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Andres E. Varela alias Andrew E. Varela, Plaintiff and Appellant, vs. Jose Villanueva, Etc., et al., Defendants and Appellees, G. R. No. L-3052, June 29, 1954, Paras, C.J.

1. JUDGMENTS; ANNULMENT ON GROUND OF FRAUD MUST BE EXTRINSIC OR COLLATERAL; PERJURY, NOT GROUND FOR ASSAILING JUDGMENT UNLESS FRAUD REFERS TO JURISDICTION; WHEN FRAUD CONSIDERED EXTRINSIC. — An action to annul a judgment, upon the ground of fraud, will not lie unless the fraud be extrinsic or collateral and the facts upon which it is based have not been controverted or resolved in the case where the judgment sought to be annulled was rendered; and false testimony or perjury is not a ground for assailing said judgment, unless the fraud refers to jurisdiction. Fraud is regarded as extrinsic or collateral, where it has prevented a party from having a trial or from presenting all of his case to the court.

2. ID.; ID.; ID.; ID.; ID.; ID.; CIRCUMSTANCES PRECLUDING ALLEGATIONS OF HAVING BEEN PREVENTED FROM HAVING A FAIR TRIAL. — Where it appears that efforts were exerted to discover the whereabouts of the party attacking the judgment; that the petition filed in the intestate proceeding wherein the judgment was rendered specifically alleged that he was the sole heir of his deceased brother; and that the proceedings lasted for quite some time thereby giving him ample opportunity to appear — he can not be said to have been prevented from having a fair trial.

3. ID.; ID.; ID.; ID.; ID.; JUDICIAL SETTLEMENT OR JUDGMENT ON THE MERITS. — Where all claims to the estate of the deceased were actually before the court, each claimant entitled and bound to establish his adverse claim, and upon a compromise agreement among the parties the court rendered judgment declaring who of said claimants had preferential right to the inheritance, there was a judicial settlement of the controversy and a judgment on the merits which may be annulled only upon the ground of extrinsic fraud.

4. ID.; ID.; ID.; ID.; ID.; ID.; ID.; RECOGNITION OF NATURAL CHILD EXCLUDES COLLATERAL RELATIVES; FRAUD LEADING TO RECOGNITION MERELY INTRINSIC. — The recognition by the Court of First Instance of a person as acknowledged natural child of the deceased, and accordingly the sole heir of the latter, excluded collateral relatives from inheritance; and the fraud, if any, that lead to such recognition, would merely be intrinsic, not justifying the annulment of a final judgment.

5. ACTIONS; INTESTATE PROCEEDING, ACTION "IN REM"; JUDGMENT BINDS THE WHOLE WORLD. — An intestate proceeding is an action *in rem* and the judgment therein is binding against the whole world.

6. PATERNITY AND FILIATION; RECOGNITION OF NATURAL CHILDREN; ACKNOWLEDGMENT MADE IN INDUBITABLE WRITING; BOOK OF MEMOIRS; SIGNATURE OF DECEASED DOES NOT DESTROY ITS AUTHENTICITY AND PROBATIVE VALUE. — Although the book of memoirs indubitably acknowledging C as natural child, was not signed by the deceased, in view of the fact that the entries therein were in his own handwriting and conformed to actual facts, its authenticity and probative value can not be questioned.

Mariano H. de Joya and *Numeriano U. Babao* for the plaintiff and appellant.

Claro M. Recto, Jose Perez Cardenas, Jose M. Casal, Francisco G. Perez, Jose Avanceña, Quintin Paredes, Eulalio Chaves, Vicente Reyes Villavicencio, and *Victoriano H. Endaya,* for defendants and appellees.

DECISION

PARAS, *C.J.*:

Mariano R. Varela died in Batangas, Batangas, on September 5, 1940. Intestate proceedings (No. 3708) were instituted in the Court of First Instance of Batangas on September 16, 1940 by his first cousin, Jose Villanueva. The petition alleged that Mariano Varela was single at the time of his death and left as the sole heir his brother, Andres Varela y Villanueva, who had been absent from the Philippines since many years ago and last resided at No. 1343, 122nd Street, New York City, U.S.A. Efforts were immediately exerted by Jose Villanueva, through Rafael Villanueva, and by Marcelo P. Alay, a servant and protegee of the deceased, to contact Andres Varela, enlisting the aid and good offices of Francisco Varona, then attached to the Philippine Resident Commissioner in Washington, D.C.; the Division of Territories and Island Possessions, Department of the Interior, Washington, D.C.; the Filipino National Council in New York; the U.S. Secretary of State; and Congressman Fred L. Crawford of Michigan. The whereabouts of Andres Varela, however, remained unknown. In the meantime, the petition in the intestate proceedings having been duly published, various collateral relatives of Mariano Varela had entered their appearances, namely, Rosario Rodriguez Varela, half-sister; Faustino Rodriguez Varela, son of a deceased half-brother; Felix Villanueva and brothers, first cousins; Manuel Villanueva and brothers (except Rafael Villanueva), first cousins; Rosario Villanueva and brothers, first cousins; and Rosario Torres Watson and Enriqueta Torres Smith, first cousins. On November 6, 1940, over the opposition of Rosario Rodriguez Varela and Faustino Rodriguez Varela, the court appointed Jose Villanueva as administrator.

On February 14, 1941, Rosario Rodriguez Varela and Faustino Rodriguez Varela, on the one hand, and Carmelo Bautista, the latter represented by Josefa Enopia, on the other, executed the following compromise agreement:

"ESTE CONVENIO DE TRANSACCION otorgado y suscrito POR:

"JOSEFA ENOPIA, mayor de edad, Filipina, vecina y residente en el municipio de Batangas, provincia del mismo nombre, Filipinas, en representación de su hijo CARMELO BAUTISTA;

"ROSARIO RODRIGUEZ VARELA, soltera, mayor de edad, Filipina, vecina y residente en la ciudad de Manila, Filipinas;

"FAUSTINO RODRIGUEZ VARELA, mayor de edad, Filipino, casado, vecino y residente en la ciudad de Manila, Filipinas;

"A T E S T I G U A , Que:

"1.º—POR CUANTO Don Mariano Rodriguez Varela y Villanueva falleció en el municipio de Batangas, provincia del mismo nombre, el 5 de Septiembre de 1940;

"2.º—POR CUANTO Don Mariano Rodriguez Varela y Villanueva falleció sin haber dejado testamento y con propiedades ubicadas en la provincia de Batangas que, de acuerdo con el inventario sometido por el Administrador Don José Villanueva monta a ₱45,251.00;

"3.º—POR CUANTO dicho finado no ha dejado hijos ni descendientes legítimos, ni tampoco padres o ascendientes legítimos;

"4.º—POR CUANTO de conformidad con las disposiciones de la ley, el único heredero legal del finado, con exclusión de

todos los otros parientes, es un hijo natural reconocido llamado CARMELO BAUTISTA, ahora menor de edad y representado en este documento por su madre y tutora natural Da. Josefa Enopia:

"5.º—POR CUANTO el reconocimiento de dicho hijo consta en escrito indubitado del finado Mariano Rodriguez Varela y Villanueva, cuyo escrito obra en poder y se halla bajo la custodia del administrador Don José Villanueva y Romualdez;

"6.º—POR CUANTO a los otros comparecientes, que son media hermana y sobrino, hijo de medio hermano, consta que el referido finado ha reconocido publicamente y continuadamente al joven Carmelo Bautista como su hijo natural y este ha disfrutado pública y continuadamente de tal estado de hijo natural reconocido;

"7.º—POR CUANTO como ya se ha dicho, el referido finado Don Mariano Rodriguez Varela y Villanueva reconoció en vida, publicamente, a Carmelo Bautista como su hijo natural, presentandole asi a todos sus parientes, entre ellos los comparecientes, a sus amigos y a la sociedad en general, atendiendo a su subsistencia y educación y cuidando como un buen padre de familia del bienestar y provenir de su citado hijo:

"8.º—POR CUANTO los comparecientes no desean sostener entre si ningún litigio para la división de la herencia, pues a todos consta la legítimidad del derecho de Carmelo Bautista de reclamar para si, como único heredero legal abintestado del finado, toda la herencia de este, después de deducidas las obligaciones que tuviere;

"9.º—POR CUANTO por su parte, el hijo natural reconocido Carmelo Bautista, no desea tampoco quedarse para si con toda la herencia, privando a los hermanos y sobrinos del finado, entre ellos los otros comparecientes, de toda participación en la herencia, y siendo el deseo de dicho Carmelo Bautista el que todos participen en cierto sentido de la herencia relicta por su finado padre;

"POR TANTO, las partes han convenido en lo siguiente:

"(a) En que el citado Carmelo Bautista sea declarado como hijo natural reconocido del finado Don Mariano Rodriguez Varela y Villanueva, y como su único y legítimo heredero abintestado;

"(b) Que habiendo dejado el finado un hermano llamado Andrés Rodriguez Varela, el cual se halla ausente de Filipinas, ignorandose su paradero ignorandose, asímismo, si existe o ha fallecido pues de el no se tiene noticias desde hace muchos años, el otorgante Carmelo Bautista se compromete a reservar de los bienes que reciba como su herencia del intestado de su difunto padre, bienes muebles o inmuebles por su valor equivalente a DOCE MIL PESOS (₱12,000.00), en la inteligencia de que los frutos naturales, industriales o de otra indole que perciban los bienes perteneceran al otorgante Carmelo Bautista, quien solo vendra obligado a entregar al referido ausente, al tiempo de su presentación, bienes o dinero por valor de ₱12,-000.00;

"(c) Que el otorgante Carmelo Bautista se compromete a entregar a su tia Da. Rosario Rodriguez Varela tan pronto como reciba la herencia de su difunto padre, bienes o metálico, a elección de esta, en la suma de SEIS MIL PESOS (₱6,000.00);

"(d) El mismo Carmelo Bautista se compromete a pagar a su primo FAUSTINO RODRIGUEZ VARELA, tan pronto como reciba la herencia del finado, bienes o metálico por la misma cantidad de SEIS MIL PESOS (₱6,000.00);

"(e) Finalmente, que todas las partes comparecientes en este documento considerán este como una transacción de sus derechos hereditarios en los bienes relictos por el finado Don Mariano Rodriguez Varela y Villanueva, y renuncian a formular cualquier otra reclamación ahora o en lo futuro que pudiera derivarse de sus derechos hereditarios como parientes del referido finado, y renunciando los unos en favor de los otros cualquier derecho que pudiera derivarse de su cualidad de herederos abintestado del referido finado;

"(f) Que en caso de que el ausente Don Andrés Rodriguez Varela no aparezca o sea declarado muerto, la participación que se le asigna en este documento acrecera la parte del hijo natural reconocido y cualquier derecho que los otorgantes pudieran tener sobre dicha participación se renuncia expresamente por ellos en favor del hijo natural;

"(g) Queda especialmente convenido y pactado que este documento surtira efecto entre las partes — en cuanto a las obligaciones monetarias que en su virtud se contraen — tan pronto como haya sido aprobado por el Juzgado correspondiente, conviniendo las partes en someter este documento a la aprobación del Juzgado de Testamentarias que conoce del Intestado del finado Don Mariano Rodriguez Varela y Villanueva.

"Leido este documento por los otorgantes y encontrandolo conforme con lo por ellos convenido, la otorgan su consentimiento firmandolo por octuplicado en la ciudad de Manila, Filipinas, hoy a 14 de Febrero de 1941.

"(Fdo.) ROSARIO RODRIGUEZ VARELA

"(Fdo.) JOSEFA ENOPIA en representación de su hijo Carmelo Bautista

"(Fdo.) FAUSTINO RODRIGUEZ VARELA."

On March 25, 1941, a motion was filed by Carmelo Bautista, praying that he be declared the sole heir of the deceased Mariano Varela, entitled to inherit all his properties; that the above-quoted compromise agreement (attached to the motion) be approved *in toto;* and that the administrator be ordered to pay, after payment of all debts and obligations, to Rosario Rodriguez Varela and Faustino Rodriguez Varela the amounts due them under said compromise agreement. Upon motion of attorney for some of the claimants, the hearing of the motion was postponed to April 7, 1941. On April 2, Atty. Jose Avanceña, appeared for Rosario Rodriguez Varela, represented previously by Atty. Tomas Yumol. On April 7, 1941, the Court of First Instance of Batangas issued the following order:

"Tratase de una moción presentada por la representación de Carmelo Bautista, con la concurrencia de Da. Rosario Rodriguez Varela, media hermana del finado Mariano Rodriguez Varela y Villanueva y su sobrino Faustino Rodriguez Varela en la que pide la aprobación de un convenio que obra unido a los autos en cuya virtud se pide que se declaré al mencionado Carmelo Bautista, como hijo natural reconocido del difunto Mariano Rodriguez Varela y Villanueva, y como tal, único heredero de los bienes relictos por el mencionado finado, se autorizo al administrador que pague, con cargo a la herencia, a Da. Rosario Rodriguez Varela y a D. Faustino Rodriguez Varela, la suma de ₱6,000.00 cada uno, reservandose, ademas, de los bienes remanentes del finado, bienes o metálico, montantes a la suma de ₱12,000.00 que habra de retener a su poder el hijo natural reconocido para ponerlo a disposición del hermano del finado llamado Andrés Rodriguez Varela, quien se halla ausente de Filipinas desde hace muchos años, ignorandose actualmente su paradero, en la inteligencia de que, los frutos naturales, industriales o de otra indole que perciban los bienes asi reservados perteneceran al mencionado Carmelo Bautista, quien solo vendra obligado a entregar al referido ausente al tiempo de su presentación bienes o dinero por valor de ₱12,000.00.

"Con fecha de 29 de marzo del presente año, se registro en la Escribania de este Juzgado un escrito de comparecencia por el Abogado D. Claro M. Recto como abogado de Felix Villanueva y hermanos, Manuela Villanueva y hermanos (excepto Rafael Villanueva y Rosario Torres Villanueva y hermanos, quienes alegando ser primos hermanos del finado y como tales personas interesadas en este intestado, pidieron la posposición de la con-

sideración de la moción de Carmelo Bautista que estaba señalada para el 2 de Abril de 1941. El Juzgado, proveyendo a dicha moción, pospuso la vista para esta fecha.

"Llamada la vista de esta moción en el día de hoy, previa notificación a las partes interesadas, el Escribano dió cuenta de que se ha recibido en la escribania un escrito firmado por el abogado Sr. Recto en la que con la conformidad de sus clientes, se retiraba de su representación. Ninguna otra persona comparecio por dichos opositores. Don Felix Villanueva, uno de dichos opositores, se límito a comparecer como abogado del administrador y manifesto en corte abierta que habiendo firmado el administrador su conformidad a la moción, el no tenía objeción a su aprobación. Por el mencionado Carmelo Bautista compareció el Abogado José M. Casal y Rosario Rodriguez Varela y Faustino Rodriguez Varela comparecieron asistidos de su abogado Sr. José Avanceña, quien manifesto unirse al moclonante a los efectos de pedir la aprobación del convenio de transacción unido a los autos.

"Examinados los autos, resulta, que el finado Don Mariano Rodriguez Varela y Villanueva no ha dejado hijos ni descendientes legítimos, por lo que bajo las diposiciones de la ley son llamados a su sucesión los pariente colaterales quienes resultan ser hermano de doble vínculo llamado Andrés Rodriguez Varela, Da. Rosario Rodriguez Varela y su sobrino, hijo de medio hermano, Faustino Rodriguez Varela, quien debera concurrir a la herencia con ella por derecho de representación.

"Tratandose como se trata, de una sucesión intestada, los parientes mas próximos excluyen los mas remotos y por consiguiente los hermanos y sobrinos excluyen de la herencia los primos y damas parientes en el mismo grado que estos.

"Resulta también, que dicha Da. Rosario Rodriguez Varela y su sobrino Faustino Rodriguez Varela, que como quedo dicho son llamados a la sucesión de este intestado por ministerio de la ley, reconocen, en virtud del documento cuya aprobación se pide, que el finado Don Mariano Rodriguez Varela y Villanueva, ha dejado un hijo natural reconocido publicamente llamado Carmelo Bautista y este, como tal hijo natural reconocido, viene a sucederle en sus derechos y acciones y demás bienes con la exclusión de todos los parientes colaterales.

"Y resultando, que este convenio se ha hecho por los comparecientes, Rosario Rodriguez Varela y Faustino Rodriguez Varela, en perjuicio aparente de sus propios intereses, puesto que el reconocimiento que en el documento hacen de la existencia de un hijo natural reconocido del finado y de la posesión pública que este hijo natural ha gozado de su estado de hijo natural durante la vida del finado, los excluye de toda participación a la herencia de esta, el Juzgado no halla otra alternativa mas que aprobar este convenio en los terminos en que esta redactado, salvando cualquier derecho que pudiera tener el hermano ausente Andrés Rodriguez Varela, en el caso de que compareciere.

"EN SU VIRTUD, con la aprobación del convenio unido a los autos otorgado por Carmelo Bautista, representado por su tutora Da. Josefa Enopia, por un lado, y Da. Rosario Rodriguez Varela y Faustino Rodriguez Varela por otro, se declará al joven Carmelo Bautista como hijo natural reconocido del finado Mariano Rodriguez Varela y Villanueva con derecho a sucederle en todos sus bienes y se ordena al administrador a que de los fondos que tenga en su poder o de los que pudiera procurarse con los bienes relictos por el finado, pague a Da. Rosario Rodriguez Varela y Faustino Rodriguez Varela la suma de ₱6,000.00 cada uno, en cumplimiento de los terminos del convenio."

On October 29, 1942, the administrator filed a petition for the delivery of the properties to Carmelo Bautista and for the closing of the intestate proceedings. On January 28, 1943, the court ordered Carmelo Bautista to file a bond for ₱12,000.00 to secure the payment of the amount due under the compromise agreement to Andres Varela, his heirs or successors-in-interest, or that a lien in the same amount be noted in Certificate of Title No. 5418 covering the land one half of which corresponded to Carmelo Bautista. Upon petition filed by the administrator on February 1, 1943, the court issued an order on February 2, declaring the intestate proceedings closed.

On January 2, 1946, Andres E. Varela alias Andrew E. Varela, filed a complaint in the Court of First Instance of Batangas against Jose Villanueva and others, in the main praying that the order of April 7, 1941, issued in Special Proceedings No. 3708 be annulled and that Andres Varela be declared the sole heir of his deceased brother Mariano Varela. On October 7, 1947, Andres Varela filed an amended complaint with practically the same prayer. Plaintiff's theory is that the defendants Jose Villanueva, Rafael Villanueva, Josefa Enopia, Rosario Rodriguez Varela, Faustino Rodriguez Varela, Jose Perez Cardenas and Jose M. Casal conspired together in fraudulently causing the Court of First Instance of Batangas to issue the order of April 7, 1941. After trial, the court rendered on August 12, 1948, a decision the dispositive parts of which read as follows:

"WHEREFORE, judgment is hereby rendered as follows:

"(a) The plaintiff is ordered to deliver the possession of the properties: to Luisa Villanueva the land described in Transfer Certificate of Title No. 3271 of the Province of Batangas, the cadastral lots Nos. 971 and 968 of the Municipality of Batangas, and the pro-indiviso one-half share of the land described in the Original Certificate of Title No. 139, Province of Batangas, and the following personal properties, a mirror and a small marble table parted in the middle which Andres Varela had taken; to Jose Villanueva, the land covered by Transfer Certificate of Title No. 3677, Province of Botangas; to Felisa Vergara and her minor children the land described in Transfer Certificate of Title No. 4021 of the Province of Batangas; to Encarnacion Samos and her minor children a portion of 7/12 share of the land described in Transfer Certificate of Title No. 3800 of the Province of Batangas; and to the minor children of Carmelo Bautista, namely, Carmen, Romeo and Fe, all surnamed Varela, the undivided one-half share of the land described in the Transfer Cetrificate of Title No. 5418 of the Province of Batangas, the parcels of land described in Tax Declarations Nos. 63881, 53205, 59595 (which is a portion of the land described in Transfer Certificate of Title No. 342 of the Province of Batangas), and 48758, all of them in the Municipality of Batangas, Batangas, and an undivided one-half share in the land described in the Original Certificate of Title No. 140 of the Province of Batangas, all of which are identified as the properties described in letters I, J, K, L, M and N of paragraph 5 of the amended complaint, and the following personal properties, eight chairs, two tables, two wardrobes, one bed and one desk. The defendant Luisa Villanueva has presented no proof of the value of the mirror and the small marble table, neither the minor children of Carmelo Bautista have offered proof of the value of the personal properties above-described, all of which had been taken from them by the plaintiff, and, therefore, the court is not in a position to render a money judgment against the plaintiff for the value of the said furniture and fixtures in the event that their re-delivery cannot be effected;

"(b) The plaintiff is hereby sentenced to pay to Jose Villanueva the sum of ₱1,026.73 damages suffered by him for the wrongful attachment of his properties with legal interest from the date of this decision;

"(c) The plaintiff is sentenced to pay to the minor children of Carmelo Bautista the amount of ₱6,492.50 the value of 209 cavans of palay, and ₱30.00 the value of 62 gantas of corn, and to deliver 13 gantas of mongo, the value of which has not been proven, and also to pay ₱150.00 the proceeds of

the sale of coconut fruits with legal interest thereon from the date of this judgment;

"(d) The plaintiff is sentenced to pay Luisa Villanueva the total sum of ₱3,270.00 the value of palay harvested and income received from the land with legal interest from the date of this decision; and

"(d) The complaint is hereby dismissed with costs against the plaintiff, and the attachment levied upon the properties of the defendants Jose Villanueva and Luisa Vilanueva, as also the notice of *lis pendes* recorded on the back of the titles of the properties belonging to the defendants, the subject matter of the present litigation, are hereby ordered discharged and cancelled."

The plaintiff Andres Varela has appealed. To start with, we may state that the present action was filed three years after the final closing of the intestate proceedings of Mariano Varela, and that the rule is that an action to annul a judgment, upon the ground of fraud, will not lie unless the fraud be extrinsic or collateral and the facts upon which it is based have not been controverted or resolved in the case where the judgment sought to be annulled was rendered, and that false testimony or perjury is not a ground for assailing said judgment, unless the fraud refers to jurisdiction (Labayen vs. Talisay-Silay Milling Co., 68 Phil. 376); that fraud has been regarded as extrinsic or collateral, where it has prevented a party from having a trial or from presenting all of his case to the court (33 Am. Jur., pp. 230-232). The reason for this rule has been aptly stated in Almeda et al. vs. Cruz, 47 O. G. 1179:

"Fraud to be ground for nullity of a judgment must be extrinsic to the litigation. Were not this the rule there would be no end to litigations, perjury being of such common occurrence in trials. In fact, under the opposite rule, the losing party could attack the judgment at any time by attributing imaginary falsehood to his adversary's proofs. But the settled law is that judicial determination however erroneous of matters brought within the court's jurisdiction cannot be invalidated in another proceeding. It is the business of a party to meet and repel his opponent's perjured evidence."

The deceased Mariano Varela left a book of memoirs in his own handwriting discovered by the administrator Jose Villanueva among his belongings, which book was presented in evidence as Exhibit "I". The following entries are contained in said book:

"1920. Josefa Enopia se unio conmigo en la noche del dia sabado 16 de Oct. de 1920, en Manila y estuvo toda la noche conmigo.

"(Exhibit 1-a)

"1921. El 16 de Oct. de 1920, dia en que apadrine a Ramon Tarnate, fue la primera vez en que Epay Enopia durmio conmigo en Manila, y desde entonces una vez al mes durmiamos juntos, hasta el 4 de Feb. 1921, que era carvanal.

"Desde el mes de Diciembre dijo que ella estaba en cinta.

"Julio. El dia 16 sabado 11:30 p.m. dio a luz un niño. De modo que a los nueve meses considiendo en el mismo día Sabado y fecha 16, daba a luz.

"En el registro civil en el Municipio aparece registrado el casamiento de Josefa Enopia con Gaudencio Bautista, el 19 de Junio de 1921, este es su anterior pretendiente, que yo fui preferido y aceptado a el.

"No me cabe duda que este chiquillo es mio.

"El dia Domingo 22 de Enero de 1922, fiesta del pueblo, yo fui el padrino de este niño, a peticion de toda la familia y se le puso el nombre de Carmelo.

"(Exhibits 1-b and 1-c.)"

The foregoing entries formed the principal basis for the execution of the compromise agreement between Rosario Rodriguez, Varela and Faustino Rodriguez Varela, on the one hand, and Josefa Enopia, in representation of Carmelo Bautista, on the other, which in turn led to the order of the Court of First Instance of Batangas dated April 7, 1941, declaring Carmelo Bautista as acknowledged natural child of Mariano Varela, entitled to succeed to all his estate.

As Rosario Rodriguez Varela and Faustino Rodriguez Varela were represented by counsel both in the execution of the compromise agreement and in the hearing for the approval by the Court of First Instance of Batangas of said compromise agreement, it cannot be contended that they were not aware of the true facts surrounding the proceedings. Indeed, they uncomplainingly accepted the benefits of said agreement.

As already stated, at the commencement of the intestate proceedings, a thorough search for the whereabouts of Andres Varela was made, and all available agencies were asked to lend their assistance in locating him. Even Marcelo Alay, a witness for the plaintiff and a protegee of Mariano Varela, himself made necessary inquiries. Indeed, in his letter written on June 22, 1941, to the Resident Commissioner in Washington, he made the special request that Andres Varela be advised to attend to the properties and wealth left by his brother Mariano Varela, because some other interested parties were taking charge of said wealth amounting to more than ₱200,000.00 at the same time informing that Andres was the nearest and rightful heir of his brother Mariano. It is difficult to believe that Andres Varela was purposely prevented from having or deprived of his day in court because, first, in the petition filed in the intestate proceedings by Jose Villanueva, who was appointed administrator of the estate of Mariano Varela, it was specifically alleged that Andres was the sole heir of his deceased brother Mariano Varela; secondly, no stone was left unturned in discovering the whereabouts of Andres Varela; and, thirdly, the intestate proceedings lasted for quite some time, having been started on September 16, 1940 and finally closed only on February 2, 1943, thereby giving ample opportunity for Andres to appear. That there was not the least intention to disinherit Andres Varela, although the existence of Carmelo Bautista as acknowledged natural child of the deceased Mariano Varela, necessarily excluded him and other collateral relatives, is shown by the fact that provision was made in the compromise agreement, reserving to him the share of ₱12,000.00, which was twice as much as the share granted to Rosario Rodriguez Varela and Faustino Rodriguez Varela.

There can be no question about the authenticity and probative value of the book of memoirs, since even plaintiff's principal witness, Teofilo Gui (confidential secretary of Mariano Varela), testified that the entries therein are in the handwriting of Mariano; although more than two months after said testimony was given, Teofilo was recalled to the witness stand, and in redirect examination declared that he admitted that said memoirs are in the handwriting of Mariano Varela, because, when the book was handed to him in the former hearing, he saw the name Mariano R. Varela appearing on the back thereof. This rather belated explanation is unconvincing. Moreover, while some opposing attorneys secured copies of the entries in Exhibit "I" for examination by the NBI handwriting experts, they had failed to submit in evidence any such examination or analysis.

The force and effect of the acknowledgment made by Mariano Varela in his book of memoirs of Carmelo Bautista as his natural son is sought to be nullified by the plaintiff-appellant, by contending that Josefa Enopia, mother of Carmelo was married to Gaudencio Bautista on June 19, 1921, and that Carmelo was born during said marriage. There is, however, ample evidence tending to show that Josefa was forced by her father to marry Gaudencio and that, prior to and after her marriage to Gaudencio, she never had any carnal contact with him; that in the decision of the Court of First Instance of Quezon City rendered on March 10, 1941, from which no appeal was taken, the marriage of Josefa to Gaudencio was declared null and void, and Josefa's children were declared to have never been neither legitimate nor illegitimate children of

Gaudencio. The regularity of the annulment proceedings, apart from being legally presumed, is borne out by the testimony of Juan Solijon, a lawyer and a witness for plaintiff-appellant, and of course by that of Josefa Enopia and her lawyers.

In Special Proceedings No. 3708 of the Court of First Instance of Batangas, claims to the estate of Mariano Varela were actually before the court, affecting Rosario Rodriguez Varela, Faustino Rodriguez Varela and several other first cousins of Mariano, and even the plaintiff-appellant himself, as alleged in the petition filed by Jose Villanueva; and said claims logically were in conflict with the later claim interposed on behalf of Carmelo Bautista. The court was called upon to determine who of said claimants had preferential right to the inheritance, and each claimant of course was entitled and bound not only to dispute Carmelo's alleged right but also to establish his adverse claim. The issue thus presented, was disposed of in the order of April 7, 1941, approving the compromise agreement entered into between Carmelo Bautista, represented by Josefa Enopia, and Rosario Rodriguez Varela and Faustino Rodriguez Varela, the two nearest kin next to Carmelo that necessarily excluded the other collateral relatives. There was accordingly a judicial settlement of the controversy, and said order of April 7, 1941, was no less a judgment on the merits which may be annulled only upon the ground of extrinsic fraud.

The plaintiff-appellant has failed to demonstrate notwithstanding his elaborate efforts, that there was such extrinsic or collateral fraud as would justify the setting aside of the order of April 7, 1941. As already noted, he cannot be said to have been prevented from having a fair trial. On the contrary, it may be said that the plaintiff was rather indifferent to his interests, because, although he had been absent from the Philippines since 1910, he never took the trouble or precaution of informing his brother Mariano of his whereabouts from time to time, and likewise failed to give any instructions to anybody who could protect his rights, knowing that, as early as 1933, he was, as regards his brother Mariano, the nearest kin who might succeed to his estate in case of death. The implication that follows is that the plaintiff-appellant in effect had abandoned his hereditary rights in the Philippines. It is improbable that, as claimed by him, he had stayed in the mountains in the United States recuperating from an illness from 1939 to 1943, without any facility for correspondence to the Philippines, especially when it is recalled that he admitted that he was not so sick that he could not write if he wanted to. His claim that there was no mail in the place, is also of little moment, since he could have commissioned somebody to go to the nearest post office, there being no pretense that his situation was such that he was cut from all sorts of communication. At the risk of repetition, much less can Jose Villanueva be charged with having wished to eliminate plaintiff appellant from succeeding to the estate left by Mariano Varela, as Jose Villanueva himself alleged in his petition filed in the intestate proceedings that the sole surviving heir of Mariano was Andres Varela, and he made extensive inquiries about his whereabouts in the United States.

The fraud which plaintiff-appellant has attempted the show under the evidence presented in the court below, consists of misrepresentations about the existence of Carmelo Bautista as an acknowledged natural child of Mariano Varela. Assuming that there were falsities on this aspect of the case, they make out merely intrinsic fraud which, as already noted, is not sufficient to annul a judgment. And yet we agree with the trial court that the evidence preponderates in favor of the conclusion that Carmelo Bautista had been shown to be an acknowledged natural child of Mariano Varela.

Appellant likewise tried to proved, through the testimony of Rosario Rodriguez Varela and Faustino Rodriguez Varela that the latter had signed the compromise agreement without reading its contents. In the first place, Rosario Rodriguez Varela and Faustino Rodriguez Varela have now aligned themselves with appellant's cause, for the obvious reason that their share in the inheritance would be much greater if Carmelo Bautista is excluded. In the second place, the allegation of Rosario Rodriguez Varela that she did not speak English (and therefore could not understand the compromise agreement) is negatived by the fact that said agreement was written in Spanish; and Rosario testified in Spanish. In the third place, Rosario testified that at the signing only she, her nephew Rafael Villanueva, and Attys. Cardenas and Casal were present, and yet her nephew stated that they were accompanied by their lawyer, Atty. Godofredo del Rosario, and that Josefa Enopia was there once. Indeed, Godofredo del Rosario and Josefa Enopia signed the agreement, the first as a witness and the latter as a party. In the fourth place, Faustino Rodriguez Varela admitted that he spoke Spanish, and he was therefore in a position to be aware of the contents of the compromise agreement. In the fifth place, both Rosario Rodriguez Varela and Faustino Rodriguez Varela had filed their claims as collateral relatives, were represented by counsel, opposed the appointment of Jose Villanueva as administrator of the estate; and it is improbable that they would sign any compromise agreement without being certain of the true facts. In the last place, the claim of Faustino Rodriguez Varela that he and Rosario signed the document in a hurry, because Atty. Cardenas wanted to bring it to Batangas, and that he signed when told by his attorney that, if something wrong was discovered later, he should be informed thereof, is apparently without any basis; since the compromise agreement was not submitted to the court until March 25, 1941, the motion for its approval was not heard until April 7, 1941, and the agreement had been signed as early as February 14, 1941. Moreover, it is surprising that, notwithstanding the advice of his counsel to inform him if something wrong was discovered, nothing was done from 1941 to the date of the filing of appellant's complaint, although it is admitted that copy of the agreement was given to Faustino Rodriguez Varela at the latest, after having been paid what was stipulated in said agreement.

Atty. Jose Perez Cardenas explained the steps leading to the signing of the compromise agreement and he testified that Atty. Jose Avanceña, representing Rosario Rodriguez Varela and Faustino Rodriguez Varela, was given a draft which finally gave to his two clients ₱6,000.00 each, and that at the signing of the document Rosario and Faustino were accompanied not only by Atty. Avanceña but also by Atty. Del Rosario. It is significant that neither of said attorneys was placed on the witness stand by appellant to negative Atty. Cardenas' testimony.

Appellant presented in evidence, to show that Carmelo was the child Josefa Enopia with Gaudencio Bautista, a baptismal certificate (Exhibit "D"), purporting to show that Carmelo was their legitimate son. It appears, however, that on cross-examination, Reverend Father Eustaquio Daite, who testified that the certificate was an exact copy of the original admitted that the word "legitimate" did not appear in the Parrochial book. Exhibit "CC" was also presented, a supposed copy of the original record of the marriage of Josefa and Gaudencio and yet it does not contain the rotation made by the civil registrar regarding the annulment of said marriage. These omissions were taken by the trial court as indications of a false claim on the part of plaintiff-appellant, and it is not without foundation.

The testimony of Teofilo Cui to the effect that Jose Villanueva had told him that they should produce a son of the deceased Mariano Varela so that they could get a portion of his estate, is rather inconsistent with the frankness of Jose Villanueva in alleging in the petition filed in the intestate proceedings that the sole heir of Mariano was his brother Andres, plaintiff-appellant. Considering that Teofilo had presented a claim against the estate of Mariano Varela in the amount of ₱2,840.00, which, in view of the opposition of Jose Villanueva was, reduced to ₱300.00, it is easy to understand why Teofilo could not have been without any motive for testifying against Jose Villanueva.

Antonio Villanueva, another witness for appellant, declared that he heard Atty. Cardenas suggest that they should present somebody as a son of Mariano Varela, because of the claims filed by Rosario Rodriguez Varela and Faustino Rodriguez Varela.

The veracity of this witness is again doubtful, it appearing that he alleged having heard the conversation after the war or during the war, when the intestate proceedings took place in 1940 and 1941 and Carmelo's claim was filed long before the war; and that said conversation was in the law office of Attys. Cardenas and Casal at 34 Escolta, Manila, when it is beyond question that said office was on the second floor of the National City Bank Building at Juan Luna, Manila, at the institution of the intestate proceedings.

Exhibits "F" and "G" were presented by plaintiff-appellant the first being an affidavit of Josefa Enopia tending to show that she was induced to testify before the Court of First Instance of Batangas that Carmelo Bautista was the son of Mariano Varela, when in fact he was a child of Gaudencio Bautista; the second being an affidavit of Cristina Marajas, Carmelo's widow, to the effect that she was returning the property she had received after she learned that her deceased husband Carmelo was not a natural child recognized by Mariano. We are inclined to give no weight to said exhibits, which have been repudiated by Josefa and Cristina during the trial.

Appellant argues that he cannot be bound by the compromise agreement because he was not a party thereto. In answer it is sufficient to state that the intestate proceedings were *in rem* and the judgment therein, declaring Carmelo Bautista the sole heir of the deceased Mariano Varela, was therefore binding against the whole world. Section 44 (a) of Rule 39 of the Rules of Court provides that: "In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a deceased person, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title of the thing, the will or administration, or the condition or relation of the person; however, the probate of a will or granting of letters of administration shall only be *prime facie* evidence of the death of the testator or intestate." As aptly commented by Chief Justice Moran, subdivision (a) refers to judgments *in rem*. Thus, a judgment rendered in connection with a petition for the probate of a will is binding upon the whole world. A judgment concerning personal, political, or legal condition or relation of a particular person, as, for instance, a judgment in intestate or testate proceedings, declaring who the heirs of the deceased person are, or a judgment in an application for citizenship, or a judgment adjudging a person to be a spendthrift, may be considered as a judgment *in rem*, binding on the whole world." (Moran, Comments on the Rules of Court, 2d Ed. Vol. II, p. 704.)

Even if the plaintiff Andres Varela had appeared and actively taken part in Special Proceedings No. 5708, the result would have been the same, in the sense that the recognition by the Court of First Instance of Batangas of Carmelo Bautista as acknowledged natural child of Mariano Varela, and accordingly the sole heir of the latter, would also have excluded appellant from any inheritance, being merely a collateral relative; and the fraud, if any, that would lead to such recognition, would merely be intrinsic, not justifying the annulment of a final judgment. The present case should be distinguished from that of Anuran vs. Aquino, 38 Phil. 29, wherein the estate of the deceased Ambrosio Aquino was awarded and delivered to the defendant Ana Aquino, because, although the latter and the administrator knew that the plaintiff Florencia Anuran was the surviving spouse of Ambrosio Aquino, and that the defendant Ana was not a legitimate but only a natural daughter of the deceased sister Ambrosio, the said Ana Aquino and administrator, without notice to the widow, and acting in collusion, fraudulently procured the entry of the order in the administration proceedings approving the delivery of all the estate to Ana Aquino. It will be noted that in the Anuran case, the mere appearance of the plaintiff Florencia Anuran (prevented from having a trial) changed the result of the order sought to be annulled.

Plaintiff appellant invokes the reservation contained in the order of April 7, 1941, namely, "salvando cualquier derecho que pudiera tener el hermano ausente, Andres Rodriguez Varela en el caso que compareciere." It appears, however, that said reservation is recited in the course of the order, and not in the dispositive part declaring Carmelo Bautista as the acknowledged natural son of Mariano Varela, entitled to succeed to his estate. The dispositive part logically excludes the recognition of any successional right on the part of the appellant, and that this was the sense of the order is shown by the fact that, after Carmelo had put up a bond in the amount of ₱12,000.00 to answer for the obligation in favor of appellant, as convenanted in the compromise agreement approved by the court, the intestate proceedings were declared definitely closed. The clause, "en el caso que compareciero" should merely mean that appearance by the appellant contemplated therein was to be within the period before the final closing of the proceedings.

Neither is there anything irregular in the action of the trial court in making an express finding to the effect that Carmelo Bautista, under the evidence presented in the present case, was an acknowledged natural child of the deceased Mariano Varela. As explained in the appealed judgment, although the order of April 7, 1941 was final and not tainted with extrinsic fraud, the trial court had to make a pronouncement of fact under the evidence presented by appellant which, however, had reference merely to intrinsic fraud.

The book of memoirs, indubitably evidencing Carmelo Bautista's recognition by Mariano Varela as the latter's acknowledged natural child, is assailed by plaintiff-appellant for not being signed by its author. This criticism is of no moment, because the entries therein are in the handwriting of Mariano and proved to be so by the very key witness for appellant, Teofilo Gui. We have elsewhere pointed out the reason why the attempt of appellant to have Teofilo Gui, upon being recalled to the witness stand two months after his direct examination, explain his damaging testimony, may not be believed. In this connection, it may be added that, in at least two instances cited in the appealed decision, the entries in the book have been shown to conform to the actual facts. We quote from said decision: "For instance the last entry on page 26, which reads: El 16 de Oct. de 1920, día en que apadrire a Ramon Tarnate, etc., x x x is fully corroborated by the marriage certificate Exhibit 1-F, wherein it is shown that on October 16, 1920, Ramon Tarnate was married to Mercedes de la Peña, and one of the sponsors or witnesses to the wedding was Mariano R. Varela. Again, the second entry appearing on page 25, which reads: Mi buena y querida Mama fallecio en mi cuarto, sentada en mi butaoa, el 8 de Sept. dia Domingo y dia de la Correa, las 4:45 p.m. de 1918, y al dia siguiente fueron sus funerales en este pueblo de Batangas, x x x is also confirmed by the death certificate of Julia Villanueva, the mother of Mariano Varela, wherein it is shown that said Julia Villanueva died on September 8, 1918."

Plaintiff-appellant capitalizes the circumstance that Carmelo had used the surname Bautista, to show that he was not the child of the deceased Mariano Varela. Apart from the denial of Josefa Enopia, Carmelo's mother, and Cristina Marajas, his widow, the use of that surname finds its explanation in the fact that Josefa Enopia was forcibly married by her father to Gaudencio Bautista to protect her honor, and it should be an indiscretion on her part to let the people know, by using the surname Varela, that Carmelo and her other children are those of Mariano Varela to whom she was not married. The same explanation controls with reference to the circumstances that Josefa did not reveal her relations with Mariano until the latter's death.

Appellant contends that the trial court erred in not finding that Jose Villanueva did not include in his inventory in Special Proceedings No. 3708 the jewelries belonging to appellant and his brother Mariano Varela which were taken by defendant-appellee Jose Villanueva. According to appellant, the collection of jewelries and coins referred to was worth ₱234,569.00 as early as 1910. and he even went to the extent of describing the various items; and in 1933, when appellant learned through his brother that his mother and sister had died, the estate left by these two was worth at least ₱280,000.00. Appellant's theory is hard to sustain. There

is evidence to show that in 1912 the properties of Sinforoso Varela, father of appellant and Mariano Varela, were sold at an execution sale to satisfy a debt of only ₱1,500.00, and this is quite inconsistent with the existence of the jewels claimed to have been "looted" by appellee Jose Villanueva. At the time the appellant learned of the death of his mother and sister, he was earning only enough to cover his expenses and save a little, and yet, if he was certain that there were such jewels as now claimed by him, he never bothered about returning to the Philippines to receive his share in the fortune. It cannot be said that he trusted his relatives in the Philippines, because no sooner had he learned of the death of his brother Mariano than he lost no time in returning home. The trend of appellant's evidence is also to the effect that appellee Jose Villanueva grabbed the valuable jewels and coins left by Mariano Varela in the presence of appellant's witnesses, like Teofilo Gui, Marcelo Alay and Aurea Lumague. In the ordinary course of things, if Jose Villanueva really intended to take possession of Mariano Varela's jewelries and coins he would have done so surreptitiously. Moreover, as elsewhere adverted to, Teofilo Gui's claim against the estate of Mariano Varela was opposed by administrator Jose Villanueva and this left Teofilo with at least some motive for being hostile to the former. Upon the other hand, Marcelo Alay and Aurea Lumague might themselves have been biased, in that the first admittedly had a quarrel with the Villanuevas because the latter ordered the cutting of Marcelo's banana plantation which caused him damage, and they told him to leave the house where he was staying, for Mrs. Villanueva was going to burn it; and the second admittedly was working for and being supported by the appellant in his house at the time of the trial. On top of these, although Jose Villanueva submitted to the court the required inventory of the properties of Mariano Varela as early as December 14, 1940, no opposition was registered thereto, notwithstanding the fact that Rosario Rodriguez Varela and Faustino Rodriguez Varela appeared in the intestate proceedings and even assailed the appointment of Jose Villanueva as administrator.

We have found nothing wrong in the agreement for attorneys' fees between Atty. Jose Perez Cardenas and Josefa Enopia. Atty. Cardenas represented the interest of Carmelo Bautista, agreeing to bear all the expenses of the litigation, on condition that he would receive one half of everything awarded to Carmelo. The fee is clearly contingent, and as Atty. Cardenas ultimately received less than ₱20,000.00, it cannot be held that the fee was expensive, much less unconscionable. Indeed, the arrangement was submitted to and approved by the court.

For the rest, we agree to the appealed decision as regards the various properties that passed to the defendants-appellees pursuant to and as a result of the recognition of Carmelo Bautista as the sole heir of the deceased Mariano Varela, in relation to the compromise agreement between Josefa Enopia, in representation of Carmelo Bautista, and Rosario Rodriguez Varela and Faustino Rodriguez Varela. The trial court has particularized the properties thus conveyed, as follows:

"PROPERTIES CONVEYED TO LUISA VILLANUEVA:

"By virtue of the aforesaid order of the court of April 7, 1941, and in order to comply with that portion of the order to pay to Rosario R. Varela and Faustino R. Varela the sum of ₱6,000.00 to each, the administrator filed a motion in court on June 6, 1941, praying the court to approve the deed of sale over four parcels of land, the first, is covered by Original Certificate of Title No. 5417 of the Province of Batangas, registered in the exclusive name of Mariano R. Varela, single (Exh. SS); the second and third, are cadastral lots Nos. 971 and 968, which until now are not covered by any Torrens title, but their tax declarations appear in the exclusive name of Mariano R. Varela (Exhs. 55-1 and TT); and the fourth is covered by original Certificate of Title No. O-139 of the Province of Batangas, in the names of Mariano R. Varela, single, and Andres R. Varela, single, pro-indiviso and in equal shares (Exhs. GG), and the total assessed value of the said four parcels is ₱2,127.00, which said administrator has executed in favor of Luisa Villanueva, a defendant in the instant case, for the sum of ₱10,000.00. After consideration by the court of the aforesaid motion the same was approved. The administrator received from Luisa Villanueva the amount of ₱10,000.00, which together with an additional sum of ₱2,000.00, that the administrator took from the funds of the estate, making a total of ₱12,000.00, was paid to Rosario R. Varela and Faustino R. Varela, each, receiving the sum of ₱6,000.00, receipt of which was acknowledged by them. The Original Certificate of Title No. 5417 has already been cancelled by Transfer Certificate of Title No. 3271 which is now in the name of Luisa Villanueva. Luisa Villanueva took immediate possession of the property through her overseer, treated and dealt with it as her own. However, when Andres Varela arrived in Batangas (he arrived in August 1946), and with the help of other persons, he took possession of the property without the consent of its owner, Luisa Villanueva, depriving her of the use and enjoyment thereof and of the fruits therefrom.

"ADJUDICATED SHARE TO ANDRES E. VARELA IN THE INTESTATE ESTATE OF MARIANO VARELA:

"In the agreement Exh. E-1, Andres Varela was given a share in the estate of his deceased brother equivalent to ₱12,000.00 which Carmelo Bautista agreed to satisfy either in movable or immovable properties in the event that said Andres Varela would be found alive, and in the order on April 7, 1941, the court provided that out of the properties which Carmelo Bautista shall receive as inheritance there shall be reserved for the use and benefit of Andres Varela properties either movable or inmovable equivalent to the value of ₱12,000.00. In compliance with the said agreement and order of the court, the property described in the Original Certificate of Title No. 5418 of the Province of Batangas, registered in the name of Mariano R. Varela and Andres E. Varela pro-indiviso and in equal shares, the half portion pertaining to Mariano R. Varela in said land which has been adjudicated to Carmelo Bautista as part of his inheritance was made to answer of an encumbrance in favor of Andres Varela for the sum of ₱12,000.00, as appears duly noted on the said title (Exhs. FF and JJJ).

"PROPERTIES CONVEYED TO JOSE PEREZ CARDENAS AND PORTIONS OF THEM SOLD TO JOSE VILLANUEVA, JOSE M. CASAL, AND RAFAEL VILLANUEVA

"On May 29, 1941, attorney Cardenas filed a motion in the intestate proceedings praying that his attorney's fees as agreed upon in the contract for attorney's fees of November 18, 1940 (Exh. 4-A), be ordered paid by the heir Carmelo Bautista by delivering to said attorney Cardenas one half of the properties inherited by Carmelo Bautista from the estate. After hearing thereon, the court, on June 16 1941, approved the contract for attorney's fees and it ordered that one-half of the properties inherited by Carmelo Bautista be delivered to said Attorney Cardenas. Upon a notarial document dated June 19, 1941 (Exh. DD-1), executed by the administrator in favor of attorney Jose Perez Cardenas, the former conveyed to the latter certain real and personal properties taken from the share of Carmelo Bautista of his inheritance in the estate of his deceased father in full payment of Jose Perez Cardenas attorney's fees. The real properties consist of four parcels with the improvement thereon, the first is that covered by Transfer Certificate of Title No. 41194 of the Province of Batangas, registered in the exclusive name of Mariano R. Varela, single Exh. RR); the second is that covered by Transfer Certificate of Title No. 2584 of the Province of Batangas, registered in the exclusive name of Mariano R. Varela, single (Exh. PP-12); the third is that portion pertaining to Mariano R. Varela of an undivided interest of 7/12 share in the property covered by Original Certificate of Title No. 30998 of the Province of Batangas, registered in the names of Mariano R. Varela and Andres E. Varela, in an undivided

interest of 7/12 share for Mariano R. Varela and 5/12 share for Andres E. Varela (Exh. DD); and the fourth is that portion pertaining to Mariano R. Varela of an undivided interest of 7/12 share in the property covered by Original Certificate of Title No. 30997 of the Province of Batangas, registered in the names of Mariano R. Varela and Andres E. Varela, in an undivided interest of 7/12 share for Mariano R. Varela and 5/12 share for Andres E. Varela (Exh. EE). And the personal property consists of a gold ring with small diamonds appraised in the inventory for ₱60.00.

"Transfer Certificate of Title No. 41194 was cancelled by Transfer Certificate of Title No. 62344 issued in the name of Jose Perez Cardenas (Exh. RR-1), and later sold by him to Victoria G. de Laperal of Manila, on October 27, 1941 (Exh. RR-2), and this purchaser is not a party defendant in the case.

"Transfer Certificate of Title No. 2584 was cancelled by Transfer Certificate of Title No. 3318 issued in the name of Jose Perez Cardenas (Exh. PP-13), who caused the subdivision of the land into four lots, namely, lots 869-A, 869-B, 869-C, and 869-D (Exh. PP-8). For lot 869-A, a new Transfer Certificate of Title No. 3697-A (Exh. PP-1) was obtained in the name of Jose Perez Cardenas, and portions thereof had been sold by Cardenas to several purchasers, the sales having been duly noted on the title, and said purchasers are not parties defendants in the case (See memorandum of incumbrances on back of title); Lot 869-B was conveyed to Jose M. Casal (Exh. PP-5), who secured in his name Transfer Certificate of Title No. 3676 (Exh. PP-2), and later sold by him to Jose Linatok (Exh. PP-10), said purchaser having obtained in his name Transfer Certificate of Title No. 4021 (Exh. 2-Linatok), and said last purchaser is a defendant in the case; Lot 869-C was conveyed to Rafael Villanueva (Exh. PP-6), who secured in his name Transfer Certificate of Title No. 3678 (Exh. PP-3), and portions thereof had been sold to several purchasers, the sales having been duly noted on the title and said purchasers are not defendants in this case; and Lot 869-D was conveyed to Jose Villanueva (Exh. PP-7), who secured in his name a new Transfer Certificate of Title No. 3677 (Exh. PP-4).

"The third parcel of land conveyed by the administrator to Jose Perez Cardenas in payment of his attorney's fees was that described as cadastral lot No. 355 of the Municipality of Batangas without reference to any Torrens Title. It appears, however, that said lot No. 355 with the improvements thereon is covered by Original Certificate of Title No. 30998 of the Province of Batangas, registered in the names of Mariano R. Varela and Andres E. Varela in an undivided interest, 7/12 share for Mariano R. Varela and 5/12 share for Andres E. Varela (Exh. DD). The interests and participation of 7/12 of Mariano R. Varela was conveyed to Jose Perez Cardenas and a new Transfer Certificate of Title No. 3523 was issued in the joint names of Jose Perez Cardenas and Andres Varela in an undivided interests and in the proportion of 7/12 for Jose Perez Cardenas and 5/12 for Andres E. Varela, respecting and preserving the share of Andres Varela (Exh. DD-3). The share that accrued to Jose Perez Cardenas was conveyed by him to Encarnacion Samos (Exh. DD-5), and a new Transfer Certificate of Title No. 3800 was issued in the joint names of Encarnacion Samos and Andres Varela in an undivided interest and in the proportion of 7/12 for Encarnacion Samos and 5/12 for Andres Varela (Exh. DD-2). Encarnacion Samos together with her minor children Amelia Villanueva and Rafael Villanueva, Jr., are defendants in this case.

"The fourth and last parcel of land conveyed by the administrator to Jose Perez Cardenas in payment of his attorney's fees is described in the conveyance as cadastral lot No. 361 of the Municipality of Batangas without reference to any Torrens title. It appears, however, that said parcel of land is covered by Original Certificate of Title No. 30997 of the Province of Batangas registered in the joint names of Mariano R Varela and Andres E. Varela in an undivided interest and in the proportion of 7/12 for Mariano R. Varela and 5/12 for Andres E. Varela (Exh. EE). The share of 7/12 pertaining to Mariano R. Varela was conveyed to Jose Perez Cardenas, and a new Transfer Certificate of Title No. 3522 was issued in the joint names of Jose Perez Cardenas and Andres Varela in an undivided interest and in the proportion of 7/12 and 5/12, respectively (Exh. II-1).

"PROPERTIES ADJUDICATED TO CARMELO BAUTISTA AS HIS SHARE IN THE INHERITANCE:

"The properties adjudicated to Carmelo Bautista consists of real and personal properties as shown in the document Exh. JJJ:

"(a) The share of Mariano R. Varela in the parcel of land situated in barrio Galincanto, Municipality of San Juan, Batangas, described in the Original Certificate of Title No. 5418 registered in the joint names of Mariano R. Varela and Andres E. Varela pro-indiviso and in equal shares (Exh. FF).

"(b) That parcel of land, without Torrens title, declared under Tax Declaration of real property No. 63881, situated in barrio San Jose, Batangas, Batangas, in the exclusive name of Mariano R. Varela (Exh. VV).

"(c) That parcel of land, without Torrens title situated in barrio San Jose, Batangas, Batangas, registered in the exclusive name of Mariano R. Varela under Tax Declaration of real property No. 33205 (Exh. WW).

"(d) That parcel of land situated in barrio Sambat, Batangas, Batangas, with an area of 2,264 sq. m., which is a portion of a larger mass of land described in the Transfer Certificate of Title No. 342 of the Province of Batangas in the names of Ward B. Gregg and others which had been sold to several persons, among them Mariano R. Varela, the names of the purchasers are given in the attached list to the deed of conveyance executed by the said Ward B. Gregg and others (Exh. 50-A), and the portion sold to Mariano Varela is the same land described in Tax Declaration of real property No. 89328 in the name of Mariano R. Varela (Exh. XX).

"(e) That parcel of land described in the Original Certificate of Title No. 39494 of the Province of Batangas registered in the exclusive name of Mariano R. Varela (Exh. 51), and which is the same land mentioned in the Tax Declaration of real property No. 46758 in the name of Mariano R. Varela (Exh. YY).

"(f) That parcel of land situated in barrio Cuta, Batangas, Batangas, known as Lot No. 102 of the Cadastral Survey of Batangas covered by Original Certificate of Title No 140 of the Province of Batangas (Exh. HH), in the joint names of Mariano R. Varela and Andres E. Varela, pro-indiviso and in equal shares. Although the title contains no notation of the interest pertaining to Carmelo Bautista, obviously, the interest and patricipation acquired by Carmelo Bautista could only be that of his deceased father.

"(g) And those movables, large cattles, and a credit against Doroteo Ylagan for ₱1,000.00 mentioned in the document of delivery (Exh. JJJ).

"PROPERTY CONVEYED TO MELECIO ARCEO:

"Melecio Arceo is made a defendant in this case for having purchased the cadastral lot No. 14076 situated in the barrio of San Jose, Batangas, Batangas, containing an area of a little over 40 hectares, from the administrator of the estate of Mariano R. Varela, deceased, which sale was duly approved by the court in said intestate proceedings of Mariano R. Varela, Civil Case No. 3708 (Exhs. 1, 1-A, 1-B, 1-C and 2-Arceo). The

consideration paid by the purchaser Arceo in the amount of ₱150.00, apparently seems to be out of reasonable proportion to the area of the land sold, but the documents have shown that the purchaser had certain acquired rights over the land for having purchased it from another person other than Mariano R. Varela, and to compromise the conflicting claims, for the land was also claimed by the estate of the deceased Mariano R. Varela, the administrator sold the interest of the estate for the amount of ₱150.00, which fact was made to appear in the motion of the administrator when the deed of sale was submitted to the court for approval (Exh. 1-Arceo).

"From the documents presented by defendant Arceo, it appears that by virtue of writ of execution issued by the Court of First Instance of Manila on September 6, 1910. upon a judgment obtained by 'Jose T. Paterno, Albacea del finado Maximino M. A. Paterno, demandante, contra Sinforoso R. Varela, demandado', in Civil Case No. 1330-54, the Provincial Sheriff of Batangas levied execution upon certain parcels of land of the defendant Sinforoso R. Varela situated in barrio Bilogo, Batangas, Batangas, containing an area of about 40 hectares, to satisfy a money judgment against said Sinforoso R. Varela in the sum of ₱1,500.00. The sale of the attached property of Sinforoso R. Varela was effected on January 18, 1912, and the judgment debtor having failed to redeem the property within the time fixed in the law, the Provincial Sheriff of Batangas executed a definite deed of sale on July 10, 1913, in favor of Jose T. Paterno, the purchaser at the execution sale. The documents also show that the defendant Arceo had acquired his right, title, and interest to the land which is now as Cadastral Lot No. 14076 from the successors in interest of the said Jose T. Paterno.

"PROPERTY CONVEYED TO JOSE LINATOK:

"Under the amended complaint, Lucia Linatok, the oldest daughter of Jose Linatok, deceased, and Felisa Vergara, the surviving spouse of said deceased, for herself and as guardian *ad litem* of her minor children Silvestre, Artemio, Adelaida and Julita, all surnamed Linatok, have been included as parties defendants herein. The reason for their inclusion is the fact that Jose Linatok in life purchased from Jose M. Casal lot No. 869-B of the Batangas Cadastre containing an area of 54,768 square meters, more or less, situated in the Municipality of Batangas.

"The proofs demonstrate that in the lifetime of Jose Linatok, and to be more specific, on July 4, 1944, he purchased from Jose M. Casal said Lot No. 869-B for the sum of ₱130,000.00 of which ₱4,000.00 were genuine Philippine currency and the balance Japanese Military notes, that said lot is now covered by Transfer Certificate of Title No. 4021 of the Province of Batangas issued in the name of Jose Linatok, married to Felisa Vergara; and Jose M. Casal acquired said lot from Jose Perez Cardenas who obtained same from the estate of Mariano Varela in Special Proceeding No. 3708 of this court as part payment of the fees of said attorney Jose Perez Cardenas; that said lot was a part of a greater mass of land covered by Transfer Certificate of Title No. 2584 of the Province of Batangas, registered in the exclusive name of Mariano R. Varela, and was accounted as property of the deceased in the inventory submitted by the administrator in the estate of Mariano Varela, deceased; that prior to the sale to Jose Linatok, said lot was covered by Transfer Certificate of Title No. 3676 of the Province of Batangas in the name of Jose M. Casal, free from any lien or encumbrance; that the Torrens title No. 4021 in the name of Jose Linatok, married to Felisa Vergara, is also free from any lien or encumbrance whatsoever; that Jose Linatok died in the year 1945, leaving as his surviving heirs the defendants Felisa Vergara and their children Lucia, Silvestre, Artemio, Adelaida and Julita; that due to the last war, Jose Linatok in life and his heirs after his death were not able to take immediate possession of said property, and said defendants were able to take possession only after the liberation of Batangas from the Japanese and remained in possession thereof for several months only, because shortly after the arrival of plaintiff in Batangas he forced the tenants in the land in question to quit paying their respective monthly rentals to defendants herein, but instead to him; that actually plaintiff is in possession of said Lot No. 869-B.

"From the proofs, the court finds that Jose Linatok in whose name Transfer Certificate of Title No. 4021 of the land records of the Province of Batangas now stands is a purchaser for value and in good faith, and that his surviving heirs, defendants herein, have been deprived by the plaintiff of their possession thereof."

The trial court correctly hold that, in respect of contain transfers involved in the litigation, the different purchasers paid valuable consideration and on the faith of the titles covering the properties, and accordingly they are purchasers for value and in good faith. Upon the whole, we find the appealed decision to be supported by a preponderance of the evidence, unaffected by the fact that part of the lost testimony had been retaken.

Wherefore, the appealed judgment is affirmed and it is so ordered with costs against the plaintiff-appellant.

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

Pablo, J., took no part.

Justice Padilla took no part.

II

The People of the Philippines, Plaintiff and Appellee, vs. Arturo Mendoza, Defendant and Appellant, G. R. No. L-5877, *September* 28, 1954, *Paras, C. J.*

BIGAMY; MARRIAGE CONTRACTED DURING THE EXISTENCE OF THE FIRST MARRIAGE IS VOID "AB INITIO"; NO JUDICIAL DECREE IS NECESSARY TO ESTABLISH ITS INVALIDITY.—A subsequent marriage contracted by any person during the lifetime of his espouse is illegal and void from its performance, and no judicial decree is necessary to establish its invalidity. A prosecution for bigamy based on said void marriage will not lie.

Solicitor General Pompeyo Diaz and *Solicitor Felicisimo R. Rosete* for the plaintiff and appellee.

Nestor A. Andrada for the defendant and appellant.

DECISION

PARAS, *C.J.*:

The defendant, Arturo Mendoza, has appealed from a judgment of the Court of First Instance of Laguna, finding him guilty of the crime of bigamy and sentencing him to imprisonment for an indeterminate term of from 6 months and 1 day to 6 years, with costs.

The following facts are undisputed: On August 5, 1936, the appellant and Jovita de Asis were married in Marikina, Rizal. On May 14, 1941, during the subsistence of the first marriage, the appellant was married to Olga Lama in the City of Manila. On February 2, 1943, Jovita de Asis died. On August 19, 1949, the appellant contracted another marriage with Carmencita Panlilio in Calamba, Laguna. This last marriage gave rise to his prosecution for and conviction of the crime of bigamy.

The appellant contends that his marriage with Olga Lama on May 14, 1941 is null and void and, therefore, non-existent, having been contracted while his first marriage with Jovita de Asis on August 5, 1936 was still in effect, and that his third marriage to Carmencita Panlilio on August 19, 1949 cannot be the basis of a charge for bigamy because it took place after the death of Jovita

de Asis. The Solicitor General, however, argues that, even assuming that appellant's second marriage to Olga Lama is void, he is not exempt from criminal liability, in the absence of a previous judicial annulment of said bigamous marriage; and the case of People vs. Cotas, 40 O. G. 3154 is cited.

The decision invoked by the Solicitor General, rendered by the Court of Appeals, is not controlling. Said case is essentially different, because the defendant therein, Jose Cotas, impeached the validity of his first marriage for lack of necessary formalities, and the Court of Appeals found his factual contention to be without merit.

In the case at bar, it is admitted that appellant's second marriage with Olga Lama was contracted during the existence of his first marriage with Jovita de Asis. Section 29 of the Marriage Law (Act 3613), in force at the time the appellant contracted his second marriage in 1941, provides as follows:

> Illegal marriages.—Any marriage subsequently contracted by any person during the lifetime of the first spouse of such person with any person other than such first spouse shall be illegal and void from its performance, unless:
>
> (a) The first marriage was annulled or dissolved;
>
> (b) The first spouse had been absent for seven consecutive years at the time of the second marriage without the spouse present having news of the absentee being alive, or the absentee being generally considered as dead and believed to be so by the spouse present at the time of contracting such subsequent marriage, the marriage so contracted being valid in either case until declared null and void by the competent court.

This statutory provision plainly makes a subsequent marriage contracted by any person during the lifetime of his first spouse illegal and void from its performance, and no judicial decree is necessary to establish its invalidity, as distinguished from mere annulable marriages. There is here no pretence that appellant's second marriage with Olga Lama was contracted in the belief that the first spouse, Jovita de Asis, had been absent for seven consecutive years or generally considered as dead, so as to render said marriage valid until declared null and void by a competent court.

Wherefore, the appealed judgment is reversed and the defendant-appellant acquitted, with costs *de oficio*.
So ordered.

Pablo, Bengzon, Jugo, Bautista Angelo, Concepcion, J. B. L. Reyes, J.J., concur.

REYES, *J., dissenting*:

I dissent.

Article 349 of the Revised Penal Code punishes with *prisión mayor* "any person who shall contract a second or subsequent marriage before the former marriage has been *legally* dissolved."

Though the logician may say that where the former marriage was void there would be nothing to dissolve, still it is not for the spouses to judge whether that marriage was void or not. That judgment is reserved to the courts. As Viada says, "La sentidad e importancia del matrimonio no permite que los casados juzguen por si mismos de su nulidad; esta ha de someterse precisamente al juicio del Tribunal competente, y cuando este declare la nulidad del matrimonio, y solo entonces, se tendra por nulo; mientras no exista esta declaracion, la presuncion esta siempre a favor de la validez del matrimonio, y de consiguiente, el que contrae otro segundo antes de dicha declaracion de nulidad, no puede menos de incurrir la pena de este articulo." (3 Viada, Codigo Penal p. 275.)

"This is a sound opinion," says Mr. Justice Tuason in the case of People v. Jose Cotas, (CA), 40 O. G. 3145, "and is the line with the well-known rule established in cases of adultery, that 'until by competent authority in a final judgment the marriage contract is set aside, the offense to the vows taken and the attack on the family exists.' "

Padilla and *Montemayor, J.J.*, concur.

III

Pedro Mendoza, Plaintiff-Appellee, vs. Justina Caparros et al., Defendants. Paulino Pelejo, Defendant-Appellant, G. R. No. L-5937, *January* 30, 1954, *Pablo, J.*

1. SALE; DAMAGES IN CASE OF EVICTION.—The seller of a parcel of land who is obliged "to defend it now and always against just claims presented by anyone," answers for damages in case of eviction or in case the buyer or his heirs is deprived of the thing bought or part of it by final judgment. And although it was not put in writing on the deed of sale still the seller is responsible for eviction.

2. FORENSIC PRACTICE; PARTIES IN CASES OF DAMAGES IN CASE OF EVICTION.—If the buyer of a parcel of land brings action for damages under Article 1548 of the new Civil Code (Article 1475 of the old Civil Code), the action does not lack any fundamental legal principle in including the seller as one of the defendants.

Pedro Ynsua for the defendant-appellant.

Coce & Coce for the plaintiff-appellee.

PABLO, *M.*:

El Juzgado de Primera Instancia de la provincia de Quezon declaró probados los siguientes hechos:

El 11 de junio de 1921 Agapito Ferreras vendió a Paulino Pelejo dos parcelas de terreno descritas en la decisión (Exh. C) y situadas en Camagón, municipio de Alabat, provincia de Quezon, en la suma de ₱3,650.

En 15 de febrero de 1932 el demandado Paulino Pelejo vendió las mismas parcelas a los esposos Victoriano Mendoza y Bernabela Tolentino (Exh. D). Estos fallecieron en 31 de julio de 1934 y 8 de agosto de 1933, respectivamente, y sus herederos Pedro, Leandro y Justiniano, todos apellidados Mendoza, otorgaron una partición extrajudicial (Exh. A), declarando que, como herederos de sus difuntos padres, adjudicaban dichas parcelas a Pedro Mendoza (Exh. A-1).

En marzo de 1935 Agapito Ferreras obtuvo el certificado original de título No. 1345 de dichas parcelas. El 6 de abril de 1951 sus herederos otorgaron una partición extrajudicial (Exh. E), en virtud de la cual el certificado de transferencia de título No. 10350 se expidió a favor de Justina Caparros, Socorro y Policornia Ferreras, estas dos últimas hijas de la primera. Que dichas parcelas fueron registradas erróneamente; pero no consta que se haya empleado mala fe de parte de Agapito Ferreras, ni de su viuda Justina Caparras e hijas Socorro y Policornia al obtener el registro; que los verdaderos dueños de las parcelas son Victoriano Mendoza y Bernabela Tolentino a quienes fueron vendidas por Paulino Pelejo, y al fallecimiento de los mismos, es su heredero Pedro L. Mendoza que es el demandante. El juzgado dictó decisión ordenando al registrador de títulos de la provincia que cancelara el certificado de transferencia de título No. 10,350 y, en su lugar, expidiese otro a nombre de Pedro L. Mendoza, casado con Alfonsa Pérez. Los demandados, con excepción de Paulino Pelejo, fueron condenados a pagar las costas. Las demandadas Justina Caparros e hijas Socorro y Policornia no apelaron.

En 19 de febrero de 1952 Paulino Pelejo presentó una moción de reconsideración pidiendo que, de acuerdo con su contrademanda, se dictase sentencia a su favor en la suma de ₱500, cantidad que él pagó, en concepto de honorarios, al abogado que le defendió en la presente causa. El juzgado denegó dicha moción, y contra esta orden apeló Paulino Pelejo directamente ante este Tribunal.

El apelante contiende que su inclusión como demandado en la

presente causa es "completamente infundada y con carácter maliciosa, por cuanto que no se le puede considerar como parte necesaria ni como parte indispensable para la disposición completa y definitiva de la causa de acción del demandante," basa su reclamación en la artículo 2208 del Código Civil nuevo que dice así: "In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except: x x x (4) In case of a clearly unfounded civil action or proceeding against the plaintiff;"

El demandado vendió a los padres del demandante las parcelas de terreno con la siguiente condición: "defender ahora y siempre contra reclamaciones justas de quien las presentare." De acuerdo con esta condición, el demandado responde del seneamiento, en caso de evicción, o en el caso de que el comprador o su heredero fuese privado de la cosa comprada o parte de la misma por sentencia firme, y, aunque no se hubiera puesto en la escritura de venta dicha condición, todavía sería responsable el vendedor de la evicción (art. 1548, Cód. Civ. nuevo, y Art. 1475, Cód. Civ. antiguo.) Cuando el demandante presentó la demanda, sabía positivamente que la inclusión del demandado era innecesaria? No consta en autos: al contrario, pedía en su demanda "in case cancellation or reconveyance be impossible, that the defendants (el apelante es uno de ellos) or any of them be required to pay the herein plaintiff the purchase price paid by the plaintiff's predecessor in interest." Indudablemente fundada su acción en la condición expresa del contrato de venta y artículo 1548 del Código Civil nuevo y artículo 1475 del Código Civil antiguo. Tampoco aparece que el demandante haya obrado a sabiendas que su acción contra el demandado era infundada, pues no existe pronunciamiento en tal sentido. Si el demandante incluyó al demandado era para proteger sus derechos: no hacía otra cosa más que ejercitar un derecho que le confiere la ley y no para perjudicar o molestar al demandado apelante. Si el demandante no hubiera incluído al hoy apelante como uno de los demandados, y se hubiera dictado sentencia contra aquél, en una reclamación posterior sobre saneamiento, el demandado podría presentar la defensa de que no se le dió oportunidad de probar su justo título al tiempo de la venta y que Victoriano Mendoza había registrado indebidamente dichas parcelas.

Si Pedro L. Mendoza hubiera sido demandado por Justina Caparros e hijas, pidiendo la posesión de las parcelas de terreno, armadas con el certificado de transferencia de título No. 10,530, qué hubiera hecho el demandado? Pedir la inclusión de Paulino Pelejo como uno de los demandados para que, en caso de evicción, le pagase daños y perjuicios. Si no pidiese la inclusión de Paulino Pelejo, Pedro L. Mendoza perdería su acción por saneamiento, pues el artículo 1558 del Código Civil nuevo dispone que "The vendor shall not be obliged to make good the proper warranty, unless he is summoned in the suit for eviction at the instance of the vendee." y el artículo 1481 del Código Civil antiguo dice que "El vendedor estará obligado al saneamiento que corresponda, siempre que resulte probado que se le notificó la demanda de evicción a instancia del comprador. Faltando la notificación, el vendedor no estará obligado al saneamiento." Y en sentencia de 11 de febrero de 1908, el Tribunal Supremo de España dijo: "Hecha la citación de evicción, y habiendo intervenido en le pleito el vendedor, tiene el comprador expedito su derecho para ejercitar la acción de saneamiento, sin que obste no haberse hecho declaración en la sentencia."

Paulino Pelejo, como vendedor, estaba en la obligación de probar que había vendido con justo titulo las parcelas de terreno: si Paulino Pelejo no había comprado de veras dichas parcelas de Agapito Ferreras, éste tenía perfecto derecho de registrarlas a su nombre. El título del comprador Victoriano Mendoza, de quien heredó el demandante Pedro Mendoza estas parcelas, dependía del título que tenía Paulino Pelejo sobre las mismas al tiempo de la venta. No carecía de fundamento legal, por tanto, la demanda al incluir a Paulino Pelejo como uno de los demandados. Su inclusión era un aviso de que, en caso de evicción, él — como vendedor — tenía que responder del saneamiento.

Se confirma la orden apelada.

Paras, C.J., Bengzon, Padilla, Montemayor, Jugo, Bautista Angelo, y *Labrador, J.J.*, conformes.

IV

The People of the Philippines, Plaintiff and Appellant, vs. Irenea Alipao, Defendant and Appellee, G. R. No. L-7251. October 18, 1954, *Bengzon, J.*

1. CRIMINAL PROCEDURE; CONTINUANCE, WHEN IT SHOULD BE GRANTED. — Where a continuance is asked for the first time on the ground that the witnesses can not appear in court because of the inclement weather, it should be granted.

2. ID.; ID.; RIGHT OF DEFENDANT TO SPEEDY TRIAL; LIMITATION THEREON. — The right of a defendant to speedy trial should not be carried to the extreme of practically denying the prosecution its day in court for causes beyond its control.

Assistant Solicitor General Guillermo E. Torres and *Solicitor Meliton G. Soliman* for the plaintiff and appellant.

Bernardino C. Almeda for the defendant and appellee.

DECISION

BENGZON, *J.*,

The fiscal of Surigao has appealed from the order of the court of that province dismissing the information charging Irenea Alipao with oral defamation.

The matter orginated from the justice of the peace court, wherein a fine had been imposed. The defendant appealed. The corresponding information was filled in the higher court, later substituted by an amended information.

When in the morning of July 2, 1952, the case was called for hearing, the prosecution moved for postponement, the complaining witness being absent because there was a typhoon on that day. The court adverting to the presence of the accused and her witnesses and the right of defendants to speedy trial, denied the postponement, and dismissed the proceeding. A motion to reconsider failed. Hence this appeal, which may be entertained, because, at least it does not appear that the accused had pleaded to the information. The order of dismissal reads as follows:

> "The Provincial Fiscal moves for the postponement of the trial of this case on the ground that his witnesses have failed to come because there is now a typhoon. The defense objects to the motion for postponement on the ground that the accused and her witnesses are from the same place as the complaining witness and other witnesses for the prosecution; but inspite of this fact said accused and said witnesses have come and there is no reason why the witnesses for the prosecution should not have come.
>
> The accused is entitled to a speedy trial. She has come with her witnesses inspite of the inclement weather. There is no reason why the trial of this case should be postponed.
>
> WHEREFORE, this case is hereby dismissed with costs *de oficio* and the bail bond of the accused, released."

There is no question that postponements are discretionary with the court. However, as the fiscal alleged in his motion to reconsider, in the afternoon of July 1, 1952 the local station of the Weather Bureau issued a warning to the public of a storm approaching Surigao, with strong winds expected the following day; the next day at 8 a.m. another typhoon warning was published, announcing that Surigao would be lashed by the typhoon between eleven and 2 at noon "to-day"; there were strong winds and heavy rains that blew down some houses; and because of the weather the complainant and her two witnesses, who resided in barrio Rizal and had small children, could not appear in court.

Under the circumstances, we believe the continuance should have been granted considering it was *for the first time* asked by the Government. The court's concern for the defendant's right to speedy trial is commendable; but it should not be carried to the extreme of practically denying the prosecution its day in court for causes beyond its control.

That the accused had come from the same place where the complainant lived, is not conclusive. The judge was advised that whereas the accused had no children, the complainant had several small boys to take care of. And the condition of their respective dwellings--in relation to the stormy weather—does not appear. The presence of complainant's husband—pointed out by defense—is no reason to say that she could have come if she wanted. A man may be willing to face consequences which it is unfair to require a woman to face. That the judge and the court personnel were in court, may be due either to their high degree of sense of duty or to the sturdiness of the Government buildings. A mother out in the barrio, will hesitate to go to town five kilometers distant, knowing the probability of being overtaken by the storm, and of finding no means of transportation.

Wherefore, the order of dismissal will be reversed, and the record will be remanded for further proceedings. So ordered.

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

V

Andres Achondoa, Plaintiff-Appellant, vs. Marcelo Rotea, Joaquina Rotea, Beatriz Rotea and Pastora Rotea, Defendants-Appellees, G. R. No. L-5340, August 31, 1954, Padilla, J.

OBLIGATIONS AND CONTRACTS; SALES; SALE MADE IN GOOD FAITH AND EVIDENCED BY A PUBLIC DOCUMENT CAN BE RESCINDED ONLY ON GROUNDS PROVIDED FOR BY LAW. — Where the transfer and assignment by the defendants to their brother of a sugar cane mill was ineffective and invalid because of the objection of their father who was co-owner thereof, the subsequent sale by the defendants to the plaintiff of the same mill in good faith and at the latter's insistent requests and evidenced by a document acknowledged before a notary public cannot be rescinded except on grounds provided for by law.

Francisco Capistrano, Jr. for plaintiff and appellant.

Felix Mercades, Briones & Pascual for defendants and appellees.

DECISION

PADILLA, *J.*:

On 20 March 1933 Joaquina, Beatriz and Pastora surnamed Rotea, the last two represented by their attorney-in-fact Marcelo Rotea, for and in consideration of ₱1,800, conveyed and sold to Andrés Achondoa a steam sugar cane mill, 12 H.P., manufactured by A. & W. Smith & Company, Ltd., Glasgow, together with its boiler, 14 H.P., a carriage and caldrons, the sale being evidenced by an instrument acknowledged before notary public José M. Romero (Exhibit M). But prior to that sale or on 18 February 1932, Marcelo Rotea, in his behalf and in behalf of Joaquina, Pastora and Beatriz, transferred and assigned to his brother José Rotea the same steam sugar cane mill found in the *Hacienda San Rafael* in the municipality of Tanjay, Oriental Negros (Exhibit O). Andrés Achondoa sent Manuel Bastida, a mechanic, to the *Hacienda San Rafael* to take possession of the mill and in fact dismounted it partly, took and sent some parts thereof to the land of Achondoa in the barrio of Tipanoy, municipality of Iligan, province of Lanao. While Manuel Bastida was thus engaged in dismounting the mill, Laureano Flores, to whom José Rotea allegedly had sold the steam sugar cane mill, brought an action in the Court of First Instance of Oriental Negros to be declared owner of the steam sugar cane mill, to enjoin Achondoa and his mechanic Bastida from dismounting, removing and transporting the said steam sugar cane mill or parts thereof, to enjoin perpetually the defendants from molesting him in the enjoyment of the possession of said steam sugar cane mill, and to recover damages and costs (Civil Case No. 826, Court of First Instance of Oriental Negros; Exhibit A). After hearing the Court of First Instance of Oriental Negros rendered judgment declaring Laureano Flores owner of the steam sugar cane mill and all its accessories, making final the writ of preliminary injunction issued against Achondoa and Bastida, their agents and representatives, and ordering them to pay the costs. On appeal the Court of Appeals reversed the judgment of the trial court and held that Andrés Achondoa was the lawful owner of the mill because as vendee he was the first to take possession thereof. As to the counterclaim for damages in the sum of ₱32,000, the Court of Appeals held that the amount of damages allegedly suffered by Andrés Achondoa was of speculative character, because he was found to have been planting sugar cane in the tract of land where the mill was to be installed and used since 1931, or long before he bought the sugar mill in litigation. The judgment of the appellate court reserved to Laureano Flores whatever right he may have against José Rotea (Exhibit B). The judgment of the Court of Appeals just referred to was promulgated on 29 December 1939. But on 29 June 1939, or before the appeal was decided by the Court of Appeals, Andrés Achondoa commenced this action against Marcelo, Joaquina, Beatriz and Pastora surnamed Rotea in the Court of First Instance of Occidental Misamis to rescind the contract entered into on 20 March 1933 by and between him and the Roteas (Exhibit N), and to recover from the defendants the sum of ₱1,800, the purchase price paid by him for the steam sugar cane mill, together with lawful interest thereon from that day, the further sum of ₱51,000 as damages and costs. After summons the defendants filed a general denial answer to forestall their being declared in default. On 11 December 1940, the date set for the hearing of the case, the attorney for the defendants sent a telegram to the court praying for the continuance of the hearing as he was busy then appearing in a case in the Manila court, but the motion was denied and the plaintiff allowed to present his evidence in the absence of the defendants and their attorney. On 22 March 1941, the Court of First Instance of Occidental Misamis rendered judgment rescinding the contract of purchase and sale of the sugar cane mill executed by and between the plaintiff and the defendants and ordering the latter to pay back to the former the sum of ₱1,800, the purchase price of the mill, together with lawful interest from 20 March 1933, the further sum of ₱75,223.25 as damages and costs. A motion to set aside the judgment and for a new trial was denied. The defendants appealed. Briefs were filed but before judgment could be rendered the Pacific War broke out and the record was destroyed during the battle for liberation of the City of Manila. Steps were taken to have the record reconstituted and on 13 November 1947 this Court adopted the following resolution:

> In Reconstitution Case G.R. No. L-1256, Achondoa vs. Rotea et als., the Court ordered that a new trial be held in the Court of First Instance of Occidental Misamis for the purpose of receiving evidence not yet of record.

On 16 October 1948, the defendants filed an amended answer alleging that after the contract was executed and receipt of the purchase price, they made delivery of the steam sugar mill to the plaintiff, by placing him in material possession thereof, so much so that many of its parts were already sent to Iligan by the plaintiff; that if the whole mill was not fully dismounted and sent to its destination, it was due to causes beyond the control and will of the defendants and without any fault on their part, because Laureano Flores instituted the action already referred to against Andrés Achondoa et al.; that in said case the Court of Appeals declared Andrés Achondoa the lawful owner of the steam sugar cane mill because he took possession thereof and that the question of damages allegedly suffered by Andrés Achondoa was threshed out, passed upon and decided by the Court of Appeals in the case referred to between Laureano Flores, on the one hand, and Andrés Achondoa and Manuel Bastida, on the other. By way of special defense, Marcelo Rotea in his own behalf and as judicial adminis-

trator of his co-defendants, the late Joaquina, Beatriz and Pastora surnamed Rotea, alleged that they had acted in good faith in entering into the contract of purchase and sale of the mill; that they did not know the purpose for which the plaintiff acquired the mill; that if they did finally consent to sell it to him it was due to the latter's request and insistence; that they were not aware of the alleged sale of the mill by their brother José Rotea to Laureano Flores; that a few days after Marcelo Rotea had assigned and transferred the mill is question to his brother José, which transfer was subject to the general approval of their father, José Rotea was notified by telegram by his father objecting to the assignment and transfer of the mill to him; that until the time the action was instituted by Laureano Flores and injunction issued by the Court of First Instance of Oriental Negros, the defendants did not know nor were they aware that there had been such cession or assignment of the mill to Laureano Flores as there had been no prior valid assignment thereof to José Rotea, the predecessor or vendor of Laureano Flores; that the validity of the sale made by the defendants to the plaintiff has already been passed upon and decided by the Court of Appeals and is now *res judicata;* that after the institution of the action by Laureano Flores against the herein plaintiff Achondoa, as evidence of their good faith the defendants engaged the services of an attorney to defend the herein plaintiff, then defendant, paid for the attorney's fees, presented witnesses to the court, secured and furnished the attorney with documentary evidence, and paid the expenses incurred in connection with the appeal to the Court of Appeals after an adverse judgment had been rendered by the Court of First Instance of Oriental Negros which was reversed by the Court of Appeals; that damages allegedly suffered by the plaintiff, if any, could not be laid upon the defendants; that it is not true that the plaintiff planted sugar cane in his land in Iligan in 1933 only when he acquired by purchase the mill, because the plaintiff had planted sugar cane in the land since 1931. The admission of this amended answer was objected to by the plaintiff. After hearing at which the defendants presented their evidence, the record was forwarded to this Court for final disposition, but on 6 March 1950 the record was returned to the trial court pursuant to the following resolution:

> In reconstitution case L-1256, Andrés Achondoa vs. Marcelo Rotea, et al., in which a new trial was held in the Court of First Instance of Misamis Occidental for the reception of evidence not yet of record, the Court ordered that said case be returned to said Court of First Instance for new decision as in a new trial.

Conformably thereto, the Court of First Instance of Occidental Misamis rendered judgment dismissing the complaint, with costs against the plaintiff. A motion for new trial was denied. Hence this appeal.

The evidence shows that the sale by the defendants to the plaintiff of the mill in question was made in good faith and at the latter's insistent requests and that the transfer or assignment of the mill to José Rotea was ineffective and invalid because of the objection of their father Luis Rotea who was a co-owner of the mill. Not only did Luis Rotea express his objection to the assignment of the mill to his son José Rotea in a telegram sent from Manila to Emeteria Gonzales on 22 February 1932 (Exhibit I), but also in his letter to his children dated 25 February 1932 (Exhibit K). Granting that Laureano Flores did not know of such objection, still the fact remains that as the assignment by way of donation to José Rotea, the predecessor and vendor of Laureano Flores, was made in a private instrument it could not prevail over the sale of the mill made in a public document to Andres Achondoa who took possession thereof. A consummated sale cannot be resolved but only upon certain grounds provided for by law. If he failed to dismount completely and ship the whole mill to his land in barrio Tipanoy, municipality of Iligan, province of Lanao, it was not due to any fault imputable to the defendants, for as vendors in good faith of the mill sold they did all what was expected of them. Not only did the vendors place the vendee in possession of the mill but also when his possession was disturbed by the filing of an action in which a writ of preliminary injunction was issued against him (the vendee), they (the vendors) engaged and paid for the services of an attorney to defend the sale made by them to him and furnished the attorney with witnesses and documentary evidence necessary for his defense and when the case was decided adversely against the vendee they with the latter's consent caused the case to be appealed to the Court of Appeals and secured a reversal of the judgment.

In the case appealed to the Court of Appeals, the vendee, then defendant-appellant, set up a counterclaim for ₱32,000 for his failure to make use of the mill because of the injunction issued by the Court of First Instance of Oriental Negros. Passing upon that point of damage for ₱32,000 allegedly suffered by the then defendant-appellant, the Court of Appeals held that said damages were of speculative character and dismissed the counterclaim.

It appearing that in 1933 the plaintiff-appellant planted his land in Iligan with sugar cane not in anticipation or expectation that he would acquire the mill from the defendants, because in 1931, or two years before, he had planted it with sugar cane, the claim for damages of Andrés Achondoa is without basis in law and in fact.

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

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

VI

Maximo Omandam, Applicant-Appellee, vs. The Director of Lands, Oppositor-Appellant, G.R. No. L-4301, July 29, 1954, Padilla; J.

1. LAND REGISTRATION; OPPOSITION; FAILURE TO FILE OPPOSITION WITHIN THE PERIOD GRANTED OR WITHIN REASONABLE TIME THEREAFTER IS ABANDONMENT. — Although the Director of Lands, as oppositor to an application for registration, was not declared in default because his representative appeared on the date and time set for the hearing and was granted fifteen days within which to file his opposition, yet the fact that he did not file it within the period granted or within a reasonable time thereafter constituted abandonment of his opposition, the reservation to the effect that the nonpresentation of an opposition was "without prejudice to the right of this Bureau to take proper steps should it find upon proper investigation that the applicant is not entitled to the land sought to be registered," notwithstanding.

2. PLEADING AND PRACTICE; MOTION FOR RELIEF, WHEN SUFFICIENT IN FORM AND SUBSTANCE. — A motion for relief, although verified by the movant, yet if, apart from failing to show excusable neglect, it was not accompanied by an affidavit of merits, is not sufficient in form and substance to justify the Court to require those against whom it is filed to answer within fifteen days from the receipt thereof, as provided for in section 4, Rule 38 of the Rules of Court.

First Solicitor General Ruperto Kapunan, Jr., and *Solicitors Pacifico P. de Castro* and *Mariano M. Trinidad* for appellant, Director of Lands.

Alfonso L. Penaco for the applicant and appellee.

DECISION

PADILLA, *J.*:

Maximo Omandam applied for registration, under the Land Registration Act, of a parcel of agricultural land, together with the improvements thereon, containing an area of 177,813 sq.m. or

17.7813 hectares, located in the barrio of Casul, municipality of Baliangao, province of Occidental Misamis, delimited and described in the plan and technical description attached to the application, subject to a mortgage in favor of the Philippine National Bank for the sum of ₱600. Notice of hearing was issued on 1 September 1949, duly published and served upon all interested parties setting the hearing of the application for 28 December 1949 at 8:00 a.m. On that day the representatives of the Bureau of Lands and of the Philippine National Bank and other opponents appeared. The representatives of the Bureau of Lands and of the Philippine National Bank were granted fifteen days within which to file a written opposition to the application. Except as to those who had made their appearance a general default was entered. On 2 May 1950 after hearing the Court rendered judgment for the applicant decreeing the registration of the parcel of land in his name, subject to a mortgage to secure the payment to the Philippine National Bank of ₱600. The opponents Pedro Omandam and Evencia Omandam who appeared and cross-examined the witnesses withdrew their opposition to the application. On 6 June 1950 an opposition was filed by the Director of Lands and ten days later (16 June), a motion for reconsideration was filed by him predicated upon newly discovered evidence and lack of notice of the hearing held on 2 May 1950. This was denied by the Court in its order of 8 July 1950. On 15 August, the provincial fiscal in behalf of the Director of Lands filed a motion for relief from judgment on the ground of excusable neglect. He alleged that the faulty means of communication from Occidental Misamis to Manila was the cause of the Government's failure to file its opposition to the application. This was denied by the Court on 9 September 1950, from which order denying the relief prayed for the Director of Lands is appealing.

Appellant points to the lack of hearing on the petition for relief, as provided for in sections 4 and 6, Rule 38. According to the rule the Court is to require "those against whom the petition is filed to answer the same within fifteen days from the receipt thereof" "if the petition is sufficient in form and substance to justify such process." Granting that the means of communication between Occidental Misamis and Manila was faulty as alleged by the appellant, still there is no justification for the delay in filing his opposition to the application. It was filed on 6 June 1950. And although he was not in default because his representative appeared on the date and time set for the hearing and was granted fifteen days within which to file his opposition to the application, yet the fact that he did not file it within the period granted or within a reasonable time thereafter led the Court to believe that he abandoned his opposition to the application. More, as early as 5 June 1949 the Solicitor General returned the record of the case to the Court with the statement that the Director of Lands did not deem it necessary to file an opposition to the registration applied for by Maximo Omandam. This statement must have been made upon report on investigation done by the field officers of the Bureau of Lands. The reservation made by the Director of Lands in the indorsement to the Solicitor General that the non-presentation of an opposition was "without prejudice to the right of this Bureau to take proper steps should it find upon proper investigation that the applicant is not entitled to the land sought to be registered" does not justify the delay of the appellant in filing his opposition. The motion for relief, apart from failing to show excusable neglect, does not have an affidavit of merits, for although it is verified by the provincial fiscal and the affidavit attached thereto sworn to also by the provincial fiscal, the latter does not know the facts upon which the opposition is based, to wit: that the applicant has not been in possession of the parcel of land applied for since 26 July 1894. Hence, being an insufficient petition not only in form but also in substance to justify the Court to require those against whom it is filed to answer within fifteen days from the receipt thereof, as provided for in section 4, Rule 38, the hearing provided for in section 6 of the rule was not available to the party seeking the relief.

The order appealed from is affirmed, without costs.

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

VII

Jose M. Lezama, Petitioner, vs. Edmundo Piccio, et al., Respondents, G. R. No. L-6606, September 29, 1954, Montemayor, J.

PLEADING AND PRACTICE; DELAY IN THE SERVICE OF SUMMONS ENTITLES DEFENDANT TO LIFT ORDER OF DEFAULT. — Although this court has held that the filing by the defendant of a motion praying for the dissolution of an attachment without impugning the jurisdiction of the trial court and the subsequent giving of a counterbond for its dissolution could be regarded as a voluntary appearance, equivalent to service of summons and therefore he could be properly declared in default (Flores vs. Zurbito, 37 Phil., 746, 750; Monteverde vs. Jaranilla, 60 Phil., 306; and Marquez Lim Cay vs. Del Rosario, 55 Phil., 962), this rule may not be invoked in the present case where the defendant, in petitioning the trial judge by means of a telegram to fix the amount of a counterbond to dissolve the writ of attachment, had also asked that the clerk of court send him a copy of the complaint by air mail in order to be apprised of the court action against him and put up his defense, but said copy apparently was never sent him; and the summons was only served on him two months after the order of default had been rendered against him.

Tirso Espeleta for the petitioner.

Gaudioso C. Villagonzalo for the respondents

DECISION

MONTEMAYOR, *J.*:

From the record we gather the following facts. Perfecto Guillen and eleven others were employed by petitioner Jose M. Lezama in his fishing business. Claiming that they had not been paid their wages to May 28, 1952, they filed Civil Case No. R-1916 in the Court of First Instance of Cebu to collect said pay, and for other relief. At that time Lezama would appear to be residing in the City of Iloilo, although his Manager Juan B. Cesar lived in the City of Cebu. Because Cesar could not be found in Cebu at the time that the complaint was filed the corresponding summons together with a copy of the complaint were sent to the Provincial Sheriff of Iloilo for service on Lezama and were received by said Sheriff on May 31, 1952. On petition of plaintiffs Guillen et al., a writ of attachment was issued against the fishing boat M/L CATALINA belonging to Lezama. Manager Cesar then already in Cebu was notified of this writ of attachment and he must have notified his employer Lezama because the latter for the purpose of lifting the writ, from Iloilo on June 5, 1952, sent a telegram to Judge Piccio who was hearing the case asking him to telegraph to him collect if he was agreeable to his filing of a ₱5,000.00 counterbond and also asking that the Clerk of Court send to him a copy of the complaint via airmail (Appendix A). Judge Piccio answered by telegram on the same date to the effect that a ₱5,000.00 counterbond would be approved. On June 13, 1952, Lezama filed the corresponding counterbond in the amount of ₱5,000.00 which was approved by the Judge.

On October 11, 1952, Judge Piccio issued the following order:

"Defendant not having filed his Answer to the Complaint within the statutory period, as prayed for, this Court hereby declares the defendant in default.

"Plaintiff may, therefore, introduce their evidence at any convenient date.

"SO ORDERED."

It would seem however that the Provincial Sheriff of Iloilo had not in the meantime served the summons and the copy of the complaint on Lezama in Iloilo, despite the fact that he (Sheriff) received said summons as early as May 31, 1952. On November

28, 1952, the Cebu Clerk of Court wired said Sheriff requesting him to inform the court of the date a copy of the complaint in Civil Case No. R-1916 was served on the defendant. No answer was received. On December 8, 1952, Judge Piccio himself telegraphed the Iloilo Provincial Sheriff to answer by telegram collect and inform him if he had summoned defendant in said case. Still, no answer. But two days after, this is, on December 10th, said Sheriff served the summons on Lezama.

On December 22, 1952, Judge Piccio rendered judgment in favor of Guillen and his eleven co-plaintiffs in Civil Case No. R-1916 and against defendant Lezama. On December 23, 1952, Lezama filed a motion for reconsideration asking that the order of default be reconsidered, and that he be allowed to answer the complaint, at the same time enclosing a copy of his answer alleging that it was only on December 10, 1952, that he received the summons and a copy of the complaint. According to respondents, Guillen et al., this motion was denied by the court on January 3, 1953; and the answer attached to the motion was dismissed on the same date. Then, in an undated petition for relief but bearing the month of January and the year 1953, defendant Lezama claiming that he had a "good and strong evidence to counteract plaintiffs' claim, if the former is given a chance to be heard," asked that the judgment rendered against him be set aside and that a new trial be ordered, at the same time contending that his filing of a counterbond to dissolve the writ of attachment did not constitute a voluntary appearance nor did it confer upon the court jurisdiction over his person because he was not regularly served with sommons.

According to Lezama this petition for relief was never acted upon by the court, and according to respondents, a copy of said petition for relief was never served on them or upon their attorney. Lezama has now come to this Tribunal with a petition for certiorari, prohibition and mandamus, asking that the decision of Judge Piccio as well as the proceedings had in his court be declared null and void, and that the case be remanded to that court for trial on the merits.

One question involved in the present case is whether the action taken by Lezama in asking the trial court by means of a telegram to fix the amount of a counterbond to dissolve the writ of attachment and his subsequent filing of the counterbond fixed by the court constituted a voluntary appearance which according to Rule 7, Section 23 of the Rules of Court is equivalent to service of summons. If it is, then the fifteen (15) day period provided by Rule 9, Section 1, of the Rules of Court within which a defendant shall file his answer should be computed not from December 10, 1952, when Lezama was actually and formally served with summons by the Iloilo Sheriff but from June 5, 1952, when sent the telegram to Judge Piccio or at the latest from June 13, 1952, when he filed his counterbond. And if this be the case. then Lezama was properly and correctly declared in default for his failure to file an answer on time.

In the case of Flores v. Zurbito, 37 Phil. 746, 750, this Court said the following:

> " x x x. While the formal method of entering an appearance in a cause pending in the courts is to deliver to the clerk a written direction ordering him to enter the appearance of the person who subscribes it, an appearance may be made by simply filing a formal motion, or plea or answer. This formal method of appearance is not necessary. He may appear without such formal appearance and thus submit himself to the jurisdiction of the court. He may appear by presenting a motion, for example, and unless by such appearance he specifically objects to the jurisdiction of the court, he thereby gives his assent to the jurisdiction of the court over his person."

In the case of Monteverde v. Jaranilla, 60 Phil. 306, this Court said that a special appearance in which the jurisdiction of the court over the person of the defendant is not expressly impugned and in which the *dissolution of an attachment is asked upon the filing of a counterbond,* is equivalent to a general appearance.

And in the case of Marquez Lim Cay v. Del Rosario, 55 Phil. 962, this Court also held that "the filing of a motion praying for the dissolution of an attachment without objecting to the jurisdiction of the court over the place where the property is situated, by means of a special appearance;" and "the giving of a bond for the dissolution of said attachment, imply a submission to the jurisdiction of the court x x x."

On the strength of the authorities above cited we could hold that petitioner Lezama was properly declared in default because he should have filed his answer within fifteen days, not from December 10, 1952, when he was actually served with summons in Iloilo, but from June 5, 1952, or at the latest, from June 13 1952, when he filed with the Cebu court the corresponding counterbond in the amount fixed by said court at his request and instance, all of which could be regarded as a voluntary appearance, equivalent to service of summons, an appearance in which the jurisdiction of the trial court was not impugned. But there is one aspect of the case, by no means unimportant, which must be considered, namely, the delay in the service of summons on Lezama. The Iloilo Sheriff served the summons on him only on December 10, that is, about two months after the order of default. It will be remembered that in Lezama's telegram to Judge Piccio on June 5, he asked that the Cebu Clerk of Court send him a copy of the complaint by air mail. That shows that Lezama was anxious to see a copy of the complaint, apprise himself of the court action against him and put up a defense. But apparently, said copy of the complaint was never sent to him. Besides, according to him, and judging from a copy of his answer, he had a good defense, provided of course that he can prove his allegations in it. We believe and hold that under the circumstances, Lezama should be given his day in court.

In view of the foregoing, the petition is granted, the order of default and the decision are hereby set aside, and the trial court is directed to reopen the case, admit Lezama's answer and hear and decide the case anew. No costs.

We cannot overlook the long delay in the service of the summons by the Provincial Sheriff of Iloilo. Said Sheriff received said summons from Cebu on May 31, 1952. On November 28, 1952, the Cebu Clerk of Court wired him asking for information about the date the summons was served on the defendant in said Civil Case No. R-1916. The Sheriff apparently did not deign to answer the telegram. On December 8, 1952, Judge Piccio himself telegraphed said Sheriff of Iloilo asking if he had already served summons on the defendant. The Sheriff again failed to answer; but apparently spurred by said two telegrams and realizing the necessity of some action, on December 10, 1952, he actually served the summons on the defendant. According to the answer of respondents, said sheriff actually cashed the money order covering his fees as sheriff, as early as June 1952, meaning that he collected his fees long before he rendered services on December 10, 1952 when he served the summons. The attention of the Department of Justice and the Presiding Judge of the court of Iloilo are invited to this incident for purposes of investigation if they deem necessary, so that a similar case of long, unexplained, and obnoxious delay in the service of summons will not be repeated.

Paras, C.J., Bengzon, Alex. Reyes, Jugo, Bautista Angelo; Concepcion, and *J.B.L. Reyes JJ.*, concur.

Mr. Justice Labrador did not take part.

Pablo, J.: took no part.

VIII

Good Day Trading Corporation, Petitioner, vs. Board of Tax Appeals, Respondent, G. R. No. L-6574, July 31, 1954, Montemayor, J.

1. BOARD OF TAX APPEALS DECLARED ILLEGALLY ESTABLISHED; REPUBLIC ACT 1125 CREATED THE COURT OF TAX APPEALS WITH SAME JURISDICTION AND

FUNCTIONS AS BOARD OF TAX APPEALS; ALL CASES DECIDED BY FORMER BOARD AND APPEALED TO THE SUPREME COURT SHALL BE DECIDED ON THE MERITS. — Presumably due to a ruling by this Tribunal (University of Santo Tomas vs. Board of Tax Appeals, G. R. No. L-5701, June 23, 1953) that the Board of Tax Appeals was illegally established (because by mere Executive Order) for the reason that the jurisdiction assigned to it deprived the Courts of First Instance of their jurisdiction to entertain and pass upon cases taken to them from actions and decisions of the Collector of Customs and the Collector of Internal Revenue regarding taxes, assessments, refunds, etc., Republic Act 1125 was subsequently passed. Said Act abolished the Board of Tax Appeals, created what is now known as the Court of Tax Appeals with practically the same jurisdiction and functions of the former Board of Tax Appeals, and although it repealed Executive Order No. 401-A, nevertheless it provided that all cases decided by the former Board of Tax Appeals and appealed to the Supreme Court pursuant to Executive Order No. 401-A shall be decided by the Supreme Court on the merits, to all intents and purposes as if said Executive Order No. 401-A had been duly enacted by Congress.

2. TAXES; SPECIFIC TAXES ON IMPORTED ARTICLES; EITHER OWNER OR IMPORTER SHALL PAY. — If a shipment stored. pursuant to existing law, in a bonded warehouse under the custody of the Bureau of Customs is sold, while in storage to another person, the specific taxes on the shipment may be paid either by the importer or the buyer, as owner under section 125 of the National Internal Revenue Code.

3. COURT OF TAX APPEALS; JURISDICTION; REVIEW AND APPROVAL OF ORIGINAL ASSESSMENT MADE BY THE COLLECTOR OF INTERNAL REVENUE; ONLY ISSUES SUBMITTED CAN BE REVIEWED BY THE TAX COURT. —Where no appeal was taken from the decision of the Collector of Internal Revenue, as approved by the Secretary of Finance, authorizing the refund of specific taxes paid by the importer, in view of its full payment by the buyers of the stored shipment, and because the amount involved exceeded ₱5,000 the approval of the Court of Tax Appeals under section 9 of Executive Order No. 401-A becomes necessary, the latter court should consider only the amount and propriety of the refund and nothing more.

4. ID.; ID.; WHETHER OR NOT BACKPAY CERTIFICATES CAN BE USED FOR THE PAYMENT OF TAXES IS NOT FOR THE TAX COURT TO DETERMINE. — Whether or not owners of backpay certificates should be given certificates of indebtedness ostensibly to be used to pay taxes but in reality to be speculated upon and negotiated by some unscrupulous person, is not for the Court of Tax Appeals to determine, but is wholly the legal concern of the Treasurer of the Philippines and the Department to be affected by the use of said certificate of indebtedness.

Enrico I. de la Cruz for the petitioner.

Solicitor General Juan R. Liwag and *Solicitor Jose P. Alejandro* for the respondent.

DECISION

MONTEMAYOR, *J.*:

The facts in this case are not disputed. The petitioner GOOD DAY TRADING CORPORATION imported 238 cases of Chesterfield cigarettes on February 18, 1952. The corresponding surety bond was filed in its favor to secure the payment of the sum of ₱2,360.00, the amount of specific taxes due on the cigarette importation, and pursuant to existing law, the shipment was stored in a bonded warehouse under the custody of the Bureau of Customs. On September 23, 1952, while the cigarettes were still in storage, petitioner sold them to one Buenaventura Isleta for a total sum of ₱32,000.00, exclusive of specific taxes, the sale being conditioned on the buyer paying all the specific taxes or filing a surety bond with the Bureau of Internal Revenue to guarantee payment thereof, within 15 days from the sale agreement, besides paying all the storage fees, fire insurance premium and other expenses from the date of sale until the cigarettes have been withdrawn by the buyer.

A few days after the sale agreement Isleta informed petitioner that he bought the cigarettes not for himself but on behalf of his companions who intended to pay the specific taxes with their backpay certificates or certificates of indebtedness. Petitioner then wrote a letter to the Collector of Internal Revenue advising him of the sale, at the same time requesting that should the certificates of indebtedness with which the buyers intend to pay the specific taxes on the cigarettes be approved and accepted, the surety bond previously filed by petitioner be ordered cancelled. This letter was duly received by the Collector of Internal Revenue.

Afterwards, when despite several extensions given to Isleta and his companions they failed to show evidence that they had either paid the specific taxes or filed the corresponding surety bond, petitioner to avoid deterioration of the cigarettes, decided to rescind the sale and on December 8, 1952, on account of the specific taxes, it made an initial payment of ₱8,800.00 to the Collector of Internal Revenue and thereafter attempted to withdraw from storage 40 cases of cigarettes, covered by the initial payment. The warehouseman, however, refused delivery saying that Isleta and companions claimed ownership of the whole shipment because they already had submitted with the Bureau of Internal Revenue certificates of indebtedness (Back Pay) for payment of all the specific taxes, which according to them have already been approved and accepted by the Bureau. At the same time Isleta came to petitioner's office with a letter requesting the suspension of the withdrawal of the cigarettes by petitioner, with the condition that should he (Isleta and companions) fail to comply with the sale agreement on or before December 15, 1952, then petitioner may withdraw the whole shipment and Isleta and companions would pay ₱10,000.00 as liquidated damages.

Eventually, the Bureau of Internal Revenue approved or accepted the certificates of indebtedness tendered by the buyers as payment of the specific taxes on the cigarettes, the issuance of the cretificates of indebtedness having been approved by the National Treasurer of the Philippines. The Bureau of Internal Revenue also authorized the Bureau of Customs to release to the buyers the whole shipment; the buyers filed their entries with the Bureau of Customs, and withdrew all the cigarettes and allegedly sold the same.

Thereafter, petitioner asked for the refund of the ₱8,800.00 paid by it in cash, in view of the full payment of the specific taxes on the cigarettes by the buyers. The Collector of Internal Revenue granted the refund and his action was approved by the Secretary of Finance. No appeal was taken from said decision; but because the amount involved was more than ₱5,000.00 the case was brought before the Board of Tax Appeals for final resolution under the provisions of Executive Order No. 401-A, Sec. 9, particularly the second paragraph thereof. Said section 9 reads as follows:

"Sec. 9 In all cases involving an original assessment of ₱5,000 or less, the action of the Collector of Internal Revenue pursuant to his authority to compromise cases and make refunds under section 309 of the National Internal Revenue Code, and that of the Commissioner of Customs pursuant to similar authority under section 1369 of the Revised Administrative Code, shall in no case become effective unless approved by the Secretary of Finance. Copies of the action of the Collector of Internal Revenue or of the Commissioner of Customs, as the case may be, and of the approval thereof by the Secretary of Finance, shall be promptly furnished the Board of Tax Appeals, and within sixty days from the receipt of copy thereof, the Board may, for justifiable reasons, review the case *motu proprio*.

"But in cases involving an original assessment of more than ₱5,000, the approval by the Secretary of Finance of the action taken as aforesaid by the Collector of Internal Revenue or of the Commissioner of Customs shall not become effective until and unless the same is approved by the Board of Tax Appeals."

The case was set for hearing before the Tax Board and memoranda were filed after which, the Board issued its resolution dated January 31, 1953. The Board not only reversed the decision of the Collector of Internal Revenue granting the refund of ₱8,800.00 but it also rejected the payment of the entire amount of specific taxes in certificates of indebtedness, and ordered petitioner to pay the balance of ₱43,560.00 in cash. In other words, the Good Day Trading Corporation which originally imported the cigarettes whose specific taxes amounted to ₱52,360.00 was held liable and was ordered to pay the whole of said specific taxes.

Petitioner asked for reconsideration claiming that the payment of ₱8,800.00 in cash amounted to a double payment because the corresponding amount was later paid with certificates of indebtedness, accepted by the Collector of Internal Revenue and approved by the Secretary of Finance; being double payment petitioner was entitled to a refund; moreover, assuming that petitioner was not entitled to refund, the Tax Board had neither authority nor jurisdiction to order petitioner to pay the balance of ₱43,560.00 because it was not involved nor was it an issue in the matter submitted to the Tax Board for review. Acting upon the motion for reconsideration the Tax Board denied the same, saying that said motion was filed out of time; that the resolution had become final, and that even if the resolution were still subject to modification and that the Board were to admit that it had no jurisdiction to order the petitioner to pay the balance of the specific taxes due, still petitioner would gain nothing by it because the Tax Board may yet and could reverse the decision of the Collector of Internal Revenue and enjoin him to collect from petitioner the said amount of the balance, pursuant to the Board's ruling that the petitioner is the importer of the cigarettes and so was bound to pay said taxes. Petitioner is now appealing from the resolution and order of the Board of Tax Appeals.

Incidentally, and to avoid any possible confusion, we might state that, presumably due to a ruling by this Tribunal (University of Santo Tomas v. Board of Tax Appeals, G. R. No. L-5701, June 23, 1953) that the Board of Tax Appeals was illegally established (because by mere Executive Order) for the reason that the jurisdiction assigned to it deprived the Courts of First Instance of their jurisdiction to entertain and pass upon cases taken to them from actions and decisions of the Collector of Customs and the Collector of Internal Revenue regarding taxes, assessments, refunds, etc., Republic Act 1125 was subsequently passed. Said Act abolished the Board of Tax Appeals, created what is now known as the COURT OF TAX APPEALS with practically the same jurisdiction and functions of the former Board of Tax Appeals, and altho it repealed Executive Order No. 401-A, nevertheless it provided that all cases decided by the former Board of Tax Appeals and appealed to the Supreme Court pursuant to Executive Order No. 401-A shall be decided by the Supreme Court on the merits, to all intents and purposes as if said Executive Order 401-A had been duly enacted by Congress. We are, therefore, deciding this case pursuant to the provisions of said Executive Order 401-A.

The main ground on which the Tax Board based its resolution is that petitioner Good Day Trading Corporation is the importer of the shipment of cigarettes and therefore is the one called upon to pay the specific taxes, and consequently, should pay the same in cash, and the Tax Board proceeds to cite authorities defining what is meant by an importer, namely, that the importer is the primary consignee to whom the goods are sent and who himself presents the invoices, makes the entry, receives the bill of lading, and gets the goods, as distinguished from one who may be the ultimate consignee, and that it does not include a person who purchases the goods from the importer after they have been brought within the jurisdiction of the United States. On the other hand, petitioner claims that under section 1248 of the Revised Administrative Code which reads as follows:

"Sec. 1248. *When importation by sea begins and ends.* — Importation by sea begins when the importing vessel enters the jurisdictional waters of the Philippines with intention to unload therein, and is not completed until the duties due upon the merchandise have been paid or secured to be paid at a port of entry and the legal permit for withdrawal shall have been granted, or, in case said merchandise is free of duty, until it has legally left the jurisdiction of the customs."

importation is not completed until the duties due upon the merchandise have been paid and legal permit for withdrawal shall have been granted. So that the person or entity paying the duties due and receiving the legal permit for withdrawal and actually withdrawing the goods becomes the importer.

Under our view of the case, whether or not petitioner is the importer of the cigarettes in question, is of little import because under section 125 of the National Internal Revenue Code which provides —

"Sec. 125. *Payment of specific tax on imported articles.* — Specific taxes on imported articles shall be paid by the *owner* or *importer* to the customs officers, conformably with regulations of the Department of Finance and before the release of such articles from the customhouse."

either the owner or importer shall pay the specific taxes on imported articles. So that if the sale of the cigarettes by the importer to the owners of the certificates of indebtedness was valid, then said purchasers became the owners of the shipment and could pay the specific taxes. We, therefore, believe and hold that the Tax Board erred in holding that only petitioner Good Day Trading Corporation was called upon and could pay the specific taxes on the cigarette shipment.

What about the payment of the balance of ₱43,560.00 ordered by the Tax Board to be paid by petitioner in spite of the payment of the entire specific tax in certificates of indebtedness? We agree with the petitioner that only the question of the refund of ₱8,800.00 was in issue and was involved in the matter considered and decided by the Tax Board. It will be remembered that there was no appeal from the decision of the Collector of Internal Revenue approving the refund, which decision was approved by the Secretary of Finance. If it was brought to the Tax Board at all, it was because of the provisions of Section 9 of Executive Order No. 401-A already reproduced at the first part of this decision. Under said section, in cases of original assessment involving ₱5,000.00 or less, in one case and involving more than ₱5,000.00 in another it is the action of the Collector of Internal Revenue pursuant to his authority to compromise cases and make refunds under section 309 of the National Internal Revenue Code, that is subject to review and approval by the Tax Board. So that the assessment and payment of the specific tax of ₱52,360.00 in themselves, where there was neither dispute nor appeal, was not subject to review by the Tax Board. What was subject to review and what was in issue here was the refund of ₱8,800.00 approved by the Collector of Internal Revenue and approved by the Secretary of Finance because that was an action taken by the Collector of Internal Revenue pursuant to his authority to compromise cases and make refunds under section 309 of the National Internal Revenue Code. Consequently, the consideration and resolution by the Tax Board should be confined to that amount and to the propriety of the refund, nothing more.

One of the reasons if not the main consideration behind the motion of the Tax Board in ordering the payment of the whole of the specific taxes by the petitioner, and in cash, is reflected in a portion of its resolution which we quote:

"x x x. It is apparent that interested parties wanted to negotiate their backpay certificates by circumventing the law and as wisely recommended by the Collector of Internal Re-

venue in his memorandum, 'as a measure of sound fiscal policy, the acceptance of applications for issuance of certificates of indebtedness for the payment of specific tax on imported articles, should be disapproved.' To allow the purchasers the payment of specific tax on imported goods in backpay certificates will open a way to unscrupulous dealers to speculate in the negotiation of backpay certificates."

The Tax Board in its resolution added that "it is highly improper for the Government to accept certificates of indebtedness in lieu of cash." We can well understand the point of view of the Tax Board. There is reason to suspect that the 29 alleged purchasers of the cigarettes whose certificates of indebtedness (back pay) were used to pay the specific taxes, were not bona-fide purchasers; that they were not interested in the cigarettes imported but were solely concerned with getting their backpay liquidated by any one who may have bought the same at a discount and later used them to pay the specific taxes by making it appear that 29 persons who had nothing in common but their ownership of backpay certificates, and who heretofore were never importers, dealers or buyers of foreign cigarettes, all of a sudden were drawn and banded together to invest in a commodity they never dealt in or were interested in, and became purchasers and owners of the entire shipment of cigarettes.

The interest taken and solicitude shown by the Tax Board for the Government and the public, is commendable indeed. However, the present appeal has to be decided solely on the basis of the pertinent legal provisions. Whether or not owners of backpay certificates should be given certificates of indebtedness ostensibly to be used to pay taxes but in reality to be speculated upon and negotiated by some unscrupulous persons, is wholly the legal concern of the Treasurer of the Philippines and the Department to be affected later by the use of said certificates of indebtedness. The attitude of the Tax Board intended to minimize this anomalous practice may be of great interest to the department or departments of the Government charged with the issuance of certificates of indebtedness based on backpay, and the acceptance of the same in payment of taxes.

In view of the foregoing, the resolution of the Tax Board denying the refund of ₱8,800.00 and ordering petitioner to pay the balance of ₱43,560.00 is reversed. No costs. Let copies of this decision be furnished the Treasurer of the Philippines and the Secretary of Finance.

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

IX

Pedro Gabriel and Avelino Natividad, Petitioners, vs. People of the Philippines and Court of Appeals (First Division), Respondents, G.R. No. L-6730, October 15, 1954, Reyes, A., J.

1. TRESPASS TO DWELLING; OPPOSITION TO ENTER NEED NOT BE EXPRESSED BY DIRECT WORDS; OPPOSITION BY ACTION OF HOUSEHOLDER. — Prohibition to enter a dwelling does not have to be expressed in words. It may be inferred where the lady of the house tells defendants to wait on the porch and closes the door behind her as she enters the drawing room.

2. ID.; ID.; ID.; MERE SUSPICION THAT HOUSEHOLDER IS HIDING TRANSFORMER USED FOR STEALING ELECTRICITY DOES NOT GIVE MERALCO LINE INSPECTORS RIGHT TO ENTER HOUSE AGAINST HIS WILL. — Mere suspicion that the householder is hiding a transformer used by him in stealing electricity in his house does not give the Meralco line inspectors the right to enter the house against his will.

Ross, Selph, Carrasco & Janda for the petitioners and appellants.

Assistant Solicitor General Guillermo E. Torres and *Solicitor Felicisimo R. Rosete* for the respondents and appellees.

DECISION

REYES, A., *J.*:

This is an appeal from a judgment of the Court of Appeals, convicting the appellants Pedro Gabriel and Avelino Natividad of simple trespass to dwelling on facts found by said court to be as follows:

> "x x x Sherman Jones and his wife, Josefina Jones, were occupying the house No. 9-B, M. H. del Pilar St., Malabon, Rizal, having as neighbor their comadre Mariquita Beltran. The electric meter of the premises was installed on a wall in the balcony, and visible from the porch of the house (Exhibit 1). At about 7:00 o'clock in the evening of April 19, 1949, accused Pedro Gabriel, Avelino Trinidad and Miguel Evangelista arrived in the house, presented themselves as Meralco light inspectors to Mrs. Jones who was then on the stairs of the house with Mariquita and inquired from the ladies for Sherman Jones. Mrs. Jones told them to wait on the porch; she entered the living room, closed the door behind her and went to the family bedroom where Sherman was then in the act of changing his clothes. While Mrs. Jones was inside the bedroom and informing her husband of the presence of the Meralco inspectors, accused Gabriel inspected the electric meter and then shouted to his co-accused Natividad: 'Naty, atras ang contador.' Natividad rushed into the living room and then entered the bedroon where Sherman and his wife were talking. Natividad pushed the door of the bedroom with such force that the said door brushed aside Mrs. Jones who was then leaning behind it. Accused Gabriel followed Natividad to the bedroom and, with the help of flashlights, both searched for a gadget which they suspected Sherman used in order to steal electric fluid. Notwithstanding Sherman's protest of their intrusion, the two accused continued their search. Finding that Sherman meant business, the intruders left the bedroon hastily, boarded their jeep and went away with the other accused Evangelista to Sangandaan Street where they met policeman Pablo Malesido of Caloocan. The trio requested the policeman to accompany them to Sherman's house in order to explain to him that they had no intention to do him any harm. The policeman accompanied them, but upon noticing the presence of several Americans in the house, they left. They noticed later that a truck commonly known as 6 x 6 started from Sherman's house and followed them. They were able to hide and later went to the municipal building of Caloocan, at which Sherman and his companions subsequently arrived to complain. Sherman's complaint, however, was referred to the police authorities of Malabon who had jurisdiction over the case."

In asking for the reversal of the judgment below counsel for appellants argue that inasmuch as the original entry was with the permission of the occupants of the house and therefore lawful, nothing that happened afterwards could "convert the original lawful entry into an unlawful one." The argument assumes that appellants entered a dwelling with the consent of the householder. But the assumption is gratuitous and unwarranted, the Court of Appeals having found "that the entry was against the will of the spouses." That will was, we think, clearly manifested by the lady of the house when she told appellants to wait on the porch and closed the door behind her as she entered the drawing room. She did not, it is true, in so many words tell the appellants not to enter. But when she made them wait outside and shut the door to the interior of the house, her action spoke louder than words. The porch is an open part of the house, and being allowed to wait there under the circumstances mentioned can in no sense be taken as entry to a dwelling with the consent of the dweller.

Counsel cite the cases of U. S. v. Dionisio and Del Rosario, 12 Phil. 283; U. S. v. Flemister, 1 Phil. 354; and People v.

De Peralta, 42 Phil. 69. But those cases were decided upon facts different from those of the present case.

In the case first cited. *U. S. v. Dionisio and Del Rosario*, the defendants found the principal door of a house half-open. Entering without opposition from the occupant of the lower part of the house, who was present, they proceeded to the upper story, also without opposition, and there conversed with one of the inmates, who invited them to sit down and allowed them to stay for about two hours. Then trouble arose when defendants, posing as detectives, started doing something illegal. In declaring defendants not guilty of the crime of trespass to dwelling, this Court there held that the facts and circumstances from which, in a given case, the opposition of the occupant may be inferred, must have been in existence prior to or at the time of the entry, and in no event can facts arising after an entry has been secured with the express or tacit consent of the occupant change the character of the entry from one with the assent of the occupant to one contrary thereto. That case is to be distinguished from the one before us in that there the defendants entered a half-opened door and went *inside* the house without opposition, express or implied, from any of the occupants. Here, on the other hand, the lady of the house clearly — be it only impliedly — manifested her opposition to appellants' entry by telling them to wait on the porch and closing the door behind her as she left them there.

In the second case, *U. S. v. Flemister*, the defendant, an American, went to a ball uninvited, danced with somebody and then left. Returning a short time thereafter, he was met near the door by the host, who took him by the hand and asked him if he had come to dance and even invited him to be seated, but tried to prevent him from entering the *sala* where there was a guest, another American, with whom he had a quarrel pending. The defendant, however, rudely brushed the host aside, proceeded to the *sala* and quarreled with the other American. "It seems clear to us," said this Court in declaring the defendant not guilty of trespass to dwelling, "that the purpose of the owner of the house was to prohibit the defendant not from entering his house but from entering the *sala* in order to avoid a quarrel between the two Americans. His taking the defendant by the hand, asking him if he came to dance, and requesting him to be seated, are inconsistent with the idea that he was attempting to keep the defendant from entering the house." Again, unlike the appellants in the present case, the defendant in the case cited was not prohibited from entering the house; on the contrary, it would appear that he was welcomed into it.

In the third case, *People v. De Peralta*, the accused, the new president of the Philippine Marine Union, called at the door of a room which his predecessor in office was allowed to occupy as his dwelling in a house rented by the union, pushed the said door and without the permission of the occupant entered the room to take away a desk glass which he believed was union property. There was no evidence that the occupant "had expressed his will in the sense of prohibiting (the accused) from entering his room," and it was to be supposed, this Court said, "that the members of the Philippine Marine Union, among them the accused, had some familiarity which warrants entrance into the room occupied by the president of the association, particularly when we consider the hour at which the act in question happened (between half past ten and eleven in the morning), the fact that the door of the room was not barricaded or locked with a key, and the circumstance that the room in question was part of the house rented to said association." Upon these facts, this Court acquitted the accused of the charge of trespass to dwelling, following the uniform doctrine here and in Spain that "this crime is committed when a person enters another's dwelling *against* the will of the occupant, but not when the entrance is effected without his knowledge or opposition." It is to be noted that the entry in that case was effected without express or implied opposition from the occupant of the room and under circumstances warranting an entrance without previous leave. In the present case, the entry was, as already noted, against the will of the lady of the house, who, by her action if not by direct words, made it plain to the appellants that they were not to enter her dwelling.

Lastly, counsel contend that appellants are exempt from criminal liability under the third paragraph of Art. 280 of the Revised Penal Code, because "they rendered a service to justice" when, as Meralco line inspectors, they "followed Mrs. Sherman Jones to the bedroom" and there found her husband "hiding a transformer in an 'aparador' ". Here again, counsel assume something which was not believed by the Court of Appeals, that is, that appellants saw Jones in the act of hiding a transformer used by him "in stealing electricity," this claim being characterized by the court as nothing but a "vain effort on the part of the appellants to fit the facts of the case to the provisions of the Revised Penal Code to the effect that a person who enters a dwelling for the purpose of rendering service to justice, is not guilty of trespass." In other words, the Court of Appeals believed that appellants merely *suspected* that there was a transformer in the house. That alone did not give them the right to enter the house against the will of its owner, unarmed as they were with a search warrant.

It appearing that the judgment appealed from is in accordance with law and the facts as found by the Court of Appeals, the same is hereby affirmed, with costs against the appellants.

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

X

Aurelia de Lara and Rufino S. de Guzman, Plaintiffs and Appellants, vs. Jacinto Ayroso, Defendant and Appellant, No. L-6122, May 31, 1954, Reyes, A., J.

1. LAND REGISTRATION LAW; MORTGAGE EXECUTED BY AN IMPOSTOR A NULLITY; REGISTRATION DOES NOT VALIDATE MORTGAGE. — A mortgage executed by an impostor without the authority of the owner of the interest mortgaged is a nullity. Its registration under the Land Registration Law lends it no validity because, according to the last *proviso* to the second paragraph of section 55 of that law, registration procured by the presentation of a forged deed is null and void.

2. ID.; INNOCENT PURCHASERS FOR VALUE WHEN PROTECTED; DUTY OF VENDEE TO ASCERTAIN THE IDENTITY OF VENDOR. — Where the certificate of title was already in the name of the forger when the land was sold to an innocent purchaser, the vendee had the right to rely on what appeared in the certificate and, in the absence of anything to excite suspicion, was under no obligatoin to look beyond the the face of said certificate. But, where the title was still in the name of the real owner when the land was mortgaged to the plaintiffs by the impostor, although it was not incumbent upon them to inquire into the ownership of the property and go beyond what was stated on the face of the certificate of title, it was their duty to ascertain the identity of the man with whom they were dealing, as well as his legal authority to convey. That duty devolves upon all persons buying property of any kind, and one who neglects it does so at his peril.

3. ID.; ID.; ELEMENT ESSENTIAL TO THE APPLICATION OF PRINCIPLE OF EQUITY. — Before the principle of equity that "as between two innocent persons, one of whom must suffer the consequences of a breach of trust, the one who made it possible by his act of confidence must bear the loss" can be applied, it is essential that the fraud was made possible by the owner's act in entrusting the certificate of title to another.

4. ID.; ID.; ID.; MORTGAGE FORGED WITHOUT NEGLIGENCE OF OWNER CAN NOT BE ENFORCED AGAINTS HIM. — Where the mortgage is admittedly in forgery and the registered owner has not been shown to have been negligent or

in connivance with the forger, the mortgage can not be enforced against the owner.

5. ID.; PURPOSE OF; LAW CAN NOT BE USED AS SHIELD FOR COMMISSION OF FRAUD. — Although the underlying purpose of the Land Registration Law is to impart stability and conclusiveness to transactions that have been placed within its operations, still that law does not permit its provisions to be used as a shield for the commission of fraud.

Lauro Esteban for the plaintiffs and appellants.

Alfonso G. Espinosa for the defendant and appellee.

DECISION

REYES, *J.*:

This is an action for foreclosure of mortgage.

From the stipulation of facts and the additional evidence submitted at the hearing the lower court found and it is not disputed that the spouses Jacinto Ayroso and Manuela Lacanilao were the registered owners of a parcel of land, situated in the municipality of Cabanatuan, Nueva Ecija, their title thereto being evidenced by Transfer Certificate No. 4203 of the land records of that province. The land had an area of a little over 3-1/2 hectares, but according to an annotation on the back of the certificate a large portion of that area—a little less than 3 hectares—had already been alienated, sold to the Pilgrim Holiness Church in 1940. The certificate was kept in Jacinto Ayroso's trunk in his house in the *poblacion* of Cabanatuan, but somehow his daughter, Juliana Ayroso, managed to get possession of it without his knowledge and consent and gave it to a man whose name does not appear in the record. With the certificate in his possession and representing himself to be Jacinto Ayroso, this man was able to obtain from the plaintiff spouses the sum of ₱2,000.00, which he agreed to pay back in three months and as security therefor constituted a mortgage on Jacinto Ayroso's interest in the land covered by the certificate, signing the deed of mortgage with the latter's name. At that time, April 19, 1949, Jacinto Ayroso was already a widower, his wife having died on the 31st of the preceding month. Neither Jacinto Ayroso nor the man who impersonated him was personally known to the plaintiffs, though the latter believed in good faith that the two were one and the same person, the impostor being then accompanied by Ayroso's daughter Juliana whom they knew personally and who also signed as a witness to the mortgage deed. The mortgage was later registered in the office of the Register of Deeds of Nueva Ecija and annotated on the back of the certificate of title. Jacinto Ayroso never authorized anyone to mortgage the land and received no part of the mortgage loan.

Upon the foregoing facts, the trial court rendered judgment declaring the mortgage invalid, ordering the Register of Deeds of Nueva Ecija to cancel the corresponding annotation on Transfer Certificate of Title No. 4203 and dismissing the complaint with costs. From this judgment an appeal has been taken directly to this Court, and the question for determination is whether the said mortgage may be enforced by plaintiffs against the defendant Jacinto Ayroso.

There can be no question that the mortgage under consideration is a nullity, the same having been executed by an impostor without the authority of the owner of the interest mortgaged. Its registration under the Land Registration Law lends it no validity because, according to the last *proviso* to the second paragraph of section 55 of that law, registration procured by the presentation of a forged deed is null and void.

Plaintiffs, however, allege that they are innocent holders for value of a Torrens certificate of title, and on the authority of Eliason vs. Wilborn (281 U. S. 457), De la Cruz vs. Fabie (35 Phil., 144), and Blondeau et al. vs. Nano and Vallejo (61 Phil. 625), invoke the protection accorded to such holders. But an examination of those cases will show that they have no application to the one before us.

In the case first cited, *Eliason vs. Wilborn*, the appellants, owners of registered land, delivered the certificate of title to a party under an agreement to sell and the said party forged a deed to himself, had the certificate issued in his name and then conveyed it to others, who were good faith purchasers for value. Upholding the last conveyance, the U. S. Supreme Court said: "The appellants saw fit to entrust it (the certificate) to Napletone and they took the risk x x x. As between two innocent persons, one of whom must suffer the consequences of a breach of trust, the one who made it possible by his set of confidence must bear the loss."

In the second case, *De la Cruz vs. Fabie*, the attorney-in-fact of the owner of registered land, having been entrusted with the title to said property, abused the confidence thus reposed upon him; forged a deed in his favor, had a new title issued to himself and then conveyed it to another, who thereafter was issued a new certificate of title. This Court held the purchaser to be the absolute owner of the land as an innocent holder of a title for value under section 55 of Act No. 496.

It will be noted that in both of the above cases the certificate of title was already in the name of the forger when the land was sold to an innocent purchaser. In such case the vendee had the right to rely on what appeared in the certificate and, in the absence of anything to excite suspicion, was under no obligation to look beyond the certificate and investigate the title of the vendor appearing on the face of said certificate to be the registered owner. It should also be noted that in both cases fraud was made possible by the owner's act in entrusting the certificate of title to another. And this should be emphasized because it is what impelled this Court to apply in those cases that principle of equity that "as between two innocent persons, one of whom must suffer the consequences of a breach of trust, the one who made it possible by his act of confidence must bear the loss."

In the present case the title was still in the name of the real owner when the land was mortgage to the plaintiffs by the impostor. And it is obvious that plaintiffs were defrauded not because they relied upon what appeared in a Torrens certificate of title—there was nothing wrong with the certificate—but because they believed the words of impostor when he told them that he was the person named as owner in the certificate. As the learned trial judge says in his decision, it was not incumbent upon plaintiffs to inquire into the ownership of the property and go beyond what was stated on the face of the certificate of title, but it was their duty to ascertain the identity of the man with whom they were dealing, as well as his legal authority to convey, if they did not want to be imposed upon. That duty devolves upon all persons buying property of any kind, and one who neglects it does so at his peril. It should be added that the appellee has not entrusted the certificate of title to anybody, an element essential to the application of the principle of equity above cited. It is thus clear that the circumstances which impelled this Court in the cases cited to extend protection to the innocent holders for value of the Torrens certificates, at the expense of the owner of the registered property, are not present in the case at bar.

Nor could the third case cited, *Blondeau et al. vs. Nano and Vallejo* serve as a good precedent for the one now before us. That case, it is true, was also for foreclosure of mortgage, and the defense set up by the registered owner was also forgery. But it should be noted that in that case this Court found as a fact that *the mortgage had not been forged* and in addition there was the circumstance that the registered owner had by his negligence or acquiescence, if not actual connivance, made it possible for the fraud to be committed. It is thus obvious that the case called for the application of the same principle of equity already mentioned, and the decision rendered by this Court was in line with the two previous cases. But that decision does not fit the facts of the present case, where the mortgage is admittedly a forgery and the registered owner has not been shown to have been negligent or in connivance with the forger. The contention that it was negligence on appellee's part to leave the Torrens title in his trunk in his

house in the *poblacion* when most of the time he was in the farm, was we think well answered by the trial court when it said:

> "x x x it was not shown that the defendant has acted with negligence in keeping the certificate of title in his trunk in his own house. That his daughter was able to steal it or take it from the trunk without his knowledge and consent and was able to make use of it for a fraudulent purpose, (it) does not necessarily follow that he was negligent. It is in keeping with ordinary prudence in common Filipino homes for the owners thereof to keep their valuables in their trunks. It would be too much to expect of him that he should carry said certificate with him to wherever he goes."

On the other hand the considerations underlying the decision in the case of Ch. Veloso & Rosales vs. La Urbana & Del Mar (58 Phil. 681), cited by the appellee, would seem to be applicable to the present case. In the case cited, the plaintiff Veloso, owner of certain parcels of registered land, brought action to annul certain mortgages constituted thereon by her brother-in-law, the defendant Del Mar, using two powers of attorney purportedly executed for that purpose by plaintiff and her husband Rosales, but which were in reality forged, the forgery having been committed by Del Mar himself. How Del Mar obtained possession of the certificate of title the report does not show, but the mortgages were duly registered and noted on the certificates of title. In holding the mortgages void, this Court said:

> "x x x Inasmuch as Del Mar is not the registered owner of the mortgaged properties and inasmuch as the appellant was fully aware of the fact that it was dealing with him on the strength of the alleged powers of attorney purporting to have been conferred upon him by the plaintiff, it was his duty to ascertain the genuineness of said instruments and not rely absolutely and exclusively upon the fact that the said powers of attorney appeared to have been registered. In view of its failure to proceed in this manner, it acted negligently and should suffer the consequences and damages resulting from such transactions. (p. 683.)

Appellants, however, contend that the doctrine laid down in that case has already been overruled by the Blondeau case, *supra*. This is not so, and to show that it is still good jurisprudence, this Court quotes it with approval in Lopez vs. Seva et al. (69 Phil. 311), a case decided after the Blondeau decision.

We are with the learned trial judge in applying to the present case, which, as His Honor well says, "is fair and just because it stands for the security and stability of property rights under any system of laws, including the Torrens system," affording protection against the dangerous tendency of unprincipled individuals "to enrich themselves at the expense of others thru illegal or seemingly lawful operations." And as His Honor also says, "as between an interpretation and application of the law which serves as an effective weapon to curb such dangerous tendency or that which technically may aid or foment it, the choice is clear and inavoidable." For, as repeatedly stated by this Court, although the underlying purpose of the Land Registration Law is to impart stability and conclusiveness to transactions that have been placed within its operations, still that law does not permit its provisions to be used as a shield for the commission of fraud.

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

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

XI

The People of the Philippines, Plaintiff and Appellee, vs. Pascual Castro, Defendant and Appellant, G. R. No. L-6407, July 29, 1954, Bautista Angelo, J.

CRIMINAL PROCEDURE; PRESCRIPTION OF CRIMES MAY BE RAISED EVEN AFTER ARRAIGNMENT. — The plea of prescription should be set up before arraignment, or before the accused pleads to the charge; otherwise, the defense would be deemed waived. But this rule is not of absolute application, especially when it conflicts with a substantive provision of the law, such as that which refers to prescription of crimes. (People vs. Moran, 44 Phil., 387). Since, under the Constitution, the Supreme Court has only the power to promulgate rules concerning pleadings, practice and procedure, and the admission to the practice of law, and cannot cover substantive rights, the rule about waiver of the plea of prescription of crimes cannot be interpreted or given such scope or extent that would come into conflict or defeat an express provision of our substantive law. One of such provisions is article 89 of the Revised Penal Code which provides that the prescription of crime has the effect of totally extinguishing the criminal liability. The ruling laid down in the Moran case *supra* still holds good even if it were laid down before the adoption of the present Rules of Court.

Solicitor General Juan R. Liwag and *Solicitor Isidro C. Borromeo* for the plaintiff and appellee.

Alfredo Reyes for the defendant and appellant.

DECISION

BAUTISTA ANGELO, *J.*:

Apolonio Bustos, the complainant, was the head teacher of the barrio school of San Jose, Macabebe, Pampanga, and Pascual Castro, the accused, a teacher in said school. In the morning of January 19, 1952, while the complainant was on his way to the barrio chapel to hear mass he met a group of persons including the accused. The complainant invited the accused to hear mass but instead of accepting his invitation a discussion ensued in the course of which the accused gave the complainant a fist blow on the face causing him injuries which required medical attendance for a period of five days.

On April 14, 1952, a complaint for slight physical injuries was lodged by the complainant against the accused in the Justice of the Peace Court of Macabebe, Pampanga. After trial, the accused was found guilty as charged and sentenced to suffer fifteen days of *arresto menor* and to pay the costs. From this decision, the accused appealed to the Court of First Instance where he pleaded not guilty Before trial on the merits, but after he had entered his plea, the accused moved to dismiss the charge on the ground that the crime had already prescribed. This plea was ignored, and after the presentation of evidence, the court rendered judgment reiterating the same penalty imposed upon the accused by the inferior court. Hence, this appeal.

The only issue to be determined is whether the lower court erred in not dismissing the information on the ground that the offense charged had already prescribed.

It appears that the incident which gave rise to the injuries now complained of occurred on January 19, 1952 while the corresponding criminal complaint was filed before the justice of the peace court on April 14, 1952, or after the period of two months had elapsed. And considering that a light offense prescribes in two months (Article 90, Revised Penal Code), it is now contended that the crime had already prescribed and as such it cannot serve as basis of criminal prosecution.

The Solicitor General does not agree with this contention. He claims that, since the accused failed to moved to quash before pleading, he must be deemed to have waived this defense under Rule 113, Section 10, of the Rules of Court.

The rule thus invoked in effect provides that if the accused does not move to quash the information before he pleads thereto, "he shall be taken to have waived all objections which are grounds for a motion to quash except when the complaint or information does not charge an offense, or the court is without jurisdiction of the same." And one of the grounds on which a motion to

quash may be predicated is that the criminal action or liability has been extinguished. (Section 2, paragraph f, Rule 113.) On the other hand, the law provides that the criminal liability may be extinguished by prescription of the crime. (Article 89, Revised Penal Code).

The question that now arises is: Does the failure of the accused to move to quash before pleading constitute a waiver to raise the question of prescription at a later stage of the case?

A case in point is People v. Moran, 44 Phil., 387. In that case, the accused was charged with a violation of the election law. He was found guilty and convicted and the judgment was affirmed, with slight modification,, by the Supreme Court. Pending reconsideration of the decision, the accused moved to dismiss the case setting up the plea of prescription. After the Attorney General was given an opportunity to answer the motion, and the parties had submitted memoranda in support of their respective contentions, the Court ruled that the crime had already prescribed holding that this defense cannot be deemed waived even if the case had been decided by the lower court and was pending appeal in the Supreme Court. The philosophy behind this ruling was aptly stated as follows: "Although the general rule is that the defense of prescription is not available unless expressly set up in the lower court, as in that case it is presumed to have been waived and cannot be taken advantage of thereafter, *yet this rule is not always of absolute application in criminal cases*, such as that in which prescription of the crime is expresly provided by law, for the State not having then the right to prosecute, or continue prosecuting, *nor to punish, or continue punishing*, the offense, or to continue holding the defendant subject to its action through the imposition of the penalty, the court must so declare." And elaborating on this proposition, the Court went on to state as follows:

> "As prescription of the crime is the loss by the State of the right to prosecute and punish the same, it is absolutely indisputable that from the moment the State has lost or waived such right, the defendant may, at any stage of the proceeding, demand and ask that the same be finally dismissed and he be acquitted from the complaint, and such petition is proper and effective even if the court taking cognizance of the case has already rendered judgment and said judgment is merely in suspense, pending the resolution of a motion for a reconsideration and new trial, and this is the more so since in such a case there is not yet any final and irrevocable judgment."

The ruling above adverted to squarely applies to the present case. Here, the rule provides that the plea of prescription should be set up before arraignment, or before the accused pleads to the charge, as otherwise the defense would be deemed waived; but, as was well said in the Moran case, this rule is not of absolute application, especially when it conflicts with a substantive provision of the law, such as that which refers to prescription of crimes. Since, under the Constitution, the Supreme Court has only the power to promulgate rules concerning pleadings, practice and procedure, and the admission to the practice of law, and cannot cover substantive rights (Section 13, Article VIII, of the Constitution), the rule we are considering cannot be interpreted or given such scope or extent that would come into conflict or defeat an express provision of our substantive law. One of such provisions is Article 89 of the Revised Penal Code which provides that the prescription of crime has the effect of totally extinguishing the criminal liability. And so we hold that the ruling laid down in the Moran case still holds good even if it were laid down before the adoption of the present Rules of Court.

The learned dissenter opines that the Moran case has already lost its validity because at the time it was decided there was no rule prescribing waiver of prescription and, besides, this question was not raised and could not have been raised because the law was enacted only when the case was already pending in the Supreme Court. In other words, the learned dissenter is of the opinion that the Moran case cannot be invoked as authority because the question of waiver was not specially raised therein unlike the present case.

We cannot agree to this appraisal of the Moran case for precisely the ruling laid down therein was predicated upon the theory that the defense of prescription, even if not set up its proper time, is not deemed waived it being an exception to the general rule. Thus, it was there said that, "Although the general rule is that the defense of prescription is not available unless expressly set up in the lower court, as in that case it is presumed to have been waived and cannot be taken advantage of thereafter, yet this rule is not always of absolute application in criminal cases x x x."

It is true that the doctrine in the Moran case was not adhered to in the case of Santos vs. Supt. of the "Phil. Training School for Girls", 55 Phil. 345, but that was because the plea of prescription was raised in a petition for a writ of habeas corpus. It has been held that such plea is not available" on an application for a writ of habeas corpus (16 C. J. 416), for the reason that "All questions which may arise in the orderly course of a criminal prosecution are to be determined by the court to whose jurisdiction the defendant has been subjected by the law, and the fact that a defendant has a good and sufficient defense to a criminal charge on which he is held *will not entitle him to his discharge on habeas corpus*." (12 R .C. L., 1206.) (1) (Underlining supplied) The Santos case did not nullify our ruling in the Moran case.

An attempt was made to maintain the case by showing that as a result of the incident in question a criminal complaint for attempted homicide was filed against the accused prior to the charge of slight physical injuries which was dismissed without prejudice and must have had the effect of interrupting the period of prescription; but this attempt cannot be given serious consideration it appearing that the date when the criminal complaint for attempted homicide was filed, does not appear in the record. The only data we have on hand is that the complaint was dismissed on March 27, 1952. The failure of the Government to furnish us sufficient data prevents us from concluding that the prescription period has not yet elapsed since the charge for attempted homicide may have been filed after March 20, 1952 and dismissed on March 27. Under the facts presently obtaining the only alternative is to dismiss the case as prayed for by the defense.

Wherefore, the judgment appealed from is reversed, and the case is dismissde, with costs *de oficio*.

Paras, C.J., Pablo, Padilla, Jugo, Labrador, and *Concepcion, J.J.;* concur.

Alex. Reyes, J., concurs in the result.

BENGZON, *J. dissenting*:

Without saying so, the decision strikes down Rule 113 sections 2(f) and 10 of the Rules of Court providing that if the defendant does not, before pleading move to quash on the ground that the criminal action or liability has been extinguished "he shall be taken to have waived" such defense. The Court confesses, *sotto voce*, that it exceeded its constitutional powers in promulgating such Rule or its pertinent portion, because it takes away a substantial right.

Willingness to admit error is always praiseworthy; but when such acknowledgment is due to a short-sighted view of jurisdictional posts and boundaries, regrets are surely in order.

For the record I must state, it was not my privilege to take part in the preparation and promulgation of the Rules of Court of 1940. None the less it is my duty, as a member of the Court now, to exert efforts exploring the nature and extent of Rule 113, with a view to upholding it if legally possible, preserving intact the Court's regulatory powers under the Constitution. On this subject, to give in easily enhances no judicial virtue.

Following P. v. Moran (1923), the majority brushes aside Rule 113 and declares that prescription may be asserted by the

(1) These authorities are quoted by the ponente in the Santos case (55 Phil. 345).

accused for the first time, *even after pleading* and *even on appeal;* but the fundamental facts must be borne in mind that Moran was tried for violation of the Election Law, at a time when no period of prescription for such offenses existed (a); that during the pendency of his appeal the law was amended, *and for the first time* a prescription period was fixed, and that he immediately invoked it. The Court had to agree that Moran made no waiver, because he could not have waived something (prescription) that did not exist when he was tried in the court below (b).

True, there were dicta regarding non-waivability of the defense of prescription, in view of its nature. But *in the year* 1923 Rule 113 sections 2(f) and 10 *had not yet been adopted* (c). Obviously in the absence of positive legal rules, the Court *could then* (1923) *and did expound,* abstract principles of criminal law about waiver of prescription. *Now that the Rules of Court* (1940) *provide otherwise expressly,* the philosophical observations in People v. Moran have lost their validity. If necessary it should be declared that the Rules modified *pro tanto* the theories described in that case. In fact those theories were limited —if not overruled— in Santos v. Superintendent, 55 Phil. 345, wherein Virginia Santos having been finally convicted of violation of ordinance, filed habeas corpus proceedings, alleging the offense had prescribed. Revoking the lower court that upheld prescription, we said prescription *may be, and was, waived* thru failure to allege it on time.

> "In granting the writ, the lower court relied upon the ruling by this court in People vs. Moran (44 Phil., 387), which was an ordinary criminal case and not an habeas corpus proceedings and where the prescription of the violation of the Election Law was only alleged after the whole proceedings were over, because only then had the Legislature passed a law to that effect. In that *case there was no waiver of that defense for the simple reason that there was no prescription.* If the plea of prescription will not be admitted by the court in habeas corpus proceedings, it is precisely for the reason *that it is deemed to have been waived.* x x x
>
> That the defense of prescription *must be alleged* during the proceedings in prosecution of the offense alleged to have prescribed, is a doctrine recognized by this court in United States vs. Serapio (23 Phil., 584) where the principle is supported by citations of Aldeguer vs. Hoskyn (2 Phil. 500), Domingo vs. Osorio (7 Phil., 405), Maxilom vs. Tabotabo (9 Phil., 390), Harty vs. Luna (13 Phil., 31) and Sunico vs. Ramirez (14 Phil., 500)." (55 Phil. 345)

We held, expressly in the above case that the defense of *prescription* is waived if not alleged during the proceedings, notwithstanding "the State has lost" the right to punish. By the Rules we made it clear afterwards that it must be alleged *before pleading;* otherwise it is waived. This decision now confesses *we had no power* so to direct. Did we also *exceed our power* in the many cases upholding waiver of prescription? (U. S. v. Serapio etc. supra.)

In a few words this decision reaches the conclusion that prescription being a substantial right, it is beyond this Court's power to regulate and debar.

Such a broad statement, sweeps away repeated practices, specially in civil cases. However I will answer it as follows: substantial rights may be lost —and have been lost— thru failure to comply with rules of procedure or thru the neglect duly to set them up (d).

Again the privilege against double jeopardy is a constitutional right even more substantial; but according to our Rules it *is waived if not seasonably pleaded.* And we said so in repeated decisions listed in the footnote (e), wherein we declined to philosophize (along the lines of the Moran dicta), that as the first jeopardy meant "the loss by the State of its right to prosecute and punish" the accused again, "it is absolutely indisputable that from the moment the state has lost or waived such right, the defendant may at any stage of the proceedings demand and ask that the same be finally dismissed" because "the State not having then the right to prosecute" a second time "or to continue holding the defendant subject to its action thru the imposition of the penalty, the court must so declare".

In those cases we also refused to consider that a *constitutional* right —more than merely substantive— should not be taken away by operation of court decisions, or the Rules.

It is undeniable that the matter of formulating defenses to define issues, and the proofs allowable, is procedural in nature, a matter of pleading and practice. That is exactly the scope of secs. 2(f) and 10 Rule 113. They warn the defendant in advance: if you do not allege prescription, before pleading, it will not be deemed an issue, and it cannot be proved. If he makes no allegations, *he* renounces the defense. The Rules do not take it away. For all we know, the accused may have reasons to want acquittal on the merits, not on a plea of prescription.

It might be asserted that prescription *needs no proof,* because the information fixes the date of the crime's commission, and prescription may be counted up to the date of filing of such information, which date the court knows. The assertion *forgets* that prescription begins to run, not necessarily from the crime's commission, but "from the day on which the crime *is discovered* by the offended party, the authorities or their agents". (Art. 31 Rev. Penal Code)

The learned *ponente* will reply of course, that *in this case* the physical injuries had to be known on the same day they were inflicted, and that prescription began immediately. Correct. But we are writing doctrines for *all cases.* In malversation, forgery, bribery and other offenses, the crime is not usually known on the same day it is committed. Evidence of that day is therefore needed, upon proper allegations. Herein the *raisan d'etre* of the Rule in question.

Yet I will meet the issue even on this particular ground. This crime, the decision states was known on the same day, Jan. 19, 1952; and as the information is dated April 14, 1952, i. e., more than two months later, therefore prescription and acquittal. With all due respect, there seems to be a jump to conclusions. The period *might have been* "interrupted" by the filing of a complaint or by the defendant's escape to foreign countries, as expressly provided in Article 90 Rev. Penal Code. In fact the justice of the peace, and the court of first instance, say a criminal complaint for attempted homicide had previously been filed which was subsequently dismissed without prejudice. However, despite such information, the majority decision gives the point no serious consideration "it appearing that the date when the criminal complaint for attempted homicide was filed does not appear in the record", *the Government having failed* "to furnish us sufficient data". To be sure, the Fiscal service will be surprised to infer what is left unsaid: "because *it is the duty* of the prosecution to prove that the crime *has not prescribed, even if the accused* does not raise the point".

If the *ponente* should insist that the accused here invoked pescription, my answer would be: the allegation was late, and according to Rule 113, prescription was waived.

His reply should then be: but the prosecution *ought to have known* that Rule 113 was a nullity because it was beyond this Courts' power, and there was no waiver.

(a) & (b) Santos v. Superintendent of the Phil. Training School for Girls, 55 Phil. 345.

(c) Section 2(f) is a new provision, and section 10 was taken from the American Law Institute.

(d) Examples: Sued on a forged promisory note transcribed in the complaint, the defendant fails to deny specifically under oath. Result, he cannot prove forgery — he loses money.
Sued on a promisory note which he has already paid, defendant fails to allege payment as defense. Result, he pays again.
A counterclaim not set up is bared. (Rule 10, sec. 6)
Discharge in bankruptcy, if not pleaded, is waive. (Secs. 9 and 10, Rule 9)

(e) U.S. v. Perez, 1 Phil. 203; U.S. v. Cruz, 36 Phil. 727; U.S. v. Ondaro, 39 Phil. 76; P. v. Cabero, 61 Phil. 121; Trinidad v. Siochi, 72 Phil. 241.

No rejoinder is necessary.... Need it be stressed that the prosecution had a right to rely on the Rule promulgated by the highest court of the land? Could it presume to know better?

And this leads to the inequitable result of the majority's position: Having acted according to Rule 113 and disregarded prescription, the State is left "holding the bag" when we strike such Rule down. Fairness, I submit, requires that the prosecution should at least be allowed, to prove the interruption of the period which it asserts.

Or do we advise litigants to stick to the Rules at their own peril?

Montemayor, J., concur.

XII

Herbert Brownell, Jr., Attorney General of the United States, as successor of the Philippine Alien Property Administrator, Plaintiff and Appellant, vs. Macario Bautista, Defendant and Appellee Republic of the Philippines, Intervenor and Appellant, G. R. No. L-6801, September 28, 1954, Bautista Angelo, J.

1. INTERNATIONAL LAW; SEIZURE AND SEQUESTRATION OF ENEMY-OWNED PROPERTIES. — It is a well-settled rule that the Congress of the United States, in time of war, may authorize and provide for the seizure and sequestration, through executive channels, of properties believed to be enemy-owned, if adequate provision be made for a return in case of mistake. (Stoehr v. Wallace, 255 U. S. 239, 65 L. ed., 604, 612; Central Union Trust Co. vs. Garvan, 254 U. S. 554, 65 L. ed. 403.)

2. ID.; ID.; PHILIPPINE PROPERTY ACT OF 1946; EXTRA-TERRITORIAL EFFECT IN THE PHILIPPINES AFTER JULY 4 1946. — Can the Philippine Alien Property Administrator invoke the Philippine Property Act of 1946 to enforce his vesting order or to compel compliance with his demand for possession of the properties vested, in spite of the proclamation of Philippine independence on July 4, 1946? *Held*: "The consent of the Philippine Government to the application of the Philippine Property Act of 1946 to the Philippines after independence was given, not only by the Executive Department of the Philippine Government, but also by the Congress, which enacted the laws that would implement or carry out the benefits accruing from the operation of the United States law." * * * "In the case at bar, our ratification of or concurrence to the agreement for the extension of the Philippine Property Act of 1946 is clearly implied from the acts of the President of the Philippines and of the Secretary of Foreign Affairs, as well as by the enactment of Republic Acts No. 7, 8 and 477." (Brownell vs. Sun Life Assurance Co. of Canada, L-3751, June 22, 1954.)

3. ID.; ID.; ID.; ACTION TAKEN BY ADMINISTRATOR UNDER SECTION 3 OF THE PHILIPPINE PROPERTY ACT OF 1946; NATURE OF. — If an action is taken by the Administrator under section 3 of the Philippine Property Act of 1946, our courts can only pass upon the identity of the property and the question of possession but cannot look into the validity of the vesting order, nor entertain any adverse claim which would require the determination of ownership of the property. (Silesian American Corporation vs. Markham, 156 Fed. Sup., 793; In re Miller, 281 Fed., 764, 773-774: Miller vs. Kaliwerke Aschersleben Aktien-Gesselschaft, 283 Fed., 746, 752; Kahn vs. Garvan, 263 Fed., 909, 916; Garvan vs. Certain Shares of International A. Corp., 276 Fed., 206, 207; In re Sutherland, 21 Fed. 2d 667, 669.) Of course the vesting may be erroneous, or it may cover property which does not belong to an alien enemy. If this case arises, then the remedy of the interested party is to give notice of his claim to the Alien Property Custodian, and if no action is taken thereon, to bring an action in the proper court under section 9 (a) of the Trading with the Enemy Act, where the validity of the vesting order can be tested and the question of title adjudicated.

4. ID.; ID.; ID.; PARTITION OF PROPERTIES DOES NOT COME UNDER SECTION 3 OF THE PHILIPPINE PROPERTY ACT OF 1946 BUT UNDER RULE 71 OF THE RULES OF COURT. — Where the averments of the complaint show that the real purpose of the action is not the recovery of possession but the partition of the properties, the action is not, and could not be, one under section 3 of the Philippine Property Act of 1946, but one contemplated in Rule 71 of the Rules of Court.

Dallas S. Townsend, Stanley Gilbert, Juan T. Santos and *Lino M. Patajo* for the plaintiff and appellant.

Primitivo A. Bugarin and *Esmeraldo U. Galoy* for the defendant and appellee.

DECISION

BAUTISTA ANGELO, *J.*:

On October 6, 1947, the Philippine Alien Property Administrator, hereinafter referred to as Administrator, issued Vesting Order No. P-394, which was amended on February 2, and July 14, 1949, vesting in himself, among others, one-half undivided interest in the following properties: (a) five parcels of land situate in the city of Baguio and one parcel situate in San Clemente, Tarlac; (b) personal properties consisting of furniture and household equipments; (c) the sum of ₱5,156.83 representing balance of a savings account with the People's Bank & Trust Company, Baguio branch; (d) the sum of ₱1867.50 representing rents and income of the lands mentioned above; and (e) the net proceeds of an insurance policy in the amount of $1,451.81.

The vesting was made upon the claim that the one-half undivided interest was owned by Carlos Teraoka and Marie Dolores Teraoka who were found to be nationals of Japan, an enemy country. After the vesting, the Administrator demanded from their grandfather, Macario Bautista, who was in possession of the aforementioned properties the delivery to him of the possession of one-half thereof. Macario Bautista refused to comply with the demand claiming to be the sole owner of the aforementioned properties having inherited them as the only surviving heir of their former owners who were already dead, including Carlos Teraoka and Marie Dolores. Because of such refusal, the Administrator filed an action in the Court of First Instance of Mountain Province praying for the partition of the properties and the delivery of one-half thereof to the plaintiff. As one of the parcels involved was sold to one Antonio Baluga, the latter was included in the complaint as party defendant.

The Republic of the Philippines moved to intervene as party plaintiff in view of the provision of the law to the effect that whatever property may be vested in the Administrator would be eventually transferred to the Republic. This motion was granted, and the Republic of the Philippines adopted as its own the complaint filed by the Administrator.

Defendant Macario Bautista set up as special defense that he is the sole owner of the properties in question with the exception of the lot sold to his codefendant Antonio Baluga; that as such owner he has already spent a considerable amount on said properties in the form of taxes, repairs, fines, penalties, and the like; that Muneo Teraoka was not an enemy national but a naturalized Filipino citizen; that the children of Muneo Teraoka, including Carlos and Marie Dolores, were Filipino citizens; that the Philippine Alien Property Administrator cannot vest properties not enemy-owned, such as the properties in question and, therefore, he has no personality to bring the present action for partition, for such right pertains only to the heirs of the former owners of said properties who are the only ones who can maintain an action for partition as co-owners thereof pro-indiviso; and that, assuming that Carlos and Marie Dolores are Japanese nationals, the present action for partition is premature, since said children are still minors and as such have the right to elect Philippine citizenship upon reaching the age of majority in accordance with the Philippine Constitution.

In reply to the claim that the Administrator had no authority to vest the interest of Carlos and Marie Dolores because they are not Japanese nationals, the Administrator stated that the determination of the character of the properties vested and the nationality of their owners by the Administrator under the law is conclusive and not subject to judicial review; that if the vesting is erroneous, the remedy of the owners is to file a claim under Section 32, or a suit under Section 9 (a), of the Trading with the Enemy Act; and that the nationality of Carlos and Marie Dolores cannot be passed upon in the present action.

After hearing, the court rendered judgment dismissing the complaint, the court holding in effect that plaintiff failed to prove that Carlos and Marie Dolores are Japanese nationals; that the evidence in facts shows that they are Filipino citizens; and that the vesting of their interest in the property in question was erroneous and, therefore, the vesting order issued by the plaintiff in connection with said interest is illegal and did not vest ownership thereof in the plaintiff. As to Antonio Baluga, the court found that he was an innocent purchaser whose title to the property cannot be reviewed.

From this judgment, the Administrator and the Republic of the Philippines have appealed to the Court of Appeals. After the briefs had been admitted within the reglementary period, the parties took steps to have the case transferred to this Court upon the plea that the issues raised involve purely questions of law, and this move was granted by the court. In the meantime, the Philippine Alien Property Administration was terminated by Executive Order No. 10254 of the President of the United States, effective June 29, 1951, and all its rights, powers, duties, and functions, as well as the properties vested by it, were transferred to the Attorney General of the United States, and so, on motion of the Attorney General of the United States, the lower court, in its order of August 13, 1951, ordered the substitution of this official in lieu of the Philippine Alien Property Administrator.

Inasmuch as this case was transferred to this Court upon the plea that the only issues raised by the parties involve purely questions of law, and hence the facts as found by the lower court in its decision are deemed admitted, for the purposes of the issues raised, we would quote hereunder the pertinent portion of the decision wherein said facts are outlined:

"In 1924, one Muneo Teraoka, also known as Charles M. Teraoka, then a Japanese subject, married a native Filipino named Antonina Bautista. Out of this wedlock six children were born, namely, Victor, Sixto, Carlos, Marie Dolores, Catalina, and Eduardo. The couple during their married life acquired all the properties described in the complaint. On August 21 1941, Muneo Teraoka died, survived by his widow Antonina Bautista de Teraoka and his six children by her, above named. An intestate proceedings was instituted in the Court of First Instance of Baguio, as a result of which the real properties described in the complaint were divided between the widow Antonina Bautista on one hand, and the six surviving children on the other, giving to the widow three parcels and to the six children in common another three (see paragraphs 5 and 6 of the original complaint.) The personal properties enumerated in the complaint, as well as the cash and the insurance policy of Antonina Bautista were not divided or touched in the said intestate proceedings. Later, or in December, 1944, Sixto Teraoka died single at the age of 17 without leaving any issue, while Victor Teraoka was taken by the Japanese soldiers on suspicion of being spy and has never been heard of since then. He was presumably killed by the Japanese soldiers. Victor Teraoka left no issue also and he died single, at the age of about 19 years. On April 24, 1945, during the bombing of the City of Baguio by the American forces of liberation, Antonina Bautista and two of her children, Catalina and Eduardo, were hit by bomb and died. Antonina Bautista died instantly, while Catalina and Eduardo died later on the same day. After liberation and after the surrender of Japan to the American forces, Carlos Teraoka and Marie Dolores Teraoka, the only living members of the ill-fated Teraoka family, these two then being minors, as they are still minors, being 19 and 16 years old, respectively, were taken by the American army to Japan. Once in Japan the two went to stay with their grandfather, father of Muneo Teraoka. They are still in Japan up to date living with their paternal uncle, their grandfather having died. The evidence is clear and greatly preponderant that these two brother and sister, Carlos and Marie Dolores Teraoka, did not want to go to Japan but they were powerless to resist and of too tender age to protest. They just sought their nearest relatives once they were landed in Japan. After liberation also, or to be more exact, on July 18, 1945, the Enemy Property Custodian of the U.S. Army took into his custody the properties described in the complaint on suspicion that these properties were tainted with enemy interest. Then defendant Macario Bautista, father of Antonina Bautista, believing that the entire Teraoka family had already died, and being the nearest surviving kin or relative of the Teraokas, claimed the said properties from the Enemy Property Custodian. The latter, ignorant of the existence in Japan of two of the Teraoka children, granted the petition of Macario Bautista and released the said properties. Macario Bautista, then, by an affidavit of adjudication, succeeded in securing the cancellation of the certificates of title of those real properties and the issuance of new transfer certificates of title in his own name. Once he had the certificates of title in his name, free of any lien or encumbrance, Macario Bautista sold one lot (Lot No. 113 MM, now covered by Transfer Certificate of Title No. T-331, in the name of Antonio Baluga, in favor of third party defendant Eulalio D. Rosete who, in turn, sold it to defendant Antonio Baluga, hence the said Transfer Certificate of Title No. T-331 is now in his name (Exh. 3-Baluga). In October, 1946, the office of the Philippine Alien Property Administration was established in the Philippines. This new office assumed and took over the functions and duties of the defunct Enemy Property Custodian of the United States Army. This new office learned that, contrary to the assertion of Macario Bautista that the entire Teraoka family had died already, two of the Teraoka children, Carlos and Marie Dolores, are very much alive and are living in Japan. Then the Philippine Alien Property Administrator, on the supposition that Carlos Teraoka and Marie Dolores Teraoka are Japanese nationals, vested and took title to the portion of the said properties belonging, by right of succession, to said Carlos and Marie Dolores Teraoka, by virtue of Vesting Order No. P-394, issued on February 2, 1949, which was later supplemented and amended. The above facts have been conclusively established by the evidence. In fact, most of them are directly admitted or not contradicted by any of the parties. Plaintiff filed this case of judicial partition on the theory that the vesting order issued by plaintiff himself made him co-owner of the said property in common with the defendants Macario Bautista and Antonio Baluga."

It is a well-settled rule that the Congress of the United States, in time of war, may authorize and provide for the seizure and sequestration, through executive channels, of properties believed to be enemy-owned, if adequate provision be made for a return in case of mistake. (Stoehr v. Wallace, 255 U.S. 239, 65 L. ed., 604, 612; Central Union Trust Co. v. Garvan, 254 U.S. 554, 65 L. ed., 403.) Congress did this with the approval of the Trading with the Enemy Act, which was originally enacted on October 6, 1917, authorizing the President of the United States, or the officer or agency that may be designated by him as his representative, to determine the enemy ownership of the properties to be seized. The agency so designated was the Alien Property Custodian. Section 7 (c) of said Act, as amended, referring more specifically to the scope of the authority granted to the President, provides as follows: "If the President shall so require *any money or other property* x x x x owning or belonging to, or held for, by or on account of, or on behalf of, or for the benefit of, an enemy x x x x which the President after investigation shall determine is so owning or so belonging or is so held, *shall be conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian.*" (Underlining supplied)

On July 3, 1946, the Congress of the United States approved the Philippine Property Act of 1946 providing in section 3 thereof

that the Trading with the Enemy Act, as amended, shall continue in force in the Philippines after July 4, 1946, and adding that "all powers and authority conferred upon the President of the United States or the Alien Property Custodian by the terms of said Trading with the Enemy Act, as amended, with respect to the Philippines shall continue thereafter to be exercised by the President of the United States or such other officer or agency as he may designate." Inasmuch as the Philippine Property Act of 1946, was approved only one day before the granting of Philippine independence, the immediate designation of the Alien Property Custodian of the United States, who was already the designee of the President, to continue acting thereafter, was considered most expedient to avoid disrupting the continuity of the vesting program (Executive Order No. 9747). This was done without prejudice however of establishing an independent agency which may take charge of the administration and control of enemy properties in the Philippines. So on October 14, 1946, the Philippine Alien Property Administration was formally established having as head an Administrator to be appointed by the President of the United States, and to this Administrator were transferred the duties and functions of the Custodian with respect to enemy properties located in the Philippines (Executive Orders Nos. 9789 and 9818). During the pendency of the present action, the Philippine Alien Property Administration was in turn terminated effective June 29, 1951 by Executive Order No. 10254 of the President of the United States, and the functions and duties of the Philippine Alien Property Administrator were transferred to the Attorney General of the United States.

It was in the exercise of the powers vested in him by the Trading with the Enemy Act, the Philippine Property Act of 1946, and Executive Order No. 9818 that the Philippine Alien Property Administrator vested in himself the properties in question to be held, administered, or otherwise dealt with in the interest and for the benefit of the United States. Vesting Order No. P-394, which was issued in vesting said properties, recites that, after proper investigation, the Administrator had found that Carlos and Marie Dolores Teraoka were nationals of Japan and that the properties were owned by said nations.

It is now contended by the Philippine Alien Property Administrator that, as the immediate effect of the vesting order, from the time the properties were vested, title to them passed to the United States as "completely as if by conveyance, transfer or assignment." (Commercial Trust Company v. Miller, 262, U.S. 51, 57, 67 L. ed., 858, 861.) Being the owner, he contends, the Administrator may obtain possession of the properties vested, or "may either seize said properties or proceed judicially to compel compliance with his demand for possession." But, in the present case,— he avers —although the Administrator could have seized the properties vested by him, under Section 7(e) of the Trading with the Enemy Act, he preferred to file suit because "it was more orderly and decent to obtain possession by the aid of the court than to seize them by violence and the strong hand." Hence, the Administrator preferred to institute the present action under Section 3 of the Philippine Property Act of 1946 the pertinent portion of which reads:

> "x x x x Provided further, that the courts of first instance of the Republic of the Philippines are hereby given jurisdiction to make and enter all such rules as to notice or otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce any orders, rules, and regulations issued by the President of the United States, the Alien Property Custodian, or such officer or agency designated by the President of the United States pursuant to the Trading with the Enemy Act, as amended, with such right of appeal therefrom as may be provided by law."

But, can the Philippine Alien Property Administrator now invoke the Philippine Property Act of 1946 to enforce his vesting order or to compel compliance with his demand for possession of the properties vested, in spite of the proclamation of our independence on July 4, 1946? Does that Act have extraterritorial effect in the Philippines after Philippine independence? This is the issue now posed by counsel for the defendants who contends that such an extension of authority cannot be entertained as it would be in violation of our Constitution, especially section 2, Article VIII, which gives to the Supreme Court jurisdiction to review, revise, reverse, modify, or affirm on appeal final judgments and decrees of inferior courts in all cases involving the constitutionality or validity of any treaty, law, ordinance, executive order, or regulation. Counsel contends that, under this all-embracing judicial power that Act cannot be given such effect in this jurisdiction that would deprive the Supreme Court of its power to look into the validity of the vesting order issued by the plaintiff.

Fortunately, the issue posed by counsel is not new, as the same has already been passed upon by this Court in a similar case. Thus, in the case of Herbert Brownell, Jr. v. Sun Life Assurance Company of Canada, G. R. No. L-3751, June 22, 1954, this Court held: "It is evident, therefore, that the consent of the Philippine Government to the application of the Philippine Property Act of 1946 to the Philippines after independence was given, not only by the Executive Department of the Philippine Government, but also by the Congress, which enacted the laws that would implement or carry out the benefits accruing from the operation of the United States law." And in another portion of the decision, we also said: "In the case at bar, our ratification of or concurrence to the agreement for the extension of the Philippine Property Act of 1946 is clearly implied from the acts of the President of the Philippines and of the Secretary of Foreign Affairs, as well as by the enactment of Republic Acts Nos. 7, 8, and 477."

It is therefore clear that the Philippine Alien Property Administrator can now invoke section 3 of the Philippine Property Act of 1946 in order to secure the issuance of any peremptory order from any court of first instance in this jurisdiction to enforce a vesting order to enable said Administrator to obtain possession of the properties vested. But, again, the issue that arises is: Is the action taken by the Administrator, by its nature, substance, and prayer, one that comes under said section 3 of the Philippine Property Act of 1946? If it is, then our courts can only pass upon the identity of the property and the question of the possession but cannot look into the validity of the vesting order, nor entertain any adverse claim which would require the determination of ownership of the property. (Silesian American Corporation v. Markham 156 Fed. Sup., 793; In re Miller, 281 Fed., 764; 773-774; Miller v. Kaliwerke Aschersleben Aktien-Gesselschaft, 283 Fed., 746, 752; Kahn v. Garvan, 263 Fed., 909, 916; Garvan v. Certain Shares of International A. Corp. 276 Fed., 206, 207; In re Sutherland, 21 Fed. 2d 667, 669.) If otherwise, then the court can look into the ownership of the property and make the corresponding adjudication. Of course, the vesting may be erroneous, or it may cover property which does not belong to an alien enemy. If this case arises, then the remedy of the interested party is to give notice of his claim to the Alien Property Custodian, and if no action is taken thereon, to bring an action in the proper court under Section 9 (a) of the Trading with the Enemy Act, where the validity of the vesting order can be tested and the question title adjudicated. According to the plaintiff, this is the only course now open to the defendants in this case.

After a careful examination of the complaint filed in this case, we are inclined to uphold the contention of counsel for the defendants to the effect that, "The present action is not one, and could not be one, under Section 3 of the Philippine Property Act of 1946 viewed from the standpoint of its form, substance and prayer. The present action is clearly an action for partition of real estate, which incidentally includes personal properties, under Rule 71 of the Rules of Court." This can be gleaned from the nature both of the interest involved and the relief prayed for in the complaint. It should be noted that the complaint prays for partition of the properties and not merely for delivery of their possession. Apparently, this is an action contemplated in Rule 71 wherein the court, before proceeding with the partition, has to pass upon the rights or the ownership of the parties interested in the property (Section 2). In an action for partition the determination of owner-

ship is indispensable to make proper adjudication. In this particular case, this acquires added force considering that the titles of the properties appear issued in the name of the defendants, and the plaintiff contends that they belong to enemy aliens. By filing this action of partition in the court *a quo*, the Philippine Alien Property Administrator has submitted to its jurisdiction and put in issue the legality of his vesting order. He cannot therefore now dispute this power. It is true that the complaint does not specifically allege that the Administrator in invoking the authority of the court under section 3 of the Philippine Property Act of 1946 and that the failure to make mention of that fact should not militate against the stand of the Administrator. But while we agree with this contention, the fact however remains that the very averments of the complaint show that the real purpose of the action is not the recovery of possession but the partition of the properties. This makes this case come, as already said, under Rule 71 of our Rules of Court.

We are, therefore, persuaded to conclude, and so hold, that the lower court did not err in passing upon the nationality of Carlos and Marie Dolores Teraoka, or in determining the validity of the vesting order issued by the Philippine Alien Property Administrator, wherefore, we affirm the decision appealed from, without pronouncement as to costs.

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

XIII

Herbert Brownell, Jr., as Attorney General of the United States, Petitioner and Appellee, vs. Sun Life Assurance Company of Canada, Respondent and Appellant, G. R. No. L-5731, June 22, 1954. Labrador, J.

1. INTERNATIONAL LAW; EXTRATERRITORIAL EFFECT OF FOREIGN LAW; NECESSITY OF CONSENT OF COUNTRY IN WHICH IT IS SOUGHT TO BE ENFORCED. — A foreign law may have extraterritorial effect in a country other than the country of origin, provided the former, in which it is sought to be made operative, gives its consent thereto.

2. ID.; ID.; ID.; CONSENT NEED NOT BE EXPRESS. — The consent of a State to the operation of a foreign law within its territory does not need to be express; it is enough that said consent be implied from its conduct or from that of its authorized officers.

3 ID.; ID.; ID.; ID.; PHILIPPINE PROPERTY ACT OF 1946: BASIS OF ITS APPLICATION IN THE PHILIPPINES. — The operation of the Philippine Property Act of 1946 in the Philippines is not derived from unilateral act of the United States of Congress, which made it expressly applicable, or from the saving provision contained in the proclamation of independence. It is well-settled in the United States that its laws have no extraterritorial effect. The application of said law in the Philippines is based concurrently on said act (Philippine Property Act of 1946) and on the tacit consent thereto and the conduct of the Philippine Government itself in receiving the benefits of its provisions.

Rowland F. Kirks, Stanley Gilbert, Juan T. Santos and *Lino M. Patajo* for the petitioner and appellee.

Perkins, Ponce Enrile and *Contreras* for the respondent and appellant.

DECISION

LABRADOR, *J.*:

This is a petition instituted in the Court of First Instance of Manila under the provisions of the Philippine Property Act of the United States against the Sun Life Assurance Company of Canada, to compel the latter to comply with the demand of the former to pay him the sum of ₱310.10, which represents one-half of the proceeds of an endowment policy (No. 757199) which matured on August 20, 1946, and which is payable to one Naogiro Aihara, a Japanese national. Under the policy Aihara and his wife, Filomena Gayapan, were insured jointly for the sum of ₱1,000, and upon its maturity the proceeds thereof were payable to said insured, share and share alike, or ₱310.10 each. The defenses set up in the court of origin are: (1) that the immunities provided in Section 5(b)(2) of the Trading with the Enemy Act of the United States are of doubtful application in the Philippines, and have never been adopted by any law of the Philippines as applicable here or obligatory on the local courts; (2) that the defendant is a trustee of the fund and is under a legal obligation to see to it that it is paid to the person or persons entitled thereto, and unless the petitioner executes a suitable discharge and an adequate guaranty to indemnify and keep it free and harmless from any further liability under the policy, it may not be compelled to make the payment demanded. The Court of First Instance of Manila having approved and granted the petition, the respondent has appealed to this Court, contending that the court of origin erred in holding that the Trading with the Enemy Act of the United States is binding upon the inhabitants of this country, notwithstanding the attainment of complete independence on July 4, 1946, and in ordering the payment prayed for.

On July 3, 1946, the Congress of the United States passed Public Law 485-79th Congress, known as the Philippine Property Act of 1946. Section 3 thereof provides that "The Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, shall continue is force in the Philippines after July 4, 1946, x x x." To implement the provisions of the act, the President of the United States on July 3, 1946, promulgated Executive Order No. 9747, "continuing the functions of the Alien Property Custodian and the Department of the Treasury in the Philippines." Prior to and preparatory to the approval of said Philippine Property Act of 1946, an agreement was entered into between President Manuel Roxas of the Commonwealth and U. S. Commissioner Paul V. McNutt whereby title to enemy agricultural lands and other properties was to be conveyed by the United States to the Philippines in order to help the rehabilitation of the latter, but that in order to avoid complex legal problems in relation to said enemy properties, the Alien Property Custodian of the United States was to continue operations in the Philippines even after the latter's independence, that he may settle all claims that may exist or arise against the above-mentioned enemy properties, in accordance with the Trading with the Enemy Act of the United States. (Report of the Committee on Insular Affairs No. 2296 and Senate Report No. 1578 from the Committee on Territories and Insular Affairs, to accompany S. 2345, accompanying H. R. 6801, 79th Congress, 2nd Session.) This purpose of conveying enemy properties to the Philippines after all claims against them shall have been settled is expressly embodied in the Philippine Property Act of 1946.

> Sec. 3. The Trading With the Enemy Act of October 6 1917 (40 Stat. 411), as amended, shall continue in force in the Philippines after July 4, 1946, and all powers and authority conferred upon the President of the United States or the Alien Property Custodian by the terms of the said Trading with the Enemy Act, as amended, with respect to the Philippines, shall continue thereafter to be exercised by the President of the United States, or such officer or agency as he may designate; Provided, That all property vested in or transferred to the President of the United States, the Alien Property Custodian, or any such officer or agency as the President of the United States may designate under the Trading With the Enemy Act, as amended, which was located in the Philippines at the time of such vesting, or the proceeds thereof, and which shall remain after the satisfaction of any claim payable under the Trading with the Enemy Act, as amended, and after the payment of such costs and expenses of administration as may by law be charged against such property or proceeds, shall be transferred by the President of the United States to the Republic of the Philippines: Provided further, That such property, or proceeds thereof, may be transferred

by the President of the United States to the Republic of the Philippines upon indemnification acceptable to the President of the United States by the Republic of the Philippines for such claims, costs, and expenses of administration as may by law be charged against such property or proceeds thereof before final adjudication of such claims, costs and expenses of administration: Provided further, that the courts of first instance of the Republic of the Philippines are hereby given jurisdiction to make and enter all such rules as to notice or otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce any orders, rules, and regulations issued by the President of the United States, the Alien Property Custodian, or such officer or agency designated by the President of the United States pursuant to the Trading With the Enemy Act, as amended, with such right of appeal therefrom as may be provided by law: And provided further, That any suit authorized under the Trading With the Enemy Act, as amended, with respect to property vested in or transferred to the President of the United States, the Alien Property Custodian, or any officer or agency designated by the President of the United States hereunder, which at the time of such vesting or transfer was located within the Philippines, shall after July 4, 1946, be brought, in the appropriate court of first instance of the Republic of the Philippines, against the officer or agency hereunder designated by the President of the United States with right of appeal therefrom as may be provided by law. In any litigation authorized under this section, the officer or administrative head of the agency designated hereunder may appear personally, or through attorneys appointed by him, without regard to the requirements of law other than this section.

And when the proclamation of the independence of the Philippines by President Truman was made, said independence was granted "in accordance with and subject to the reservations provided in the applicable statutes of the United States." The enforcement of the Trading With the Enemy Act of the United States was contemplated to be made applicable after independence, within the meaning of the reservations.

On the part of the Philippines, conformity to the enactment of the Philippine Property Act of 1946 of the United States was announced by President Manuel Roxas in a joint statement signed by him and by Commissioner McNutt. Ambassador Romulo also formally expressed the conformity of the Philippine Government to the approval of said act to the American Senate prior to its approval. And after the grant of independence, the Congress of the Philippines approved Republic Act No. 8, entitled

AN ACT TO AUTHORIZE THE PRESIDENT OF THE PHILIPPINES TO ENTER INTO SUCH CONTRACTS OR UNDERTAKINGS AS MAY BE NECESSARY TO EFFECTUATE THE TRANSFER TO THE REPUBLIC OF THE PHILIPPINES UNDER THE PHILIPPINE PROPERTY ACT OF NINETEEN HUNDRED AND FORTY-SIX OF ANY PROPERTY OR PROPERTY RIGHT OR THE PROCEEDS THEREOF AUTHORIZED TO BE TRANSFERRED UNDER SAID ACT; PROVIDING FOR THE ADMINISTRATION AND DISPOSITION OF SUCH PROPERTIES ONCE RECEIVED; AND APPROPRIATING THE NECESSARY FUNDS THEREFOR.

The Congress of the Philippines also approved Republic Act No. 7, which established a Foreign Funds Control Office. After the approval of the Philippine Property Act of 1946 of the United States, the Philippine Government also formally expressed, through the Secretary of Foreign Affairs, conformity thereto. (See letters of Secretary dated August 22, 1946, and June 3, 1947.) The Congress of the Philippines has also approved Republic Act No. 477, which provides for the administration and disposition of properties which have been or may hereafter be transferred to the Republic of the Philippines in accordance with the Philippine Property Act of 1946 of the United States.

It is evident, therefore, that the consent of the Philippine Government to the application of the Philippine Property Act of 1946 to the Philippines after independence was given, not only by the Executive Department of the Philippine Government, but also by the Congress, which enacted the laws that would implement or carry out the benefits accruing from the operation of the United States law. The respondent-appellant, however, contends that the operations of the law after independence could not have actually taken, or may not take place, because both Republic Act No. 8 and Republic Act No. 477 do not contain any specific provision whereby the Philippine Property Act of 1946 or its provisions is made applicable to the Philippines. It is also contended that in the absence of such express provision in any of the laws passed by the Philippine Congress, said Philippine Property Act of 1946 does not form part of our laws and is not binding upon the courts and inhabitants of the country.

There is no question that a foreign law may have extraterritorial effect in a country other than the country of origin, provided the latter, in which it is sought to be made operative, gives its consent thereto. This principle is supported by unquestioned authority.

> The jurisdiction of the nation within its territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from on external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which would impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. (Philippine Political Law by Sinco, pp. 27-28, citing Chief Justice Marshall's statement in the Exchange, 7 Cranch 116)

> In the course of his dissenting opinion in the case of S.S. Lotus, decided by the Permanent Court of International Justice, John Bassett Moore said;
>
> > 1. It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiciton, and that any exception to this right must be traced to the consent of the nation, either express or implied (Schooner Exchange v. McFadden (1812), 7 Cranch 116, 136). The benefit of this principle equally enures to all independent and sovereign States, and is attended with a corresponding responsibility for what takes place within the national territory. (Digest of International Law, by Hackworth, Vol. II, pp. 1-2)

The above principle is not denied by respondent appellant. But its argument on this appeal is that while the acts enacted by the Philippine Congress impliedly accept the benefits of the operation of the Uunited States law (Philippine Property Act of 1946), no provision in the said acts of the Philippine Congress makes said United States law expressly applicable. In answer to this contention, it must be stated that the consent of a State to the operation of a foreign law within its territory does not need to be express; it is enough that said consent be implied from its conduct or from that of its authorized officers.

> 515. *No rule of International Law exists which prescribes a necessary form of ratification.* Ratification can, therefore, be given tacitly as well as expressly. Tacit ratification takes place when a State begins the execution of a treaty without expressly ratifying it. It is usual for ratification to take the form of a document duly signed by the Heads of the States concerned, and their Secretaries for Foreign Affairs. It is usual to draft as many documents as there are parties to the Convention, and to exchange these documents between the parties. Occasionally the whole of the treaty is recited verbatim in the ratifying documents, but sometimes only the title, preamble, and date of the treaty, and the names of the signatory

representatives are cited. As ratification is only the confirmation of an already existing treaty, the essential requirement in a ratifying document is merely that it should refer clearly and unmistakably to the treaty to be ratified. The citation of title, preamble, date, and names of the representatives is, therefore, quite sufficient to satisfy that requirement. (Oppenheim, pp. 818-819; underscoring ours.)

International law does not require that agreements between nations must be concluded in any particular form or style. The law of nations is much more interested in the faithful performance of international obligations than in prescribing procedural requirements. (Treaties and Executive Agreements, by Myres S. McDougal and Asher Lans, Yale Law Journal, Vol. 54, pp. 318-319)

In the case at bar, our ratification of or concurrence to the agreement for the extension of the Philippine Property Act of 1946 is clearly implied from the acts of the President of the Philippines and of the Secretary of Foreign Affairs, as well as by the enactment of Republic Acts Nos. 7, 8, and 447.

We must emphasize the fact that the operation of the Philippine Property Act of 1946 in the Philippines is not derived from the unilateral act of the United States Congress, which made it expressly applicable, or from the saving provision contained in the proclamation of independence. It is well-settled in the United States that its laws have no extraterritorial effect. The application of said law in the Philippines is based concurrently on said act (Philippine Property Act of 1946) and on the tacit consent thereto and the conduct of the Philippine Government itself in receiving the benefits of its provisions.

It is also claimed by the respondent-appellant that the trial court erred in ordering it to pay the petitioner the amount demanded, without the execution by the petitioner of a deed of discharge and indemnity for its protection. The Trading With the Enemy Act of the United States, the application of which was extended to the Philippines by mutual agreement of the two Governments, contains an express provision to the effect that delivery of property or interest therein, made to or for the account of the United States in pursuance of the provision of the law, shall be considered as a full acquittance and discharge for purposes of the obligation of the person making the delivery or payment. (Section 5(b) (2), Trading With the Enemy Act.) This express provision of the United States law saves the respondent-appellant from any further liability for the amount ordered to be paid to the petitioner, and fully protects it from any further claim with respect thereto. The resquest of the respondent-appellant that a security be granted it for the payment to be made under the law is, therefore, unnecessary, because the judgment rendered in this case is sufficient to prove such acquittance and discharge.

The decision appealed from should be, as it is hereby affirmed, with costs against the respondent-appellant.

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

XIV

Emiliano Morabe, Acting Chief, Wage Administration Service, Petitioner and Appellant, vs. William Brown, doing business under the name and style of Clover Theater, Respondent and Appellee, No. L-6018, May 31, 1954, Labrador, J.

1. MANDAMUS; MANDATORY INJUNCTION IS ALSO MANDAMUS; COURTS OF FIRST INSTANCE MAY GRANT WRIT AFTER ACT HAS BEEN CARRIED OUT. — Where the action seeks the performance of a legal duty, such as the reinstatement of an employee who has been unlawfully dismissed, the action is one of mandamus and not injunction. The writ known as preliminary mandatory injunction is also a mandamus, though merely provisional in character, and may be granted by the Court of First Instance after the act complained of has been carried out.

2. ID.; ID.; EMPLOYEE UNLAWFULLY DISMISSED IS ENTITLED TO REINSTATEMENT; COURTS MAY COMPEL EMPLOYER TO ADMIT HIM BACK. — Where an employee was unlawfully deprived of his right or privilege to continue in the service of his employer because his dismissal was unlawful, it is within the competence of courts to compel the employer to admit him back to his service.

Jimenez B. Buendia and *W. Ramcap Lagumbay* for the respondent and appellee.

Assistant Solicitor General Francisco Carreon and *Solicitor Ramon L. Avanceña* for the petitioner and appellant.

DECISION

LABRADOR, *J.*:

This is an appeal from a judgment of the Court of First Instance of Manila denying a petition of the chief of the Wage Administration Service for the reinstatement of Pablo S. Afuang by the respondent William Brown. The original petition filed in the Court of First Instance alleges that the respondent had dismissed Pablo S. Afuang because in an investigation conducted by the petitioner of charges against the respondent that the latter paid his employees beyond the time fixed in Republic Act No. 602, the said Afuang was one of the complainants; that the respondent discharge the said employee in violation of Section 13 of said Act. The petitioner, therefore, prayed that the respondent be ordered to reinstate Pablo S. Afuang, and that a writ of preliminary mandatory injunction issue for his reinstatement. The court issued a writ of preliminary mandatory injunction. Thereafter, the respondent presented a petition asking for the dismissal of the petition on the ground that Pablo S. Afuang had presented a letter asking excuse or apology from the respondent for having taken his case to court. This motion to dismiss was, however, not acted upon, and the case was heard and the parties presented their evidence. On May 2, 1952, the Court of First Instance rendered judgment finding that the dismissal from the service of Pablo S. Afuang is unlawful and violates Section 13 of the Minimum Wage Law, because the fact that he testified at the investigation is not a valid ground for his dismissal from the service. The court, however, refused to grant an order for the reinstatement of said Pablo S. Afuang on the ground that this remedy, which it considers as an injunction, is available only against acts about to be committed or actually being committed, and not against past acts; that injunction is preventive in nature only; and that as the law has already been violated, the remedy now available is for the prosecution of the employer for the violation of the Minimum Wage Law, and not for the reinstatement of Pablo S. Afuang. It, therefore, dismissed the action, as well as the petition for the writ of preliminary mandatory injunction, and that which was therefore granted was dissolved. Against this judgment an appeal has been prosecuted to this Court.

The only assignment of error is that the lower court erred in not ordering the respondent to reinstate Pablo S. Afuang in the service. It is evident that the court *a quo* erred in considering that a mandatory injunction is preventive in nature, and may not be granted by the Court of First Instance once the act complained of has been carried out. The action of the petitioner is not an action of injunction but one of mandamus; because it seeks the performance of a legal duty, the reinstatement of Pablo S. Afuang. The writ known as preliminary mandatory injunction is also a mandamus, though merely provisional in character. In the case at bar, Pablo S. Afuang was entitled to continue in the service of respondent, because his act is expressly provided to be no ground or reason for an employee's dismissal. Section 13 of Republic Act No. 602 states that "it shall be unlawful for any person to discharge or in any other manner to discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this

Act, x x x." Pablo S. Afuang was, therefore, unlawfully deprived of his right or privilege to continue in the service of the respondent, because his dismissal was unlawful or illegal. Having been deprived of such right or privilege, it is within the competence of courts to compel the respondent to admit him back to his service.

In the case of Manila Electric Co. vs. Del Rosario and Jose, 22 Phil. 433, the lower court ordered the Manila Electric Co. to furnish electric current to Jose, the electric company having cut the current to Jose's house because it suspected him of stealing electricity by the use of a jumper. This Court held that the action was not one of injunction but of mandamus, as it compelled the electric company to furnish Jose with electric service. In the case at bar, the court can also order the respondent to reinstate Pablo S. Afuang. Were we to hold that Afuang may not be reinstated because he had already been dismissed, there would not be any remedy against the injustice done him, or for him to return to the position or employment from which he was unlawfully discharged. This remedy (of ordering reinstatement) has been granted in parallel situations by the Court of Industrial Relations with our approval, when laborers have been illegally separated by their employers without legal or just cause. This remedy has also been granted in similar cases in the United States, from which jurisdiction the Minimum Wage Law or Republic Act No. 602 has been taken. (Walling, etc. vs. O'Grady, et al, No. 2140, Nov 3, 1943 U.S. District Court, Southern District of New York; 3WH Case 781.)

The Judgment appealed from is hereby reversed, and the respondent William Brown is hereby ordered to reinstate Pablo S. Afuang to the position he held prior to his dismissal. Without costs.

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

Mr. Justice Padilla took no part.

XV

The People of the Philippines, Plaintiff and Appellant, vs. Jesus Bangalao, Filemon Jubahib, Francisco Loveno and Tito Estaca, Defendants and Appellees, No. L-5610, February 17, 1954, Labrador, J.

RAPE; JURISDICTION OF COURT OF FIRST INSTANCE; EFFECT OF CHANGE IN THE ALLEGATION AS TO THE MANNER OF COMMITTING THE CRIME; DOUBLE JEOPARDY BARS APPEAL. — The right and power of the Court of First Instance to try the accused for the crime of rape attaches upon the filing of the complaint, and a change in the allegations thereof as to the manner of committing the crime should not operate to divest the court of the jurisdiction it has already acquired. While it is an error for the trial court to dismiss the case for lack of jurisdiction, the Fiscal's appeal from the order of dismissal can not prosper because the accused would be placed in double jeopardy.

Assistant Solicitor General Guillermo E. Torres and *Solicitor Jose G. Bautista* for the plaintiff and appellant.

Agapito Hontanosas for the defendants and appellees.

DECISION

LABRADOR, *J.*:

The above-entitled case was begun in the justice of the peace court of Tagbilaran, Bohol, upon complaint of Abundia Palban, mother of the offended party, Rosita Palban, a minor. The complaint alleges that the accused "by means of force and intimidation succeeded in having sexual intercourse with one Rosita Palban, x x x." When the case reached the court of first instance, the provincial fiscal filed an information for rape, alleging that Rosita Palban is "a minor and demented girl", and that the defendants-appellees "successively had sexual intercourse with her by means of force and against the will of said Rosita Palban," and as a result of which she suffered less serious physical injuries in her genitalia.

In the Court of First Instance, with Hon. Hipolito Alo as presiding judge, the proceedings and trial were interrupted by failure of some of the witnesses to appear, and in the course of the hearing of a motion for the arrest of the absent witnesses, the father and the mother of the offended party, a motion was presented by counsel for the defense to quash the information on the ground that the court lacks jurisdiction to try the case. As ground for this motion, it was argued that while the complaint filed by the mother of the offended party alleges that the crime was committed through the use of force and intimidation, no such allegation exists in the information filed by the provincial fiscal, and in lieu thereof allegation is made that the offended party is a minor and demented girl. A motion to the same effect had been previously denied in the earlier part of the proceedings by Judge Segundo Apostol, who had previously presided over the court that was trying the case. Judge Alo granted the motion to quash, stating that there was a difference between the complaint and the information insofar as the manner in which the crime of rape was committed, and that although the information alleges also the use of force, the Fiscal admitted during the trial that he had no evidence to prove it. His Honor, reasoning that the main basis of the charge contained in the information is the offended party's insanity, while the complaint, that of intimidation and force, so that the complaint alleges one way of committing the crime while the information charges another, held that as the allegation of force set forth in the information was not alleged in the complaint, the proceedings were not initiated by the person called upon by Article 344 of the Revised Penal Code to file the complaint, and in violation of the rule enunciated in the case of People vs. Oso, 62 Phil. 271.

The Fiscal has appealed against the order of dismissal, claiming that the court had jurisdiction to try the case and that the lower court erred in applying the doctrine laid down in the case of People vs. Oso. The accused-appellees try to justify the order of dismissal, arguing that even if the lower court had erred in dismissing the case for lack of jurisdiction, they have the right to invoke the defense of double jeopardy, and this would be a bar to the prosecution of the appeal.

We find that His Honor did not correctly apply our ruling in the case of People vs. Oso. In that case the complaint filed was for forcible abduction, while the information filed by the Fiscal was for rape. Inasmuch as the crime of rape is different from the crime of forcible abduction alleged in the complaint, said complaint could not serve as a basis for the court to acquire jurisdiction over the crime actually committed, rape. In the case at bar, however, the complaint was for rape, and this gave the court jurisdiction to try the case. The power or jurisdiction of the court is not over the crime of rape when committed on a minor and demented girl, but over rape, irrespective of the manner in which the same may have been committed.

It must be borne in mind that complaints are prepared in municipalities, in most cases without the advice or help of competent counsel. When the case reaches the court of first instance, the Fiscal usually conducts another investigation, and thereafter files the information which the results thereof justify. The right and power of the court to try the accused for the crime of rape attaches upon the filing of the complaint, and a change in the allegations thereof as to the manner of committing the crime should not operate to divest the court of jurisdiction it has already acquired. The right or power to try the case should be distinguished from the right of the accused to demand an acquittal unless it is shown that he has committed the offense charged in the information even if he be found guilty of another offense; in the latter case, however, even if the court has no right to find the accused guilty because the crime alleged is different from that proved, it cannot be stated that the court has no jurisdiction over the case.

We are, therefore, constrained to hold that His Honor com-

mitted an error in holding that the court had no jurisdiction to try the crime charged in the information, simply because it charges the accused with having committed the crime on a demented girl, instead of through the use of force and intimidation. However, we find the claim of the defendants-appellees that the appeal can not prosper because it puts them in double jeopardy, must be sustained. Under Section 2, Rule 118 of the Rules of Court, the People of the Philippines can not appeal if the accused or defendant is placed thereby in double jeopardy. As the court below had jurisdiction to try the case upon the filing of the complaint by the mother of the offended party, the defendants-appellees would be placed in double jeopardy if the appeal is allowed.

Wherefore, the appeal is hereby dismissed, with costs *de oficio*.

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

Pablo, J., took no part.

XVI

Dionisia Cañaveral and Rufino Bautista, Petitioners, vs. The Honorable Judge Demetrio C. Encarnacion of the Court of First Instance of Manila (Branch I), Serenidad V. Surio and Maximo Villacorta, Respondents, G.R. No. L-6205, September 28, 1954, Concepcion, J.

COURT OF FIRST INSTANCE; JURISDICTION OVER CASES APPEALED FROM INFERIOR COURTS. — Although the Court of First Instance had no *appellate* jurisdiction to decide the ejectment case in question on the merits, inasmuch as the municipal court had no original jurisdiction over said case, in view of the question of title to real property upon which the right of possession involved therein was dependent (Teodoro vs. Balatbat, L-6314, January 22, 1954), said court of first instance had *original* jurisdiction to pass upon such issue, no objection to the exercise of such jurisdiction having been interposed by any of the parties.

Jose Q. Calingo for the petitioners.

Fojas & Fojas for the respondents.

DECISION

CONCEPCION, *J.*:

This is a petition for certiorari and mandamus to set aside and annul a decision rendered by the Court of First Instance of Manila in Civil Case No. 13306 thereof, entitled "Serenidad V. Surio and Maximo Villacorta vs. Dionisia Cañaveral and Rufino Bautista", as well as an order of said court denying a reconsideration of said decision, and to compel said court to remand the case to the Municipal Court of Manila "for further proceedings in accordance with Section 10, Rule 40, of the Rules of Court."

It appears that on April 19, 1949, Dionisia Cañaveral executed, with the consent of her husband, Rufino Bautista, an instrument, entitled "Deed of Pacto de Retro Sale," conveying, to Serenidad Surio, married to Maximo Villacorta, "two parcels of land with the building and improvements thereon, situated at 1403 Basilio, Sampaloc, Manila" and more particularly described in said document, subject to redemption within 12 months and to the right of the vendor to "continue occupying the premises in the capacity of a lessee at a monthly rent of ₱40.00 within a period of one year." On November 4, 1950, the Villacortas instituted in the Municipal Court of Manila Civil Case No. 13621, against the Bautistas, for illegal detainer. In the complaint therein filed, the Villacortas alleged that they are owners of the property above referred to, by virtue of said "Deed of Pacto de Retro Sale," and that the Bautistas refuse to vacate said property despite their failure to pay the agreed monthly rental and the repeated demands made by the Villacortas. Subsequently thereto, or on December 19, 1950, the Bautistas commenced Civil Case No. 12803 of the Court of First Instance of Manila, against the Villacortas, for a declaration, among other things, that the deed already adverted to does not express the true intent of the parties thereto, which was alleged to be only to make a "contract of loan with security." This pretense was reiterated by the Bautistas in their answer in the ejectment case, in which pleading they, likewise, alleged the pendency of said Civil Case No. 12803 of the Court of First Instance of Manila. In said answer, the Bautistas, also contested the alleged right of the Villacortas to the possession of the property in dispute, upon the ground that the same belongs to the former and that the true intent of the parties to the aforementioned deed was merely to constitute a mortgage. After due trial, the municipal court issued an order, dated February 2, 1951, reading:

> "Considering that according to the evidence adduced by the parties in this case, the main issue that is raised before the Court is the question of ownership; and considering that the question of possession cannot be decided in this instant without first deciding the question of ownership, the Court finds that it has no jurisdiction to proceed further.
>
> WHEREFORE, this case is hereby dismissed. Without pronouncement as to costs." (Record p 29)

The Villacortas appealed from this order to the court of first instance, where the case was docketed as Civil Case No. 13386 and the Bautistas reproduced the answer filed by them in the municipal court. In due course the court of first instance, then presided over by Hon. Demetrio Encarnacion, Judge, thereafter rendered a decision, dated February 20, 1952, the dispositive part of which is as follows:

> "POR TODO LO EXPUESTO, encontrando el Juzgado bien fundada la demanda, con gran preponderencia de pruebas a favor de los demandantes, se dicta sentencia condenando a los demandados a pagar a dichos demandantes los alquilares arriba reclamados, de ₱240.00 acumulados desde Abril 19, 1949 hasta Octubre 19, 1950, mas ₱40.00 mensuales desde esta fecha hasta que se vaquen las propiedades en cuestión y se entreguen a los demandantes.
>
> Quedan ordenados los demandados a desalojar las propiedades en cuestión y a pagar las costas del juicio de nubes instancias." (Record, p. 59).

A reconsideration of this decision having been denied, the Bautistas filed the petition for certiorari and mandamus now under consideration. They claim that the court of first instance had no appellate jurisdiction to decide the case on the merits, because the municipal court had no jurisdiction to entertain the same, the the issue of possession involved therein being dependent upon the question of title to the immovable property in litigation, which was raised in their answer. This pretense was not sustained by respondent judge, upon the ground that "la defensa de los demandados, de que el convenio era una simple hipoteca entre ellos, xxxes inmaterial en la presente causa, habiendo habido un convenio formal de pagar los alquilares a los demandantes." However, if, as contended by the Bautistas, the parties to the deed above referred to merely intended to constitute a mortgage, not to make a conditional sale, with a contract of lease, as said instrument purports to be, then the stipulation contained therein relative to said lease and to the payment of rentals must have been devised solely for the purpose of cloaking the payment of interest. Hence, said defense was very material to the right of possession, which is the gist of the case.

Respondent Judge, likewise, held that said defense of the petitioners herein is barred by the fact that Civil Case No. 12803 of the Court of First Instance of Manila — in which the Bautistas sought a declaration that the contract in question was not a conditional sale, but a loan guaranteed by a mortgage — was dismissed on August 15, 1951, for failure of the Bautistas to appear on the date set for the hearing thereof. This conclusion is well taken for the order of dismissal was unqualified and, hence, it constituted "an adjudication upon the merits," and, a final determination adverse to the aforesaid pretense of the Bautistas, as

plaintiffs in said case No. 12803 and as defendants in case No. 13306 (Section 4, Rule 30, Rules of Court).

Although the court of first instance had no *appellate* jurisdiction to decide the ejectment case on the merits, inasmuch as the municipal court had no *original* jurisdiction over said case, in view of the question of title to real property, upon which the right of possession was dependent (Pedro Teodoro v. Agapito Balatbat et al., G.R. No. 6314, decided on January 22, 1954) said court of first instance had *original* jurisdiction to pass upon such issue. What is more, it did exercise its original jurisdiction without any objection on the part of the Bautistas. Indeed, in their motion for reconsideration dated March 1, 1952, the latter merely assailed the *accuracy* of the findings of the court of first instance on the merits of the case, thus clearly accepting and, even, invoking, the jurisdiction of the court to pass upon the same. The Bautistas did not question said jurisdiction until March 12, 1952, when they filed a pleading entitled "additional ground for the reconsideration of the decision of the Court", alleging, for the *first* time, that the " Court had no jurisdiction to try the case on the merits". It was, however, too late to raise this issue, for the court had original jurisdiction over the case and had exercised it with the implied consent of the Bautistas (Amor vs. Gonzales, 42 Off. Gaz. [No. 12] p. 3203, 76 Phil. 481; Espanta vs Bartolome, et al., CA-G.R. No. 2592, April 27, 1949, 46 O.G. [11] 5447). As provided in section 11, Rule 40 of the Rules of Court:

> "A case tried by an inferior court without jurisdiction over the subject-matter shall be dismissed on appeal by the Court of First Instance. But instead of dismissing the case, the Court of First Instance in the exercise of its original jurisdiction, may try the case on the merits if the parties therein file their pleadings and go to the trial without any objection to such jurisdiction."

In view of the foregoing, the petition is hereby denied and the case dismissed, with costs against the petitioners.

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

XVII

Domingo del Rosario, Plaintiff and Appellee, vs. Gonzalo P. Nava, Defendant-Petitioner and Appellant, Alto Surety & Insurance Co., Inc., Surety-Respondent and Appellee, G.R. No. L-5513, August 18, 1954, *Reyes, J. B. L., J.*

1. EXECUTION OF JUDGMENT; DAMAGES ON ACCOUNT OF WRONGFUL ATTACHMENT; CLAIM FOR DAMAGES ON PLAINTIFF'S BOND; SINGLE JUDGMENT AGAINST PRINCIPAL AND SURETIES. — Section 20 of Rule 59 plainly calls for only one judgment for damages against the attaching party and his sureties; which is explained by the fact that the attachment bond is a solidary obligation. Since a judicial bondsman has no right to demand the exhaustion of the property of the principal debtor (as expressly provided by article 2084 of the new Civil Code, and article 1856 of the old one), there is no justification for the entering of separate judgments against them. With a single judgment against principal and sureties, the prevailing party may choose, at his discretion, to enforce the award of damages against whomsoever he considers in a better situation to pay it.

2. ID.; ID.; ID.; ID.; APPLICATION AGAINST SURETIES MUST BE MADE BEFORE JUDGMENT AGAINST PRINCIPAL BECOMES FINAL AND EXECUTORY. — While the prevailing party may apply for an award of damages against the surety even after an award has been already obtained against the principal (Visayan Surety and Insurance Corp. vs. Pascual, L-2981, March 23, 1950), still the application and notice against the surety must be made before the judgment against the principal becomes final and executory, so that all awards for damages may be included in the final judgment.

3. ID.; ID.; PURPOSE OF REQUIREMENTS OF SECTION 20, RULE 59. — The requirements of section 20 of Rule 59 appear designed to avoid a multiplicity of suits. To enable the defendant to secure a hearing and judgment against the sureties in the attachment bond, even after the judgment for damages against the principal has become final, would result in as great a multiplicity of actions as would flow from enabling him to sue the principal and the sureties in separate proceedings.

Relova & Melo for plaintiff and appellee.

Guido Advincula and *Potenciano Villegas, Jr.* for defendant Gonzalo P. Nava.

Raul A. Aristorenas for the Alto Surety & Insurance Co., Inc.

DECISION

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

Appeal from an order of the Court of First Instance of Manila in its Civil Case No. 4949, refusing to entertain appellant's application to require the Alto Surety and Insurance Co., Inc. to show cause why execution should not issue against its attachment bond filed in said case.

The facts are undisputed. Domingo del Rosario had instituted an ejectment suit against Gonzalo P. Nava in the Municipal Court of Manila, Civil Case No. 4467, and on January 30, 1948, he secured a writ of attachment upon due application and the filing of an attachment bond for ₱5,000, with the Alto Surety and Insurance Co., Inc. as surety. Attachment was levied and after the case was tried, the Municipal Court rendered judgment against the defendant Nava. The latter appealed to the Court of First Instance of Manila, where the case was docketed with number 4949. In the Court of First Instance, Nava filed a new answer with a counterclaim, alleging that the writ of attachment was obtained maliciously, wrongfully, and without sufficient cause, and that its levy had caused him damages amounting to ₱5,000. No notice was served upon the surety of the attachment bond, Alto Surety and Insurance Co., Inc.

By decision of July 21, 1950, the Court of First Instance found that the attachment was improperly obtained, and awarded ₱5,000 damages and costs to the defendant Nava. The judgment having become final, a writ of execution was issued, but it had to be returned unsatisfied on January 19, 1951, because no leviable property of the plaintiff Del Rosario could be found. On November 7, 1951, Nava filed, through counsel, a motion in Court setting forth the facts and praying that the Alto Surety and Insurance Co., Inc. be required to show cause why it should not respond for the damages adjudged in favor of the defendant and against the plaintiff. The surety company filed a written opposition on the ground that the application was filed out of time, it being claimed that under sec. 20, Rule 59 of the Rules of Court, the application and notice to the surety should be made before trial, or at the latest, before entry of the final judgment. After written reply and rejoinder, the Court of First Instance, on December 10, 1951, issued the assailed order, rejecting Gonzalo P. Nava's motion to require the Alto Surety and Insurance Co., Inc. to show cause, because it was filed out of time. Nava then appealed to this Court.

The issue before us is whether a notice to the sureties made after the award of damages against the principal in the attachment bond has become final, can be considered timely in view of section 20, Rule 59, providing as follows:

> "Sec. 20. *Claim for damages on plaintiff's bond on account of illegal attachment.* — If the judgment on the action be in favor of the defendant, he may recover, upon the bond given by the plaintiff, damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or, in the discretion of the court, before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. Damages sustained during the pendency of an ap-

peal may be claimed by the defendant, if the judgment of the appellate court be favorable to him, by filing an application therewith, with notice to the plaintiff and his surety or sureties, and the appellate court may allow the application to be heard and decided by the trial court."

Appellant invokes and relies upon the decisions of this Court, in Visayan Surety and Insurance Corp vs. Pascual, G. R. No. L-2981, promulgated on March 23, 1950, and in Liberty Construction Supply Company vs. Pecson, et al., G.R. No. L-3694, promulgated on March 23, 1951. In the first case cited, this Court ruled as follows:

"(1) That damages resulting from preliminary attachment, preliminary injunction, the appointment of a receiver, or the seizure of personal property, the payment of which is secured by judicial bond, must be claimed and ascertained in the same action with due notice to the surety;

(2) That if the surety is given such due notice, he is bound by the judgment that may be entered against the principal, and writ of execution may issue against said surety to enforce the obligation of the bond; and

(3) That if, as in this case, no notice is given to the surety of the application for damages, the judgment that may be entered against the principal cannot be executed against the surety without giving the latter an opportunity to be heard as to the reality or reasonableness of the alleged damages. In such case, upon application of the prevailing party, the court must order the surety to show cause why the bond should not respond for the judgment for damages. If the surety should contest the prevailing party, the court must set the application and answer for hearing. The hearing will be summary and will be limited to such new defense, not previously set up by the principal, as the surety may allege and offer to prove. The oral proof of damages already adduced by the claimant may be reproduced without the necessity of an opportunity to cross-examine the witness or witnesses if it so desires.

To avoid the necessity of such additional proceedings, lawyers and litigants are admonished to give due notice to the surety of their claim for damages on the bond at the time such claim is presented."

And in Liberty Construction & Supply Co. vs. Pecson, G. R. No. L-3694, May 23, 1951, this Court held:

"The petitioner, in support of his contention that the judgment for damages in favor of the petitioner against the plaintiff in the civil case binds the respondent Alto Surety and Insurance Co., Inc., although the latter was not notified or included as defendant in the petitioner's counterclaim for damages against the said plaintiff, quotes the decision of this Court in the case of Florentino vs. Bomadag, 45 O. G. (11) 4937, promulgated on May 14, 1948. But the ruling in said case was abandoned in a later case entitled Visayan Surety and Insurance Corp. vs. Pascual et al. G. R. No. L-2981, promulgated on March 23, 1950, in which this Court held that 'damages resulting from preliminary attachment, preliminary injunction, the appointment of a receiver, or the seizure of personal property, the payment of which is secured by judicial bond, must be claimed and ascertained in the same action with due notice to the surety' and 'that if the surety is given such due notice, he is bound by the judgment that may be entered against principal, and writ of execution may issue against said surety to enforce the obligation of the bond,' and that if no notice is given the surety the judgment cannot be executed against him without giving him an opportunity to present such defense as he may have which the principal could not previously set up."

It will be seen that the rulings above quoted are silent on the question now before us, that is to say, the time within which the application and notice to the surety should be filed in those cases where a judgment for damages has already been rendered against the plaintiff as principal of the attachment bond. Upon mature consideration, we have reached the conclusion that under the terms of section 26 of Rule 59, the application for damages and the notice to the sureties should be filed in the trial Court by the party damnified by the wrongful or improper attachment either "before the trial" or, at the latest, "before entry of the final judgment," which means not later than the date when the judgment becomes final and executory (sec. 2, Rule 35). Only in this way could the award against the sureties be "included in the final judgment" as required by the first part of sec. 26 of Rule 59. The rule plainly calls for only one judgment for damages against the attaching party and his sureties; which is explained by the fact that the attachment bond is a solidary obligation. Since a judicial bondsman has no right to demand the exhaustion of the property of the principal debtor (as expressly provided by Art. 2084 of the new Civil Code, and Art. 1856 of the old one), there is no justification for the entering of separate judgments against them. With a single judgment against principal and sureties, the prevailing party may choose, at his discretion, to enforce the award of damages against whomsoever he considers in a better situation to pay it.

It should be observed that the requirements of section 20 of Rule 59 appear designed to avoid a multiplicity of suits. But to enable the defendant to secure a hearing and judgment against the sureties in the attachment bond, even after the judgment for damages against the principal has become final, would result in as great a multiplicity of actions as would flow from enabling him to sue the principal and the sureties in separate proceedings.

In view of the foregoing, we hold that while the prevailing party may apply for an award of damages against the surety even after an award has been already obtained against the principal, as ruled in Visayan Surety and Insurance Corp. vs. Pascual, G. R. No. L-3694, still the application and notice against the surety must be made before the judgment against the principal becomes final and executory, so that all awards for damages may be included in the final judgment. Wherefore, the Court below committed no error in refusing to entertain the appellant Nava's application for an award of damages against the appellee surety Company ten months after the award against the principal obligor had become final.

The order appealed from is affirmed, with costs against appellant.

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

JUDGE MORFE UPHOLDS THE . . .

(*Continued from page* 585)

political or social motives, that is, in furtherance of rebellion, instead of being punished separately, be deemed to form part of the complex crime of rebellion with murder or other grave felonies, and punished as provided in Art. 48 of said Code.

3. In view of the existence of the complex crime of rebellion with murder and other grave offenses in this jurisdiction, the motions to quash the informations is the above-entitled cases on the ground that they charge more than one offense are clearly without merit.

4. There is no merit in the additional ground invoked in the motion to quash the information in Crim. Case No. 19650, People v. Dumlao, namely, that the accused has been previously convicted, or in jeopardy of being convicted, or acquitted of the offense charged. It is true that the said accused was convicted in Crim. Case No. 19179 by this Court on December 14, 1951 of the offense of illegal association penalized by Art. 147 of our Revised Penal Code, but the present rebellion charge against the accused is one that does not necessarily include or is necessarily included in the

(*Continued on page* 622)