The LAWYERS JOURNAL

MANILA, PHILIPPINES

VOLUME XIX | DECEMBER 31, 1954 | NUMBER 12

In this issue

VICENTE J. FRANCISCO
Editor and Publisher

LOPE E. ADRIANO
RODOLFO J. FRANCISCO
Assistant Editors

ADELA OCAMPO
Business Manager

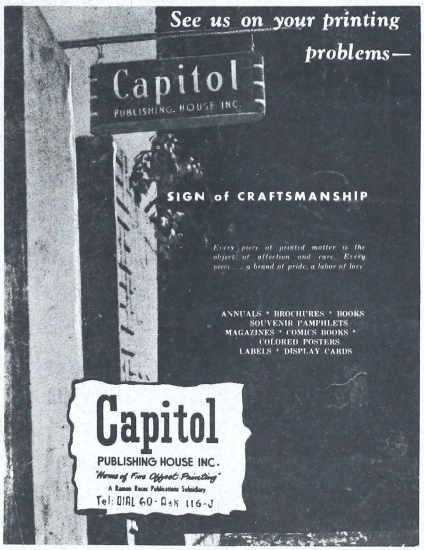
RICARDO J. FRANCISCO
Assistant Business Manager

THE LAWYERS JOURNAL is published monthly by Sen. Vicente J. Francisco, former delegate to the Constitutional Convention, practising attorney and President of the Francisco College (formerly Francisco Law School).

SUBSCRIPTION AND ADVERTISING RATES: Subscription: ₱18:00 for one year; ₱10.00 for 6 months. Advertising: Full page — ₱105.00; Half page — ₱65.00; One-fourth page — ₱45.00; One-eight page — ₱35.00; One-sixteenth page ₱25.00 Entered as second class mail matter at the Post Office.

BUSINESS OFFICE: 1192 Taft Avenue, Manila.
Tel. 5-43-55

☆ ☆ ☆



EDITORIAL

A WISE man once defined Christmas as "the day that changes a man." Like most epigrams, this one is probably more witty than true, and offhand one can cite numerous instances not covered by the definition. By and large, however, it expresses a great truth. For this is indeed the season of the year when opportunity and tradition combine to remind man of his spiritual heritage. Once again he will feel the strong urge to speak kindly, to believe the best in his fellow men, to give instead of to receive. Once again the flinty heart will be touched, the sharp tongue curbed and the streak of meanness covered up.

As it has done in the past, the spirit of Christmas will come to us in different ways and at different times. To many, it is a date in the calendar, to others it is a state of the mind. To some, it came during that chill evening late in November, when the advance guard of ragged street urchins shivering in the unseasonable cold, went about their nocturnal rounds screeching their interpretation of the Christmas carols for a modest fee of five or ten centavos. To many more it will come later, in the stacks of Christmas cards, in the series of glittering parties, in brilliantly lighted pine trees loaded down with tissue-wrapped packages.

And once again, in the little towns and villages, the small "belen" will be set up in the plaza and the old church patio will be garlanded with bunting and streamers. As the schools close for the holiday, the sense of expectancy will mount, until it can almost be felt, like a fever, or heard, like distant thunder. In school programs all over the land, a little girl will recite the Night Before Christmas, the "Gift of the Magi" will be dramatized, and gifts will be exchanged after the last vocal solo and declaimed poem. Over the radio the transformation of Scrooge will again be described, and Anatole France's "Our Lady's Juggler" will be recounted. Even in the battlefield, men who had been killing each other will lay down their arms.

> No war, or battle's sound,
> Was heard the world around;
> The idle spear and shield were high uphung;
> The hushéd chariot stood,
> Unstained with hostile blood;
> The trumpet spoke not the armèd throng;
> And kings sat still with awful eye,
> As if they surely knew their sovran Lord was by.

Yes, Christmas has something for everybody — music and poetry, frankincense and myrrh, pomp and pageantry. Gold and silver for the prince, a special Christmas package for the pauper. And the churches will be full to overflowing with those who believe in the hereafter, and the nightclubs jampacked with those who believe in the present.

But — suppose this were to be the last Christmas on earth?

If any one expressed this thought as a statement rather than a question, he would of course be thought a fool or a madman. And yet in the light of world developments since the last Christmas, why should the thought be far fetched? The scientists tell us that man has already penetrated nature's innermost secret of the structure of matter, and has come into possession of a source of energy whose force cannot yet be accurately measured. And from this source he has fashioned a weapon that can exterminate all things that crawl, swim or fly and so pollute the earth, the sea and the air that nothing can ever live in them again. This is not a theory, for in scaled down demonstrations, an island was made to disappear, and the ashes of that explosion borne by an ocean breeze, brought death to some fishermen so far away they did not see or hear or feel anything. Such a bomb, set off in Siberia, causes effects and influences that can be measured in North America, and a hundred such bombs could presumably change the geography of an industrial region as large as Europe.

Now, indeed, man has arrived at the most serious crisis in his life. Never in his long history of struggle against wild beast, against floods and fires, against disease, has he faced a more desperate situation or a more fearful enemy. For now he finds himself standing against other men, as strong as he is, as well equipped with weapons, as full of hatred and vindictiveness.

Only two countries in the world possess the H-bomb and each has called the other a mortal enemy. What is to prevent them from making this the last Christmas on earth?

Already, we have been told, the cataclysm had been averted by the narrowest margin on many occasions. At Yalu, Dienbenphu, Berlin — in half a dozen secret places, the wisdom of dropping the hydrogen bomb had been considered. But at the last moment somebody has faltered, and thus we are still here to spend another Christmas. But there will certainly be other occasions. If not Yalu, then another battleground, if not Dienbenphu . . . .

> "Glory to God in the highest,
> Peace on earth to men of goodwill."

This is Christmas, 1954. As we greet each other, and toast our health and happiness, an uneasy feeling grips our heart. The voice of the Prince of Peace cannot be heard in the din of heavy tanks maneuvering for prepared positions and in the roar of jet planes warming up for practice bombing runs. All around us, nations continue building up their armies and stockpiling the supplies and material called for by logistic expert. On all sides, hatred of men for other men.

Can anything stay the hand of doom?

Over the years we have lost sight of the vital meaning of that first Christmas. In our search for power and wealth, we have forgotten the significance of the Birth in the Manger. We no longer remember that in that stable, kings and shepherds became brothers, that in worshipping the new born God, they were laying the foundation for the brotherhood of men.

This is the only thing that can save us now. For we cannot continue to live in an atmosphere that daily grows more tense with mutual distrust and animosity. The crisis calls not for more effort to unravel the secret of the atom but for more time and enthusiasm to understand our fellow men. Peace cannot be established by force, not even by the force of ten thousand H-bombs. It can only come when we realize that all men are brothers, that they need each other, that they must help each other. We must face the reality that we have to live together in a cramped world, white men and black men, men of many beliefs and languages and customs.

In the past we have looked to our kings and generals and statesmen to put a stop to this senseless killings, to end this mad race for power. But such a peace cannot be written in Washington, or Moscow or Versailles.

An enduring peace, and a just peace, can only come from Bethlehem.

I am happy to extend the Season's greetings to the votaries of justice — the members of the Philippine Bench and Bar.

We have much to thank for this Christmas. During the year about to end, thirteen million more people passed to a regime under which the accused is tried and sentenced without benefit of counsel. We can call ourselves fortunate in that we in this country continue to live under a government that recognizes legal representation as part and parcel of our judicial system.

Our legal practitioners, no less than the members and administrators of our judiciary, are indispensable if our courts are to be the last bulwark of democratic government.

More power then to our practising lawyers and to the members of the Bench! May they be in the coming year as vigilant and untiring in their advocacy of the freedom and rights of the accused as they have been in the past.

RAMON MAGSAYSAY
President of the Philippines

Basic in the scheme of democratic governments such as ours is the concept of government of laws and not of men. Reflection on this truism underscores the importance of accurate, reliable and up-to-date legal publications.

The Lawyers Journal fills this need. Published by men of tested legal ability, it has had a satisfying career of public service: it has established an enviable and well deserved reputation as a faithful reporter of important statutes, judicial decisions and other legal materials, and, with its learned editorials and comments on current legal and judicial events, promotes the cause of enlightened administration of justice.

It is a pleasure to join the ranks of the well-wishers of the Journal in wishing it on the occasion of Christmastime long continued success.

PEDRO TUASON
Secretary of Justice

I doubt whether any lawyer or judge has not at one time or another been awed by the power of life and death over his fellowmen which the law has placed in his hands. Through any failing of the lawyer, or any error in judgment of the judge, an innocent man may be sent to his death. And no temporal power can hold them to account for their errors: as arbiters of justice, they are responsible only to God and to their conscience.

This thought should be with us during Christmas because we have much to learn and inspire us from the earthly life of our Lord, Jesus Christ. It is not without meaning and significance that He was born in a lowly manger and that during His sojourn on earth He did not use His Divine powers to strike back at His oppressors. We can only try to follow His Divine example — by approaching our tasks with humility and humanity.

I wish the LAWYERS JOURNAL *and my colleagues on the Bench and at the Bar a Joyous Christmas and a Fruitful New Year.*

P. M. ENDENCIA
Presiding Justice
Court of Appeals

I am grateful to the Lawyers Journal for always enabling me to extend to its readers, especially members of the Bench and the Bar, my Christmas and New Year greetings. The Yuletide brings joy and contentment, not so much in a materialistic sense as from a feeling of piety and spiritual upliftment brought about by the celebration of the Nativity of Jesus. Along with the significance of Christmas, the festivities give us time not only to reflect on and be thankful for all the things we have had and enjoyed in the past year, but also to resolve to make the New Year more fruitful and more in line with Christian tenets. The members of the Bench and the Bar, in particular, should integrate their efforts and energies with a view to the attainment of their common objective, a speedy and true administration of justice, — the one thing that will spread cheer not only during Christmas but everyday of the year.

RICARDO PARAS
Chief Justice
Supreme Court

The year 1954 with all its achievements and prosperity will inevitably close. Before its termination, allow me to make a short message relative to the independence of the Judiciary.

We are happy to note that from the implantation of the American regime in these Islands to the establishment of our present Republic, our Courts of Justice have gained the respect of all — not only for their brilliant achievements but also, for having consistently retained their independence.

This was made possible by the careful selection of our magistrates by our Chief Executives — choosing them for their good preparation in the Law, their probity, tact and independent judgment. Before entering upon the performance of their duties, they are sworn to administer justice equally to all — without fear or favor. It is to this strict adherence to their oath that our Courts have gained universal respect and independence, a state attained with the full cooperation of the members of the Bar who themselves, as officers of the Courts, are duty-bound to keep this independence that our Democratic institutions may flourish for the benefit of posterity.

To this end, the Lawyers Journal has contributed in no small measure, through the publication of the activities of our Courts, for the information and benefit of the people as well as the Bar and the Bench.

I would like to wish the Lawyers Journal continued blessings in its sacred purpose of serving the country in the name of Justice and Democracy.

FROILAN BAYONA
Executive Judge
Court of First Instance of Manila

JUDGE MORFE UPHOLDS THE THEORY THAT THERE CAN BE THE COMPLEX CRIME OF REBELLION WITH MURDER, ROBBERY, ARSON AND OTHER GRAVE FELONIES

Judge Morfe of the Court of First Instance of Pangasinan in an order issued in 5 cases[1] upheld the theory that there exists such a complex crime of rebellion with murder, robbery, arson and other grave felonies. In view of the importance of this question which until now has not been decided by our Supreme Court, we have transcribed hereunder the pertinent portions of his order.

A QUESTION PRIMAE IMPRESSIONIS

The question of whether there is such a crime as rebellion complexed with murders, etc. under our laws is one of first impression in this jurisdiction, our Supreme Court not having as yet passed upon this question squarely. Consequently, the opinion of one Court of First Instance judge on this question is as good as the opinion on it by any other judge of the same judicial level, until our Supreme Court rules on the matter with finality in an appropriate case elevated to it on appeal.

THE TARUC DECISION REPRESENTS THE MINORITY VIEW

From available materials presently accessible to the presiding Judge of this Court it appears that so far there have been decided by various Courts of First Instance in this jurisdiction seven (7) rebellion cases, six (6) of which are now pending consideration by our Supreme Court, all involving the question of whether there is such an offense under our Revised Penal Code as rebellion complexed with murder, etc. Said cases are the following:

People v. Lava, Crim. Case No. 14071 of the Court of First Instance of Manila, decided by Judge Oscar Castelo, now before our Supreme Court as case G. R. No. L-4974;

People v. Hernandez, Crim. Case No. 15841 of the Court of First Instance of Manila, decided by Judge Agustin P. Montesa, now before our Supreme Court as case G. R. No. L-6025;

People v. Capadocia, et al., Crim. Case No. 2878 of the Court of First Instance of Manila, decided by Judge Magno Gatmaitan, now before our Supreme Court as case G. R. No. L-5796;

People v. Salvador, Crim. Case No. 1400 of the Court of First Instance of Bulacan, decided by Judge Manuel P. Barcelona, and now before our Supreme Court as case G. R. No. L-5745;

People v. Nava, Crim. Case No. 2704 of the Court of First Instance of Iloilo, decided also by Judge Manuel P. Barcelona, and now before our Supreme Court as case G. R. No. L-4907;

People v. William J. Pomeroy and Celia Pomeroy, Crim. Case No. 19166, decided by then Judge Felicisimo Ocampo of the Court of First Instance of Manila, decision now no longer in question as the accused did not appeal and instead began serving the sentence meted on them; and

People v. Taruc, Crim. Case No. 19166 decided by Judge Gregorio S. Narvasa of the Court of First Instance of Manila, now before our Supreme Court as case G. R. No. L-8229.

Of the six (6) Judges of Court of First Instance aforementioned, only the Hon. Gregorio S. Narvasa, deciding the Taruc case, held that there is no such crime as rebellion complexed with murder, etc., under our Revised Penal Code. In other words, upon examination of pertinent portions of these seven decided cases constituting persuasive precedents in this jurisdiction on the question under consideration, this Court finds that the Taruc decision invoked by the movants represents the minority view.

THIS COURT ADHERES TO THE MAJORITY VIEW

This Court is now called upon to consider the persuasive precedents set in the above-mentioned seven cases on this matter decided by other Judges of Court of First Instance of this Republic, and adopt or reject any or all of them. After carefully considering the motions, supplemental motions, oral arguments of counsel for the movants, and reply arguments of the prosecuting officers handling these cases for the State, this Court, for the reasons to be stated farther below, has come to the conclusion, and so holds with the majority of the above mentioned Judges, that the complex crime of rebellion with murder and other grave offenses exists under Art. 48 and related articles of our Revised Penal Code.

LEGISLATIVE HISTORY

The decisive question for determination in connection with the motions under consideration is whether or not murder, arson, robbery, physical injuries, etc., perpetrated as necessary means of committing rebellion, in connection therewith, or in furtherance thereof, become identified with said offense of rebellion and cannot be used in combination with the latter to increase the penalty as provided in Art. 48 of our Revised Penal Code. For a logical consideration of this question an inquiry into the legislative history of the pertinent provisions of our Revised Penal Code would no doubt be enlightening.

The present Revised Penal Code of the Philippines is based mainly on the Penal Code of Spain of 1870 which has been in force in the Philippines since July 14, 1887 (U. S. v. Tamporing, 31 Phil. 321). Regarding complex crimes said Penal Code of Spain provided as follows:

> Art. 89. Las disposiciones del articulo anterior no son aplicables en el caso de que un solo hecho constituye dos o mas delitos, o cuando el uno de ellos sea medio necesario para cometer el otro.
>
> En estos casos solo impondra la pena correspondiente al delito mas grave, aplicandola en su grado maximo.
> (P. 677, Albert: The law on Crimes, First Edition).

When the present Revised Penal Code (Act No. 3815) was approved on December 8, 1930 it re-embodied the aforequoted provision of the Penal Code of Spain in almost identical words, to wit:

> Art. 48. Penalty for complex crimes... When a single act constitutes two or more grave or less grave felonies, or when an offense is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period. (As amended by Act No. 400).

This Court specially notes, in this connection, that until the enactment of our present Revised Penal Code the provision aforequoted regarding complex crimes clearly did not apply to the crime of rebellion. Instead, an express provision was embodied in said Penal Code of Spain in force in the Philippines since July 14, 1887, reading as follows:

> Art. 244. Los delitos particulares cometidos en una rebelión ó sedición, ó con motivo de ellas, serán castigados respectivamente segun las disposiciones de este Codigo:
>
> Cuando no pueden discubrirse sus autores, seran penados como tales los jefes principales de la rebelión ó sedición.
> (p. 707, Albert: Law on Crimes, First Edition).

---

1 People vs. Hermenegildo Abreo, No. 19408, for rebellion with robbery; People vs. Filomeno Dumlao, No. 19650, for rebellion with multiple murder, robbery, arson and physical injuries; People vs. Felicidad Ocinos, No. 20393, for rebellion with multiple murder, robbery, arson and physical injuries; People vs. Bernardo Aquino, No. 20399, for rebellion with multiple murder, robbery, arson and physical injuries, and People vs. Miguel Franco, No. 20588, for rebellion with multiple murder, robbery, arson and physical injuries.

Upon implantation of the erstwhile American regime in these Islands, Act No. 292, punishing rebellion, was approved on November 4, 1901; and since then up to January 1, 1932 when our present Revised Penal Code took effect, rebellion was punished, not under said Penal Code of Spain in force in this jurisdiction, but by said special law, Act No. 292. Consequently, the provision on complex crimes (Art. 89, Old Penal Code; Art. 48, Revised Penal Code) likewise clearly did not apply to rebellion from November 4, 1901 to February 1, 1932, because of the express provision of our penal code that offenses which are or in the future may be punished under special laws are not subject to the provisions of said Code (Art. 7, Old Penal Code; Art. 10, Revised Penal Code).

Under this set-up the Supreme Court of Spain has decided in numerous cases that with the crime of rebellion are merged and identified only the less grave felonies (see Art. 6 Old Penal Code) if committed in connection with or in pursuance of such rebellion, but not the grave crimes defined in said Code. Thus state the pertinent Spanish authorities:

> Los delitos particulares cometidos en una rebelión ó sedición, ó con motivo de ellos, serán castigados, respectivamente, segun las disposiciones del Codigo (Art. 227).
>
> Se establece aqui que el que en una rebelión ó sedición; ó con motivo de ellas, comete otros delitos (v. g. roba, mata o lesiona), será responsable de estos además de los delitos de rebelión ó sedición. Por tanto, en estos casos existira un concurso de delitos punible conforme a las normas correspondientes. *Pero la dificultad consiste aqui en separar los accidentes de la rebelión ó sedición de los delitos independientes de estas*, y como las leyes no contienen en este punto precepto alguno aplicable, su solución ha quedado encomendada a los tribunales. *La jurisprudencia que estos han sentado considera como accidentes de la rebelión ó sedición — cuya criminalidad queda embebida en la de estos delitos, y, por tanto, no son punibles especialmente — los hechos de escasa gravedad* (v. g. atentados, desacatos, lesiones menos graves), y por el contrario, las infracciones graves, como el asesinato o las lesiones graves, se consideran como delitos independientes de la rebelión ó de la sedición. Pero aquellos hechos de no relevante gravedad (atentados, desacatos, lesiones menos graves) solo podrán ser considerados como accidentes de la rebelión ó sedición, cuando se cometieron con fines politicos ó sociales, si falta este especifica finalidad deberan ser apreciados como delitos comunes conforme a las disposiciones respectivas del Codigo penal.
>
> (Calon, Derecho Penal, Tomo II, pp. 116-117).

El Tribunal Supremo parece que sigue este principio general: las infracciones graves se consideran como delitos independientes, en cambio los hechos de menor gravedad pueden ser considerados como accidentes de la rebelión. Es este sentido el T. S. ha declarado que son accidentes de la rebelión, los desacatos y lesiones a la autoridad y otros delitos contra el orden publica (23 mayo 1890). El abuso de superioridad tambien es inherente el alzamiento tumultuario (19 noviembre 1906).

Es cambio, el asesinato de un Gobernador cometido en el curso de un tumulto debe penarse como un delito comun de asesinato (3 febrero 1872). — (Peña, Derecho Penal, Tomo II, pp. 89-90).

Such is the rule previous to the enactment of our Revised Penal Code, that is, only less grave felonies committed in connection with or in furtherance of rebellion are deemed merged with the latter as component parts thereof, and such grave offenses as are committed in connection with or in furtherance of rebellion must, under said rule, be punished as independent crimes pursuant to the corresponding article of the Code.

The rulings of the Spanish Supreme Court in this regard had obviously in mind Art. 244 of our Old Penal Code which withdrew the crime of rebellion from the operation of the same code's provision relating to complex crimes (Art. 89, Old Penal Code; Art. 48, Revised Penal Code). Then, when our lawmakers enacted Act No. 3815, our Revised Penal Code, they not only retained and re-emphasized the provisions of the Old Penal Code relating to complex crimes, but also eliminated from our Revised Penal Code said Art. 244 of the old Code. Consequently, this Court is of the opinion, and so holds, that this had the effect of making the provision of Art. 48 of our Revised Penal Code apply to the rebellion provisions of the latter (Arts. 134, 135), in the sense that henceforth all grave felonies committed with political or social motives, that is, in furtherance of rebellion, instead of being punished separately, are deemed to form part of the complex crime of rebellion with murder or other grave felonies, and that light and less grave felonies (Art. 9, Revised Penal Code), committed in connection with or in furtherance of rebellion must be deemed as merged with the latter.

ERRONEOUS APPLICATION OF PRECEDENT

The movants, citing the Taruc decision as a persuasive precedent, invoke in their favor, by analogy, they say, the decisions of our Supreme Court in the following treason cases: People v. Prieto, L-399, January 29, 1948; People v. Aldawan, 46 O.G., 4299, 4306; People v. Ingalla, 45 O. G., 4831-4832; People v. Jardinico, 47 O. G., 3508, 3513.

This Court has examined the texts of the decisions in these cases and does not find them to be logically applicable to rebellion cases. These cited cases are treason cases, where two elements must concur to warrant conviction, namely: (1) adherence to the enemy; and (2) overt acts of giving the latter aid and comfort. In the cited cases, multiple murders, arson, robbery, etc. were alleged as the very overt acts of giving the enemy aid and comfort. Consequently, they must be held as merged with the crime of treason for which the accused were indicted. As Mr. Justice Tuason said in the cited case of People v. Prieto, supra:

> It is where murder or physical injuries are charged as overt acts of treason that they can not be regarded separately under their general denomination. (People v. Prieto, 45 O. G. 3329, 3333).

Murder, robbery, arson, and physical injuries alleged in the informations for the complex crime of robbery with murder, etc. now before this Court, are not therein alleged as indispensable overt acts of rebellion. The only indispensable overt act in rebellion is armed uprising against the government. But armed uprising does not necessarily require actual shooting. Examples of rebellion or *coup d' etat* successfully carried out by mere silent marches of superior number of armed men are not wanting in contemporary history. In fact, in the case of People v. Perez, et al., CA-G. R. No. 9185-R, promulgated June 30, 1954, the Court of Appeals, thru Mr. Justice Dizon, held that rebellion may be committed even without bloodshed.

When, therefore, armed uprising is staged before popular support to the vaunted cause renders the time ripe for coming out in open rebellion, and as a consequence murders, arsons, robberies and kidnappings become necessary so as to strike terror on those unwilling to join the vaunted cause, such felonies, which are not elements of simple rebellion, render the offenders guilty of the complex crime of rebellion with multiple murder, etc.

RE-EXAMINATION AND ABANDONMENT OF ALLEGED PRECEDENT

As further authority for the proposition that the ruling in the above mentioned treason cases also applies to rebellion cases the movants cite the resolution of our Supreme Court of October 11, 1951 in the cases of Nava, et al v. Gatmaitan, G. R. No. L-4855; Hernandez v. Montesa, G. R. No. L-5964; and Angeles v. Abaya, G. R. No. L-5102. No text of said resolution is at present available to the presiding Judge of this Court. At any rate, assuming that such a precedent exists, it is not yet too late to re-examine such precedent and abandon it for good.

Considering the provision of Art. 48 of our Revised Penal Code, in relation to the significant fact that the provision of Art. 244 of our Old Spanish Penal Code of 1870 providing for separate penalties for common crimes committed in connection with or in furtherance of rebellion was repealed by Art. 367 of our Revised Penal Code, this Court finds absolutely no justification for the view of the movants that the grave felonies of murder, arson, robberies, kidnappings, etc., committed in connection with, or in furtherance of, rebellion, are merged with the latter and cannot be separately punished or used in combination with rebellion to increase the penalty for the resulting complex crime as provided in Art. 48 of said Revised Penal Code. For this Court to adhere to said unfortunate and unwarranted rule, claimed by the movants as established precedent in this jurisdiction, would be for it to perpetuate an error under which the bigger offenses of murder, arson, robbery, kidnappings, etc. shall, borrowing the words of Judge Montesa, in spite of metaphysical and physical impossibility, by pure legal fiction be considered absorbed in the lesser offense of rebellion and be left unpunished. The end result would be that one committing a single murder for a fancied wrong may be meted the supreme death penalty, but if he organizes, also for a fancied wrong, an armed uprising, he can commit hundreds of murders, robberies, arsons, rapes, and kidnappings and yet be subjected only to a maximum of 12 years imprisonment and ₱20,000.00 fine.

This Court fails to conceive of any logical reason for punishing persons indicted of rebellion with such ridiculously low penalty. Such lenient treatment of murderous rebels might be justified in a monarchical or totalitarian regime, where people do not enjoy freedom of speech as a means of agitating for reforms or redress of grievances, and where rebellion is, therefore, the patriotic means and the only effective means of unshackling the people from abuse and oppression; but there is absolutely no justification in a democracy for the use of murder, arson, kidnappings, rape, or other cruel and wasteful instruments intended as means of realizing objectives attainable through peaceful, orderly processes of constitutional democracy.

The alleged precedent invoked by the movants is not only inconsistent with a sound sense of justice but is also destructive of the social welfare and must better be discarded. This Court consequently chooses to discard said alleged precedent for good, following our Supreme Court's admonition that in balancing conflicting solutions, that one should be made to tip the scales as the court may believe will best promote the public welfare in its probable operation as a general rule or principle. (Rubi v. Provincial Board of Mindoro, 39 Phil. 660).

Mr. Justice Benjamin N. Cardozo suggests the same course of action in his following words:

> But I am ready to concede that the rule of adherence to precedent though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. (Cardozo: The Nature of the Judicial Process, p. 150).

The same idea was enunciated in a Connecticut Case:

> That Court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society... (Dwy v. Connecticut Co., 89 Conn. 74, 99).

The modern trend, indeed, is for the courts to abandon a rule when the same is found to be conceived in error, that is, for them to discard in proper cases idolatrous reverence for precedents (Torres v. Tan Chim, SC-G.R. No. 40693, February 3, 1940; Philippine Trust v. Mitchell, 59 Phil. 30, 36).

DOCTRINE RELIED UPON NOW ABANDONED

The doctrine relied upon by the movants was set down in treason cases, but is proposed to be applied to rebellion cases simply because Mr. Justice McDonough, in his concurring opinion, opined that rebellion is treason of less magnitude (U.S. v. Lagnoason, 3 Phil. 472, 484). Said doctrine holds that murder, robbery, rape, etc., committed in connection with or in furtherance of treason, are merged in and identified with it and cannot be used in combination with it to increase its penalty under Article 48 of the Revised Penal Code (People v. Prieto G.R. No. L-399, January 29, 1948). In other words, there is no such complex crime as treason with murder, etc. in this jurisdiction, but the ruling to this effect has already been abandoned or overruled by our Supreme Court and is therefore of no further force and effect at present. Thus, in a decision promulgated as early on May 12, 1949, our Supreme Court said:

> ...the verdict of guilt must be affirmed. Articles 48, 114 and 248 of the Revised Penal Code are applicable to the offense of *treason with murder*. (People v. Labra, G.R. No. L-1240, May 12, 1949).

Again, on March 23, 1950 our Supreme Court, in a per curian decision, applied Art. 48 and held the accused guilty of the complex crime of treason with murder, concluding as follows:

> The Solicitor-General, however, recommends that the penalty of death be imposed upon the appellant. Considering that the treason committed by the appellant was accompanied not only by the apprehension of Americans (U.S. citizens) and their delivery to the Japanese Forces which evidently later executed them, but also by killing with his own hands not only one but several Filipinos, his countrymen, and that in addition to this, he took part in the mass killings and slaughter of many other Filipinos, we are constrained to agree to said recommendation. However unpleasant, even painful, is the compliance with our duty, we hereby impose upon the appellant Teodoro Barrameda the penalty of death which will be carried out on a day to be fixed by the trial court within thirty days after the return of the record of the case to said court.
>
> (People v. Barrameda, SC-G.R. No. L-2584, March 25. 1950, 47 Off. Gaz. 5062-5087).

RESUMÉ

Our Supreme Court having abandoned its original doctrine that there is no complex crime of treason with murder, etc. in this jurisdiction, but failed to elaborate on the scope of the operation of Art. 48 of our Revised Penal Code in relation to said crime, and by analogy, to the crime of rebellion defined in Arts. 134 and 135 of our Revised Penal Code, this Court deems it necessary, for the guidance of members of the Philippine Bar appearing in the above entitled rebellion cases. to summarize, in the light of the foregoing, its conclusions and rulings, as follows:

1. The elimination from our Revised Penal Code of the provisions of Art. 244 of the Penal Code of Spain of 1870, the retention therein of said code's provision relating to complex crimes, and the embodiment therein of the rebellion provisions of Act No. 292, show that our lawmakers intended to, and did thereby, create the complex crime of rebellion with murder, arson, etc. in this jurisdiction.

2. Considering pertinent legislative history, light and less grave felonies that may be committed in connection with or in furtherance of rebellion must now be deemed as absorbed by, merged in, and identified with, said crime of simple rebellion punished in Arts. 134 and 135 of the Revised Penal Code; and in view of metaphysical and physical impossibility of the greater being absorbed by the lesser, all grave felonies, such as murder, arson, kidnappings, etc. for each of which a penalty of *prisión mayor* or a still higher one is provided in our Revised Penal Code, must, if committed with

(*Continued on page* 618)

I

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

PARÁS, *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.°—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.°—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.°—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.°—POR CUANTO los comparecientes no desean sostener entre si ningún litigio para la división de la herencia, pues a todos consta la legitimidad 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.°—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 consideran 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 limito 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 treuble 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 compareciere" 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 immovable 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 título 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.

D E C I S I O N

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 obligation 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.

D E C I S I O N

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.

RENGZON, *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. Hercin 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 prescription, 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 *Luna 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, x x x es 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)

I

Valentin Domasig, Plaintiff-Appellee, vs. A. L. Ammen Transportation Co., Inc., Defendant-Appellee, CA-G. R. No. 8244-R, August 30, 1952, Gutierrez David, J.:

ACTION FOR DAMAGES ARISING FROM A COLLISION BETWEEN A TRUCK AND A BUS; NEGLIGIENCE; LIABILITY OF THE BUS COMPANY; CASE AT BAR. — On September 5, 1949 between 3:00 and 4:00 o'clock p.m., plaintiff boarded an Alatco bus of the Ammen Transportation Company at Sorsogon, Sorsogon, bound for Gubat and after passing a curve said bus stopped infront of a store in Gubat to take in and unload passengers. It parked on the right edge of the road and at a distance of 20 meters from the curve. While the inspector of the bus was examining the tickets of the passengers, a 6 x 6 cargo truck coming at a great speed from the direction of Sorsogon and bound for Gubat, bumped said Alatco bus on the left rear side destroying and damaging its rear portion and seats and pinning the left leg of the plaintiff between two seats thereof. Plaintiff was brought to the hospital wherein his leg was amputated at the joint below the knee. As a result of said injury he is now permanently disabled and has to depend on charity and the help of friends and relatives for his living. This action was brought by the plaintiff-appellee against the Ammen Transportation Company, the defendant-appellant for the recovery of damages in the amount of ₱6,300 resulting from the injury suffered by the plaintiff. HELD: It is beyond debate that appellant's liability was contractual. The contract was of carriage, appellant binding itself to carry the appellee safely and securely to his destination. Upon the facts of the case, we are of the opinion that the accident in question was caused by an act of a third person which, even with the exercise of utmost diligence, could not be reasonably foreseen. It was an extraordinary circumstance independent of the will of the appellant or its employees. It was, therefore, a *case fortuito*. The plaintiff may claim proper damages for his injury from the owner of operator of the cargo truck which bumped the Alatco bus.

Vicente L. Peralta, for the plaintiff-appellee.

Manuel O. Chan, for the defendant-appellant.

DECISION

GUTIERREZ DAVID, *J.*:

On May 22, 1950 Valentin Domasig filed this action in the Court of First Instance of Sorsogon, against A. L. Ammen Transportation Company, Inc. — hereinafter referred to as Alatco — to recover damages in the amount of ₱6,300.00 for the injury he suffered while a passenger of the bus No. 316 of the defendant transportation company.

In the main there is no dispute on the following facts of the case:

On September 5, 1949 between 3:00 and 4:00 o'clock p.m. Valentin Domasig boarded Bus No. 316 of the Alatco, at Sorsogon, Sorsogon, bound for Gubat and after passing a curve, said bus stopped in front of a store in Gubat, Sorsogon, to take in and unload passenger. It parked at the right edge of the road and at a distance of 20 meters from the curve. While the inspector of said bus was examining the tickets of the passengers, a 6 x 6 truck — owned and operated by Arnedo and Salandanan, of Castilla, coming at a great speed from the direction of Sorsogon and bound for Gubat — bumped said Alatco car on the left rear side destroying and damaging its rear portion and seats and pinning the left leg of Valentin Domasig between two seats thereof. Domasig was able to extricate himself with the help of his son, Benbenuto, and another passenger. He was later on brought to the Sorsogon Provincial Hospital in a sedan car of the Alatco. In the hospital his leg was amputated at the joint below the knee. He stayed in said hospital from September 5 to November 5, 1949 and spent ₱275.10 for hospitalization; ₱200.00 for medicines and ₱200.00 for subsistence. As a result of said injury he is now permanently disabled and has to depend on charity and the help of friends and relatives for his living.

Plaintiff has proved that although he was already old, of 87 years of age, he was still able to work as tenant, and had, at the time of the accident, an earning capacity of not less than ₱4.00 a day.

After trial, the lower court rendered judgment ordering the Alatco to pay to Domasig, as damages, the amounts of ₱2,000.00 for his permanent disability, ₱1,000.00 for moral damages and ₱525.10 for hospital expenses, and to pay the costs.

From the aforesaid judgment the Alatco has brought this appeal assigning, as errors of the trial court, the following: (1) in holding that parking a car 20 meters from a curve constitutes negligence; (2) in failing to consider that the accident from which plaintiff-appellee suffered the injuries complained of, was not due to the fault of the appellant or any of its agents; (3) in failing to take into account that the negligence and imprudence of the driver of the cargo truck which struck car No. 316 of the appellant was the immediate cause of the accident; (4) in holding appellant liable for damages to appellee; (5) in holding appellant liable to the plaintiff-appellee in the total sum of ₱3,525.10; and (6) in not dismissing plaintiff's complaint.

The judgment of the lower court against the appellant was predicated on the following findings:

> "x x x Considering specially the admitted fact that the Alatco car No. 316 was parked not only after passing the curve, but that the road was going down, and that the bus could be seen only after passing the curve, or at a distance of less than 20 meters, the defendant transportation company was guilty of negligence in parking in that place. By parking in that place, the defendant made it possible for the accident to happen. It should have exercised reasonable diligence, and should not have placed its car in a situation, where the contributory negligence of other drivers, and accident might happen. The defendant, having contributed to the accident, is liable for damages caused to the plaintiff who was a passenger in its car, as it is its duty as a carrier to transport its passengers safely to their destination."
>
> (R. on A., p. 13)

It is beyond debate that appellant's liability, if any, was contractual. The contract was of carriage, appellant binding itself to carry the appellee safely and securely to his destination. The only question to be determined is whether appellant's failure to do so was due to the causes mentioned in Art. 1105 of the Civil Code which reads as follows: "No one shall be liable by events which could not be foreseen or which, even if foreseen, were inevitable, with the exception of the cases in which the law expressly provides otherwise and those in which the obligation itself imposes such liability."

Upon the facts of the case, we are of the opinion that the accident in question was caused by an act of a third person which, even with the exercise of utmost diligence, could not be reasonably foreseen. It was en extraordinary circumstance independent of the will of the appellant or its employees. It was, therefore, a *caso fortuito*.

The act of the driver of the Alatco bus in stopping to load passengers and parking on the right side of the road at a distance of 20 meters from a curve is not a violation of any traffic regulation nor does it constitute negligence. The driver of the cargo truck which struck the Alatco bus was the one guilty of negligence.

Had he been sufficiently careful he would have had time and opportunity to avoid the mishap. Since the negligence of this driver created the situation from which the injury resulted, neither the driver nor the owner of the Alatco bus should be held liable therefor; and as far as these are concerned the injury should be regarded as an unavoidable accident.

WHEREFORE, without prejudice to the right of the appellee to claim the proper damages for his injury from the owner or operator of the cargo truck which bumped the Alatco bus, the judgment appealed from is, hereby, ordered reversed and the complaint dismissed, without costs.

Felix and Peña, J.J., concur.

II

Pedro Villarama, Plaintiff-Appellant, vs. Pampanga Bus Company, Inc., Defendant-Appellee; Adriano Lindayag, Plaintiff-Appellant, vs. Pampanga Bus Company, Inc., Defendant-Appellant CA-G.R. Nos. 11026-27-*R, Rodas, J.*

ACTION FOR DAMAGES RESULTING FROM A COLLISION BETWEEN A BUS AND AN ARMY TRUCK; NEGLIGENCE; FORCE MAJEURE; CASE AT BAR. — In the afternoon of December 22, 1948 plaintiffs boarded the Pambusco bus which was on its run from Manila to Malolos. On reaching a place at the highway between Bocawe and Bigaa, Bulacan, and when it was about to meet an Army Convoy, a bus of Villanueva Transit went ahead the Pambusco bus and before the Villanueva Transit Bus could take its proper side on the road a collision took place between said bus and a 6 x 6 truck of the Army Convoy, as a result of which the driver of the latter lost control of the wheel and in turn strucked the Pambusco Bus which fell on its right side. Plaintiffs suffered injuries. They filed this action against the Pambusco Bus Company asking each one of them ₱10.000.00 damages arising from the injuries they suffered. *HELD*: The Pambusco Bus Company is exempt from any civil liability. It was impossible for the Pambusco driver to do anything to prevent the collision of the Army truck with his bus. What the law says about fortuitous event is that it is an event which could not be foreseen or which though foreseen is inevitable. There was no means on the part of the Pambusco driver to avoid the collision of the Army truck with his bus. Had he stopped his bus by putting on the brake the collision would have taken place just the same.

F. R. Capistrano & M. L. Nicolas for the plaintiff.

Manuel O. Chan Counsel for the Defendant.

DECISION

RODAS, *J.*:

At 5 o'clock in the afternoon of December 22, 1948, Adriano Lindayag boarded the Pambusco Bus No. 44, which was on its run from Manila to Malolos, at the corner of Magdalena and Azcarraga streets, Manila, and Pedro Villarama on Rizal Avenue of the same City. On reaching a place at the highway between Bocaue and Bigaa, Bulacan, and when it was about to meet an Army convoy, a bus of the Villanueva Transit went ahead of the Pambusco bus and before the Villanueva Transit bus could take its proper side on the road collision took place between said bus and a 6 x 6 truck of the Army convoy, as a result of which the driver of the latter lost control of the wheel and in turn struck the Pambusco bus which fell on its right side. Both Pedro Villarama and Adriano Lindayag suffered injuries and had to be taken to the provincial hospital of Bulacan where they were treated, Villarama having remained in said hospital until January 9, 1948, while Adriano left after five days with the doctor's permission upon the assurance that he would have a local doctor of Paombong where he hails from to assist him.

Pedro Villarama filed Civil Case No. 377 on June 22, 1949, and Adriano Lindayag filed Civil Case No. 397 on October 10, 1949, both in the Court of First Instance of Bulacan, each asking ten thousand pesos damages arising from the injuries they suffered.

After the presentation of evidence by plaintiffs Villarama and Lindayag in said two civil cases which were tried together against defendant Pambusco Bus Co., Inc., the lower court on July 28, 1952, ordered the suspension of further proceedings until Criminal Cases Nos. 1009 and 10010 of said court concerning the same accident which gave rise to the filing of said two civil cases and were then pending in the Court of Appeals, be finally decided. Counsel for plaintiff Villarama moved in vain for the setting aside of said order. After due trial, the lower court handed down its decision in said two cases acquitting the defendant in both cases with costs against the plaintiffs, without prejudice to any civil action which plaintiffs may have against the Villanueva Transit.

The case is now before this Court on appeal based on the following assignment of errors:

1. In holding that defendant's breach of the contractual obligation of carriage was due to a fortuitous event.

2. In not holding that defendant was not free from fault or negligence or from participation in the aggravation of the injury resulting to the plaintiffs.

3. In absolving defendant from the plaintiffs' complaints and in not giving judgment for each plaintiff in the amount of ten thousand pesos (₱10,000.00) as compensatory and moral damages.

It is true that the actions brought by plaintiffs in the abovementioned two civil cases arise from the contracts of transportation impliedly entered into between said defendant company and the plaintiffs for their safe conveyance from the place where they boarded the bus in Manila to their destination in Malolos, Bulacan, and that any obligation arising from any injury or loss they may suffer on the way could only be excused by a fortuitous event and the burden of proof is incumbent upon the defendant to establish fortuitous event to rebut the presumption of fault or negligence on its part.

Pedro Villarama testified that the Pambusco bus was running at a regular speed or a little bit faster than the ordinary because "we were on a straight road and the Army trucks were coming from a different direction or toward Manila. The Villanueva bus which was following the same direction as ours succeeded in passing our bus".

Adriano Lindayag testified that after passing the building of the San Miguel Brewery in Balintawak the speed of "our bus was increased because there was no heavy traffic; it was running at a speed of 40 miles per hour. While between Bocaue and Bigaa at about 7 o'clock in the evening I suddenly noticed a collision of our bus with a truck and up to the moment of the collision our driver had not lower down his speed."

Juan Manalo, driver of the Pambusco bus, testified that upon arriving at Marilao, Bulacan, he put on his lights; that he noticed that all the cars had already their lights on; that he was running then at the rate of 30 kilometers per hour; that between Bocaue and Bigaa, he saw a convoy of Army trucks coming from the opposite direction and when he was about to meet them the Villanueva Transit bus suddenly passed him; that before it could reach its proper place it collided with the first Army truck and the truck in turn collided with his bus which was thrown sidewise.

Appellant's counsel contend "that the testimony of the Pambusco driver on cross-examination shows that he was not free from fault or negligence or from participation in the aggravation of the injury resulting to the plaintiffs', and in support of their contention they quoted part of his testimony:

P. Sabe usted si despues del choque siguio en camino corriendo o paro despues del choque?

R. No se he fijado porque mi coche se cayo.

P. Bueno, inmediatamente antes del choque del Army truck con Pambusco, usted se ha fijado a que sitio o a que distancia estaba Villanueva Transit?

R. Poco mas o menos de 10 metros.

P. Ese despues de que el Army (truck) haya chocado con el Villanueva Transit?

R. Si señor.

P. Al ver esto, que hizo cuando al ver que el Army truck choco con el Villanueva Transit que hizo usted?

R. Continuo manejando porque no podemos hacer parar.

P. Quiere usted decir que continuo corriendo haciendo correr el Pambusco?

R. Cuando al tiempo que ellos, el Army y Villanueva chocaron, inmediatamente el Army truck estaba ya conmigo y me chocco. (Tr. p. 10, trial of July 23, 1952).

The negligence of the Pambusco bus driver is made to consist in his inability to state whether after the Army truck collided with his bus the latter continued to run or came to a stop and in his failure to slacken his speed in spite of the fact that he saw an Army truck coming from the opposite direction and likewise in his failure to stop his bus when the Army truck collided with the Villanueva Transit bus. The inability of said driver to state whether the Army truck came to a stop after colliding with his bus only proves failure of his memory caused by the unexpected and unforeseen event of the collision of the Army truck first with the Villanueva bus and then with his bus. When the collision between the Villanueva Transit bus and the Army 6 x 6 truck took place the Pambusco bus was behind the Villanueva Transit bus at a distance of about 10 meters but before he could do anything the Army truck hit his bus. We don't see any negligence on the part of the driver of the Pambusco bus because of his failure to stop his bus. There was no chance or time for him to either slacken his speed or put the bus to a dead stop, for before he could do so the Army truck had already struck his bus. The collision between the Villanueva Transit bus and the Army truck and the collision between the 6 x 6 truck and the Pambusco bus must have taken place almost at the same time or at the wink of the eye. It was impossible for the Pambusco driver to do anything to prevent the collision of the Army truck with his bus. What the law says about fortuitous event is that it is an event which could not be foreseen or which though foreseen is inevitable. There was no means on the part of the Pambusco driver to avoid the collision of the Army truck with his bus. Had he stopped his bus by putting on the brake the collision would have taken place just the same.

Again appellant's counsel tried to lay the blame on the Pambusco bus driver because of his failure to slacken his speed when the Villanueva Transit bus overtook and passed him despite the fact that he saw an Army convoy of trucks coming from the opposite direction, and it was already dark, and in support of this contention counsel quoted from the testimony of the Pambusco bus driver the following:

Q. Immediately before the Villanueva Transit bus and the Army truck collided, did you notice whether there was any vehicle parked along the road?

A. No habia.

Q Was there any pedestrian walking?

A. No me he fijado.

Q. At the time were the lamps of your vehicle already lighted?

A. Si, señor.

Q. How long had you already lighted your lamps at the time you met the accident?

R. Estando en Marilao ya he abierto la luz.

Q. About the vehicles which are coming from the opposite direction of Malolos to Manila were they already lighted at the time the accident happened?

R. Si, señor, ya tenian.

Q. Immediately before you were overtaken by the Villanueva Transit bus did you notice any vehicle going ahead of you towards Malolos?

R. Muchos.

Q. Can you tell this Court the number more or less?

R. Habia muchos, ya era de noche.

Q. Were they more than ten?

R. Mas de dies.

Q. What were those vehicles if you know?

R. Trucks of an Army.

COURT:

Q. All those ten vehicles more or less that you saw are all Army trucks?

R. Si señor, porque tenian luz.

Q. Only you can see it was an army vehicle because of the light?

R. Yo lea vi por medio de la luz que tienen que eran convoy. (tr. pp. 14-16, July 28, 1952)

Counsel contend that the Pambusco bus driver's failure to notice whether there was a pedestrian on the road ahead of him again shows that he was inattentive or negligent. Again this is a question of memory. A driver, while passing along a road should notice of course the presence of pedestrians on both sides of the road and more particularly on the side where he is travelling, but that does not mean that he is bound to remember that at such and such a place at the time he was passing there were pedestrians and we believe no driver can have enough retentive memory as to be able to remember at what place or places on his way he saw pedestrians. He may remember for instance that while passing on the approach of a bridge or on the bridge he saw pedestrians on both sides or while going through a city or town or a barrio he saw people on the road but not in all the places of the road could he remember the presence of pedestrians. And when, as in this case, a collision occurred which involved his own bus and caused considerable damage thereto, there is nothing strange that he may have forgotten whether there were pedestrians or not at the place of the collision.

Again counsel contend that "the fact that it was already dark, that his bus and all vehicles he had met prior to the collision had their headlights on and that, prior to the mishap, he had already met ten Army trucks from the opposite direction, should have put him on his guard when he noticed or saw the Villanueva Transit bus trying to overtake and pass him and an Army convoy of trucks speeding toward them from the opposite direction should have put him on his guard when he noticed or saw the Villanueva Transit bus trying to overtake and pass him and an Army convoy of trucks speeding toward them from the opposite direction. Prudence and caution dictated an immediate slackening of his speed due to a possibility of collision between the Villanueva Transit bus and the incoming Army truck considering the narrow stretch of the road; but said Pambusco driver did not do so, in view of which the Army truck, after colliding with the Villanueva bus, struck the Pampanga bus on the rebound. Therefore, and even assuming that the collision between the Army truck and the Villanueva Transit bus was a case of fortuitous event, still there was fault or negligence on the part of the driver of the Pambusco bus." The Pambusco bus driver stated that upon seeing the Army convoy he lowered down his speed from 30 to about 25 kilometers per hour. He admitted that he did not slacken his speed while the Villanueva Transit bus was passing him or immediately after it had passed him. It should be remembered that both the drivers of the Pambusco bus and the plaintiff Adriano Lindayag testified that the

passing of the Villanueva Transit bus took place so suddenly and in fact Lindayag said he only noticed it when all of a sudden the collision took place. And the plaintiff Pedro Villarama did not even notice the Villanueva Transit bus passing the Pambusco bus. The Pambusco bus driver stated that he knew the Villanueva Transit bus was following him because of his light but all of a sudden he just saw it ahead. If the Pambusco bus was running fast it would have taken the Villanueva Transit bus sometime to get ahead of the Pambusco bus. The fact that he was able to do so without being noticed shows that he did it so quick while the Pambusco bus, as the driver stated, was running about 25 kilometers per hour after having slackened down his speed upon seeing the convoy coming. A speed of 25 kilometers per hour would allow the driver to bring the bus to a dead stop within less than one meter distance if his brakes are in good working condition. If the driver of the Villanueva Transit bus dared pass the Pambusco bus notwithstanding the incoming Army convoy of several trucks that goes to show that said driver must have estimated that he could do so without any risk of collision. And the driver of the Pambusco bus who feared no collision at all between the incoming Army convoy and his bus had no reason to still slacken his speed after having done so upon seeing the Army convoy. At any rate, at the speed he was running he could bring his bus to a dead stop within a distance of one meter but the trouble came because of the miscalculation of the distance between the Villanueva Transit bus and the incoming Army convoy and this brought about the collision and made it impossible for the Pambusco driver to stop his bus or maneuver in some way to avoid the accident because of the suddenness of the event. If cars or buses have to stop on the highway upon seeing incoming Army convoy of trucks, we can hardly figure out the blocking of traffic that may result. A slackening of the speed of said cars or buses was more than enough to forestall untoward event and no collision would have taken place had the Villanueva Transit bus which was behind the Pambusco bus had not dared to pass the latter. No rules of traffic require the stopping of cars or buses on a highway upon meeting Army convoy. In fact no rules of traffic require even the slackening of speed provided the proper distance is observed; that is why a middle line is always drawn on highways so that no car or bus will encroach on the opposite lane except when there is a clear road. Counsel for appellants are willing to concede that the collision between the Army truck and the Villanueva Transit bus was a case of fortuitous event but are not willing to concede that there was no fault or negligence on the part of the driver of the Pambusco bus. We differ on this altogether, that is, that the collision between the Army truck and the Villanueva Transit bus was due to the carelessness and imprudence of the latter's driver while the collision between the Army truck and the Pambusco bus was a clear case of fortuitous event.

Counsel for appellants contend that the Pambusco bus driver was running at a speed of more than 40 miles per hour or about 64 kilometers and not 25 or 30 kilometers, as testified to by said driver. In this connection said counsel stated: "It is, therefore, probable that when the Villanueva Transit bus was trying to overtake the Pambusco bus, each considerably increased its speed; the former to overtake and pass the latter, and the latter not to be overtaken and passed behind by the former. Under the circumstances, the estimated speed of 40 miles per hour given by Adriano Lindayag as the speed of the Pambusco bus when it was overtaken and left behind by the Villanueva Transit bus is more worthy of credence, than the speed of 25 kilometers (about 15 miles) testified to by the Pambusco bus driver. At the speed of 15 miles per hour, a motor vehicle can be put to a stop in an instant. If the Pambusco bus could not be put to a stop despite the application of the brakes, it was because it was running fast despite the apparent probability of collision under the circumstances, which the Pambusco bus driver did not heed. He was, therefore, negligent because he should have foreseen the collision, and did not exercise diligence to avoid or prevent the same." Experience tells us that buses on the highway run most of the time faster than 40 miles per hour. In fact only powerful cars can overtake them and even drivers of such cars would not dare do so. Such buses constitute a terror not only to pedestrians but also to automobiles. In the instant case, however, all indications are to the contrary. It was established without contradiction that the distance between Manila and Malolos is 43 kilometers and that around five o'clock in the afternoon of December 22 the Pambusco bus No. 44 was at the corner of Azcarraga and Magdalena streets where plaintiff Villarama boarded it and a little later the other plaintiff Lindayag boarded the same bus along Rizal Avenue and that the collision took place between Bocaue and Bigaa between 6 and 8 o'clock in the evening or about 20 or 25 kilometers from the starting point which was covered by said bus in over one hour. It is, therefore, not probable that it would have run faster than 30 kilometers per hour. Moreover if, as contended by counsel for appellants, "when the Villanueva Transit bus was trying to overtake the Pambusco bus, each considerably increased its speed, the former to overtake and pass the latter, and the latter not to be overtaken and passed behind by the former, and that under the circumstances, the estimated speed could not be less than 40 miles per hour," the passengers of the Pambusco bus, including the two plaintiffs herein, would have naturally noticed the race between the two buses and certainly the damage caused to the buses would have been greater and probably there would have been some casualties. Nothing of this sort happened. The passing of the Villanueva Transit bus was almost unnoticed by the passengers of the Pambusco bus including the two plaintiffs, so that even against our personal experience we have to admit that all the facts established by the evidence in this case afforded by the witnesses for both sides — excluding Adriano Lindayag who inspite of not having noticed that there was a race between the Pambusco bus and the Villanueva Transit bus has assured the court that the Pambusco bus was running over forty miles per hour — do not uphold the theory of appellants' counsel.

We need not pass on the other legal questions raised by counsel for appellants for what has already been stated is more than sufficient to lead us to the conclusion that the decision appealed from is in accordance with the law and facts of the case and is hereby affirmed with costs against appellants.

Feliz and Peña, J.J., concur.

JUDGE MORFE UPHOLDS THE . . .

(*Continued from page* 618)

crime of illegal association for which the accused was formerly convicted, it being possible under Arts. 134 and 135 of our Revised Penal Code for one who is not a member of an illegal association to commit rebellion by joining in an armed uprising against the government. Moreover, this Court does not adhere to the doctrine set by our Court of Appeals in the case of People v. Cube, CA-G.R. No. 1069, decided on November 24, 1948, in which it was held that mere membership in or identification with an organization openly fighting to overthrow the government is legally sufficient to render one guilty of rebellion in this jurisdiction. This Court holds the view, in this connection, that one accused of rebellion must perform an overt act of public disorder consisting in direct participation in an uprising against the government before he can be convicted of the offense of rebellion under our Revised Penal Code, and is consequently of the opinion, and so holds, that the evidence of membership in an illegal association for which the accused was convicted in Crim. Case No. 19179 of this Court on December 14, 1951 would not be sufficient to convict him of the offense of rebellion now charged against him, it being necessary in the latter case that an additional evidence, namely, that he actually took part in armed uprising against the government, be adduced against him. This accused's motion to quash under sub-sec. (h), Sec. 2, of Rule 113 is, therefore, without merit. (People v. Garcia, 63 Phil. 296; Blair v. State, 81 Ga. 629; 7 S.E. 855; State v. White, 123 Iowa 425; 98 N.W. 1027).

DECISIONS OF THE COURT OF INDUSTRIAL RELATIONS

I

National Labor Union, Petitioner, vs. Malate Taxicab & Garage, Inc., Respondent, Case No. 946-V, November 9, 1954, Bautista, J.

1. COURT OF INDUSTRIAL RELATIONS; PAYMENT OF ONE MONTH SEPARATION PAY; LAW APPLICABLE. — The petition alleges that the 360 drivers of respondent were dismissed without one month notice on September 10, 1954, and that respondent, when required to pay them one month compensation, refused to do so. *HELD*: There is a cause of action based on the provisions of Republic Act No. 1052 which was enacted on June 12, 1954.

2. IBID.; IBID.; IBID.; TAXICAB DRIVERS ENTITLED TO ONE MONTH COMPENSATION UNDER REP. ACT NO. 1052; MEANING OF ONE MONTH COMPENSATION. — The case of Lara vs. Del Rosario (50 O. G., No. 5, 1975) wherein the Supreme Court held that drivers of taxicabs do not come under the provisions of Art. 302 of the Code of Commerce, because they have no fixed salary either by the day, week or the month, while the Code of Commerce speaks of "salary corresponding to one month" commonly known as "mesada", being an interpretation of a law which no longer exists is not applicable to the instant case, because Republic Act No. 1052 is different from the old law. Instead of "mesada" the new law speaks of "one month compensation". This means that whatever may be the compensation, whether it is based on a fixed salary for hours of work or by piece work, or by commission basis, falls under the provision of the new law. Since the payment by commission is also a form of compensation, the drivers in this case are within the scope of said Republic Act.

3. IBID.; COMMONWEALTH ACT NO. 103 NOT REPEALED BY INDUSTRIAL PEACE ACT. — Although modified and supplemented by the Industrial Peace Act, Commonwealth Act No. 103 is still in force. The Industrial Peace Act expressly recognizes the Court of Industrial Relations by declaring that when this Act uses "Court" it means the Court of Industrial Relations *unless another Court shall be specified*." And instead of reducing the exclusive jurisdiction of the Court of Industrial Relations, the new law amplified it in cases related to unfair labor practice, certification election, investigation of internal labor organization procedures, compliance of Republic Act No. 602 and Commonwealth Act No. 444 and many other matters. There is no provision in the new law expressly repealing Commonwealth Act No. 103, but a repealing clause worded in general term: "Sec. 29. Prior Inconsistent Laws. — All acts or parts of acts inconsistent with the provisions of this Act are hereby repealed."

4. IBID.; IBID.; EFFECT OF THE INDUSTRIAL PEACE ACT ON THE COURT'S POWER OF COMPULSORY ARBITRATION UNDER COMMONWEALTH ACT NO. 103.— The compulsory arbitration in the old Act, being inconsistent with the purpose of the new law, is abolished and replaced by the process of collective bargaining. But this does not mean that the whole C. A. No. 103 is repealed. Since "laws are repealed only by subsequent ones", (NCC Art. 7) not by mere implication, the duty of the Court is to reconcile apparently conflicting laws.

5. IBID.; IBID.; IBID.; POWER OF THE COURT TO ENFORCE PAYMENT OF SEPARATION PAY. — The question is whether the Court of Industrial Relations can enforce the provision of law relating to the protection of workers. This is not a question of arbitration. No arbitration is sought by the petitioner. The question of separation pay cannot be settled in an arbitration proceeding. Since the very law fixed the amount of compensation and voids its waiver, the matter cannot be the subject either by arbitration or collective bargaining. Because, the arbitrator or the contracting parties may not fix other amounts and other terms and conditions different from the legal ones. When the "Mesada" was awarded in the leading cases of Sta. Mesa Slipways vs. CIR (G. R. No. 4521) and Philippine Manufacturing Co. vs. National Labor Union (G. R. No. 4507) the Court of Industrial Relations did not act as an arbitrator nor do any arbitration.

"No Court of the Philippines shall have the power to set wages, rates of pay, hours of employment, or conditions of employment", etc. (Sec. 7, Rep. Act No. 875). What the law wants is that the fixing of conditions of labor be left to collective bargaining. The petition for the payment of separation pay does not ask the Court of Industrial Relations to fix the condition of employment, since the law itself had already fixed it. What is asked is the enforcement of the condition of employment that is already fixed.

If the mere adjudication of one month compensation amounts to fixing the condition of employment, no court, not even the Supreme Court nor the Court of First Instance can award it, because the law says 'no court' at all can fix the conditions of employment. In such case, in what Court may the aggrieved party bring his grievances?"

Eulogio R. Lerum, for the petitioner

Diaz and *Baizas*, for the respondent.

O R D E R

Petitioner National Labor Union prays that respondent Malate Taxicab & Garage, Inc. be ordered to pay one month separation pay to all its drivers who were dismissed on September 10, 1954.

Both parties agree that respondent is a commercial establishment operating a fleet of taxicabs under the Public Service Commission; that to operate said taxicabs, respondent had to hire drivers who were paid on commission basis of 25%, on the gross earnings; that on September 10, 1954, said cars were sold to the Manila Yellow Taxicab Company and on the same date, the 360 drivers of the respondent were dismissed without giving them 30 days advance notice.

Respondent moves to dismiss this case on three (3) grounds:

1. That the petition states no cause of action;
2. That this Court has no jurisdiction over the case at bar; and
3. That the petitioning union has no capacity to sue in behalf of the 360 drivers.

I — Since the petition alleges that the 360 drivers of the respondent were dismissed without one month notice on September 10, 1954; and that the respondent, when required to pay them one month compensation, refused to do so, there is a cause of action based on the provisions of Republic Act No. 1052, which was enacted on June 12, 1954.

The case of Lara vs. Del Rosario (50 O.G. No. 5, 1975) is invoked, wherein the Supreme Court held that drivers of taxicab do not come under the provision of Art. 302 of the Code of Commerce, because they have no fixed salary either by the day, week or month, while the Code of Commerce speaks of "salary corresponding to one month", commonly known as "mesada."

The cited case, being an interpretation of a law, which no longer exists, is not applicable to this case, because Republic Act No. 1052 is different from the old law. Said Republic Act reads as follows:

"Section 1. In cases of employment, without a definite period, in a commercial industrial, or agricultural establishment of enterprise, neither the employer nor the employee shall terminate the employment without serving notice on the other at least one month in advance.

The employee, upon whom no such notice was served, shall be entitled to one month's compensation from the date of termination of his employment.

Section 2. Any contract or agreement contrary to the provisions of section one of this Act shall be null and void.

Section 3. This Act shall take effect upon its approval."

Instead of "mesada" the new law speaks of "one month compensation". This means that whatever may be the compensation, whether it is based on a fixed salary for hours of work or by piece work, or by commission basis, falls under the provision of the new law. Since the payment by commission is also a form of compensation, the drivers in this case are within the scope of said Republic Act.

II — (Although modified and supplemented by the Industrial Peace Act, Commonwealth Act No. 103 is still in force. The Industrial Peace Act, expressly recognizes the Court of Industrial Relations by declaring that when this Act uses "Court" it means the Court of Industrial Relations *unless another Court shall be specified*".

And instead of reducing the exclusive jurisdiction of the Court of Industrial Relations, the new law amplified it in cases related to unfair labor practice, certification election, investigation of internal labor organization procedures, compliancce of Republic Act No. 602 and Commonwealth Act No. 444 and many other matters.

We find in the new law, not a provision expressly repealing Commonwealth Act No. 103, but a repealing clause worded in general term:

> "Sec. 29. Prior Inconsistent Laws. — All acts or parts of acts inconsistent with the provisions of this Act are hereby repealed."

We find also that the compulsory arbitration in the old Act, being inconsistent with the purpose of the new law, is abolished and replaced by the process of collective bargaining. But this does not mean that the whole C. A. No. 103 is repealed. Since "laws are repealed only by subsequent ones", (NCC Art. 7) not by mere implication, our duty is to reconcile apparently conflicting laws.

The question here is whether this Court can enforce the provision of law relating to the protection of workers. This is not a question of arbitration. No arbitration is sought by the petitioner. The question of separation pay cannot be settled in an arbitration proceeding. Since the very law fixed the amount of compensation and voids its waiver, the matter cannot be the subject either by arbiration or collective bargaining. Because the arbitrator or the contracting parties may not fix other amounts and other terms and conditions different from the legal ones. When the "Mesada" was awarded in the leading cases of Sta. Mesa Slipways vs. CIR (G.R. No. 4521) and Philippine Manufacturing Co. vs. National Labor Union (G. R. No. 4507) this Court did not act as an arbitrator nor do any arbitration.

"No Court of the Philippines shall have the power to set wages, rates of pay, hours of employment, or conditions of employment, etc. (Sec. 7, Rep. Act No. 875). What the law wants is that the fixing of conditions of labor be left to collective bargaining. The herein petitioner does not ask this Court to fix the condition of employment, since the law itself had already fixed it. They ask for the enforcement of the condition of employment that is already fixed.

If the mere adjudication of one month compensation amounts to fixing the condition of employment, no court, not even the Supreme Court nor the Court of First Instance can award it, because the law says "no court" at all can fix the conditions of employment. In such case, in what Court may the aggrieved party bring his grievances?

Moreover, as the counsel of the petitioner rightly says: "if this Honorable Court has the exclusive jurisdiction to enforce collective bargaining contracts (the contract is the law between the contracting parties) which was recognized by the Supreme Court in G. R. No. L-5649, P.S. United Mine Workers vs. Samar Mining Co., May 12, 1954, it necessarily follows that it had also jurisdiction over all labor dispute involving a right granted by law such as the payment of separation pay." (Memorandum by the petitioner, p. 7).

We conclude, therefore, that, when the one month separation pay was demanded by the drivers and the respondent refused to pay it, it became a labor dispute cognizable by this Court under Commonwealth Act No. 103.

III—As to the alleged union's lack of capacity to represent its members, the mere enumeration of the labor organization's rights by the new law does not alter the right of labor unions to represent its members recognized by Commonwealth Act No. 213 and sanctioned by a long practice in this jurisdiction.

WHEREFORE, the respondent's motion to dismiss is denied for lack of merit; and said respondent shall pay to each of said 360 drivers ₱120.00 as separation pay, based on 30 working days at ₱4.00 per day, which is the minimum wage fixed by law.

SO ORDERED.

Manila, Philippines, November 9, 1954.

(Sgd.) JOSE S. BAUTISTA
Associate Judge

II

The Catholic Church Mart Factory, Petitioner, vs. The Federation of Free Workers (Building Employees Association), Respondent, Case No. 156-ULP, March 17, 1954, Lanting, J.

1. COURT OF INDUSTRIAL RELATIONS; UNFAIR LABOR PRACTICE; RIGHT OF THE EMPLOYER TO INSTITUTE UNFAIR LABOR PRACTICE PROCEEDING AGAINST A LABOR ORGANIZATION. — Where the complaint alleges that on different dates the members of the respondent association coerced, threatened, and intimidated certain employees into joining said association in its strike against the said employer, it cannot be said that the employer has no right to initiate an unfair labor practice proceeding against the said labor organization because the acts complained of certainly affect its interest. Furthermore, the provision of Seciton 4 (b) (1) of Republic Act No. 875 which is alleged to have been violated is a verbatim copy of section 8 (b) (1) (a) of the National Labor Relations Acts of the United States, as amended by the Taft-Hartley Act. The Reports of Decisions and Order of the National Labor Relations Board abound with cases in which employers are the charging parties in cases of unfair labor practice falling under the provisions of the American law above adverted to. The propriety of the employer appearing as a party to an unfair labor practice proceeding in the United States, as far as can be ascertained, has not been successfully questioned.

2. IBID; IBID; COURT AS THE REAL COMPLAINANT IN AN UNFAIR LABOR PRACTICE PROCEEDING. — It can be also said that the real complainant in an unfair labor practice proceeding is the court itself. Section 5(b) of Rep. Act. No. 875 provides, among other things, that "Whenever it is charged by an offended party or his representative that any person has engaged or is engaging in any such unfair labor practice, the Court or any agency or agent designated by the Court must investigate such charge and shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect . . ." Under this provision an offended party or his representative may file a charge that a person has engaged or is engaging in unfair labor practice. Such charges must be investigated by this Court or any agency or agent designated by it and it is only after the investigation when the facts so warrant that a complaint is issued and caused to be served against the offending party. Since the camplaint is issued by this Court or its designated agency or agent, necessarily it is itself the complainant. Of course, this may give rise to the criticism that the law makes this Court the accuser,

prosecutor and judge all at the same time. To a certain extent, such criticism has a ring of validity. The same criticism was levelled against the National Labor Relations Board as it followed the procedure prescribed by the Wagner Act. Even then, the procedure has not been successfully challenged in the courts as violative of the due process clause of the constitution. It was partly to obviate the criticism that the Wagner Act was amended by the Taft-Hartley Act by creating the position of General Counsel who was made independent of the Board and given final authority in respect of investigation of charges, issuance of complaints and the prosecution of such complaints before the Board. It would be well if our Legislature would also introduce the same amendment to our law.

3. IBID; IBID; UNREGISTERED LABOR ORGANIZATION AS RESPONDENT IN AN UNFAIR LABOR PRACTICE CASE. — It can be stated as a general proposition that a labor organization need not be registered in order to come within the purview of Section 4(b), of the Industrial Peace Act. In the first place, if it was the intention of the legislature to make only registered labor organizations subject to the provisions of Sec. 4(b) it would have qualified the phrase "labor organization" with the word "legitimate".

In the second place, acts falling under said section are generally committed during the time that a labor union is in the process of formation or organization and therefore prior to its registration. If respondent's contention is correct, such acts would be beyond the power of this Court to prevent. Worse still, a labor organization may continually commit acts of unfair labor practice and yet, by simply not registering with the Department of Labor, render itself immune for the penalties and remedies provided in the Act. Such a result would violate the spirit and intent of the law.

In the third place, the argument that a labor organization cannot defend an action in its own name because it is not a legitimate labor organization would hold water only in cases of actions or suits in which the subject matter is the Union's property [See Sec. 24(d)] but not where the proceeding does not involve any of its properties. Furthermore, an unfair labor practice case initiated under Sec. 5 is not an action or suit at law nor is it a litigation between individual litigants for damages or other private redress. It is a public procedure for the attainment of public ends and not a private one to enforce a private right.

4. IBID; IBID; CRIMINAL COMPLAINT INVOLVING THE SAME ACTS IS NOT A BAR TO COMPLAINT FOR UNFAIR LABOR PRACTICE. — The pendency of a criminal complaint before the Fiscal's Office involving the same acts alleged in the complaint constituting unfair labor practice, is not a bar to an unfair labor practice proceeding. An unfair labor practice case initiated under Sec. 5 of Rep. Act No. 875 is not criminal or penal in nature. The Court of Industrial Relations has already made a ruling to this effect in Case No. 4-ULP entitled, "La Mallorca Local 101 vs. La Mallorca Taxi" and it was sustained by the Supreme Court when it dismissed for lack of merit the appeal interposed by the respondent in that case. Furthermore, to support a finding of guilt in a criminal action, the degree of proof required is "beyond reasonable doubt." To sustain a finding that a person has engaged in unfair labor practice within the meaning to Sec. 4 of the Act, only substantial evidence is necessary. (See Sec. 6). Consequently, an acquittal in a criminal case would not necessarily result in dismissal of an unfair labor practice complaint based on the same acts because of the difference in the degree of proof required in each case. Since no criminal punishment can be meted out by this Court in the present proceeding, respondent has no cause to complain that it would be put in double ejopardy.

5. IBID; IBID; RIGHTS OF THE EMPLOYEES TO ABSTAIN FROM UNION ACTIVITIES IS GUARANTEED BY THE INDUSTRIAL PEACE ACT. — Sec. 3 of Rep. Act No. 875, as it is, fully guarantees to employees the right to refrain or abstain from any and all union activities as a corollary of its express guarantee that they shall have the right to form, join or assist labor organizations of their own choosing. This conclusion is supported by American precedents which have great persuasive effect because of the origin and antecedents of our law.

Jose W. Diokno, for the petitioner.

Ramon Garcia, for the respondent.

ORDER

This is a motion of counsel for respondent praying for the dismissal of the complaint filed in the above-entitled case by the Acting Prosecutor of this Court. The said motion is based on four grounds which shall presently be taken up in the order they appear in the motion.

1. That complaint is not prosecuted in the name of the real parties in interest.

It is claimed by the respondent that the employees Catholic Church Mart Factory had no interest in the present case and that the compalint should have been instituted by the employees who claim that unfair labor practices have been committed against them. The complaint alleges that on different dates the members of the respondent association coerced, threatened, and intimidated certain employees of the Catholic Church Mart Factory into joining said association in its strike against the said employer. Considering carefully the acts enumerated in the complaint, it cannot be said that the employer has no right to initiate the present proceeding because the acts complained of certainly affect its interest. Furthermore, the provision of Section 4 (b) (1) of Republic Act No. 875 which is alleged to have been violated is a verbatim copy of section 8(b) (1) (a) of the National Labor Relations Acts of the United States, as amended by the Taft-Hartley Act. The Reports of Decisions and Order of the National Relations Board abound with cases in which employers are the charging parties in cases of unfair labor practice falling under the provisions of the American law above adverted to. The propriety of the employer appearing as a party to an unfair labor practice proceeding in the United States, as far as can be ascertained, has not been successfully questioned.

It can be also said that the real complainant in this case is the court itself. Section 5(b) of Rep. Act No. 875 provides, among other things, that "Whenever it is charged by an offended party or his representative that any person has engaged or is engaging in any such unfair labor practice, the Court or any agency or agent designated by the Court must investigate such charge and shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect . . ." Under this provision an offended party or his representative may file a charge that a person has engaged or is engaging in unfair labor practice. Such charges must be investigated by this Court or any agency or agent designated by it and it is only after the investigation when the facts so warrant that a complaint is issued and caused to be served against the offending party. Since the complaint is issued by this Court or its designated agency or agent, necessarily it is itself the complainant. Of course, this may give rise to the criticism that the law makes this Court the accuser, prosecutor and judge all at the same time. To a certain extent, such criticism has a ring of validity. The same criticism was levelled against the National Labor Relations Board as it followed the procedure prescribed by the Wagner Act. Even then, the procedure has not been successfully challenged in the courts as violative of the due process clause of the constitution. It was partly to obviate the criticism that the Wagner Act was amended by the Taft-Hartley Act by creating the position of General Counsel who was made independent of the Board and given final authority in respect of investigation of charges, issuance of complaints and the prosecution of such complaints before the Board. It would be well if our Legislature would also introduce the same amendment to our law.

It would have been better if, in conformity with established American procedure, this case was entitled, "In the Matter of Catholic

Church Mart Factory and the Federation of Free Workers and Building Employees Association." The fact, however, that the complaint was not so titled does not render it fatally defective and it may serve as the basis for the continuation of the instant proceeding without causing substantial prejudice to the parties concerned.

The Court therefore finds the first ground as without merit.

2. The Federation of Free Workers is not the proper respondent in this unfair labor practice Case.

There are two main reason adduced in support of this ground. The first is that it is only the Building Employees Association, a legitimate labor organization, which has been representing the unionized employees of the Catholic Church Mart Factory and negotiating with said company, thereby implying that only said union could be made respondent and that "assuming that there is one or two officers of the Federation of Free Workers who committed alleged unfair labor practices then it should be only these persons who should be charged for unfair labor Practice and not the Federation of Free Workers." The second reason is that "the Federation of Free Workers is not a legitimate labor organization and therefore cannot defend an action in its own name."

As to the first reason, if it can be shown at the trial on the merit that certain officers of the Federation of Free Workers committed acts constituting unfair labor practice *as its agents*, then such acts would also be considered as the acts of the Federation, and an order may be issued requiring it to cease and desist from the unfair labor practice and to take such affirmative action as will effectuate the policies of the Industrial Peace Act. If it can be shown further that the Building Employees Association is only an affiliate of the Federation of Free Workers, and that both of them committed acts of unfair labor practice either by themselves or through their agents, both may be made subject to the remedies provided in the Act.

The Court also considers the second reason as untenable. In the first place, if it was the intention of the legislature to make only registered labor organizations subject to the provisions of Sec. 4(b) it would have qualified the phrase "labor organization" with the word "legitimate".

In the second place, acts falling under said section are generally committed during the time that a labor union is in the process of formation or organization and therefore prior to its registration. If respondent's contention is correct, such acts would be beyond the power of this Court to prevent. Worse still, a labor organization may continually commit acts of unfair labor practice and yet, by simply not registering with the Department of Labor, render itself immune for the penalties and remedies provided in the Act. Such a result would violate the spirit and intent of the law.

In the third place, the argument that the Federation of Free Workers cannot defend an action in its own name because it is not a legitimate labor organization would hold water only in cases of actions or suits in which the subject matter is the Union's property [Sec. 24(d)]. The present proceeding does not involve any of its properties. Furthermore, an unfair labor practice case initiated under Sec. 5 is not an action or suit at law nor is it a litigation between individual litigants for damages or other private redress. It is a public procedure for the attainment of public ends and not a private one to enforce a private right.

Summing up, it can be stated as a general proposition that a labor organization need not be registered in order to come within the purview of Sec. 4 (b) of the Act.

3. The alleged acts of unfair labor practice complained of are the subject of criminal proceedings in the Fiscal's Office of the Cit yof Manila.

The pendency of a criminal complaint before the Fiscal's Office involving the same acts alleged in the present complaint as constituting unfair labor practice is being invoked as a bar to the instant proceeding. The nature of an unfair labor practice proceeding has been hereinabove dealt with and it would be superfluous to discuss it again at this juncture. Suffice is to state that an unfair labor practice case initiated under Sec. 5 of Rep. Act No. 875 is not criminal or penal in nature. This Court has already made a ruling to this effect in Case No. 4-ULP entitled, "La Mallorca Local 101 vs. La Mallorca Taxi" and it was sustained by the Supreme Court when it dismissed for lack of merit the appeal interposed by the respondent in that case. Furthermore, to support a finding of guilt in a criminal action, the degree of proof required is "beyond reasonable doubt." To sustain a finding that a person has engaged in unfair labor practice within the meaning to Sec. 4 of the Act, only substantial evidence is necessary. (See Sec. 6). Consequently, an acquittal in a criminal case would not necessarily result in dismissal of an unfair labor practice compiaint based on the same acts because of the difference in the degree of proof required in each case. Since no criminal punishment can be meted out by this Court in the present proceeding, respondent has no cause to complain that it would be put in double jeopardy.

4. The complaint states no cause of action.

In connection with this ground, respondent argues that granting, without admitting, that the acts enumerated in the complaint constitute restraint or coercion under Sec. 4(b) (1) of the Act, they do not constitute unfair labor practice on the part of a labor organization or its agents. As previously pointed out, Sec. 4 (b) (1) was copied from Sec. 8(b) (1) (a) of the National Labor Relations Act or the Wagner Act as amended by the Taft-Hartley Act. However, as correctly pointed out by counsel for respondent, Sec. 3 of our law was copied from Sec. 7 of the Wagner Act as originally enacted, that is, without the following Taft-Hartley amendatory provision: "and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3)." On the basis of this difference between our law and the Taft-Hartley Act, respondent argues that inasmuch as Sec. 3 of our law does not expressly guarantee to employees the right to refrain from union activities, the violaiton of such right does not constitute unfair labor practice on the part of a labor organization or its agents.

After a very careful examination of this issue, this Court is of the opinion that Sec. 3 of Rep. Act No. 875, as it is, fully guarantees to employees the right to refrain or abstain from any all union activities as a corollary of its express guarantee that they shall have the right to form, join or assist labor organizations of their own chosing. This conclusion is supported by American precedents which have great persuasive effect because of the origin and antecedents of our law.

> "Although the latter right of abstention from union affiliation was not contained in the original act and was newly introduced in legislative form by the amended Act, *this right was freely recognized by the courts prior to the enactment of the amended Act.*" (Rothenberg, Law of Labor Relations, p. 353, citing the cases of Tri-Plex Shoe Co. vs. Cantor, 25 F. Supp. 996; Magnolia Petroleum Co. vs. N.L.R.B., 115 F. (2nd) 1007; DeBardeleben vs. N.L.R.B., 135 F. (2nd) 13; N.L.R.B. vs. Superior Tanning Co., 117 F. (2nd) 881). "It has long been held that in making their choice, whatever it be, whether to join an existing affiliated or unaffiliated union, or to form a new union, *or in choosing to abstain from joining or aiding any union, the employees are entitled to the full protection of the Act.*" (Supra, citing the cases of N.L.R.B. vs. Sterling Motors Co., 109 F. (2nd) 194; Consolidated Edison Co. vs. N.L.R.B., 305 U.S. 197; and N.L.R.B. vs. Schwarzt, 146 F. (2nd) 773).

It will thus be readily seen that the Taft-Hartley amendment protecting the right of employees to refrain from union activities was only a legislative reiteration of a long-established doctrine laid down by the courts.

WHEREFORE, the motion to dismiss is denied and let the Clerk of Court set the case for hearing on the merits at 8:30 o'clock a.m. and 2:00 p.m. on March 22, 23, and 24, 1954.

SO ORDERED.

Manila, Philippines, March 17, 1954.

(Sgd) JUAN L. LANTING
Associate Judge

OPINIONS OF THE SECRETARY OF JUSTICE

OPINION NO. 262

(On the question as to whether the family drivers may be considered house helpers within the contemplation of Article 1695 of the Civil Code.)

October 6, 1954

Mr. Ruben F. Santos
Acting Chief
Wage Administration Service
Department of Labor
Manila

S i r :

This is in reply to your request for opinion on whether family drivers may be considered house helpers within the contemplation of Article 1695 of the Civil Code which provides:

> "Article 1695. House helpers shall not be required to work more than ten hours a day. Every house helper shall be allowed four days' vacation each month, with pay."

The above-quoted article is found in the Section on "Household Service" (Section 1, Chapter 3). Commenting on this Section, the Code Commission stated: "Domestic servants in the Philippines have not, as a general rule, been fairly treated. x x x . Consequently, under the heading of 'Household Service' there are provisions to strengthen the rights of domestic servants." (Report of the Code Commission on the Civil Code, p. 15.) The term *house helper* was therefore used in said section with the same connotation as the term domestic servant.

A "domestic servant" is one who renders such services in and about the employer's home which are usually necessary or desirable for the maintenance and enjoyment thereof and ministers exclusively to the personal comfort and enjoyment of members of his employer's family. (See Anderson v. Ucland, 267 NW 517; In re Johnson, 282 NYS 806; In re Howard, 63 F 263.) It is true that, ordinarily, it is not the family driver's job to take part in the care of the employer's home. But he does usually live there or, at least, must be there to be available whenever his employer or any member of his family needs his services. His duties consist in keeping the car, and in many cases the garage, in good condition, and in driving his employer and any of the latter's family to and from work, school, business and social engagements, and other places. Not infrequently, during his stand-by periods, he is called upon to perform odd jobs or errands in or about the house.

Ministering exclusively to the personal comfort and enjoyment of the members of his employer's family, I am of the opinion that the family driver is a house helper or domestic servant within the meaning of Article 1695 of the New Civil Code. A motor vehicle driver is not unlike the family coachman of bygone days whose duty it was partly to assist in keeping the stables, horses, and carriages in good order, and principally in driving any of the carriages when the employer or any of his employer's family went out. Such coachman, it was held, was a "personal or domestic servant". (In re Howard, *supra*.)

Your query therefore should be, and is, answered in the affirmative.

Respectfully,
(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 296

(On the questions as to what comprises "a day" under the Minimum Wage Law and as to whether the following workers are covered by the Minimum Wage Law: (1) Night club hostesses who do not observe fixed working hours and whose income depend solely on the tips of customers; and (2) barbers working in a barbershop operated by another who are paid on commission basis.)

October 27, 1954

The Acting Chief
Wage Administration Service
M a n i l a
S i r :

This is in reply to your letter requesting opinion on certain questions regarding the interpretation of the Minimum Wage Law (Republic Act No. 602).

Your first query has reference to the hours of work a non-agricultural worker or employee must perform daily in order to be entitled to the daily minimum wage of four pesos fixed by said law.

It appears that while the Minimum Wage Law fixes at "four pesos a day" the minimum wage for employees in non-agricultural enterprises, it is silent on the number of working hours comprising "a day". This being so, resort may be made to laws of a similar plan or purpose. For statutes which have a common purpose or the same general scheme or plan should be construed together as if they constitute but one act (50 Am. Jur., 346-347).

Under the Eight Hour Labor Law (Com. Act No. 444) — which like the Minimum Wage Law, is designed to promote the welfare of the working men — the legal working day of any person employed by another shall not be more than eight hours (sec. 1). An employee in a non-agricultural enterprise may not, therefore, be required to work for more than eight hours a day to entitle him to a day's pay of not less than four pesos under the Minimum Wage Law.

My opinion is also sought to whether the following workers are covered by the Minimum Wage Law:

(1) Night club hostesses who do not observe fixed working hours and whose income depend solely on the tips of customers; and

(2) Barbers working in a barbershop operated by another who are paid on commission basis.

Since the law under consideration requires "every employer" to pay the minimum wage "to each of his employees" (sec. 3), the question is whether an employer-employee relationship within the contemplation of said law exists between said night club operators and hostesses and between said barbershop operators and barbers.

The definitions in the Minimum Wage Law of the terms "employee" ("any individual employed by an employer", sec. 2-c) and "employ" ("to suffer or permit to work", sec. 2-i) do not shed much light on the matter. However, courts usually consider four elements present in the relationship of employer and employee — namely, selection and engagement of the employee, payment of wages, power of dismissal and power to control the employee's conduct. And the weight of authority holds that, of these four, the really essential factor is the power to control and direct the details of the work, not only as to the result but also to the means to be used. This is the ultimate test of the existence of the employer-employee relationship. (Sec. 35 Am. Jur., 445-447.)

It is apparent that the night club operators neither control nor direct the hostesses on the details and manner of their work in the entertainment of night club patrons and that, having no fixed hours of work, said hostesses may come and go as they please. They are, therefore, not employees of the night club operators. This conclusion is bolstered by the fact that the hostesses do not receive any wages from the nightclub operators, their income proceeding exclusively from customer's tips.

With respect to barbers, we have observed from actual practice that they are free from the supervision and direction of the barbershop operators on the manner and results of their work.

The participation of the operators in the business consists merely in furnishing the shop, the chair, etc., in consideration of which they receive a fixed percentage of the income of each barber. My view, therefore, is that those barbers are not employees of the barbershop operators within the contemplation of the Minimum Wage Law

Respectfully,
PEDRO TUASON
Secretary of Justice

OPINION NO. 298

(On the question as to whether the Director of Prisons, in compliance with the order of the Court of First Instance of Manila in Criminal Case No. 28055, entitled, "People of the Philippines vs. Alfonso Tulauan alias Camilo Patakail y Mujergas" may transfer said Alfonso Tulauan to the National Mental Hospital in Mandaluyong, Rizal, in spite of the fact that he is at present in the New Bilibid Prison, Muntinlupa, Rizal, serving a final judgment)

2nd Indorsement
October 28, 1954

Respectfully returned to the Director, Bureau of Prisons Muntinlupa, Rizal.

Opinion is requested "whether the Director of Prisons, in compliance with the order of the Court of First Instance of Manila in Criminal Case No. 28055, entitled, 'People of the Philippines vs. Alfonso Tulauan alias Camilo Patakail y Mujergas' may transfer said Alfonso Tulauan to the National Mental Hospital in Mandaluyong, Rizal, in spite of the fact that he is at present in this Prison serving a final judgment imposed by the Court of First Instance of Cagayan in another case, the penalty of which is from 7 years to 10 years and 1 day imprisonment."

"The consulta," it is said, "is being made having in mind Section 1722 of the Revised Administrative Code, whereby the President is the only official who may authorize the transfer of a National prisoner from the National Prison to any other place of confinement."

Section 1722 of the Revised Administrative Code provides that the President of the Philippines shall "have the power to direct, as occasion may require, the transfer of national prisoners between national penal institutions, or from a national penal institution to a provincial prison or vice versa."

But this provision does not apply. The applicable provision with respect to prisoners serving sentences is Article 79 of the Revised Penal Code, and the case of U. S. vs. Guendia, 37 Phil 336, should govern cases of detention prisoners.

Article 79 of the Revised Penal Code provides that if sanity occurs while a convict is serving his sentence, the execution of the sentence shall be suspended and the convict committed to a mental hospital. In U.S. vs. Guendia, supra, it was held that it is the duty of the court to suspend proceedings and commit the accused to an asylum for the insane until his sanity is restored.

Prisoner Alfonso Tulauan falls under both situations; he is undergoing trial for one crime and serving sentence for another.

The order of Judge Ibañez, therefore, committing this prisoner to the National Mental Hospital is legal and proper and should be complied with.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 316

(On the question of the "existence of reciprocity" in the practice of engineering between the Philippines and Spain.)

4th Indorsement
November 20, 1954

Respectfully returned to the Honorable, the Under Secretary of Foreign Affairs, Manila.

Opinion is requested on the question of the "existence of reciprocity" in the practice of engineering between the Philippines and Spain. More concretely, the question concerns the admission to examination and the practice of engineering of certain Spanish nationals, named below, in the Philippines.

The Board of Examiners for Chemical Engineers witheld the ratings of Mr. Pedro Picornell, a Spanish national, who took the chemical engineer examination in July, 1949, pending submission of evidence that the requirements of section 26 of Republic Act No. 318 have been satisfied. The Board also disapproved the application of Mr. Manuel Igual, another national of Spain, for permission to take the chemical engineer examination in July, 1951 upon his failure to submit such evidence.

The Board of Electrical Engineering Examiners nullified the examination for assistant electrical engineer taken by still another Spanish national, Mr. Jose S. Picornell, in February, 1951 and debarred him from admission to future examinations, until the provisions of section 42 of Republic Act No. 184 were complied with.

The Board of Mechanical Engineering Examiners withheld the ratings of a fourth Spanish national, Mr. Antonio R. Esteban, obtained in the junior mechanical engineering examination of August 1953, pending the clarification of the provisions of section 42 of Commonwealth Act No. 294, and generally, of the question here under consideration.

The actions of the several Boards in all the above cases were based on their view that no "real reciprocity" exists between the Philippines and Spain in the matter of the practice of engineering. The Boards declared that there is disparity or inequality between the treatment accorded in the Philippines to Spanish engineers and that meted out in Spain to Filipino engineers. The inequality in the Board's view, consists in the subjection of Filipino engineers in Spain to the regulations of the Spanish Ministry of Labor governing alien labor, while Spanish engineers in the Philippines who have qualified under our laws are treated as if they were Filipinos. The Boards further specified that:

1. Philippine law does not require the "commutation" of engineering degrees obtained abroad into their Philippine equivalents. Under Spanish law, a degree secured abroad must first be "commuted" by the Spanish Ministry of National Education into its Spanish equivalent.

2. The registration certificate issued by the Boards in the Philippines is "general", "irrevocable," and "permanent" in character, being revocable only on grounds provided by law. The "letter of professional identity" or authorization to practice issued by the Spanish Ministry of Labor is of an "exceptional", "revocable," and "temporary character", and may be revoked "in the discretion of Spanish administrative officers."

3. Spanish subjects in the Philippines, who have qualified, are "by law" entitled to a registration certificate and can always invoke the law to support their "right" to practice in the Philippines. Filipinos may practice their professions in Spain only as a "privilege", in case of denial of which, they can invoke no law to sustain their "right" to practice there. (See the joint memorandum of the Boards, date 1 March 1954, date 1 March 1954, p. 4, attached hereto).

Section 26 of Republic Act No. 318 (the "Chemical Engineering Law") approved 19 June 1948, section 42 of Republic Act No. 184 (the "Electrical Engineering Law") approved 21 June 1947, and section 42 of Commonwealth Act No. 294 (the "Mechanical Engineer may be admitted to examination, or granted a certificate of registration or any of the rights or privileges under the several Acts, unless

"the country of which he is a subject or citizen permits Filipino engineers to practice within its territorial limits *on the same basis as the subjects or citizens of such country.*"

It will be seen that the cited statutes do not require "reciprocity" or "parity" or "equality" in the sense that Filipino engineers in Spain must be accorded exactly the same treatment that Spanish engineers are given in the Philippines. What the statutes do require is that Filipino engineers in Spain be treated in exactly the same way as Spanish engineers in Spain are, that is to say, that no requisites be imposed on Spanish engineers. The statutory standard is satisfied so long as Filipino engineers in Spain are treated as if they were Spanish subjects. The equality that must be shown is not between Filipino engineers in Spain and Spanish engineers in the Philippines, but between Filipino and Spanish engineers in Spain. Under the above statutes, therefore, the moment it is shown that the Spanish government exacts from Filipino engineers in Spain compliance with conditions and requirements not simultaneously required from Spanish engineers, Spanish engineers must be regarded as disentitled to practice in the Philippines.

Account, however, must be taken of a factor which has altered significantly the legal situation above indicated. On March 4, 1949, the Treaty on Academic Degrees and the Exercise of Professions between the Philippines and Spain (Philippines Treaty Series, Vol. 1, No. IV, p. 13) was signed. The exchange of ratifications took place with article VI thereof, came into effect. Article III of the Treaty provides thus:

"The Nationals of each of the two countries, who shall have obtained recognition of the validity of their academic degrees by virtue of the stipulations of this Treaty, can practice their professions within the territory of the other, by applying for the necessary authority to this effect from the Spanish Ministry of Labor or from the competent body or authority in the Philippines, as the case may be, which authorities shall grant always the application, *subject to the provisions of applicable laws and regulations governing alien labor* and the practice of each profession, under a revocable permit, and the application shall be denied only in exceptional cases for justifiable cause that affects personally the petitioner. *The persons thus authorized to practice their professions shall be subject to all the regulations, laws, taxes and fees imposed by the state upon its nationals.*"

The underscored clauses of the quoted article, interpreted conjointly, result in this: that the Philippine government may subject Spanish engineers in the Philippines not only to such laws and regulations as are applicable to Filipino citizens, but also, and additionally, to laws and regulations that apply only to aliens. The spanish government is of course entitled to do the very same thing. Under the Treaty, each Contracting Party may treat the nationals of the other Party differently from its own nationals. The fact that one of the Contracting Parties refrains from exercising its treaty right to mete out differential treatment to nationals of the other Party in no way diminishes the right of the other Party to do so.

It need hardly be mentioned that the "applicable laws and regulations governing alien labor" observance of which each Contracting Party can require from nationals of the Other are not to be so unreasonable and oppressive as, in effect, to destroy the reciprocal right to practice granted by the Treaty. The Treaty does envisage reciprocity and mutuality in the sense that it entitles the nationals of each Contracting Party to practice their professions in the territory of the Other, subject only to such reasonable regulations and limitations as are authorized by the Treaty itself.

That the Treaty is inconsistent with those earlier statutory provisions appears evident. It is thereunder no longer necessary, as it was under the aforementioned statutory provisions, for a Spanish national to be entitled to take an examination or to practice engineering in the Philippines to show that the Spanish government permits Filipino engineers to practice in Spain on equal terms with Spanish subjects. To that extent, the Treaty, being later in point of time, is to be regarded as having modified the internal legislative acts. (Singh v. Collector of Customs 38 Phil. 867; Whitney v. Robertson 124 U.S. 190, 31 L. ed. 368; Cook v. U.S. 288 U.S. 102, 77 L. ed. 641; United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 155 F. 842. See also 2 Hyde, International Law [2nd rev. ed. 1945] 1463-1466).

It cannot rationally be maintained that compliance with the sections of the laws on engineering requiring that the country of a foreign applicant treat Filipino engineers on the same basis as its own nationals may still be exacted on the theory that those sections form part of the "applicable laws and regulations governing — the practice of each profession" to which the Treaty subjects applications to practice in the territory of each Contracting Party. The hypothetical construction would render the Treaty an entirely idle and pointless act. For the Treaty covers precisely the same field as those mentioned sections of the engineering statutes and is inconsistent therewith.

Examination of the Treaty reveals that the enforcement by Spain of the regulations complained of by the Board of Examiners is authorized by the terms of Treaty itself. The Treaty clause on "laws and regulations governing alien labor" has been mentioned above. As to the requirements of the Spanish Ministry of Education concerning the "commutation" of foreign degrees into their Spanish equivalents, article III of the Treaty requires that before nationals of each of the Contracting Parties can practice their professions in the territory of the other Party, they must have "obtained recognition of the validity of their academic degrees by virtue of the stipulations of this Treaty." Article I provides in part:

"The nationals of both countries who shall have obtained degrees or diplomas to practice the liberal professions in either of the Contracting States, issued by competent national authorities, shall be deemed competent to exercise said professions in the territory of the Other, subject to the laws and regulations of the latter.—"

Article II declares, *inter alia*, that

"In order that the degree or diploma referred to in the preceding article shall produce the effects mentioned therein, it is hereby agreed:

"1st. That it be issued or confirmed and duly legalized by the competent authorities *in conformity with the applicable laws and regulations of the other Party where it is to be recognized.*

. . . . . ."

(Italics supplied)

As to the other points of "inequality" raised by the Boards, that the authorization to practice given by Spanish authorities to Filipinos is "exceptional", "temporary" and "revocable" — it suffices to note that, by the Treaty, the Contracting Parties expressly agreed that their respective authorities "shall grant always the application," which application may be denied "only in exceptional cases for justifiable cause that affects personally the petitioner", but that the premission to practice shall be a "revocable" one. And as to the last point that Filipino engineers desiring to practice in Spain can invoke no law to support their claim, it need only be observed that there is the Treaty itself which, as a binding international agreement, lays down the legal rights and obligations of the Contracting Parties. (See Briggs, The Law of Nations [2nd ed., 1952] 868-869).

It may be noted that the Boards concede the right of Spain under the terms of the Treaty to require compliance with the regulations above mentioned. (See the joint memorandum, p. 3) What the Boards do object to is the inequality that results from the fact that the Philippines does not impose similar requirements on Spanish engineers here. It bears emphatic reiteration

(*Continued on page 632*)

REPUBLIC ACT NO. 1060

AN ACT INCREASING THE PENALTY FOR THE CRIME OF MALVERSATION OF PUBLIC FUNDS OR PROPERTY, BY AMENDING ARTICLE TWO HUNDRED SEVENTEEN OF THE REVISED PENAL CODE.

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

SECTION 1. Article two hundred seventeen of the Revised Penal Code is amended to read as follows:

"ART. 217. *Malversation of public funds or property— Presumption of malversation.*—Any public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same, or shall take or misappropriate or shall consent, or through abandonment or negligence, shall permit any other person to take such public funds or property, wholly or partially, or shall otherwise be guilty of the misappropriation or malversation of such funds or property, shall suffer:

"1. The penalty of *prisión correccional* in its medium and maximum periods, if the amount involved in the misappropriation or malversation does not exceed two hundred pesos.

"2. The penalty of *prisión mayor* in its minimum and medium periods, if the amount involved is more than two hundred pesos but does not exceed six thousand pesos.

3" The penalty of *prisión mayor* in its maximum period to *reclusión temporal* in its minimum period, if the amount involved is more than six thousand pesos but is less than twelve thousand pesos.

"4. The penalty of *reclusión temporal* in its medium and maximum periods, if the amount involved is more than twelve thousand pesos but less than twenty-two thousand pesos. If the amount exceeds the latter, the penalty shall be *reclusión temporal* in its maximum period to *reclusion perpetua*.

"In all cases, persons guilty of malversation shall also suffer the penalty of perpetual special disqualification and a fine equal to the amount of the funds malversed or equal to the total value of the property embezzled.

"The failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable, upon demand by any duly authorized officer, shall be *prima facie* evidence that he has put such missing funds or property to personal uses."

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

Approved, June 12, 1954.

REPUBLIC ACT NO. 1083

AN ACT TO AMEND ARTICLE ONE HUNDRED AND TWENTY-FIVE OF ACT NUMBERED THIRTY EIGHT HUNDRED AND FIFTEEN, OTHERWISE KNOWN AS THE REVISED PENAL CODE, AS AMENDED, BY EXTENDING THE PERIOD OF LEGAL DETENTION IN CERTAIN CASES.

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

SECTION 1. Article One hundred and twenty-five of Act Numbered Thirty eight hundred and fifteen, otherwise known as the Revised Penal Code, as amended, is hereby further amended to read as follows:

ART. 125. *Delay in the delivery of detained persons to the proper judicial authorities.*—The penalties provided in the next preceding article shall be imposed upon the public officer or employee who shall detain any person for some legal ground and shall fail to deliver such person to the proper judicial authorities within the period of: six hours, for crimes or offenses punishable by light penalties, or their equivalent; nine hours, for crimes or offenses punishable by correctional penalties, or their equivalent; and eighteen hours, for crimes or offenses punishable by afflictive or capital penalties, or their equivalent.

SEC. 2. All acts, executive orders, proclamations, rules and regulations, or parts thereof, inconsistent with the provisions of this Act are hereby repealed or amended accordingly.

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

Approved, June 15, 1954.

REPUBLIC ACT NO. 1084

AN ACT TO AMEND SECTION TWO HUNDRED AND SIXTY-SEVEN OF THE REVISED PENAL CODE.

(Re kidnapping and serious illegal detention.)

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

SECTION 1. Section two hundred and sixty-seven of the Revised Penal Code, as amended by section two of Republic Act Numbered Eighteen, is hereby further amended to read as follows:

"SEC. 267. *Kidnapping and serious illegal detention.*—Any private individual who shall kidnap or detain another, or in any other manner deprive him of his liberty, shall suffer the penalty of *reclusion perpetua* to death:

"1. If the kidnapping or detention shall have lasted more than five days.

"2. If it shall have been committed simulating public authority.

"3. If any serious physical injuries shall have been inflicted upon the person kidnapped or detained; or if threats to kill him shall have been made.

"4. If the person kidnapped or detained shall be a minor, female or a public officer.

"The penalty shall be death where the kidnapping or detention was committed for the purpose of extorting ransom from the victime or any other person, even if none of the circumstances above mentioned were present in the commission of the offense."

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

Approved, June 15, 1954.

REPUBLIC ACT NO. 1096

AN ACT FURTHER AMENDING SECTION FIFTY-EIGHT OF ACT NUMBERED FOUR HUNDRED NINETY-SIX, KNOWN AS THE "LAND REGISTRATION ACT," TO FACILITATE DEALINGS IN LANDS SOLD BY THE GOVERNMENT PENDING APPROVAL OF THE SUBDIVISION SURVEYS.

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

SECTION 1. Section fifty-eight of Act Numbered Four Hundred ninety-six, known as the Land Registration Act, is hereby further amended by adding at the end thereof the following additional paragraph:

"For the purpose of securing loans from banking and credit institutions, the foregoing prohibition against the acceptance for registration or annotation of a subsequent deed or other voluntary instrument shall not apply in the case of deeds of sale duly executed by the Government, or any of its instrumentalities, with respect to portions of lands registered in the name of the Republic of the Philippines."

SEC. 2. All laws and regulations, or parts thereof inconsistent with the provisions of this Act, are hereby repealed.

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

Approved, June 15, 1954.

1954 BAR EXAMINATION QUESTIONS

CRIMINAL LAW

I. State briefly what is the fundamental principle on which the right of the State to punish or impose coercive measures upon criminal offenders is based.

II. Mention 2 circumstances of each of the following classification: (a) justifying; (b) exempting; (c) mitigating; (d) aggravating; and (e) alternative.

III. What are the exceptions to the allowance of one-half of the period of preventive imprisonment undergone by criminal offenders?

IV. In what cases the execution of the death penalty must be suspended?

V. (a) What are the only crimes punished under the Revised Penal Code for which the Court, in addition to the penalty attached by the code, may sentence or require the offender to give bond for good behavior? (b) If the culprit fails to give such bond, shall he be DETAINED for a period not exceeding 6 months in cases of grave or less grave felonies, or not exceeding 30 days if for a light felony, as provided in Art. 35 of the RPC, or shall he be SENTENCED to *destierro* (banishment), as provided in Art. 284 of the same code? What is the reason of your answer?

VI. Sam was prosecuted and found guilty of the crime of malicious mischief under Art. 329, No. 3, of the RPC as amended by Act No. 3999 of the Legislature and sentence to pay a fine of ₱200, value of the damage caused, and to indemnify William, the offended party, in the sum of ₱200, or to suffer the corresponding subsidiary imprisonment in case of insolvency, plus the costs. Sam has money to satisfy both amounts, but he is stubbornly unwilling to pay them and prefer to serve the subsidiary imprisonment. (a) Has Sam the right to choose between the payment of said amounts and the service of the subsidiary imprisonment? (b) Does not such subsidiary imprisonment amount to imprisonment for debt and is, therefore, unconstitutional? Reason out both answers.

VII. At the corner of Rizal Avenue and Zurbaran street, Manila, Peter and Paul stopped Alex and at the point of their respective revolvers the former ordered the latter to deliver to them his wallet containing ₱500 in paper money. Alex handed them the wallet and then the robbers went away in the direction of two detectives who saw the misdeed from a distance and arrested the pair and seized from them the wallet and the money as well as the two revolvers for the possession of which Peter and Paul had no license. The crime committed by these two malefactors is frustrated or consummated robbery? (b) Could they be accused and convicted of a complex crime of robbery through unlawful possession of unlicensed firearms in accordance with the provisions of Art. 48 of the RPC as amended by Act No. 4000 of the Philippine Legislature? State briefly the reasons of your answers to these two questions.

VIII. (a) State the difference between the crimes of BRIGANDAGE and ROBBERY IN BAND. (b) What arms or weapons the malefactors must carry to be considered as armed men?

IX. John asked James to exchange him a check for the sum of ₱1,000, and upon receiving this amount from the latter, John, with deliberate intent to defraud and for the purpose of causing the Philippine National Bank, against which it was drawn, to dishonor the check, executed the same by writing his signature very differently from that registered in the Bank. John had funds to meet the check when James presented it for collection, but, as it was expected, the Bank refused payment because the signature of the drawer was not his registered signature and John declined to issue another good check or to return the money he received from James. Has John committed the crime of "estafa"? State briefly your opinion and the reasons on which it is based.

X. Blackmailing for the purpose of extorting money from the party threatened constitutes what offense? Under what classification of crimes does it fall in the Revised Penal Code?

———oOo———

POLITICAL LAW

I. State briefly the procedure to amend the Philippine Constitution until the proposed amendment becomes a part of the Constitution.

II. The State may not be sued without its consent. In what form does this consent take? In other words, how may the plaintiff obtain this consent to file a suit against the State which must be attached as Annex to his complaint?

III. An ordinance in the Municipality of X authorizes the Sanitary Inspector to seize rotten meat or fish offered for sale to be dumped into the sea or otherwise destroyed. Is the ordinance constitutional? Why?

IV. The mother of X was a Filipino citizen before she married an Alien Y. Upon reaching the age of majority X elected Filipino citizenship in accordance with law. Two years later, however, X upon the suggestion of his father, Y, registered under the Alien Registration Act of 1941 (Com. Act No. 653). Is X entitled to acquire public land or to hold an elective Office inspite of his registration under the Alien Registration Act? In other words, is X still a Filipino citizen inspite of his registration under the Alien Registration Act? Give your reasons.

V. Name three examples of public corporation. How are public corporations created in the Philippines and by whom?

VI. Give seven officers or officials of the Republic of the Philippines who must be appointed by the President with the consent of the COMMISSION ON APPOINTMENT.

VII. Give the composition and the powers of the Electoral Tribunal of the Philippine Senate and the House of Representatives.

VIII. X drives his own automobile. The automobile suffers damages amounting to ₱250.00 because it strikes a hole one meter in diameter and one meter deep in the middle of a City street in the City of Manila. X then files a suit for the recovery of ₱250.00 against the City of Manila. Will the case prosper? Give your reasons.

IX. A is proclaimed elected by the Provincial Board of Canvasers as Representative for the District B in the Province C in the elections of 1953. The election of A is protested and the protest was duly filed. QUESTIONS: (a) Can A take part and vote in the election of Speaker at the Inaugural Session of the House of Representatives? (b) May the taking of the oath of Office of A be suspended immediately after the election of Speaker? Give your reasons.

X. X is assessed ₱500,00.00 income tax for the year 1953 by the Collector of Internal Revenue. X believes that the assessment is excessive, unjust and incorrect. State all the steps (Administrative steps) that X may take to protect his rights.

———oOo———

REMEDIAL LAW

I. (1) What are the exceptions to the parole evidence rule? What are the reasons for the parole evidence rule? (2) "A" sold a parcel of land to "B" under a written contract. In a litigation over the same property "C" offers parole evidence to the effect that "B" bought the land as his trustee or agent. Is parole evidence admissible in this case? Gives reasons.

II. (1) Under the Rules of Court, who are the indispensable parties to an action? Who are the necessary parties? (2) In suit for a foreclosure of mortgage, is the second mortgagee a necessary or indispensable party? What is the effect if the first mortgagee does not include the second mortgagee as party defendant in the foreclosure proceedings?

III. Define *prejudicial question*. What are the necessary elements in order that a prejudicial question may arise?

IV. Distinguish forcible entry from unlawful detainer? State the two peculiar characteristics of these actions. Who may bring suit in each case?

V. Under what circumstances may the testimony of a witness deceased, or unable to testify, given in a former case between the same parties be given in evidence in another case?

VI. (1) "A" was charged with the crime of physical injuries Upon arraignment, she pleaded not guilty. Subsequently, the Fiscal moved for the dismissal of the case. The motion was granted. Defense counsel said nothing about the dismissal. Ten days later, another information was filed charging her with the same offense. "A" sets up the defense of double jeopardy. Decide the case, giving reasons. (2) What are the rights of a person accused of a crime?

VII. "A" filed an action against "B", a railroad corporation, for the alleged negligence of "B", in that "B" allowed its railroad track to become and remain out of order. The defects consisted allegedly of a broken rail and a defective switch which caused the train on which the plaintiff "A" was riding to be derailed, causing thereby injury to "A", namely, the loss of two hands. A few days after the accident, the railroad corporation made certain repairs and alterations on the switch alleged to be defective. At the trial of the case, plaintiff tried to prove the negligence of the defendant and the defective condition of the railroad track and switch by calling attention to the repair and alteration of the switch done by "E" after the accident. It this evidence admissible as proof of the negligence of the defendant? Give reasons.

VIII. An information for homicide was filed by the City Fiscal against "B" and "C". The prosecution has proven that "C" has in his possession a letter written to him by "B". To prove the contents of said letter the Fiscal presented secondary evidence, to which the attorney for the accused objected on the ground that the prosecution had not given previous notice of the production of the letter. Is this objection tenable? Upon what ground?

IX. As a result of a fistfight, "X" is prosecuted for serious physical injuries. It so happened that Miss "Z" was present and saw the fight and is one of the witnesses for the prosecution. A week before the trial, "X" married "Z". May "Z" be called to testify as a competent witness against "X"? Has the prosecution a right to call "Z" as a witness or to show from her statements that the accused had married her for the purpose of suppressing her testimony? Give reasons for your answer.

X. In a certain civil case filed in court, the plaintiff presented a witness to identify a signature appearing in a document. The attorney for the defendant, on cross-examination, propounded questions tending to show that the signature was obtained by fraud. May the defendant on cross-examination be permitted to ask questions of said witness tending to prove fraud? Give reasons.

———oOo———

LEGAL ETHICS & PRACTICAL EXERCISES

I. State the substance of the attorney's oath.

II. Write a short paragraph on the statement that the practice of law is a profession and not a business.

III. State the rule or principle governing the question whether or not an attorney may testify as a witness for his client in the very case he is handling.

IV. For purposes of disbarment or suspension, what is meant by "moral turpitude".

V. An attorney was required by the court of first instance to show cause why he should not be punished for contempt of court. After answer and hearing, finding that there was sufficient cause or ground, the court suspended the attorney from the practice of law for six months. It the action of the court proper? Reason.

VI. Supplying the necessary details, draw a motion for new trial (complete in form) based on the ground that the decision of the court of first instance is contrary to law, such that the motion will not be treated as *pro forma*.

VII. Draw a registerable contract of sale with right of repurchase within five years, covering one parcel of land, and complete in form. Supply the necessary details.

VIII. In a certain case for the collection of attorney's fees, the unanimous opinion of three attorneys presented as expert witnesses regarding the amount of compensation due to the plaintiff attorney, is uncontradicted. May the court disregard said opinion and follow its own professional knowledge? Explain.

IX. May an attorney be suspended or disbarred on grounds other than those enumerated in the Rules of Court? Explain.

X. Is an attorney *de officio* appointed by the Supreme Court to defend an accused-appellant always bound to uphold the appellant's innocence? Explain.

OPINIONS OF THE . . .

(*Continued from page* 632)

then, that the Philippines may, under the Treaty, enact similar regulations and need not deal with Spanish engineers on the same basis as Filipino citizens. That the Philippines may treat Spanish engineers more liberally than she is obliged to, gives rise to no legal ground for complaint against Spain for doing what the latter has an international treaty right to do.

A party who may deem the actual operation of a treaty as unduly onerous may decide to take steps leading to the modification or even the termination of the treaty. But so long as a treaty remains in force — and there is no doubt that the Treaty here is in full force — a party cannot, without exposing itself to liability for an international deliquency, refuse to give it effect. *Pacta sunt servanda* is a basic norm of international law. (See Harvard Research in International Law, the Law of Treaties, 29 Am. J. Int. L. (Supp.) 977 et seq.)

Considering all the foregoing, I am of the opinion that the Spanish nationals concerned are entitled to be admitted to examination and to the practice of their profession in the Philippines. It may be observed that although Mr. Pedro Picornell took the chemical engineer examination on July, 1949, before the Treaty went into effect, there appears no objection to the release of his grades and his admission to practice if those grades are satisfactory.

(Sgd.) PEDRO TUASON
Secretary of Justice

LAWYER WAS SWEATING

NEW YORK, Dec. 14 (UP).—Assistant District Attorney James P. McGrattan stepped toward the prosecution witness and asked the routine question before settling down to serious examination in Queens County court Monday.

"Were any promises made to you in exchange for your testimony at this trial?" McGrattan asked the witness, Michael Garcia, 24.

Garcia's answer was sharp and clear. "Yes," he said.

McGrattan was startled.

"I was promised that the four felony raps against me would be dropped and I would get larceny on the other charge," Garcia said.

Garcia, charged with felony and robbery, was slated to testify that a 21-year-old youth, William Brown, had admitted killing his girl friend.

"Who made these promises?" demanded the prosecutor.

"You did," shouted Garcia. "You did and Assistant District Attorney Thomas Cullen."

"When? How?" asked McGrattan.

"Do you want me to say I was promised nothing?" sneered Garcia. "You want me to lie, and I refuse."

He tossed two coins at the prosecutor. "Here is your two pieces of silver," Garcia said. "I'm not Judas."

McGrattan asked for a recess.

Lawyer's Directory

(In view of the present difficulty of locating the offices of practicing attorneys, the Journal publishes this directory to acquaint not only their clients but also the public of their address. Lawyers may avail themselves of this service upon payment of Two Pesos for each issue of this publication.)

ADRIANO, LOPE E.
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

AGPALO, JOSE S.
750 Lepanto, Sampaloc
Tel. 3-24-92

ANTONIO, ROMAN B.
302 Samanillo Bldg., Manila
Tel. 2-92-09

ANZURES, Dr. PABLO
Lawyer Medico-Legal Expert
Tel. 3-79-49
Rm. 404 Burke Bldg., Escolta
Santa Mesa Blvd., corner Sociego, Manila
Tel. 4-53-76

BANICO, HERMINIO B.
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

BONTO & IMPERIAL LAW OFFICES
City of Legaspi

CARDENAS, JOSE PEREZ
405 Aviles, Manila
Tel. 6-71-86

DACAYO, LEON P.
Suite 429, Fourth Floor
Wm. Li Yao Bldg., Manila
394 Bambang Ext., Manila

CALUPAN & SANCHEZ
R-314 Regina Bldg., Escolta, Manila
Tel. 3-27-57

DALMACION, ALBERTO L.
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

FERNANDEZ JR., ESTANISLAO A.
308 Samanillo Bldg., Manila
Dial: Tel: 2-92-09 Call: 4326

FRANCISCO, ALBERTO J.
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

FRANCISCO, RICARDO J.
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

FRANCISCO, RODOLFO J.
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

FRANCISCO, VICENTE J.
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

GUERRERO, BERNARDINO
R-311-C Regina Bldg.
Office Tel. 3-22-31 Local 49
Res. Tel. 6-79-19

GUZMAN, PRUDENCIO DE
R-212 Roces Hmons. Bldg.
429 Rizal Avenue, Manila
Tel. No. 3-21-79

JORDAN TECHICO LAW OFFICES
Associate: Judge L. J. Mancenido
Suites 217-218 Second Floor
562 T. Pinpin corner Ongpin, Manila
Tel. No. 2-87-24

MACAPAGAL LAW OFFICES
Suite 329 Madrigal Bldg., Escolta, Manila
Tel: 3-31-64

MACASPAC, JOSE TORRES
19 Calderon, Sta. Ana, Manila
159 Kasarinlan, Sta. Ana, Manila

MARASIGAN, FRANCISCO
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

MATIAS, ANDRES
R-201 Samanillo Bldg., Manila
Tel. 3-33-64

PACHECO, EMERENCIANA S.
371 San Anton, Manila
Tel. 3-85-29

QUISUMBING, SYCIP, QUISUMBING & SALAZAR LAW OFFICES
5th Floor, Trade and Commerce Bldg.
123 Juan Luna, Manila
Telephones: 2-73-89 & 2-33-26

SAN JUAN, AFRICA, YNIGUES & BENEDICTO
Suite 226 Regina Bldg., 2nd Floor
Escolta, Manila, Tel. 3-28-60

SANTOS, JOSE T. DE LOS,
SANTOS CIRIACO T. DE LOS
Suites 202-206 Pedro Cruz Bldg.
426 Evangelista, Manila
Tel. 3-54-49

SORIANO, MANUEL A. Q.
Soriano Law Offices
Suite 409 Samanillo Bldg.
Escolta, Manila

TENZA, ELISEO M.
Suite No. 408, Samanillo Bldg.
Escolta, Manila
Tel. 3-95-19