court has no jurisdiction over the subject-matter of the action. Plaintiff filed an opposition to this motion but the same was denied.

On November 27, 1950, defendants filed their answer setting up certain special defenses and a counterclaim. Plaintiff filed a motion to dismiss the counterclaim, to which defendants filed a written opposition. After the reception of the evidence, the court rendered judgment ordering the defendants to vacate the property involved and to pay the plaintiff a monthly rental of ₱100 from October, 1949 up to the time the defendants shall have vacated the property, and the costs of action.

On June 2, 1951, defendants filed a motion for reconsideration and the same having been denied, they brought the case on appeal to the Court of First Instance where they filed another motion to dismiss based on the same grounds set forth in the municipal court. This motion was also denied for lack of merit.

On August 14, 1951, defendants filed their answer wherein they reiterated the same special defenses and counterclaim they set up in the municipal court. Plaintiff moved to dismiss the counterclaim, and this motion was granted.

When the case was called for hearing on March 14, 1932, defendants moved for postponement on the ground that their principal witness could not be present. Counsel for the plaintiff objected to the postponement. However, the parties agreed to hear the testimony of one L. G. Marquez, an expert witness for the plaintiff, who testified and was cross-examined by counsel for the defendants. Thereafter, upon agreement of the parties, the continuation of the hearing was set for March 24, 1952.

When the case was called for the continuation of the hearing on said date, neither the defendants, nor their counsel, appeared, whereupon the court allowed the plaintiff to present his evidence, and on March 15, 1952, it rendered decision ordering defendants to vacate the property and to pay a monthly rental of ₱200 from October, 1940 until the time they shall have actually surrendered the property, with costs.

On April 14, 1952, defendants filed a motion for reconsideration and new trial, accompanied by affidavits of merits, on the ground that their failure to appear on March 24, 1952 was due to "mistake and excusable negligence" as provided for in Section 1 (a), Rule 37, of the Rules of Court. And when this motion was denied, defendants took the case directly to this Court imputing three errors to the lower court.

Defendants contend that the municipal court has no jurisdiction to entertain the case because, in their answer, they averred that, long before the filing of the present cast of ejectment, they had filed against the plaintiff in the Court of First Instance of Manila a case in which they seek the annulment of the deed of mortgage executed by Roman de Jesus, their father, without their knowledge and consent, on a property which belonged to the spouses Roman de Jesus and Maria Angeles, and that, inasmuch as the annulment case, wherein the ownership of the property is in issue, is still pending determination, the municipal court has no jurisdiction over the ejectment case upon the theory that the same cannot be determined without first pausing upon the question of ownership of the property.

This contention cannot be sustained in the light of the facts averred in the complaint which appear supported by the evidence submitted by the plaintiff. These facts show that the plaintiff is the exclusive owner of the property in question having purchased it at the auction sale carried out by the sheriff sometime in October, 1948, and that because of the failure of the mortgagor, or his successors in interest, to redeem it within the period of redemption, the Register of Deeds of Manila issued Transfer Certificate of Title No. 23590 in favor of the plaintiff. The facts also show that after plaintiff had become the owner of the property he found the defendants occupying it without having entered into a contract of lease with him, or having made any arrangement for its occupancy, or without paying any rental therefor, and for this reason, he filed this ejectment case against them before the municipal court. These facts clearly show that this case comes within the jurisdiction of the municipal court. The circumstance that there is pending in the court of first instance a case in which defendants are claiming one-half of the property as heirs of the deceased wife of the mortgagor cannot and does not deprive the municipal court of its jurisdiction. The most that could be done in the light of the present situation is to suspend the trial of the ejectment case pending final determination of the annulment case, but the pendency of the latter cannot have the effect of removing the former from the jurisdiction of the municipal court.

This case may be likened to that of Fulgencio v. Natividad, 45 O. G. No. 9, 3794, decided on February 14, 1948, in which petitioner pleaded that, before the complaint for detainer was filed against him, he had brought an action in the proper court to compel the respondents to resell to him the lot and the house erected thereon upon payment of the purchase price, and, therefore, the case does not come within the jurisdiction of the municipal court. In overruling this plea, this Court said: "Granting that petitioner has the right to repurchase the property, he cannot invoke it until after the competent court shall have rendered judgment as prayed for by him. Hence the allegation in the detainer case that he had brought an action in the proper court to compel the resale to him of the lot and the house erected thereon, did not raise the question of title to the property and for that reason did not remove the case from the jurisdiction of the municipal court. As already stated, the plea of another pending action to compel the resale to the petitioner of the property involved in the detainer case is an admission that the title thereto is not vested in him. Such being the case, the municipal court had jurisdiction to try and decide the detainer case."

A different consideration, however, should be made in connection with the second issue to the effect that the lower court erred in denying the motion for reconsideration of the defendants notwithstanding the explanation given by them of their failure to appear at the continuation of the trial and the affidavits of merit attached to the motion showing unmistakably that such failure was due to "mistake and excusable negligence" and not for purposes of delay.

It should be recalled that when this case was called for hearing on March 14, 1952, counsel for defendants moved for postponement on the ground that their principal witness was sick and could not appear. Counsel for the plaintiff objected to the postponement. However, the parties agreed to hear the testimony of one L. G. Marquez, a witness for the plaintiff, who testified and was cross-examined by counsel for defendants. Thereafter, upon agreement of the parties, the continuation of the hearing was set for March 24, 1952. And when the case was called for continuation on that date, neither defendants, nor their counsel, appeared. Nevertheless, the court allowed the plaintiff to present his evidence, and thereafter rendered decision accordingly. But when, days after, defendants filed a motion for reconsideration explaining that their failure to appear was due to "mistake and excusable negligence" of their counsel, supporting their claim with the requisite affidavits of merit, the court curtly denied the motion.

We believe that, in the light of the circumstances of the case, the court did not act properly when it denied said motion for reconsideration considering the explanation given by defendants and their counsel in their affidavits of merit. This is what counsel says in his affidavit: "That upon motion of the undersigned affiant, the Honorable Judge Higinio Macadaeg postponed the hearing of said case on March 24, 1952, but the undersigned affiant in noting the date of the postponement on his diary or memorandum, committed an honest mistake by noting it down opposite March 25, 1952, instead of March 24, 1952, consequently he was not able to appear in court on the proper date, and so with the defendants, as they were of the belief that the hearing was on March 25, 1952 and not on March 24, 1952." And these facts also appear in the affidavits subscribed to by the defendants.

These facts, which are not contradicted, constitute in our opinion a proper ground for a new trial under Section 1 (a), Rule 37, for, no doubt, they contsitute "mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which such aggrieved party has probably been impaired in his rights." This is more so considering that, according to the answer, defendants have a meritorious defense.

Wherefore, the decision appealed from is reversed. It is ordered that this case be remanded to the lower court for a new trial with the understanding that the new trial should await the final termination of the annulment case pending in the Court of First Instance of Manila (Civil Case No. 11267), without pronouncement as to costs.

Paras, Bengzon, Montemayor, Jugo and Pablo, J.J., concur.

Concepcion and Padilla, J.J., took no part.

LABRADOR, J., dissenting:

I dissent.

The land subject of the action appears to have been conjugal property of the deceased Roman de Jesus and his wife, whose successors in interest are the defendants-appellants. The deceased Roman de Jesus mortgaged the property to plaintiff-appellee, it is true, but the mortgage affected only his undivided one-half share in the property. The action by the defendants-appellants to annul the mortgage over their undivided one-half share necessarily involved both title to the property and the right to the possession thereof. The present action of plaintiff-appellee really and actually, under the circumstances, involves or should involve both the title and the right to possession. The action by the defendants-appellants to annul the mortgage over their share bars the present action, therefore. And as the issue really involved is title, the municipal court which entertain-

ed the action of unlawful detainer has no jurisdiction. The action should, therefore, be dismissed on two grounds, lack of jurisdiction and pendency of another action between the same parties over the same cause. Nothing can be gained by the continuation of the case in the court below.

XVII

In re: Will and Testament of the deceased Reverend Sancho Abadia. Severina A. Vda. De Enriquez, et al., Petitioners-Appellees, vs. Miguel Abadia, et al., Oppositiors-Appellants, No. L-7188, August 9, 1954, Montemayor, J.

1. WILLS; PROBATE OF WILL; VALIDITY OF WILL AS TO FORM DEPENDS UPON LAW IN FORCE AT TIME OF EXECUTION; TITLE OF LEGATEES AND DEVISEES UNDER WILL VESTS FROM TIME OF EXECUTION. — The validity of a will as to form is to be judged not by the law in force at the time of the testator's death or at the time the supposed will is presented in court for probate or when the petition is decided by the court but at the time the instrument was executed. One reason in support of the rule is that although the will operates upon and after the death of the testator, the wishes of the testator about the disposition of his estate among his heirs and among the legatees is given solemn expression at the time the will is executed, and in reality, the legacy or bequest then becomes a completed act.

2. ID.; EXECUTION OF WILLS; LAW SUBSEQUENTLY PASSED, ADDING NEW REQUIREMENTS AS TO EXECUTION OF WILLS; FAILURE TO OBSERVE FORMAL REQUIREMENTS AT TIME OF EXECUTION INVALIDATES WILL; HEIRS INHERIT BY INTESTATE SUCCESSION; LEGISLATURE CAN NOT VALIDATE VOID WILLS. — From the day of the death of the testator, if he leaves a will, the title of the legatees and devisees under it becomes a vested right, protected under the due process clause of the Constitution against a subsequent change in the statute adding new legal requirements of execution of wills, which would invalidate such will. By parity of reasoning, when one executes a will which is invalid for failure to observe and follow the legal requirements at the time of its execution then upon his death he should be regarded and declared as having died intestate, and his heirs will then inherit by intestate succession, and no subsequent law with more liberal requirements or which dispenses with such requirements as to execution should be allowed to validate a defective will and thereby divest the heirs of their vested rights in the estate by intestate succession. The general rule is that the Legislature can not validate void wills (57 Am. Jur., Wills, Sec. 231, pp. 192-193).

Manuel A. Zosa, Luis B. Ladonga, Mariano A. Zosa and *B. G. Advincula* for Oppositors and Appellants.

C. de la Victoria for Petitioners and Appellees.

DECISION

MONTEMAYOR, *J.*:

On September 6, 1923, Father SANCHO ABADIA, parish priest of Talisay, Cebu, executed a document purporting to be his Last Will and Testament now marked Exhibit "A". Resident of the City of Cebu, he died on January 14, 1943, in the municipality of Aloguinsan, Cebu, where he was an evacue. He left properties estimated at P8,000 in value. On October 2, 1946, one Andres Enriquez, one of the legatees in Exhibit "A", filed a petition for its probate in the Court of First Instance of Cebu. Some cousins and nephews who would inherit the estate of the deceased if he left no will, filed opposition.

During the hearing one of the attesting witnesses, the other two being dead, testified without contradiction that in his presence and in the presence of his two co-witnesses, Father Sancho wrote out in longhand Exhibit "A" in Spanish which the testator spoke and understood; that he (testator) signed on the left hand margin of the front page of each of the three folios or sheets of which the document is composed, and numbered the same with Arabic numerals, and finally signed his name at the end of his writing at the last page, all this, in the presence of the three attesting witnesses after telling that it was his last will and that the said three witnesses signed their names on the last page after the attestation clause in his presence and in the presence of each other. The oppositors did not submit any evidence.

The learned trial court found and declared Exhibit "A" to be a holographic will; that it was in the handwriting of the testator and that although at the time it was executed and at the time of the testator's death, holographic wills were not permitted by law still, because at the time of the hearing and when the case was to be decided the new Civil Code was already in force, which Code permitted the execution of holographic wills, under a liberal view, and to carry out the intention of the testator which according to the trial court is the controlling factor and may override any defect in form, said trial court by order dated January 24, 1952, admitted to probate Exhibit "A", as the Last Will and Testament of Father Sancho Abadia. The oppositors are appealing from that decision; and because only questions of law are involved in the appeal, the case was certified to us by the Court of Appeals.

The new Civil Code (Republic Act No. 386) under Art. 810 thereof provides that a person may execute a holographic will which must be entirely written, dated and signed by the testator himself and need not be witnessed. It is a fact, however, that at the time that Exhibit "A" was executed in 1923 and at the time that Father Abadia died in 1943, holographic will were not permitted, and the law at the time imposed certain requirements for the execution of wills, such as numbering correlatively each page (not folio or sheet) in letters and signing on the left hand margin by the testator and by the three attesting witnesses, requirements which were not complied with in Exhibit "A" because the back pages of the first two folios of the will were not signed by any one, not even by the testator and were not numbered, and as to the three front pages, they were signed only by the testator.

Interpreting and applying this requirement this Court in the case of In re Estate of Saguinsin, 41 Phil. 875, 879, referring to the failure of the testator and his witnesses to sign on the left hand margin of every page, said:

> "x x x. This defect is radical and totally vitiates the testament. It is not enough that the signatures guaranteeing authenticity should appear upon two folios or leaves; three pages having been written on, the authenticity of all three of them should be guaranteed by the signature of the alleged testatrix and her witnesses."

And in the case of Aspe v. Prieto, 46 Phil. 700, referring to the same requirement, this Court declared:

> "From an examination of the document in question, it appears that the left margins of the six pages of the document are signed only by Ventura Prieto. The noncompliance with section 2 of Act No. 2645 by the attesting witnesses who omitted to sign with the testator at the left margin of each of the five pages of the document alleged to be the will of Ventura Prieto, is a fatal defect that constitutes an obstacle to its probate."

What is the law to apply to the probate of Exh. "A"? May we apply the provisions of the new Civil Code which now allows holographic wills, like Exhibit "A" which provisions were invoked by the appellee-petitioner and applied by the lower court? But

Article 795 of this same new Civil Code expressly provides: "The validity of a will as to its form depends upon the observance of the law in force at the time it is made." The above provision is but an expression or statement of the weight of authority to the effect that the validity of a will is to be judged not by the law in force at the time of the testator's death or at the time the supposed will is presented in court for probate *or* when the petition is decided by the court but at the time the instrument was executed. One reason in support of the rule is that although the will operates upon and after the death of the testator, the wishes of the testator about the disposition of his estate among his heirs and among the legatees is given solemn expression at the time the will is executed, and in reality, the legacy or bequest then becomes a completed act. This ruling has been laid down by this Court in the case of In re will of Riosa, 39 Phil. 23. It is a wholesome doctrine and should be followed.

Of course, there is the view that the intention of the testator should be the ruling and controlling factor and that all adequate remedies and interpretations should be resorted to in order to carry out said intention, and that when statutes passed after the execution of the will and after the death of the testator lessen the formalities required by law for the execution of wills, said subsequent statutes should be applied so as to validate wills defectively executed according to the law in force at the time of execution. However, we should not forget that from the day of the death of the testator, if he leaves a will, the title of the legatees and devisees under it becomes a vested right, protected under the due process clause of the constitution against a subsequent change in the statute adding new legal requirements of execution of wills which would invalidate such a will. By parity of reasoning, when one executes a will which is invalid for failure to observe and follow the legal requirements at the time of its execution then upon his death he should be regarded and declared as having died intestate, and his heirs will then inherit by intestate succession, and no subsequent law with more liberal requirements or which dispenses with such requirements as to execution should be allowed to validate a defective will and thereby divest the heirs of their vested rights in the estate by intestate succession. The general rule is that the Legislature can not validate said wills (57 Am. Jur., Wills, Sec. 231, pp. 192-193).

In view of the foregoing, the order appealed from is reversed, and Exhibit "A" is denied probate. With costs.

Paras, C.J., Pablo, Bengzon, Padilla, Alex Reyes, Jugo Bautista Angelo, Labrador, Conceycion, and *J. B. L. Reyes, J.J.*, concur.

XVIII

Antonio Uy, Petitioner-Appellant, vs. Jose Rodriguez, Mayor of the City of Cebu, Respondent-Appellee, G. R. No. L-6772, July 30, 1954, Labrador, J.

ADMINISTRATIVE LAW; PUBLIC OFFICERS; CIVIL SERVICE LAW; REMOVAL OF DETECTIVES. — The ousted detective states that he is not a civil service eligible but that it does not appear from the record that his appointment as member of the detective force was temporary in character or for periods of three months merely, and that he had been reappointed every three months until his separation now in question. The Mayor of Cebu claims that said detective's position is primarily confidential and, therefore, Executive Order No. 264, series of 1940, of the President of the Philippines is applicable to the petitioner; that detectives in the City of Cebu pertain to the "detective service," which is distinct from the city police force and, therefore, the provisions of Republic Act No. 557, which require investigation prior to dismissal of a member of the city police force, are not, applicable. *Held*: The above-mentioned circumstances, in addition to the fact that said detective was promoted as senior detective inspector, show that his appointment is not in a temporary capacity. He may not, therefore, be dismissed or removed except in accordance with the provisions of Republic Act No. 557. (Palamine vs. Zapada, April 1954 Gaz., p. 1566; Mission vs. Del Rosario, April 1954 Gaz., p. 1571; Abella vs. Rodriguez, L-6867, June 29, 1954.)

Fernando S. Ruiz and *Emilio A. Matheu* for the petitioner and appellant.

Jose L. Abad and *Quirico del Mar* for the respondent and appellee.

DECISION

LABRADOR, *J.*:

This is an appeal from a judgment of the Court of First Instance of Cebu dismissing the petition for mandamus instituted in that court by Antonio Uy against Jose Rodriguez, mayor of the City of Cebu. Petitioner Antonio Uy was appointed deputy inspector of the detective force, police department, of the City of Cebu on July 1, 1946. On July 1, 1947, he was promoted to the position of senior detective inspector. He held this position from that date until September 5, 1952, when the respondent city mayor dispensed with his services on the ground that he can no longer repose his trust and confidence in him. Upon receiving this notice of dismissal, petitioner requested the mayor to reinstate him, but the latter refused to do so. Hence, this action of mandamus.

The court *a quo* held that the position held by the petitioner is primarily confidential and, therefore, Executive Order No. 264, series of 1940, of the President of the Philippines is applicable to the petitioner; that detectives in the City of Cebu pertain to the "detective service," which is distinct from the city police force and, therefore, the provisions of Republic Act No. 557, which require investigation prior to the dismissal of a member of the city police force, are not applicable.

The question raised in this special civil action has already been decided squarely by us in the cases of Palormine, et al vs. Zapada, et al, G. R. No. L-6901, promulgated March 15, 1954; Mission, et al vs. Del Rosario, G. R. No. L-6754, promulgated February 26, 1954; and Abella vs. Rodriguez, G. R. No. L-6867, promulgated June 29, 1954. In said cases, we have held that a member of the detective force of Cebu City is a member of the police department of said city and may not be removed except in accordance with the provisions of Republic Act No. 557.

The statement submitted by the petitioner shows that he is not a civil service eligible, but neither does it appear from the record that his appointment as member of the detective force was temporary in character or for periods of three months merely, and that he had been reappointed every three months until his separation. These circumstances, in addition to the fact that he was promoted as senior detective inspector, show that his appointment is not in a temporary capacity. He may not, therefore, be dismissed or removed except in accordance with the provisions of existing law.

The judgment appealed from is hereby reversed, and the respondent city mayor is ordered to reinstate the petitioner to his former position of senior detective inspector in the detective force of the City of Cebu, with right to arrears in salary from the time of his separation to the date of his reinstatement. Without costs.

ERRATA

Re: **In the matter of the last will and testament of Jose Vaño, deceased. Teodoro Vaño, Petitioner and Appellant, vs. Paz Vaño, Vda. De Garces, et al., Oppositors and Appellees, G. R. No. L-6303, June 30, 1954.** (L. J., p. 448, Sept. 30, 1954.)

In the above-mentioned case, Pedro Re. Luspo's name should have appeared as lawyer for the petitioners and appellants instead of his brother Roque R. Luspo and his former partner, Vicente L. Paelnar, who handled the case in the lower court and lost it. On appeal to the Supreme Court, Atty. Pedro Re. Luspo took over and won the case.

DECISION OF THE COURT OF INDUSTRIAL RELATIONS

La Mallorca Local 101, *Petitioner, vs. La Mallorca Taxi, Respondent, Case No. 4-ULP, October* 3, 1953, *Lanting, J.*

1. COURT OF INDUSTRIAL RELATIONS; UNFAIR LABOR PRACTICE; NATURE OF UNFAIR LABOR PRACTICE PROCEEDINGS. — An unfair labor practice proceedings under Section 5 of Republic Act No. 875 is not a criminal action. The underlying purpose of proceedings under this section of the Act is the effectuation and preservation of industrial harmony. Accordingly, it has been held that while complaint proceedings may in given cases result in incidental relief or benefit to individual employees, the proceedings are intrinsically of a public nature. The proceedings are novel in our juridical system, having been comparatively recently created by the original Act. They have neither dependence upon nor relation to either the substantive or adjective aspects of the common law. They do not constitute litigation in the sense that litigation, as it is generally conceived, is an action between individual litigants for damages or other private redress.
2. ID.; ID.; SUFFICIENCY OF THE COMPLAINT. — The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, or the elements of a cause like a declaration at law or a bill in equity. All that is required in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.
3. ID.; ID.; EFFECT OF DEFECTIVE COMPLAINT. — When a complaint does not fairly apprise the respondents of the acts allegedly constituting unfair labor practice and of all other issues they are required to meet, such defect should not be a sufficient reason to dismiss or quash the complaint; at most, it could serve as ground for a motion for bill of particulars.
4. ID.; ID.; IMPOSITION OF PENALTIES. — In the event of a finding by this Court in an unfair labor practice case initiated under section 5, that any person has engaged or is engaging in unfair labor practice, only the remedies and reliefs provided in said section may be granted. In such case, this Court should not and can not at the same time impose the penalties prescribed in section 25. On the other hand, in case the imposition of the penalties prescribed in section 25 is sought, a criminal complaint or information must be filed and the requirements of due process as to procedure and evidence in ordinary criminal cases must be observed.

B. C. Gonzales & Actg. Prosecutor Estanislao Maralit for petitioner.

Manuel Chan for respondents.

ORDER

This concerns a motion of respondent seeking to dismiss or quash the complaint filed by the Acting Prosecutor of this Court dated August 15, 1953 against the La Mallorca Taxi for unfair labor practice. The grounds in support of said motion are as follows:

"1. The complaint, which is a criminal action, has not been brought in the name of the real party in interest, that is, the People of the Philippines;

2. The respondent is a juridical person, and a juridical person cannot be made a defendant in a criminal action;

3. The allegations of the complaint are vague, uncertain and fails to inform the respondent of the nature and cause of the accusation against it; and

4. The procedure prescribed by Republic Act 875 for the hearing or trial of violation of the provisions of the same, that is, by Section 5 thereof, in relation to Section 25 of the said Act, is unconstitutional and void."

The first three grounds are all wholly based on the premise that the complaint filed in this case is a criminal complaint and that consequently the present action before this Court is a criminal action. An examination of this premise is therefore necessary.

First of all, the complaint itself states that it was brought "pursuant to Section 5(b) of Republic Act No. 875." Said section 5(b) provides:

"(b) The Court shall observe the following procedure without resort to mediation and conciliation as provided in Section four of Commonwealth Act numbered One Hundred and Three, as amended, or to any pre-trial procedure. Whenever it is charged by an offended party or his representative that any person has engaged or is engaging in any such unfair labor practice, the Court or any agency or agent designated by the Court must investigate such charge and shall have the power to issue and cause to be served upon such person a complaint, stating the charges in that respect and containing a notice of hearing before the Court or a member thereof, or before a designated Hearing Examiner, at the time and place fixed therein not less than five nor more than ten days after serving the said complaint. The person complained of shall have the right to file an answer to the complaint and to appear in person or otherwise (but if the Court shall so request, the appearance shall be personal) and give testimony at the place and time fixed in the complaint. In the discretion of the Court, a member, thereof or a Hearing Examiner, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding, the rules of evidence prevailing in Courts of law or equity shall not be controlling and it is the spirit and intention of this Act that the Court and its members and Hearing Examiners shall use every and all reasonable means to ascertain the facts in each case speedily and objectively and without regard to technicalities of law or procedure. In rendering its decisions, the Court shall not be bound solely by the evidence presented during the hearing but may avail itself of all other means such as (but not limited to) ocular inspections and questioning well-informed persons which results must be made a part of the record. In the proceedings before the Court or a Hearing Examiner thereof, the parties shall not be required to be represented by legal counsel and it shall be the duty and obligation of the Court or Hearing Examiner to examine and cross-examine witnesses on behalf of the parties and to assist in the orderly presentation of the evidence."

Paragraph 4 of the complaint alleges "that by the acts described in paragraph three (3) above, respondents and/or its agents have engaged and are engaging in unfair labor practice within the meaning of Section 4(a), sub-section 1 of Republic Act No. 875." The provisions referred to reads as follows:

"Sec. 4. Unfair Labor Practice.—

(a) it shall be unfair labor practice for an employer:

(1) To interfere with, restrain or coerce employees in the exercise of their rights guarnateed in section three;

Section 5(b) of Republic Act No. 875 was borrowed substantially from Section 10(b) of the National Labor Relations Act of the United States which, as originally enacted, reads:

"SEC. 10(b) Whenever it is charged that any person has engaged in or in engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an

order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."

Commenting on the above-quoted provision, Rothenberg, in his book entitled "Labor Relations," has the following to say:

"The underlying purpose of proceedings under this section of the Act is the effectuation and preservation of industrial harmony. Accordingly, it has been held that while complaint proceedings may in given cases result in incidental relief or benefit to individual employees, the proceedings are intrinsically of a public nature. The proceedings are novel in our juridical system, having been comparatively recently created by the original Act. They have neither dependence upon nor relation to either the substantive or adjective aspects of the common law. They do not constitute 'litigation' in the sense that litigation, as it is generally conceived, is an action between individual litigants for damages or other private redress in which the right of Jury trial obtains." (p. 560)

As to the sufficiency of a complaint filed pursuant to this provision, the Sixth Circuit Court of Appeals says:

"The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, or the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense." (NLRB v. Piqua Munising Wood Products Company, 109 F(2d) 552, cited in Teller's Labor Disputes and Collective Bargaining, Vol. 2. p. 1005).

The above is sufficient to dispose of respondent's contention that the instant proceeding is a criminal action and hence the Court considers the first three grounds of respondent's motion to dismiss as not well taken. What remains for the Court to consider is the fourth ground.

It is our opinion that the procedure prescribed in section 5 for the hearing of unfair labor practice cases does not violate the constitutional requirement of due process. As stated earlier, Section 5(b) of our law was copied from section 10(b) of the National Labor Relations Act, and in overruling the contention that this Act was lacking in due process of law, the United States Supreme Court declared:

"We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation." (Jones and Laughlin Steel Corporation vs. National Labor Relations Board, 301 USD)

The Court notes, however, that what respondent objects to is the procedure prescribed in section 5 in relation to section 25. This is evident from the wording of the fourth ground quoted at the beginning and the statement on page 12 of the motion to the effect that "Section 5 and 25, insofar as they complement each other, are null and void."

In effect it is respondent's contention that section 25 is inseparable from section 5 because any finding or decision of this Court in an action or proceeding brought under section 5 to the effect that one of the unfair labor practices enumerated in section 4 has been committed will automatically require the imposition of the penalties provided in section 25. The Court does not subscribe to such a view.

In the first place, respondent assumes that unfair labor practice cases are criminal actions but, as previously pointed out, such assumption in not correct. In the second place, the first paragraph of section 25 is applicable only to persons who violate section 3 and the commission of any of the acts of unfair labor practice enumerated in section 4 is not necessarily also a violation of section 3. In the third place, a close examination of these two sections will show that they are not inseparably intertwined but on the contrary can stand alone and independently of each other. Consequently, the imposition of the penalties provided by section 25 is not mandatory in proceedings brought under section 5.

It is our opinion that in the event of a finding by this Court in an unfair labor practice case initiated under section 5, that any person has engaged or is engaging in unfair labor practice, only the remedies and reliefs provided in said section may be granted. In such case, this Court should not and cannot at the same time impose the penalties prescribed in section 25. On the other hand, in case the imposition and penalties prescribed in section 25 is sought, a criminal complaint or information must be filed and the requirements of due process as to procedure and evidence in ordinary criminal cases must be observed.

As to the sufficiency of the complaint filed in this case, the Court is satisfied that it conforms substantially to their requirements of due process. At any rate, when a complaint does not fairly apprise the respondents of the acts alledgely constituting unfair labor practice and of all other issued they are required to meet, such defect should not be a sufficient reason to dismiss or quash the complaint; at most, it could serve as ground for a motion for bill of particulars.

IN VIEW OF ALL THE FOREGOING, the motion under consideration should be, as it is hereby, denied.

SO ORDERED.

Manila, Philippines, October 3, 1953.

(SGD.) JUAN L. LANTING
Associate Judge

Republic of the Philippines
Department of Public Works and Communications
BUREAU OF POSTS
MANILA

SWORN STATEMENT
(Required by Act 2580)

The undersigned, VICENTE J. FRANCISCO editor/managing editor/business manager/owner/publisher, of THE LAWYERS JOURNAL (title of publication), published once a month (frequency of issue), in ENGLISH AND SPANISH (language in which printed), at 1190 Taft Avenue, Manila (office of publication), after having been duly sworn in accordance with law, hereby submits the following statement of ownership, management, circulation, etc., which is required by Act 2580, as amended by Commonwealth Act No. 201:

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Notary Public
Until Dec. 31, 1954

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Page No. 63
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Series of 1954

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DECISION OF THE COURT OF INDUSTRIAL RELATIONS

La Mallorca Local 101, *Petitioner, vs. La Mallorca Taxi, Respondent, Case No. 4-ULP, October* 3, 1953, *Lanting, J.*

1. COURT OF INDUSTRIAL RELATIONS; UNFAIR LABOR PRACTICE; NATURE OF UNFAIR LABOR PRACTICE PROCEEDINGS. — An unfair labor practice proceedings under Section 5 of Republic Act No. 875 is not a criminal action. The underlying purpose of proceedings under this section of the Act is the effectuation and preservation of industrial harmony. Accordingly, it has been held that while complaint proceedings may in given cases result in incidental relief or benefit to individual employees, the proceedings are intrinsically of a public nature. The proceedings are novel in our juridical system, having been comparatively recently created by the original Act. They have neither dependence upon nor relation to either the substantive or adjective aspects of the common law. They do not constitute litigation in the sense that litigation, as it is generally conceived, is an action between individual litigants for damages or other private redress.
2. ID.; ID.; SUFFICIENCY OF THE COMPLAINT. — The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, or the elements of a cause like a declaration at law or a bill in equity. All that is required in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.
3. ID.; ID.; EFFECT OF DEFECTIVE COMPLAINT. — When a complaint does not fairly apprise the respondents of the acts allegedly constituting unfair labor practice and of all other issues they are required to meet, such defect should not be a sufficient reason to dismiss or quash the complaint; at most, it could serve as ground for a motion for bill of particulars.
4. ID.; ID.; IMPOSITION OF PENALTIES. — In the event of a finding by this Court in an unfair labor practice case initiated under section 5, that any person has engaged or is engaging in unfair labor practice, only the remedies and reliefs provided in said section may be granted. In such case, this Court should not and can not at the same time impose the penalties prescribed in section 25. On the other hand, in case the imposition of the penalties prescribed in section 25 is sought, a criminal complaint or information must be filed and the requirements of due process as to procedure and evidence in ordinary criminal cases must be observed.

B. C. Gonzales & Actg. Prosecutor Estanislao Maralit for petitioner.

Manuel Chan for respondents.

O R D E R

This concerns a motion of respondent seeking to dismiss or quash the complaint filed by the Acting Prosecutor of this Court dated August 15, 1953 against the La Mallorca Taxi for unfair labor practice. The grounds in support of said motion are as follows:

"1. The complaint, which is a criminal action, has not been brought in the name of the real party in interest, that is, the People of the Philippines;

2. The respondent is a juridical person, and a juridical person cannot be made a defendant in a criminal action;

3. The allegations of the complaint are vague, uncertain and fails to inform the respondent of the nature and cause of the accusation against it; and

4. The procedure prescribed by Republic Act 875 for the hearing or trial of violation of the provisions of the same, that is, by Section 5 thereof, in relation to Section 25 of the said Act, is unconstitutional and void."

The first three grounds are all wholly based on the premise that the complaint filed in this case is a criminal complaint and that consequently the present action before this Court is a criminal action. An examination of this premise is therefore necessary.

First of all, the complaint itself states that it was brought "pursuant to Section 5(b) of Republic Act No. 875." Said section 5(b) provides:

"(b) The Court shall observe the following procedure without resort to mediation and conciliation as provided in Section four of Commonwealth Act numbered One Hundred and Three, as amended, or to any pre-trial procedure. Whenever it is charged by an offended party or his representative that any person has engaged or is engaging in any such unfair labor practice, the Court or any agency or agent designated by the Court must investigate such charge and shall have the power to issue and cause to be served upon such person a complaint, stating the charges in that respect and containing a notice of hearing before the Court or a member thereof, or before a designated Hearing Examiner, at the time and place fixed therein not less than five nor more than ten days after serving the said complaint. The person complained of shall have the right to file an answer to the complaint and to appear in person or otherwise (but if the Court shall so request, the appearance shall be personal) and give testimony at the place and time fixed in the complaint. In the discretion of the Court, a member, thereof or a Hearing Examiner, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding, the rules of evidence prevailing in Courts of law or equity shall not be controlling and it is the spirit and intention of this Act that the Court and its members and Hearing Examiners shall use every and all reasonable means to ascertain the facts in each case speedily and objectively and without regard to technicalities of law or procedure. In rendering its decisions, the Court shall not be bound solely by the evidence presented during the hearing but may avail itself of all other means such as (but not limited to) ocular inspections and questioning well-informed persons which results must be made a part of the record. In the proceedings before the Court or a Hearing Examiner thereof, the parties shall not be required to be represented by legal counsel and it shall be the duty and obligation of the Court or Hearing Examiner to examine and cross-examine witnesses on behalf of the parties and to assist in the orderly presentation of the evidence."

Paragraph 4 of the complaint alleges "that by the acts described in paragraph three (3) above, respondents and/or its agents have engaged and are engaging in unfair labor practice within the meaning of Section 4(a), sub-section 1 of Republic Act No. 875." The provisions referred to reads as follows:

"Sec. 4. Unfair Labor Practice.—

(a) it shall be unfair labor practice for an employer:

(1) To interfere with, restrain or coerce employees in the exercise of their rights guarnateed in section three;

Section 5(b) of Republic Act No. 875 was borrowed substantially from Section 10(b) of the National Labor Relations Act of the United States which, as originally enacted, reads:

"SEC. 10(b) Whenever it is charged that any person has engaged in or in engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an

order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."

Commenting on the above-quoted provision, Rothenberg, in his book entitled "Labor Relations," has the following to say:

"The underlying purpose of proceedings under this section of the Act is the effectuation and preservation of industrial harmony. Accordingly, it has been held that while complaint proceedings may in given cases result in incidental relief or benefit to individual employees, the proceedings are intrinsically of a public nature. The proceedings are novel in our juridical system, having been comparatively recently created by the original Act. They have neither dependence upon nor relation to either the substantive or adjective aspects of the common law. They do not constitute 'litigation' in the sense that litigation, as it is generally conceived, is an action between individual litigants for damages or other private redress in which the right of Jury trial obtains." (p. 560)

As to the sufficiency of a complaint filed pursuant to this provision, the Sixth Circuit Court of Appeals says:

"The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, or the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense." (NLRB v. Piqua Munising Wood Products Company, 109 F(2d) 552, cited in Teller's Labor Disputes and Collective Bargaining, Vol. 2. p. 1005).

The above is sufficient to dispose of respondent's contention that the instant proceeding is a criminal action and hence the Court considers the first three grounds of respondent's motion to dismiss as not well taken. What remains for the Court to consider is the fourth ground.

It is our opinion that the procedure prescribed in section 5 for the hearing of unfair labor practice cases does not violate the constitutional requirement of due process. As stated earlier, Section 5(b) of our law was copied from section 10(b) of the National Labor Relations Act, and in overruling the contention that this Act was lacking in due process of law, the United States Supreme Court declared:

"We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation." (Jones and Laughlin Steel Corporation vs. National Labor Relations Board, 301 USD)

The Court notes, however, that what respondent objects to is the procedure prescribed in section 5 in relation to section 25. This is evident from the wording of the fourth ground quoted at the beginning and the statement on page 12 of the motion to the effect that "Section 5 and 25, insofar as they complement each other, are null and void."

In effect it is respondent's contention that section 25 is inseparable from section 5 because any finding or decision of this Court in an action or proceeding brought under section 5 to the effect that one of the unfair labor practices enumerated in section 4 has been committed will automatically require the imposition of the penalties provided in section 25. The Court does not subscribe to such a view.

In the first place, respondent assumes that unfair labor practice cases are criminal actions but, as previously pointed out, such assumption in not correct. In the second place, the first paragraph of section 25 is applicable only to persons who violate section 3 and the commission of any of the acts of unfair labor practice enumerated in section 4 is not necessarily also a violation of section 3. In the third place, a close examination of these two sections will show that they are not inseparably intertwined but on the contrary can stand alone and independently of each other. Consequently, the imposition of the penalties provided by section 25 is not mandatory in proceedings brought under section 5.

It is our opinion that in the event of a finding by this Court in an unfair labor practice case initiated under section 5, that any person has engaged or is engaging in unfair labor practice, only the remedies and reliefs provided in said section may be granted. In such case, this Court should not and cannot at the same time impose the penalties prescribed in section 25. On the other hand, in case the imposition and penalties prescribed in section 25 is sought, a criminal complaint or information must be filed and the requirements of due process as to procedure and evidence in ordinary criminal cases must be observed.

As to the sufficiency of the complaint filed in this case, the Court is satisfied that it conforms substantially to their requirements of due process. At any rate, when a complaint does not fairly apprise the respondents of the acts alledgely constituting unfair labor practice and of all other issued they are required to meet, such defect should not be a sufficient reason to dismiss or quash the complaint; at most, it could serve as ground for a motion for bill of particulars.

IN VIEW OF ALL THE FOREGOING, the motion under consideration should be, as it is hereby, denied.

SO ORDERED.

Manila, Philippines, October 3, 1953.

(SGD.) JUAN L. LANTING
Associate Judge

Republic of the Philippines
Department of Public Works and Communications
BUREAU OF POSTS
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(Required by Act 2580)

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(Signature)
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Subscribed and sworn to before me this 1 day of October, 1954 at Manila the affiant exhibiting his Residence Certificate No. A-0195731 issued at Q. C., on March 28, 1954.

RICARDO J. FRANCISCO
Notary Public
Until Dec. 31, 1954

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REPUBLIC ACT NO. 1198

AN ACT CREATING THE OFFICE OF STATE ATTORNEYS IN THE DEPARTMENT OF JUSTICE AND DEFINING ITS POWERS AND DUTIES AND AUTHORIZING THE APPROPRIATION OF FUNDS THEREFOR.

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

SECTION 1. There shall be in the Department of Justice an Office of State Attorneys composed of one chief, two assistant chiefs and sixteen state attorneys whose term of office shall expire on the thirty-first day of December, nineteen hundred and fifty-seven. The Chief of the Office shall receive a salary of twelve thousand pesos *per annum*, and shall have the rank of Solicitor General. He shall be assisted by two Assistant Chief Attorneys who shall each receive a salary of nine thousand pesos *per annum* and sixteen State Attorneys who shall each receive a salary of eight thousand pesos *per annum*.

The Chief and Assistant Chiefs of the Office of State Attorneys and the sixteen State Attorneys shall be appointed by the President of the Philippines with the concurrence of the Commission on Appointments.

No one shall be appointed as Chief or Assistant Chief of the Office of State Attorneys unless he has had at least ten years of trial court practice, and as State Attorney unless he has had at least five years of trial court practice in the Philippines; and appointment may take into account equitable representation of provinces in the Office, considering for this purpose the representation the provinces now already have in the offices of the provincial fiscals.

SEC. 2. The Chief and Assistant Chiefs of the Office of State Attorneys and the State Attorneys shall have the same powers as the provincial or city fiscal as provided for by the law: *Provided*, That the State Attorney shall only assist or collaborate with the provincial fiscal or city attorney unless otherwise expressly directed and authorized by the Secretary of Justice.

In all cases involving crimes cognizable by the Court of First Instance, no complaint or information shall be filed without first giving the accused a chance to be heard in a preliminary investigation, where such accused shall be subpoenaed and appears before the investigating state attorney with the right to cross-examine the complainant and his witnesses. The preliminary investigation shall be held at the capital of the province where the crime was committed. The State Attorney shall certify under oath in the information to be filed by him that the defendant was given a chance to appear on his behalf or by counsel: *Provided, however*, That when a preliminary investigation has already been conducted by the Justice of the Peace or the Provincial or City Fiscal and where such official has found at least a *prima facie* case, the State Attorney may not conduct another preliminary investigation. To this end, the State Attorney may summon witnesses and require them to appear and testify under oath before him and/or issue *subpoena duces tecum*. The attendance of absent or recalcitrant witnesses who may be summoned or whose testimony may be required by the State Attorneys under the authority herein conferred shall be enforced by proper process upon application to the corresponding Court of First Instance. In the investigation of criminal cases, any State Attorney shall be entitled to request the assistance of any law enforcement or investigation agency of the government.

The Chief of the Office of State Attorneys and the State Attorneys shall perform such other duties as in the interest of the public service may be assigned to them from time to time by the Secretary of Justice.

SEC. 3. The Office of State Attorneys shall be provided with such subordinate personnel as may be authorized by the appropriation law.

SEC. 4. Upon the organization of the Office of State Attorneys, the Prosecution Division in the Department of Justice shall be deemed abolished and its properties, furniture, equipment and records shall be transferred to the Office of State Attorneys.

SEC. 5. There is hereby authorized to be appropriated, out of any funds of the National Treasury not otherwise appropriated, the sum of three hundred thousand pesos for the salaries of the State Attorneys and their personnel and maintenance of the Office.

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

Approved, August 28, 1954.

* * *

REPUBLIC ACT NO. 1080

AN ACT DECLARING THE BAR AND BOARD EXAMINATIONS AS CIVIL SERVICE EXAMINATIONS.

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

SECTION 1. The bar examinations and the examinations given by the various boards of examiners of the Government are declared as civil service examinations, and shall, for purposes of appointment to positions in the classified service the duties of which involve knowledge of the respective professions, except positions requiring highly specialized knowledge not covered by the ordinary board examinations, be considered as equivalent to the first grade regular examination given by the Bureau of Civil Service if the profession requires at least four years of study in college and the person has practiced his profession for at least two years, and as equivalent to the second grade regular examination if the provision requires less than four years of college study.

SEC. 2. The Commissioner of Civil Service shall be furnished by the Clerk of the Supreme Court and the Secretary of the Board of Examiners a list of the successful candidates in the respective bar or board examinations with their general averages, and preference shall be given to those obtaining the highest ratings in making appointments: *Provided*, That for those who have already passed the corresponding bar or board examinations, the eligibility shall be deemed to commence from the approval of this Act.

SEC. 3. The Commissioner of Civil Service shall promulgate the rules and regulations to implement the provisions of this Act.

SEC. 4. The benefits granted under this Act shall not prescribe, the provisions of civil service law or regulations notwithstanding.

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

Approved, June 15, 1954.

OPINION NO. 129 . . . .

(*Continued from page* 499)

dities not included in the list are not governed by the cited presidential decree (Section 11), it is believed that the exportation of rice bran may not be controlled or restricted by the Export Control Committee.

The need for the conservation of rice bran for local consumption underscored by the Director of Animal Industry as essential to the campaign for increased production of poultry and livestock does not supply legal basis for the Export Control Committee to control or restrict its exportation. Necessity does not create power. Neither does it afford legal justification for the exercise of a power vested in some other authority. The President, not the Export Control Committee, is the authority designated by statute to implement and carry out the policy expressed in the Export Control Law and the Committee, as thereby created, merely assists the President in its execution and sees to it that the rules and regulations issued thereunder are observed and carried out. If there is such an urgent need for restricting or controlling the exportation of rice bran, the remedy lies in the President who may prohibit or regulate its exportation thru the issuance of the appropriate amendatory executive order. But until then, it is my opinion that rice bran may be exported even without applying for a permit from the President.

Respectfully,

PEDRO TUASON
Secretary of Justice

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