OPINION NO. 55

(Opinion on the question as to whether or not a Clerk of Court of First Instance as ex-officio sheriff is entitled to an additional compensation pursuant to the provisions of Republic Act No. 915.)

2nd Indorsement
January 30, 1954

Respectfully returned to the Honorable, the Deputy Auditor General, Manila.

The City Auditor of the City of Ozamis objects to the payment of additional compensation to the Clerk of Court of the Court of First Instance of Misamis Occidental as ex-officio sheriff of said city pursuant to the provisions of Republic Act No. 915 upon the following grounds: (1) that said law applies only to a city which is at the same time the capital of the province; and (2) Section 76 of Republic Act No. 321, otherwise known as the Charter of Ozamis City, makes the clerk of the municipal court as the sheriff of the city.

Section 1 of Republic Act No. 915 provides as follows:

> "Sec. 1. The clerk of the Court of First Instance of a province shall be *ex-officio* sheriff not only of such province but also of any city, which before conversion to a city, formed part of such province. As *ex-officio* sheriff of a city, such clerk shall receive an additional compensation of not exceeding one thousand two hundred pesos, which shall be fixed by the city council or municipal board and payable from city funds."

This law repealed Commonwealth Act No. 629 which prescribed that "the provincial sheriff of the provinces to which chartered cities belong shall be ex officio the City Sheriff, with an additional compensation not exceeding one thousand pesos per annum to be fixed by the respective city council, payable out of the city funds." Construing this provision, this Office has repeatedly held that the effect thereof is to repeal impliedly the provisions of city charters enacted prior to Commonwealth Act No. 629 which made the clerk of the municipal court ex officio sheriff of the city (Op., Sec. of Jus., No. 197, s. 1947). It was also pointed out in the last cited opinion that said law applies to a city irrespective of whether or not it is the capital of the province, there being no provision in the law on which to base such a distinction.

The enactment of Republic Act No. 915 was apparently induced by the fact that the clerks of court of first instance have assumed the duties of the provincial sheriff in accordance with Section 64 of Executive Order No. 94, series of 1947. It is practically a re-enaction of Commonwealth Act No. 629, excepting that instead of providing for additional compensation to the provincial sheriffs, Republic Act No. 915 grants said benefits in favor of clerks of court as ex officio provincial sheriffs.

This Office accordingly believes that the ruling laid down with respect to the right of provincial sheriffs to additional compensation under Commonwealth Act No. 629 applies equally to clerks of court as ex officio provincial sheriffs pursuant to Republic Act No. 915. It appearing that the Charter of Ozamis City (Republic Act No. 321) was approved prior to Republic Act No. 915, the provision of the former making the clerk of the municipal court city sheriff should be deemed repealed by Republic Act No. 915.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 68

(Retirement on account of ill-health of a temporary clerk who served in the Government for forty-two years.)

5th Indorsement
March 22, 1954

Respectfully returned to the Honorable, the Auditor General, Manila.

These papers refer to the application of Mr. Federico S. Romero for retirement under Com. Act No. 186, as amended by Republic Act No. 660. It appears that Mr. Romero first entered the government service on July 28, 1908, as a temporary clerk in the Court of First Instance of Laguna. On September 28, 1950, after 42 years of continuous service and on account of ill health, he was retired with gratuity as Chief Supervising Auditor, General Auditing Office, under the provision of Act No. 2589. Mr. Romero is still living.

Opinion is requested as to whether or not under the facts described Mr. Romero is still eligible for retirement under Com. Act No. 186, as amended by Rep. Act No. 660.

The provisions of law applicable in this case is section 26 of Republic Act No. 660, pertinent portion of which reads as follows:

> "SEC. 26. Notwithstanding the provisions of the Act to the contrary, *any officer or employee who died in the service within three years before said Act went into effect and who had rendered at least thirty-five years of service and who is entitled to or who could have established his right to the retirement gratuity provided for in Act Numbered Twenty-five hundred and eighty-nine, as amended, or to any other retirement benefits from any pension fund created by law shall be considered retired under the provisions of this Act* if his wife, or in her default, his other legal heirs shall so elect and notify the System to the effect. Upon making such election, the wife or legal heirs of the deceased officer or employee shall be paid the monthly annuity for five consecutive years or such other benefit as provided in said Act, in lieu of the retirement gratuity or retirement benefits to which the deceased was entitled at the time of his death; and any portion of such gratuity or retirement benefits already paid to his wife or other legal heirs shall be refunded to the System: Provided, that contributions corresponding to his last five years of service shall be deducted monthly from his life annuity.
>
> *"Notwithstanding any provisions of this Act to the contrary, any officer or employee whose position was abolished or who was separated from the service as a consequence of the reorganization provided for in R.A. Numbered Four Hundred and Twenty-two may be retired under the provisions of this Act if qualified.* Provided: That any gratuity or retirement benefit already received by him shall be refunded to the System: Provided, further, That contributions corresponding to his last five years of service shall be paid as provided in section twelve of this Act. *This provision shall also apply to any member of the judiciary who, prior to the approval of this Act, was separated from the service after reaching seventy years of age and rendering at least thirty years of service and who is not entitled to retirement benefit under any law."* (Underscoring supplied). x x x x

The foregoing section constitutes as an exception to the general policy of Republic Act No. 660 that it shall take effect upon its approval, and that the benefits thereof shall be limited only to those officers and employees, who are in the service at the time of such approval. Thus, it expressly provides that only the following officers and employees, though no longer in the service on June 16, 1951, may be entitled to the benefits therein provided: (1) those who died in the service within three years before Republic Act No. 660 took effect and who had rendered at least 35 years of service and were entitled, or have established their rights, to retirement gratuity under Act No. 2589 or to any other retirement benefit from any pension fund created by law; (2) those whose positions were abolished or were separated from the service as a result of the reorganization made pursuant to Republic Act No. 422; and (3) members of the judiciary who prior to the approval of Republic Act No. 660 were separated from the service after reaching the age of 70 years and have at least rendered 30 years but were not entitled to any retirement benefit under any law. Inferentially,

therefore, any person who does not come under any of the 3 groups above specified and who was not in the service of the government at the time of Republic Act No. 600 took effect, cannot be retired under its provisions.

Evidently, the resolution of the query hinges on whether or not Mr. Romero comes under any of the 3 groups of employees mentioned above.

It is claimed that while Mr. Romero is not, strictly speaking, embraced within the letter of Sec. 26 above-quoted, nevertheless, he comes within its spirit and reason, and should therefore be entitled to its benefits to invoke its provisions, such parties only may act. (Taylor v. Michigan Public Utilities Commission, 186 N. W. 485).

It is an elementary principle of statutory construction that when the intention of the legislature is so apparent from the face of the statute that there can be no question as to its meaning there is no room for construction, for there is no safer nor better settled common interpretation than that when the language is clear and unambigous it must be held to mean what it plainly expresses. (II Sutherland 334). This rule may be deviated from only when such intent of the law is rendered dubious by the context of the act, or if the words are sufficiently flexible to admit of a construction which will effectuate the legislative intention. In the instant case, a scrutiny of the whole law will yield nothing to render dubious the clear intention of the legislature. Neither can it be said that the term *"who died in the service" is* flexible enough to include one who is much alive though sickly, nor can the phrase *"whose position was abolished"* include a man who has been retired with gratuity but whose position is never abolished.

Besides, one who contends that a section of an act must not be read literally must show either that some other section of the act expands or restricts its meaning, or that the section itself is repugnant to the general purview of the act. (2 Sutherland 334-335). In this case, no showing has been made that any particular section of Republic Act No. 660 tends to vary the import of the words used in section 26 thereof so as to justify a departure from what its letters purport to convey. Moreover, being an exception it should be strictly construed, for although an exception is generally considered as a limitation only upon the matter which precedes it, yet if it is clear from the legislative intent that it is considered as a limitation to the entire act, it will operate to restrict all provisions of the act. (2 Sutherland 474).

It has been argued at length that adherence to a strict and literal construction of the provision in question will not only be unjust and discriminatory but may also be productive of mischievous result, but so the law is written. *Sid ita lex scripta est.* The undersigned is not unmindful of the merits of the claimants contention that he should, as a matter of justice, be entitled to the benefits of Republic Act No. 660, but when the law is so clear and unambiguous, the remedy is not in interpretation but an amendment, for to hold otherwise will, in effect, make an executive body superior to the legislative branch of the government, and practically invest it with law making power. (State v. Duggan, 6 A. 787).

In view of all the foregoing, the undersigned is of the opinion that Mr. Federico S. Romero may no longer be retired under Republic Act No. 660.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 69

(Opinion on the question as to whether the Veterans Memorial Building may be constructed upon the USAFFE Park in Intramuros.)

March 10, 1954

The Chairman
National Planning Commission
P. O. Box 117, Manila

S i r :

This is in reply to your request for an opinion as to whether the Veterans Memorial Building may be constructed upon the USAFFE Park in Intramuros.

The USAFFE Park was established by Republic Act No. 579, Section 3 of which provides that "the site of the former Cuartel de España is hereby declared a national park to be known as USAFFE Park."

The proposed Veterans Memorial Building is intended to be a permanent office building, four stories high to house the Philippine Veterans Board, the Board on Pensions for Veterans, and private accredited veterans' organizations in the Philippines. It will cost one million pesos, and will occupy, according to a representative of the Philippine Veterans Board, from one-fourth to one-sixth of the entire area of the USAFFE Park.

A "park" is defined to be a pleasure ground in or near a city set apart for the recreation of the public; a piece of ground inclosed for the purpose of pleasure, exercise, amusement or ornament; a place for the resort of the public for recreation, air, and light; a place open for every one. Kennedy v. City of Nevada, 281 S. W. 56, 58. It is a detached tract of ground generally of quite sizable proportions devoted to purposes of ornamentation and recreation, bounded or approached by streets or highways of which it is not part, and not devoted to purposes of travel, usually planted out with trees and ornamented in a way pleasing to the eyes as well as furnished an opportunity for open-air recreation. Kupelian v. Andrews, 135 N. W. 502, 503; 233 N. Y. 278.

The general rule is that where land is dedicated for the ordinary use of park or common, the erection of buildings thereupon not distinctively for park purposes is inconsistent with such use. 18 A.L.R. 1252 and cases cited thereunder, and 63 A.L.R. 845. A park "need not and should not, be a mere field or open space, but no objects, however worthy, such as courthouses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred, even when the dedication to park purposes is made by the public itself and the strict construction of a private grant is not insisted upon." Williams v. Gallatin, 299 N.Y. 284; 18 A.L.R. 1238, 1241. Some structures, which, according to the same decisions, have a natural connection with park purposes and are therefore permissible even without special legislative sanction, are monuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor, floral and horticultural displays, zoological gardens, playing grounds, and even restaurants and rest houses, and many other common incidents of pleasure grounds which contribute to the use and enjoyment of the park. The use of part of a park as a public library (Spires v. Los Angeles, 150 Cal. 64), or as a state capitol (Hartford v. Maslen, 76 Conn. 599), or as a museum (Atty. Gen. v. Sunderland, L. R. 2 Ch. Div. [Eng.] 534), is to be inconsistent with its use, as has been held.

But the erection upon a public park of a courthouse (McIntyre v. El Paso County, 15 Colo. App. 78; McBride v. Rockwall, 195 S.W. 926), a city hall (Church v. Portland, 18 Or. 73; Delly v. Hayward, 192 Cal. 242), a schoolhouse (Rowzee v. Pierce, 75 Miss. 846; Sharp v. Guthrie, 145 Pac. 764), a jail (Flaten v. Moorehead, 51, Minn. 518), or a building for the police department (Foster v. Buffalo, 64 How. Pr. 127), is a diversion of property devoted to park purposes. In Slavich v. Hamilton, 257 Pac. 60, the court allowed the construction of a veterans' Memorial hall upon a public park, but would not allow the construction of a building to be used as an office building. Said the court:

> "Under the well-settled principle of law generally applicable, if the city were undertaking to establish in Adams Park a city hall, fire engine station, hospital, or jail, endeavoring to devote the property to the erection of municipal buildings or offices for use in the transaction of public business, we would have little hesitancy in saying that such purposes would be entirely inconsistent with the use of property for park purposes."

The reason for the rule is that parks are conducive to health,

furnishing to the citizens of crowded cities a place where they may breathe pure air, untainted by smoke and obnoxious gases, so that the erection of public buildings, like a courthouse, would be inconsistent with the dedication of land as park. McIntyre v. El Paso County, Com'rs., *supra*. Parks, especially in large cities, are highly important. They afford healthful and pleasant resorts in the heated season, and are, in fact, the only places where a large class of the community are able to go and enjoy the blessings and comfort to shade and pure air; and any attempt on the part of public officials to appropriate them as a site for public buildings, in which to conduct the economic affairs of a city, under any pretext whatever, would, as I view it, be a cruel effort to subvert a humane scheme." Church v. Portland, 18 or. 78.

Considering the reduced size of the USAFFE Park, the construction of an office building thereon of whatever nature, would destroy its utility as a park.

For the foregoing reasons, the query is answered in the negative. Legislative authority for the erection of the building on the USAFFE Park must be secured.

Respectfully,

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 70

(Opinion on the question as to whether or not the concluding proviso of Section B-IV-10 (a) of Republic Act No. 816 regarding the fees to be received by the chairman and members of the various examining boards prevails over the provisions of Republic Acts Nos. 465 and 564, in connection with the same fees.)

March 22, 1954

Mr. Felipe Ollada
Executive Chairman
Boards of Examiners
Bureau of Civil Service
M a n i l a

S i r :

This is in reply to your letter requesting an opinion as to whether or not the concluding proviso of Section B-IV-10 (a) of Republic Act No. 816 regarding the fees to be received by the Chairman and members of the various examining boards prevails over the provisions of Republic Acts Nos. 465 and 564, in connection with the same fees.

Republic Act No. 465, which is an Act to standardize the examination and registration fees charged by the examining boards, provides as follows:

> "SEC. 5. Each chairman and member of the Boards of Examiners, whether a government employee or not, shall receive as compensation a fee *not exceeding ten pesos* per capita of the candidates examined. x x x." (Underscoring supplied.)

And Republic Act No. 564, which amends the Reorganization Law of 1932, (Act No. 4007), runs thus:

> "x x x who shall receive compensation not to exceed ten pesos per capita of the candidates examined or registered without examination." (Sec. 1)

On the other hand, the Appropriation Act for the fiscal year 1952-1953 (R.A. No. 816) sets aside a certain amount for the necessary expenses of the boards of examiners and fixes ten pesos for each candidate examined as the fee which the chairman and members of the various boards may receive, but with the proviso that "no chairman or member of any board shall receive from examination and other fees a total compensation of more than ₱9,000 per annum, the provisions of existing law to the contrary notwithstanding." (See pp. 73-74, Item B-IV-10, R.A. No. 816.) In this connection, Republic Act No. 906 (Appropriation Act for the fiscal year 1953-1954) contains the same proviso except that the maximum limit has been increased to ₱12,000. (Item B-3-19 (a), p. 84, R.A. 906).

It is averred that the above proviso of Rep. Act No. 816 (that no chairman or member of any board of examiners shall receive a total compensation exceeding ₱9,000 per annum) is only a rider and cannot prevail over the above-quoted provisions of Republic Acts No. 465 and No. 564.

It cannot be denied that Rep. Act No. 816 is a General Appropriation Law which merely appropriates or sets aside funds for government expenditures while Rep. Acts Nos. 465 and 564 are laws which specially deal with the examining boards. And it is also true that this Office has held that "Where a specific law creates an office, and fixes the salary attaching thereto, it seems plain that the mere failure to appropriate the necessary funds therefor or the appropriation of a lesser or greater sum, cannot have the effect of abolishing, or altering the compensation of, the position created, *unless expressly so provided*." (Op., Sec. of Just. No. 154, S. 1950). It must be noted, however, that the fees to be received by the chairman and members of the various boards have not been fixed by Republic Acts No. 465 and 564, beyond stating the maximum not exceeding ten pesos per capita of the candidates examined or registered without examination. Said Acts therefore do not preclude the fixing of such compensation in a subsequent law. Consequently, the proviso in the Appropriation Act cannot be said to amend or do violence to, the provisions of these two Acts, for as long as the fee fixed by the said Appropriation Act did not exceed ten pesos per capita, they would not be infringed.

Besides, even granting, *arguendo*, that said proviso in the Appropriation Act of 1952 in effect amends the corresponding provisions of the two previous Republic Acts because it fixed a maximum of nine thousand pesos as the greatest total compensation that might be allowed the Board members, yet the intention of Congress to effectuate such a change is very clear. The said Appropriation Act does not stop at merely setting aside an item for the fees but goes so far as to provide expressly that the amount of such fees may in no case exceed ₱9,000 a year. And this intention to effectuate the change has been reiterated in the Appropriation Act for the current fiscal year, above referred to, when it restates such a proviso, merely increasing the maximum amount to ₱12,000. Pursuant to the principle enunciated in the opinion above-quoted, said proviso in the Appropriation Law must necessarily supersede the provision of the specific Acts, for, and as held in said opinion, an Appropriation Law can have the effect of altering the compensation of positions created by a specific law if it is *expressly so provided* in the Appropriation Law.

The constitutionality of the proviso under consideration has been assailed. But the constitutionality of a law must be presumed and every reasonable doubt is usually resolved in favor of the validity of the enactment. (11 Am. Jur. 782.) It must also be borne in mind that the power of declaring a law unconstitutional is beyond the province of this Office. It is a prerogative exclusively belonging to the courts.

Anent the argument that the reduction in fees should be applied equally to all of the examining boards by reducing the rate paid per capita of examiners and not by eliminating the total amount paid to each examiner and that the compensation of examiners should be proportionate to the volume of work done, suffice it to say that such matter is not one for the Executive Department to consider but one properly addressed to the law-making body.

Attention has also been invited to the reason given by the President for his disapproval of an item in House Bill No. 2903 (Appropriation Bill for fiscal year, 1952-1953) aimed at raising the salary of justices of the peace, to the effect that "*unless expressly so provided*, an appropriation law may not alter the rates of salary specifically fixed in a special law." This is beside the point because, as already discussed, the proviso in question is in itself an express provision regarding the change of fee — if change there has been. Furthermore, such an objection was raised by the President in the exercise of his veto power and therefore was sufficient to put down the item objected, which is not so with the present case where the proviso is already a part of a law regularly passed and approved, which the Executive Department is bound to uphold.

Premises considered, and in view of the constitutional mandate that no money shall be paid out of the Treasury except in pursuance of an appropriation made by law [Art. VI, Sec. 23 (2), Const. of the Phils.], the undersigned is of the opinion that the provision of the Appropriation Act for the current fiscal year regarding the fees of the chairman and members of the various examining boards must be followed.

Respectfully,

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 72

(Opinion on compulsory retirement.)

2nd Indorsement
March 22, 1954

Respectfully returned thru the Secretary of National Defense, to the Chief of Staff, Camp Murphy, Quezon City.

Opinion is requested on the following queries:

1. In determining whether an individual has reached *compulsory* retirement category under Section 1(b) of Republic Act No. 340, must his service as a *civilian* Government official be counted, assuming that such service is creditable under the conditions specified in Section 9(e) of the same law, as amended?

2. If the answer to 1 above be in the affirmative; may the individual waive or renounce all rights and benefits available to him under the said Section 9(e) in order to continue in the active service until such time as the period of his active military service shall make his retirement compulsory?

3. Are the benefits of Republic Act No. 861 available to persons who had already been retired or otherwise separated from the active military service prior to the effectivity of the said Act?

Under Section 1(b) of Republic Act No. 340, retirement, upon completion of at least 30 years of continuous satisfactory active service, is compulsory upon an officer or enlisted man of the Armed Forces, unless his continued service beyond that period is considered necessary by the President of the Philippines for the good of the service. In determining the length of service of an officer or enlisted man for purposes of either his optional or compulsory retirement, Section 9(e) of Republic Act No. 340, as amended by Republic Act No. 861, expressly provides that his period of service as a civilian official or employee in the Government shall *be credited.* The only limitations to the giving of such credit specified by said subsection (e) are that the officer or enlisted man concerned must have rendered at least 10 years of active military service in the Armed Forces of the Philippines, and that in case his civilian service is longer than the period of his military service, such service as a civilian shall be credited only as equal to his military service. Accordingly, query No. 1 is answered in the affirmative, subject to the proviso specified in said subsection (e).

As to whether an officer or enlisted man may waive or renounce all rights and benefits provided for in Section 9(e) of Republic Act No. 340, as amended by Republic Act No. 861, in order to continue in the active service until such time as the period of his military service shall have reached at least 30 years, the undersigned is of the opinion that he may not, because such retirement shall be compulsory upon completion of at least 30 years of service to the Government. Section 1 (b) in conjunction with Section 9(e) of Republic Act No. 340, as amended, declares that upon the completion of at least 30 years of satisfactory service, including that as a civilian official or employee in the Government, retirement shall be compulsory upon an officer or enlisted man of the Armed Forces, unless his continued stay is deemed necessary by the President, for the good of the service. Doubtless, the purpose of such a provision is to keep the Armed Forces well staffed all the time with young officers and enlisted men and thus maintain vitality in the military bloodstream and at the same time to give those who have spent the best years of their lives in the service of the Government the much-needed rest and reward during their declining years. To allow therefore a waiver, as above contemplated, will not only nullify such purpose of the law but also, in effect, grant every officer and enlisted man the right to exercise the power to decide for themselves their retention in the service beyond the period fixed by law, which power is granted only to the President of the Philippines.

As to the 3rd query, it is said that, an amendment becomes a part of the original statute if it had always been contained therein and as if the law had been as amended as of the time it was passed, unless such amendment involves the abrogation of contractural relations between the state and others. (59 C.J. 1096, citing Commonwealth v. Hawes, 169 N.E. 806; Ex-Parte Carillo, 158 P. 800; State v. Moon, 100 S.E. 614). "The legal effect of the amendment is the reenactment of the old statute with the the amendment incorporated in it and the amendment from its adoption has the same effect as if it had been a part of the statute when first enacted. (Nichols v. Board, 24 SE 71, cited in State v. Moon, 100 SE 614). "As a rule of construction, a statute amended is to be construed in the same sense exactly as if it had read from the beginning as it does as amended." (Farrel v. State 24 A. 725; Cain v. Allen, 79 NE 201; Myers v. Fortunato, 116 A. 623). Thus, in Opinion No. 226, series of 1953, involving the right of the heirs of the late Lt. Col. Villalobos to continue receiving pension, notwithstanding its termination long before the law was amended on June 21, 1952, this Department ruled that Section 3 of Republic Act No. 340, as amended by Republic Act No. 803, should be interpreted as if it had been in that amended form when first enacted on July 26, 1946, so that those whose right to pension had already ceased prior to the amendment might be entitled to the benefits thereof.

It is believed that the rule of construction laid down in the foregoing cases, more particularly in Opinion No. 226, s. 1953, of the Secretary of Justice, is equally applicable to the enterpretation of Republic Act No. 861, insofar as it affects officers and enlisted men of the Armed Forces who were already retired at the time said Act was approved on June 16, 1953. Accordingly, and considering that no abrogation of any contractual obligation of the state is involved, Republic Act No. 861 should be interpreted as if the same had always been a part of Section 9 of Republic Act No. 340, which said Act 861 amended.

Moreover, no valid reason can be perceived why retired officers and enlisted men who are by statute declared to be a part of the Army, who may wear its uniform and are entitled to the same privileges as officers and enlisted men in the active service, whose names shall be upon its register, are subject to the rules and articles of war and may be tried by military court martial (section 4, 5, 6, Rep. Act No. 340), should not be entitled to the benefits of Republic Act No. 861, when the great purpose of the Army Retirement Act is to extend the most benefits within the means of the legislature to those who have dedicated the best years of their lives to the service of the Government. (Explanatory note, House Bill No. 2284 which latter became Republic Act No. 861.)

In view of all the foregoing and considering that it is a well-settled principle that pension statutes should be liberally construed in favor of the grantees, the undersigned is of the opinion that the 3rd query should be answered in the affirmative.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 76

(Reinstatement of a government employee who was found guilty of gross misconduct by the Bureau of Civil Service.)

3rd Indorsement
March 27, 1954

Respectfully returned to the Honorable, the Executive Secretary, Manila.

Mr. Quirico Camus, Administrative Officer of the Bureau of Public Works, was charged administratively for his partici-

pation in certain anomalies in the importation of asphalt by Florencio Reyes and Co. He was investigated by the Department of Public Works and Communications and the result of said investigation was forwarded to the Bureau of Civil Service on October 29, 1952.

Mr. Camus, jointly with Mr. Florencio Reyes, was also prosecuted criminally in the Court of First Instance of Manila for violation of Section 18 of the Import Control Law, Republic Act No. 650, and the rules and regulations issued thereunder. Pending the termination of the criminal proceeding, the Bureau of Civil Service rendered its decision in the administrative case on December 12, 1952, finding Mr. Camus guilty of gross misconduct, for which he was suspended for two months without pay, demoted to a lower position, with a warning that his commission of another offense will be dealt with more drastically. Although Mr. Camus was under suspension since September 13, 1952, and the decision of the Commissioner of Civil Service stated that his preventive suspension shall be taken into account in the computation of his two months' suspension, he was not reinstated upon the rendition of said decision in view of the pendency of the criminal case against him.

In an order dated June 1, 1953, the Court of First Instance of Manila dismissed provisionally the criminal case against Mr. Camus and his co-accused upon the ground, principally, that the law under which he was being prosecuted would cease to be effective after June 30, 1953. Upon the provisional dismissal of the criminal case, Mr. Camus requested that his suspension be lifted, without prejudice to his request for a reconsideration of the decision of the Commissioner of Civil Service. Mr. Camus was forthwith reinstated to the position of Chief of Water Rights Division, which is a lower position than that held by him as Chief of the Administrative Division.

Subsequently, Mr. Camus petitioned for reinstatement to his former position as Chief of the Administrative Division of the Bureau of Public Works. In a 1st indorsement dated December 10, 1953, the then Secretary of Public Works tnd Communicttions expressed opposition to said request but nevertheless forwarded the case to the Office of the President "for final decision." The view was expressed that to favorably consider the position for reinstatement would be to set at naught civil service rules and regulations and would adversely affect the morale and discipline of the employees of the Bureau of Public Works.

In a 3rd indorsement dated January 15, 1954, however, the Commissioner of Civil Service expressed the opinion that, inasmuch as Mr. Camus does not appear to have acted in bad faith and that he had already satisfied the decision in the administrative case against him regarding the two months suspension without pay and demotion to a lower position for over six months, which length of time makes him eligible for promotion under Section 11 of Executive Order No. 94, series of 1947, "Mr. Camus may be returned to his former position at the discretion of the appointing officer, if circumstances warrant, such as final disposition of the court case against him which has been provisionally dismissed."

As pointed out by the Commissioner of Civil Service, the return of Mr. Camus to his former position as Administrative Officer of the Bureau of Public Works is discretionary with the appointing officer. Should it be decided, in the exercise of the said discretion, to reinstate him, the circumstance that the criminal case filed against him was merely provisionally dismissed is no obstacle to the taking of such action. If at all, the criminal case against Mr. Camus for violation of Republic Act No. 650 may only be revived by the enactment of legislation to that effect. In the event that this possibility would happen, his reinstatement to his former position would not constitute a bar to Mr. Camus being charge criminally for the same offense nor to the taking of disciplinary action against him as circumstances might warrant. The fact that he had been previously charged administratively and found guilty, and the possibility that he may again be charged criminally for the same acts which led to the administrative proceedings, are factors to consider in his promotion but they do not, by themselves, prevent his appointment to the former or even higher position at the discretion of the appointing power.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 79

(Opinion on the question as to whether the Metropolitan Water District is exempted from paying the compensating tax on liquid chlorine imported by it.)

3rd Indorsement
March 24, 1954

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

This is in connection with the request of the Metropolitan Water District for exemption from the payment of the compensating tax on liquid chlorine imported by it.

It appears that this Office, in Opinion No. 285, series 1951, held that said District, being a corporation performing a non-governmental function and doing business for gain, is within the purview of Republic Act No. 104 which requires corporations owned or controlled by the government to pay the same taxes and other charges as are imposed upon individuals or corporations engaged in any taxable business. (This Republic Act, it has also been held by this Office, was intended to apply to corporations or agencies owned or controlled by the Government engaged in business or industry for profit in competition with private enterprises. Op. Nos. 67 and 153, s. 1948 and No. 16, s. 1950, Sec. of Jus.)

The Metropolitan Water District, in support of its request for exemption (and consequently, for a reconsideration of the above-cited opinion) states:

> "This opinion runs counter with the spirit and intent for which the Metropolitan Water District is created. It may be stated, in this connection, that prior to the creation of the Metropolitan Water District, Manila's water supply was administered by the City authorities, the City Engineer being in charge of the maintenance and operation of the system. The passage of Act No. 2832 in 1919 created the Metropolitan Water District, which was charged with the responsibility of maintaining and operating the Manila water supply, a function formerly done by the city government. It is clear, therefore, that the Metropolitan Water District is a corporation created primarily for governmental service, as it is charged with the function of furnishing adequate water supply and sewerage system to the metropolitan area. Furthermore, the District is not engaged in business for profit and any surplus derived is incidental only to its operation. Such surplus enables the District to repay its bonded debts and to reinvest any balance therefrom in the form of improvements and extension of its system. Any new tax or imposition made on materials needed by the District, especially in imported products required for its purification process, will either raise the cost of its operation and maintenance, thereby adversely affecting its financial position, or delay its complete rehabilitation or the expansion of its water services to the public." (3rd par., 1st Ind. of M.W.D., dated March 10, 1952.)

That Office requests comment on the above-quoted statements of the Manager of the Metropolitan Water District.

The fact that before the creation of the Metropolitan Water District, Manila's water supply was administered by the City government thru the city engineer does not in any way prove that the function is a governmental one. For, as stated in the opinion above-referred to, "the distribution of water to the inhabitants of a municipality for their domestic and commercial uses is generally considered to be undertaken by a municipality in its private or proprietary capacity," in the exercise of which the "municipal corporation is governed by substantially the same rules that govern a private individual or corporation." Thus, even if it were the city government itself which engages in the

activity now being handled by the MWD, the government would nevertheless be engaging in a private or proprietary — and not a governmental — activity.

Nor may the fact that the MWD invests the surplus derived from its operation in the improvement and the extension of the system and in the payment of its indebtedness change the character of its enterprise. On the contrary, it is an indication that said corporation is actually deriving profits from its business, thus justifying the application of Republic Act No. 104.

As to the averment that any new tax imposed on said Corporation would raise the cost of its operation and maintenance or delay its complete rehabilitation or the expansion of its services, suffice it to restate the objectives behind the passage of Republic Act No. 104, as set forth in the opinion under consideration. Said Act was passed in order "to require these government-owned or controlled corporations to reduce their expenditures; to recover the taxes that are lost to the Government as a result of this tax immunity in favor of these government-owned corporations; and, thirdly, in order to place them on an equal footing, on a level with private initiative by giving exemption to government enterprises."

The undersigned does not, therefore, see any reason for disturbing the ruling of this Office, as expressed in Opinion No. 285, series of 1951.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 149

(*On the questions as to*: (1) *Whether or not an appointment of a Foreign Affairs Officer to the same class without increase in compensation but merely involving a consolidation of basic and excess salary should be submitted to the Commission on Appointments for confirmation;* (2) *Whether or not an in-grade promotional appointment of a Foreign Affairs Officer within the same class also be submitted for confirmation; and* (3) *Whether a Foreign Affairs Officer whose appointment to a higher grade of salary within the same class is by-passed by the Commission on Appointments reverts to his last appointment or is automatically separated from the service.*)

June 22, 1954

The Honorable
The Acting Secretary of Foreign Affairs
Manila

Sir:

This is a reply to your request for opinion on the following questions:

"(1) Whether or not an appointment of a Foreign Affairs Officer to the same class without increase in compensation but merely involving a consolidation of basic and excess salary should be submitted to the Commission on Appointments for confirmation;

"(2) Whether or not an in-grade promotional appointment of a Foreign Affairs Officer within the same class also be submitted for confirmation; and

"(3) Whether a Foreign Affairs Officer whose appointment to a higher grade of salary within the same class is by-passed by the Commission on Appointments reverts to his last appointment or is automatically separated from the service."

Sec. 3, Part A, Title IV of Republic Act No. 708 provides that "all promotions of Foreign Affairs Officers shall be made by the President, with the consent of the Commission on Appointments, by appointment to a higher class x x x". By inference, it is not necessary under this provision to submit appointments in the same class to the Commission on Appointments for confirmation. The appointment in question did not involve promotions to a higher class but only in compensation, and so did not come within the requirement of the aforequoted provision of Republic Act No. 708.

This conclusion is strenghtened by the fact that under the Foreign Service Act of the United States from which Republic Act No. 708 was adopted, salary increases within the range established for the class to which a Foreign Service officer has been appointed are not required to be submitted to the Senate for confirmation, but are merely fixed by the Secretary of State (Sec. 33, Act of May 24, 1924; 46 Stat. 1215). There is no similar provision to be found in Republic Act No. 708, but neither is there any which requires in-grade promotions to be accomplished in the same manner as promotions to a higher class.

In brief, the first and second questions should be, and they are, answered in the negative. On the third question, it is believed that the qualification or description of the appointments in question as *ad interim* was not correct and their submission to the Commission on Appointments for confirmation was not required by law, and unnecessary. It follows that the failure of the Commission on Appointments to act upon them did not operate as legal and effective disapproval of said appointments. My opinion is that for all legal purposes the appointments under consideration were valid and effective as of the dates they were issued, barring refusal or failure of the appointees to qualify.

Respectfully,

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 155

(*On the question as to whether the application of Chua Man to operate a cabaret bought from Mr. Ding which had ceased to operate after liberation comes within the exception of the Cabinet resolution of December* 28, 1949 *which allows cabarets and other amusement places, within the zones specified in said Executive Order No.* 319, *s.* 1941, *and in operation on or before January* 1, 1941 *"to continue operation in their present locations until further orders."*)

5th Indorsement
June 28, 1954

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

This is with reference to the request of Mr. Chua Man for permission to operate a cabaret in Progreso Street, San Juan, Rizal, less than 1000 lineal meters from the Roosevelt Memorial High School, the Instituto de Mujeres, the San Juan Elementary School, and the municipal building, in violation of Executive Order No. 319, s. 1941.

It appears that before the war and before the promulgation of the aforesaid Executive Order, Mr. Bell S. Ding operated a cabaret, called the New Mabuhay Cabaret on the above-mentioned site. This cabaret continued in operation during the occupation but was closed thereafter. On August 15, 1952, Mr. Chua Man filed an application with the Mayor of San Juan, Rizal, for a permit to build and operate a cabaret on the same site of the New Mabuhay Cabaret. On August 18, 1952, Mr. Bell S. Ding had executed a deed transferring to said Chua Man, for a consideration of one peso, the "New Mabuhay Cabaret together with all the will that makes its name", and on September 15, 1952, the Mayor granted Chua Man the permit applied for, on the strength of which Chua Man constructed a building for a cabaret on the site indicated. In this connection our attention is invited to a resolution of the Cabinet of December 28, 1949, which allows cabarets and other amusement places, established within the zones specified in said Executive Order No. 319, s. 1941, and in operation on or before January 1, 1941, "to continue operating in their present locations until further orders; x x x."

Opinion is requested as to whether Chua Man's application comes within the exception of the above-mentioned Cabinet resolution.

The Cabinet resolution referred to was intended to protect the interests of cabaret owners who had made investments in established and going concerns. Mr. Chua Man did not have any interest in the

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ly knew or had reason to believe that a check would be received or that the check would be drawn on an out-of-town bank, necessitating its being placed in the mails for collection.

Lacking such proof, an important element of each crime charged, namely, that Brading had reason to foresee the use of the mails or interstate commerce, has not been established. It is true that the use of the mails need not have been originally intended as a part of the plan, but its use must have been a natural, reasonably foreseeable means of executing the plan. Brading might well have assumed that cash would be given to Pereira, or, if a check, one drawn on a local bank.

It may well be reasonable to infer that one receiving a check drawn on an out-of-town bank would know that it would be mailed in the process of collection, but to that inference must be added the inference that Brading had reason to know that a check would be received and also that the check would be on an out-of-town bank. This is piling inference upon inference, in the absence of direct proof. In short, this is simply guessing Brading into the federal penitentiary. It may be good guessing, but it is not proof.

Brading is clearly an aider and abettor of the scheme to defraud, which a State may punish, but is he an aider and abettor of the federal offenses of using the mails to defraud and causing the fraudulent check to be carried across state lines? I think not, unless we are willing to say that aiding and abetting the scheme to defraud is aiding and abetting any means used for the consummation of the fraud. Brading must aid and abet the federal crimes, not just the fraudulent scheme. There is not a scintilla of evidence that Brading aided and abetted anything more than the scheme to get the money from Mrs. Joyce.

In Bollenbach v. United States, 326 US 607, 90 L ed 350, 66 S Ct 402, the defendant was charged with transporting securities in interstate commerce knowing them to have been stolen, and with conspiracy to commit the offense. The court had instructed the jury that possession of the securities by the defendant in New York soon after their theft in Minnesota was sufficient to warrant the jury in finding that the defendant knew the securities had been stolen, and this would support the further "presumption" that the defendant was the thief and transported the securities in interstate commerce. This Court set the conviction aside. The latter inference was said to be untenable.

In this case, I think it untenable to infer that Brading had reason to know that Pereira would get a foreign check that must be sent through the mails and in its handling must be carried across statelines, thereby making out the federal crimes. It is untenable because it is unreasonable to infer one or more facts from the inference of another fact. Looney v. Metropolitan R. Co. 200 US 480, 488, 50 L ed 564, 569, 26 S Ct 303; United States v. Ross, 92 US 281, 23 L ed 707.—«

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New Mabuhay Cabaret which ceased operation after liberation. The only identity between that cabaret and the cabaret proposed to be constructed is that the latter would use the same name and be constructed at the same place. For all legal and practical purposes, the new cabaret is a new business and does not come within the protection of the Cabinet resolution which is being invoked.

The license granted the former owner of the New Mabuhay Cabaret was a mere privilege; he had not acquired any vested right therein which he could transfer as of right to anyone with or without valuable consideration.

The undersigned is therefore of the opinion that the query should be answered in the negative.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 157

(On the question as to whether the circumstances surrounding the death of M. Lapira, former member of the Police Force of Guagua, Pampanga, entitle him to the benefits of Sec. 1 of Rep. Act No. 30.)

5th Indorsement
June 30, 1954

Respectfully returned to the Honorable, the Executive Secretary, Manila.

The within papers refer to the claim for gratuity under Republic Act No. 30 of the widow of the late Martin Lapira.

The late Martin Lapira was a former member of the Police Force of Guagua, Pampanga. On several nights prior to November 18, 1951, he was assigned to guard duties at Barrio San Antonio, Municipality of Guagua, in connection with the campaign for the maintenance of peace and order. It appears that the barrio of San Antonio had been the scene of nightly depredations by the dissidents prior to the deceased's assignment to said barrio.

On the night of November 18, 1951, while on guard duty, he suddenly had a slight chest pain followed by frothing at the mouth, dyspnea, snoring, unconsciousness and cyanosis. He died at about 8:30 that same night. According to the maternity and charity physician of Guagua who attended the deceased, he "died of heart failure which may be the result of coronary thrombosis or a long standing myocarditis, either of which may be cause by prolong physical exertion and sleepless nights during guard duty." It also appears, from an examination conducted by the Committee on Physical Examination of the Department of Health (4th indorsement of July 7, 1952, not attached), that the continued performance of the strenuous duties of Lapira who was already suffering from a chronic heart desease may have been *the direct and immediate cause of his death.*

Opinion is now requested as to whether under the facts above described the widow and children of said deceased may be entitled to the benefits of section 1 of Republic Act No. 30 which provides as follows:

> "SECTION 1. In addition to any right or benefit which, by operation of law, accrues to the widow and/or children of a deceased officer or member of any police force or similar governmental organization, whether national, provincial, city or municipal, engaged in the maintenance of peace and order, there is authorized to be paid to such widow and/or children a gratuity equivalent to one year salary, but in no case less than the sum of one thousand pesos, if the deceased officer or member of the force *shall have been killed while engaged in the performance of his duties in connection with the campaign for the maintenance of peace and order or as a direct consequence of his participation therein.* If such deceased has no surviving widow or children, such gratuity shall be paid to his other heirs in the order of succession established by the Civil Code."

From the finding of the Maternity and Charity Physician of Guagua and the Committee on Physical Examination of the Department of Health, there is a clear showing that the late Policeman Lapira died as a consequence of his participation in the campaign for the maintenance of peace and order in his municipality. The fact that he was already suffering from a chronic heart desease at the time of his assignment does not detract from the findings that the deceased died in line of duty; died as the direct and immediate result of his duties which, because of the hours and the dangerous character of said duties, must have inflicted heavy strain on his physic and produced severe nervous tension. He was all the more deserving of reward because of the greater risk he undertook to his life on account of his impaired health.

In view of the foregoing, the query is answered in the affirmative.

(Sgd.) PEDRO TUASON
Secretary of Justice